Appeal No. UKEAT/0022/21/VP
UKEAT/0023/21/VP

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 23 March 2021
Judgement handed down on
26 March 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

T W WHITE & SONS LIMITED APPELLANT

MS K WHITE RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MOHINDERPAL SETHI (One of Her Majesty's Counsel) Instructed by: GBH Law Limited 7/8 Innovation Place Douglas Drive Godalming, Surrey GU7 1JK
For the Respondent	DEE MASTERS (Counsel) Instructed by: Charles Russell Speechlys One London Square Cross Lanes Guildford Surrey GU1 1UN

SUMMARY

PRACTICE AND PROCEDURE

There is a mandatory requirement pursuant to rule 72(1) of the Employment Tribunal Rules 2013 for an employment judge to determine whether there are reasonable prospects of a judgment being varied or revoked before seeking the other party's response and the views of the parties as to whether the matter can be determined without a hearing, potentially giving any provisional view, and deciding how the reconsideration application will be determined for the purposes of rule 72(2).

The employment judge did not err in law by refusing permission to the respondent to call expert evidence. Expert evidence can only be relied upon with the permission of the employment tribunal and should be limited to that reasonably required to resolve the issues.

In the circumstances of this case, the employment judge did not err in refusing to stay orders to prepare for the reconsideration and the remedy hearing, pending determination of the appeal.

HIS HONOUR JUDGE JAMES TAYLER

1. These appeals concern the case management of an application for reconsideration and the listing of a remedy hearing in a case in which the claimant succeeded in claims of unfair dismissal and victimisation. To understand the appeals it is necessary to consider the history of the claims in a little detail.

2. The parties are referred to as the claimant and respondent as they were before the employment tribunal. The Respondent is a new and used car dealer with locations in Surrey, South London and Kent, with a combined turnover of £38 million per annum. It is a family business. The claimant was the Finance Director when she was dismissed on 27 September 2017.

3. By a claim form received by the employment tribunal on 18 January 2018 the claimant brought claims of unfair dismissal, sex discrimination and victimisation. The claim was heard on 3, 4, 9, 10, 11, 12, 13, 16 & 17 December 2019, then in chambers 18 & 19 December 2019 and 5 February 2020 by Employment Judge Hyams-Parish, sitting with members. The claims of unfair dismissal and victimisation were successful. The claim of sex discrimination was dismissed. The liability judgment was sent to the parties on 19 February 2020.

4. On 10 March 2020, the respondent appealed to the EAT against the liability judgment ("the liability appeal").

5. On 11 March 2020, in preparation for the remedy hearing, the respondent unilaterally applied to the employment tribunal for permission to call an expert witness:

> **"4. Also, we wish to apply for permission to call expert evidence in relation to the marketplace for a finance director to obtain further employment. We believe that this is necessary in order that the Tribunal can make an informed and fair decision about the state of the marketplace for the position of finance directors not holding formal qualifications. There are agencies that specialize in the appointment of a wide range of Finance Directors, including part-time Finance Directors and those without chartered qualifications, to SME and larger companies, and believe that a director from one of these agencies should be able to provide valuable opinion evidence to the Tribunal as to the marketplace at the time of the Claimant's dismissal and thereafter, and the reasonable steps available to such a professional to secure further employment.**
>
> **5. We have not canvassed the Claimant's representative on whether an expert might be instructed or not, but we would anticipate that a single joint expert might be instructed at joint expense whose report should be written based on agreed instructions, with any points in issue being dealt with by supplemental written questions from each side. Alternatively, if the Claimant has no wish to call, or contribute to the expense of, expert evidence, then an order for permission for the Respondent to rely upon expert evidence would be in order. In the circumstances, we have not suggested directions below other than to highlight the requirement for directions following disclosure of evidence."**

6. By email sent to the employment tribunal on 17 March 2020, the claimant's solicitors objected.

7. By an order, sealed on 25 August 2020, Judge Keith stayed the liability appeal to give the respondent the opportunity to submit an application for reconsideration out of time.

8. The respondent made an application for reconsideration on 10 September 2020. At paragraph 14 the respondent stated:

> **"This is not a case in which R is seeking to introduce fresh evidence. Instead the thrust of its application is that the Tribunal, understandably given the plethora of allegations and factual evidence which C insisted it consider ranging over a thirty year period, appears in its Reasons to have lost sight of certain of its findings of fact and to have overlooked unchallenged evidence in reaching its judgment."**

9. The application included arguments that the employment tribunal should conclude on reconsideration that (1) the allegations of discrimination were false and made in bad faith, and that (2) the claimant had been guilty of what the respondent described as "unconscionable conduct".

10. On 17 September 2020 the claimant wrote contending that the application for reconsideration was out of time, and that there was no good reason to interfere with the original decision.

11. On 17 September 2020 EJ Hyams-Parish ordered that:

> **"UPON an application by the Respondent for reconsideration of the Judgment in the above matter, sent to the parties on 19 February 2020, it is ordered that:**
>
> **1. There be a hearing ("the hearing") to be listed as soon as practicable, at which the application for an extension of time to submit a request for reconsideration, and the request for reconsideration itself, be considered together.**
>
> **2. The hearing shall have a time estimate of two days, on the assumption that submissions will be concluded by the end of the first day, allowing the second day for deliberation by the Tribunal. If either party considers this time estimate to be unrealistic or insufficient, they should attempt to agree an amended time estimate and write to the Tribunal within 7 days of the date of this order.**
>
> **3. The Claimant shall set out her written response to the application for reconsideration (copy enclosed with this order) and send it to the Respondent and the Tribunal within 28 days of this order.**
>
> **4. Both parties shall send to each other and the Tribunal dates to avoid for the hearing in anticipation that it can be listed in October, November or December 2020."**

12. On 2 October 2020 the hearing to consider the reconsideration application was listed for 15 and 16 December 2020.

13. On 19 November 2020, the employment tribunal wrote to the parties setting out a timetable for the reconsideration hearing:

> **"The hearing shall be submissions only, which shall be limited to two hours for each party. There is no requirement to use the two hours, particularly as skeleton arguments will have been prepared, but the parties should certainly not exceed two hours. The parties should keep the bundle for the reconsideration hearing as short as possible …"**

14. On 11 December 2020 the respondent's solicitors sought a postponement because their counsel was unwell.

15. The claimant's solicitors wrote to employment tribunal that day, 11 December 2020, noting the limited availability of the respondent's Counsel in the early part of 2021, and applying for the reconsideration application to be considered on the papers:

> **"In the circumstances, and balancing the prejudice to our client that the further delay will cause with the Respondent's interests, we consider that a fair compromise here is for the hearing next week to be postponed and for the reconsideration application to be determined on the papers."**

16. The claimant's solicitor also provided dates to avoid in the same email.

17. On 14 December 2020, EJ Hyams-Parish directed that the reconsideration hearing be postponed because of the illness of the respondent's Counsel:

> **"Employment Judge Hyams-Parish has instructed me to write to the parties as follows:**
>
> **The hearing on 15 and 16 December will be postponed due to Respondent Counsel's ill health. The Respondent has provided dates to avoid. The Claimant should also do so within 7 days. As previously stated, the parties need only provide availability for one day. The hearing will be relisted as soon as possible in the new year."**

18. The claimant contends that the request for the claimant's dates to avoid demonstrate that EJ Hyams-Parish had not considered their email of 11 December 2020, in which they applied for the reconsideration to be considered on the papers, because in that email they provided their dates to avoid, so there would have been no need to request them if EJ Hyams-Parish had already considered the email.

19. On 18 December 2020 the respondent's solicitor wrote stating that their Counsel was more seriously ill than had previously been appreciated. On 6 January 2020 the respondent informed the employment tribunal that they would have to instruct new Counsel.

20. On 7 January 2021 the claimant's solicitors wrote to the employment tribunal stating:

> **"As the Tribunal is aware, for reasons we set out in the attached email of 11 December 2020, we have previously suggested that this matter is determined on the papers.**
>
> **We would like to stress that, if the Tribunal chooses not to resolve the reconsideration application on the papers, we would request that the hearing is listed as soon as possible so as to minimise the prejudice to the Claimant of further delay."**

21. The email went on to set out the claimant's Counsel's dates of availability.

22. On 22 January 2021 the employment tribunal sent a notice relisting the reconsideration hearing for 6 and 7 April 2021.

23. On 25 January 2021 a letter was sent on the instructions of EJ Hyams-Parish, noting the continued ill health of the respondent's Counsel, and that the claimant had raised the issue of the ongoing delay:

> **"The Respondent is therefore ordered, within the next 7 days, to provide its comments to the suggested approach by the Claimant's representatives, which is either: (i) for the Tribunal to deal with the application for reconsideration on the papers, including skeleton arguments provided by the parties; (ii) if the Respondent does not agree to a reconsideration on the papers alone, to list the remedy hearing and the application for reconsideration together.**
>
> **The Claimant's preferred approach is (i) above and for that to happen as soon as possible. I would suggest with a simultaneous listing of a remedy hearing so that can go in the diary as soon as possible for everyone, in the event it is still needed after reconsideration.**
>
> **Given the delay since liability was determined, and the delays in listing going forward, I am minded to take one of the above two options given that it appears to be in accordance with the overriding objective to do so.**
>
> **However a final decision will be made once comments have been received by the Respondent.**
>
> **This file will be referred back to me once the 7 days period has expired.**
>
> **Finally, whilst writing, I have been informed that the reconsideration hearing has been relisted and the parties have been informed of this. This date will stay in the diary for now and can be reviewed when a decision has been taken in relation to the above." [emphasis added]**

24. This supports the claimant's contention that the new listing was fixed before EJ Hyams-Parish knew that the claimant had applied for the reconsideration to be determined on the papers.

25. On 28 January 2021, the respondent's solicitors responded:

> **"Our preference is that the reconsideration remains, as listed, as a hearing in person, and not determined on paper. The matter warrants a hearing by reference to its complexity, fact sensitivity, and (by reference to the Claimant's schedule of loss at least) high value.**
>
> **As noted towards the bottom of the tribunal's letter, the reconsideration application has now been listed for a two day hearing in April. Our counsel is working towards this date, and we anticipate that the Claimant's counsel is now doing the same, the date having been fixed by reference to their availability. It would not be possible to deal with both a reconsideration hearing AND remedy hearing within the scope of the two days fixed in April, and it would appear to be wasteful to adjourn the two-day appointment merely to relist it so that it could be combined into a longer hearing with the remedy hearing having regard to Counsel's then up-to-date availability.**
>
> **May we also, respectfully, remind the Tribunal that we have previously applied for leave to call expert evidence in relation to the remedy hearing; it is an application which has not been determined as yet."**

26. Because of the dispute between the parties about the best way forward, a preliminary hearing for case management by CVP was fixed for 12 February 2021. At that hearing EJ Hyams-Parish decided that the application for reconsideration should be determined on the papers. There was insufficient time for him to make a decision on the respondent's application for permission to adduce expert evidence and to give case management directions. EJ Hyams-Parish directed that the respondent set out any further submission in support of the application for expert evidence in writing within 2 days.

27. On 15 February 2021 the respondent submitted an appeal against the order deciding that the reconsideration application be considered on the papers and that the hearing on 6 and 7 April 2021 proceed as a remedy hearing ("the reconsideration appeal"). The respondent applied for the appeal to be expedited.

28. By email sent to the employment tribunal on 16 February 2021 the respondent made further submissions in support of its application to be permitted to rely on expert evidence:

> **"At the hearing on Friday, you invited us to supplement our submissions, and accordingly we do so.**
>
> **The Claimant's position now, changed from that beforehand, is that if the Respondent is given leave to call expert evidence then she does not seek an order from the tribunal to call her own expert, nor, importantly, does she wish the expert to be called as a single joint expert. She is willing not to rely upon opinion evidence herself, and to take no part in the production of the expert's report. Accordingly, if leave is given, then none of the usual considerations of delay or cost in relation to the production of an expert's report, in terms of agreeing instructions, or the production of questions and answers, concern the Claimant nor need concern the tribunal.**
>
> **Our expert has indicated that he can produce a report in this matter within a period of 6 weeks, which gives adequate time for his instruction and report prior to the hearing, providing leave is given and communicated as soon as ever possible.**
>
> **The expert has indicated that he will be available for the hearing provided we are able to confirm the appointment shortly.**
>
> **The concern of expense need only concern the Respondent. As the Claimant has indicated no wish to take part in the process, there is no additional cost to the Claimant. …**
>
> **May we also remind the Tribunal of its liability decision at paragraph 144.**
>
> **The Tribunal was shown articles which gave a picture of the average differential in pay between Finance Directors and Managing Directors between 2014 and 2018. The differential ranged from 89% in 2014 to 61% in 2018. The Tribunal did not understand the reason why the differential should change from year to year and the authors of the research were not available at the hearing to answer questions. Whilst the Tribunal accepted the Claimant's submissions that expert evidence was not always necessary in such situations in order for the Tribunal to make particular findings, the Tribunal found it difficult to place much weight on the research provided in the bundle, without being able to delve further into the findings. In any event, the Tribunal noted that 62.5% did fall at the bottom end of the range provided albeit that the Claimant would dispute this calculation because it is based on the Claimant working four days a week.**
> **…**
>
> **We would agree with the Tribunal that expert evidence is "not always necessary in such situations" however, we also recognise the difficulty which the Tribunal identified it faced in assessing the market place for Finance Directors and Managing Directors in the period up to 2018 – and hence we want to call an expert who can offer an expert opinion as to the market place at this time, to enable the Tribunal to "delve" further into these matters. Whilst the Claimant seeks to underplay the significance of this enquiry (for instance in their email of 17 March 2020 they say: "We consider that the Tribunal is perfectly able and well used to determining issues of quantum without need for such evidence.""), we would observe that the sheer scale of the Claimant's claim takes this case out of the ordinary.**

29. The case management order with reasons was sent to the parties on 17 February 2021. EJ Hyams-Parish noted that he had not had the file before him at the preliminary hearing for case management:

> **"3. Having given very brief oral reasons for this decision at the above hearing, I have been asked by the Respondent for written reasons which I set out below. I did not have the file at the hearing and so did not give the chronology of this case in my oral reasons, but I do so now, having looked at the file, because it gives some helpful context to my decision."**

30. EJ Hyams-Parish set out the background to the original listing as follows:

> **"9. I decided to hear the application in person notwithstanding the fact that I could have dealt with it on the papers pursuant to Rule 72(1) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules"). I ordered that the reconsideration and the time point be considered together at the same hearing. A hearing was listed for 15 and 16 December 2020.**
>
> **10. On 19 November 2020, I wrote to the parties having reviewed the file and the formal application and response. I said that whilst two days had been allocated for the reconsideration hearing, the parties would only need to attend on the first day and that the parties would be limited to 2 hours each for their submissions, given that they will have submitted skeleton arguments. They were informed that there was no requirement that they use all of the 2 hours. Submissions would be on the papers, with no new evidence adduced and no oral evidence." [emphasis added]**

31. EJ Hyams-Parish set out the history leading up to the postponement of the reconsideration hearing and thereafter, and considered the submissions. He concluded:

> **"24. Having considered the submissions carefully I concluded that it was in the interests of justice to amend my order to deal with the reconsideration application on the papers, rather than at a hearing, and to convert the hearing on 6 and 7 April 2021 to a remedy hearing. This would result in a resolution of this matter much sooner than would other wise be the case.**
>
> **25. Importantly, I was satisfied that there was a material change of circumstances justifying the above variation. The order made by me anticipated that there would be a reconsideration hearing as soon as practicable. That hearing was fixed for 15 and 16 December 2020. Had that hearing gone ahead and in the event that the Respondent were not successful in their application, a remedy hearing would have been fixed for March or April 2021 at the latest. For reasons beyond anyone's control, the hearing in December could not take place. I consider that to be a material change in circumstances as I did not make the order in the anticipation that a reconsideration hearing would take place as late as April 2021.**
>
> **26. I bear in mind that the Claimant was dismissed over three years ago and if I were to continue as planned with the reconsideration hearing taking place in April 2021, it would mean that a remedy hearing would not be held, bearing in mind the worsening listing position in London South, and also taking into**

account availability of all concerned who would need to attend the hearing, until late in 2021. This would mean that the Claimant is faced with a remedy hearing taking place 4 years after dismissal. It is in the interests of justice to vary the order so that this case can be concluded as soon as possible."

32. EJ Hyams-Parish rejected the respondent's application to adduce expert evidence:

"30. The Respondent seeks leave to adduce expert evidence on the market place for a finance director to obtain employment. The Respondent states in its application that expert evidence "is necessary in order that the Tribunal can make an informed and fair decision about the state of the marketplace for the position of finance directors not holding formal qualifications".

31. The correct approach to the question whether a Tribunal should allow expert evidence to be adduced is set out in the case of De Keyser Ltd v Wilson IRLR 324, which is analogous to Part 35 of the Civil Procedure Rules 1998. In particular, the Tribunal should assess whether expert evidence is "reasonably required to resolve [the issue]".

32. On the assumption that the Respondent will wish to establish that the Claimant has not mitigated her loss since being dismissed, no doubt they will wish to adduce evidence of vacancies which the Claimant could have applied for. Such evidence are matters of fact, not opinion, as is the state of the market place at the time of the Claimant's dismissal and thereafter. The Tribunal regularly deals with such matters and Respondents regularly adduce evidence to show that a Claimant has not fully mitigated their loss. I cannot see how expert evidence will assist the Tribunal or take matters any further. I accept that the value of the quantum, as shown in the Claimant's schedule of loss is high, but the principles are the same as any other unfair dismissal claim. The addition of another witness, particularly an expert witness, risks lengthening the hearing unnecessarily. For the above reasons, I do not agree that expert evidence is reasonably required to resolve the issues and therefore this application is refused."

33. EJ Hyams-Parish made orders to prepare for the reconsideration application to be determined on the papers with (1) simultaneous exchange of written submissions to take place on 26 February 2021 and (2) simultaneous exchange of replies on 5 March 2021. He also made detailed orders to prepare for the remedy hearing of which only (1) the order for the respondent to serve any witness statement in reply to the claimant's by 26 March 2021 and (2) for the parties to agree a document which identifies areas of legal and factual dispute/agreement by 1 April 2021, remain outstanding.

34. On 17 February 2021 the respondent submitted an amended Notice of Appeal for the reconsideration appeal, including an appeal against the refusal of permission to rely on expert evidence.

35. On 26 February 2021, Clive Sheldon QC, DHCJ, permitted the reconsideration appeal to proceed, having considered it under the sift procedure, and ordered that it be expedited. That day the appeal was listed for 23 March 2021. The respondent applied to the employment tribunal to stay the directions for preparation for reconsideration and the remedy hearing.

36. On 2 March 2021, EJ Hyams-Parish refused the application to stay the directions:

> **"I have considered the application by the Respondent for a stay or variation of the orders made by me at a case management discussion on 12 February 2021 in light of the Respondent's appeal to the EAT of decisions made at that hearing. The Claimant opposes any stay or variation of the case management order and notes that no suggested variations were provided.**
>
> **Having considered all of the circumstances, I have decided that the application should be refused. I do not consider it to be in accordance of the overriding objective to follow the proposed course suggested by the Respondent. To agree to the Respondent's application would mean that whatever the outcome of the appeal to the EAT, a remedy hearing on 6 and 7 April 2021 would not be possible as there would be insufficient time to prepare for it.**
>
> **I have considered the fact that the preparation for the reconsideration will be required in any event, and whatever the outcome of the EAT appeal, so this work is not wasted.**
>
> **I recognise, and said so at the recent case management discussion, that preparations for the remedy hearing may be wasted if the reconsideration is successful, but I also have to weigh that against the potential delay of leaving preparation until after reconsideration, noting that this is a very old case.**
>
> **The parties should therefore continue to prepare for the above in accordance with the case management order."**

37. On 3 March 2021 the respondent submitted an appeal against the refusal to stay the orders to prepare for reconsideration on the papers and the remedy hearing ("the stay appeal"). The matter was considered by Choudhury J on the sift and the stay appeal was permitted to proceed to a full hearing by order sealed on 5 March 2021. Choudhury J noted that the EAT does not have

A the power to order a stay in proceedings in the ET. The two appeals were listed to be heard together.

The Law

B

General Case Management

38. Case management in the employment tribunal is subject to the overriding objective set out at rule 2 of the Employment Tribunal Rules 2013 ("ET Rules 2013"):

C

> **"2. Overriding objective**
>
> **The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—**
>
> **(a) ensuring that the parties are on an equal footing;**
>
> D
>
> **(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;**
>
> **(c) avoiding unnecessary formality and seeking flexibility in the proceedings;**
>
> **(d) avoiding delay, so far as compatible with proper consideration of the issues; and**
>
> E
>
> **(e) saving expense.**
>
> **A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."**

F

39. Application of the overriding objective requires consideration of matters in the round; **O'Cathail v Transport for London** [2013] ICR 614:

> **"45 Overall fairness to both parties is always the overriding objective. The assessment of fairness must be made in the round. It is not necessarily pre-determined by the situation of one of the parties, …"**

G

H

40. General provision for making and revising case management orders is made by rule 29 ET Rules 2013:

> **"29. Case management orders**
>
> **The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. Subject to rule 30A(2) and (3) the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."**

41. Case management is quintessentially a matter for the employment tribunal, and may have to involve finding the "least worst solution". The EAT should be, and is, reluctant to interfere; but will do so if there has been an error of law. The claimant relied on the analysis by HHJ Hand QC in **Galilee v Comr of Police of the Metropolis** [2018] ICR 634, 661 paragraph 85:

> **"85 In my judgment, challenging the exercise of judicial discretion on appeal depends on exactly the same principles as any other challenge on appeal to this tribunal: if the challenge is to succeed, it must be based on an error of law and if there is such an error then the appeal will succeed notwithstanding that the order under appeal is a case management decision. In Broughton v Kop Football (Cayman) Ltd [2012] EWCACiv 1743 at [51]**
> **Lewison LJ said:**
>
> > **"Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision-makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained." …**
>
> **89 The exercise of judicial discretion occurs in many different contexts, but in my judgment the same approach applies whatever the context, even though the analysis of that approach has sometimes been differently expressed. The approach Asquith LJ articulated, and the House of Lords approved in G v G, is a specific perspective as to how one might approach the issue of deciding whether the judge was wrong and not just wrong but "plainly wrong" , as Lewison LJ has suggested in the passage cited above. In effect, the words of Asquith LJ are a powerful antidote to the natural impulse to interfere, from which an appellate tribunal might suffer when its own inclination might have led to a different conclusion. I have noticed, however, a trend of late to regard that as all that needs to be said about an error of law in connection with the exercise of a judicial discretion. Part of Mr Crozier's submissions about whether there had been an error in the instant case had something of that flavour.**

> **90 But the scope of appellate scrutiny is much wider than "the generous ambit within which reasonable disagreement is possible" as the passage from the judgment of Lewison LJ in Broughton v Kop Football (Cayman) Ltd [2012] EWCA Civ 1743 shows. …**
>
> **92 In deciding whether a decision to give or refuse permission to amend was erroneous, I recognise that there is a broad discretion vested in the employment tribunal. But that does not mean the exercise of a broad discretion, particularly when it arises in a case management context, such as a decision about amendment, must be regarded as inviolate."**

42. While referring to the "least worst solution" approach to case management, HHJ Hand QC made it clear that the basic approach to errors of law is the same in appeals against case management decisions as it is to any appeals to the EAT; and that, notwithstanding the broad discretion afforded to the employment tribunal in case management, if there is an error of law it should be corrected.

43. Rule 29 of the ET Rules 2013 provides a specific power to "vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice". The scope of this power was considered by HHJ Hand QC in **Serco Ltd v Wells** [2016] ICR 768, at 784 paragraph 43:

> **43 In my judgment the following emerges from the above consideration of the Rules and authorities relating to the CPR and the Employment Tribunals Rules of Procedure:**
>
> **(a) The draftsmen of both sets of Rules must be taken to have drafted them with the same universal principle in mind, namely what I have described as finality and certainty of decision and orders and the integrity of judicial decisions and orders; this principle, as the authorities in both jurisdictions illustrate, usually directs any challenge to an order towards an appeal to a tribunal of superior jurisdiction and discourages seeking the same judge or another judge of equivalent jurisdiction to look again at an order or decision, save in carefully defined circumstances.**
>
> **(b) Although the only reference in either set of Rules to a "change in circumstances" is in a Practice Direction to the CPR and not in the CPR itself (and there is no explicit reference to a "material change in circumstances" in either), the principle, as it emerges from the authorities referred to above, is that before a judge can interfere with an earlier order made by a judge of equivalent jurisdiction there must be either a material change of circumstances or a material omission or misstatement or some other substantial reason, which, taking account of the warning Rix LJ gives against attempting exhaustive definition, it is not possible to describe with greater precision.**

> **(c) When it comes to long standing procedural principles such as this, unless the rubric of the Rules clearly indicates the contrary, that principle should be taken to have been in the mind of the draftsmen when the Rules were drafted and the Rules must be interpreted so as to take account of such a principle.**
>
> **(d) The draftsmen of the current Employment Tribunals Rules have used the expression "necessary in the interests of justice"; in my judgment that should be interpreted through the prism of the principle I have just articulated; variation or revocation of an order or decision will be necessary in the interests of justice where there has been a material change of circumstances since the order was made or where the order has been based on either a misstatement (of fact and possibly, in very rare cases, of law, although that sounds much more like the occasion for an appeal) or an omission to state relevant fact and, given that definitions cannot be exhaustive, there may be other occasions, although as Rix LJ put it these will be "rare" and "out of the ordinary".**

44. HHJ Hand QC went on to state at paragraph 45:

> **"I therefore incline to the view that whether or not a subsequent event amounts to a material change in circumstances is, as Rix LJ put it, a matter of "jurisdiction" and not a question of the exercise of discretion. In other words I would hold that whether or not there has been a change of circumstances and whether or not that change is material is a matter to be decided from an objective standpoint and by asking whether the circumstances changed and whether that matters not from the point of view of a band of reasonableness but from the point of view that either the factual matrix can support that view or it cannot."**

45. Ms Masters, for the claimant, accepted that this is the correct approach to considering applications to vary existing case management orders "in the interest of justice".

46. As the respondent noted, **Serco** has been followed in: **Dobson v Pricewaterhousecoopers LLP** UKEAT/0222/18/OO, 20 March 2018, unreported; and **Brettle v Dudley** UKEAT/0103/17/JOJ, 28 March 2018, unreported

47. While the point was not necessary to decide the appeal, in **Dobson** John Cavanagh QC, DJHC, considered the effluxion of time as a change of circumstances, at paragraph 62:

> **"62. For what it is worth, I share Employment Judge Crosfill's view that it would have been a mistake, if it had been done, to Order general disclosure as early as April 2016, but that of itself is not a reason to set it aside. In my judgment, there has been no material change of circumstances and no misdirection of fact or law by Employment Judge Sage. The delay that has taken place is not, of itself, usually a change of circumstances. As Mr Dobson pointed out, Judge Hand dealt with this in Serco v Wells and said that if it were otherwise than the mere**

effluxion of time would mean that all Orders of the Tribunal were up for re-examination. It seems to me that this is especially so where, as here, the main reasons for the delay are not connected with these particular directions. In this case, most of the delay that has taken place since April 2016 was to do with the appeal against the Order in relation to third party disclosure and the rest, it is fair to say, is due to some doubt as to what the Order meant. As regards uncertainty, it seems to me the difficulty with that argument is that I would only have been addressing the Serco v Wells argument if I had come to the view that the correct interpretation of the Order was that it had been an Order for general disclosure. If the right interpretation was that it was indeed an Order for general disclosure, then it seems to me the fact that it was not as clear as it might have been is not of itself a good reason for setting it aside. The fact that it would be inconvenient to maintain the Order is not, of itself, a good reason to set it aside." [emphasis added]

Reconsideration

48. Specific provision for reconsideration is made by rule 70-73 ET Rules 2013:

70 Principles

A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ('the original decision') may be confirmed, varied or revoked. If it is revoked it may be taken again.

71 Application

Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

72 Process

(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be,

chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

73 Reconsideration by the Tribunal on its own initiative

Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).

49. The rules set out a structured, and mandatory, process for the consideration of applications for reconsideration:

(1) the employment judge must first consider whether there are "no reasonable prospect of the original decision being varied or revoked", in which case the application is to be dismissed ("the rule 72(1) decision");

(2) where practicable, the consideration under paragraph (1) shall be by the employment judge who made the original decision or, as the case may be, chaired the full tribunal which made it;

(3) otherwise, the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing;

(4) the employment judge may choose to express a provisional view;

(5) a hearing will be fixed unless the employment judge considers having regard to any response to the above enquiry that "a hearing is not necessary in the interests of justice";

(6) any reconsideration determination under rule 72(2) ET Rule 2013 ("the rule 72(2) decision") shall be made by the judge or, as the case may be, the full tribunal, which made the original decision.

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50. The respondent relies on a number of cases decided under the predecessor rules. They have to be considered in the context of the different wording of the previous rules as is apparent from the determination of HHJ Richardson in **Opara v Partnerships in Care Ltd** UKEAT/0368/09 from paragraph 38:

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> **38. Rule 36(1) then provides for the review itself. The review itself is to be undertaken if practicable by the Tribunal or Employment Judge who took the decision Rule 36(1) provides –**
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> > **"36 The review**
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> > **(1) When a party has applied for a review and the application has not been refused after the preliminary consideration above, the decision shall be reviewed by the Employment Judge or tribunal who made the original decision. If that is not practicable a different Employment Judge or tribunal (as the case may be) shall be appointed by a Regional Employment Judge, the Vice President or the President."**
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> **39. In rule 36(1) there is no equivalent to the words "without the need to hold a hearing" in rule 35(3). To the contrary, rule 14(1) of the 2004 Rules expressly identifies a review hearing under rule 36 as one type of hearing which a Tribunal may hold. Rule 14(4) sets out the contents of a letter to be sent to the parties, informing them that they may make written submissions before the hearing and oral submissions at the hearing.**
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> **40. In our judgment the meaning and intention of the Rules is that a review pursuant to rule 36(1) – in contrast to the Employment Judge's initial consideration under rule 35(3) - will be undertaken at a hearing convened in accordance with rule 14, notice being given in accordance with rule 14(4). Of course, the scope of the hearing will depend on the subject matter of the review. If the issue at stake in the review is minor, the parties may content themselves with written submissions: see rule 14(5)-(6). They may even agree the result, in which case of course an order may be made under rule 28(2) and a hearing will be unnecessary. But where there is a fully contested application for a review under rule 36, the Tribunal should not dispense with a hearing.**
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51. HHJ Richardson held that if a reconsideration hearing might involve making findings of fact that could impugn the honesty or integrity of a party, this was a compelling reason why a hearing should be held:

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> **"43. Quite apart from the position under the Rules, it is in our judgment plain that the Tribunal ought to have convened a hearing in a case such as this in order to do justice between the parties. The Tribunal was being invited to make – as it eventually made – a finding tantamount to or at the very least akin to dishonesty on the part of Mr Opara. Even if Mr Opara had not been a professional man the finding would have been of the utmost seriousness. No Tribunal should make a**
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finding of this kind without affording to the person against whom it is to be made a full and proper opportunity to be heard upon it."

Expert Evidence

52. The ET Rules 2013 do not make specific provision in respect of expert evidence. The approach that the employment tribunal should adopt was considered in **De Keyser Ltd v Wilson** [2001] IRLR 324, at 330:

> **"We must not be thought to be encouraging the use of expert witnesses; their instruction might be thought by some to militate against the inexpensive, speedy and robustly 'commonsensical' determinations by the 'industrial jury' which employment tribunals were called into existence to provide. However, there plainly are cases where one or both parties or the tribunal itself see experts to be necessary or desirable. We wish to procure that where they are necessary the arrangements for them are as economical and effective, as is consistent with fairness and convenience. Our guidelines (and they are only that) are for guidance until more formal rules, including provisions as to the costs involved, emerge. They are as follows:**
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> **(i) Careful thought needs to be given before any party embarks upon instructions for expert evidence. It by no means follows that because a party wishes such evidence to be admitted that it will be. [Although the procedures of employment tribunals differ from those in the civil courts, guidance may be found by way of analogy from the provisions of CPR rr 35.1–35.14 and 35PD.] A prudent party will first explore with the employment tribunal at a directions hearing or in correspondence whether, in principle, expert evidence is likely to be acceptable.**
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> **(ii) Save where one side or the other has already committed itself to the use of its own expert (which is to be avoided in the absence of special circumstances) the joint instruction of a single expert is the preferred course."**

53. Guidance on the use of expert evidence in the civil courts is provided in CPR Rule 35, PD 35 and the Guidance for the Instruction of Experts to give Evidence in Civil Claims 2014. While the CPR does not apply to the Employment Tribunal, which is governed by the more flexible Employment Tribunal Rules 2013, they can be of assistance. CPR Rule 35 provides that:

> **"35.1 Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings."**

54. The approach to the instruction of experts was considered by HHJ Auerbach in **Morgan v Abertawe Bro Morgannwg University Local Health Board** [2020] ICR 1043, at paragraph 18 onwards:

18 It needs to be borne in mind that, in respect of a given claim or issue, the employment tribunal may be called upon to adjudicate different types of question concerning expert evidence. Two, in particular, need to be distinguished. The first is whether, in principle, expert evidence will be permitted to be adduced in relation to a given issue in the case at all. If the answer to that question is yes, then, as a distinct matter, the tribunal will need, secondly, to consider the form which that evidence will take, what steps the parties should be taking in relation to its preparation and disclosure, how it will be presented at the hearing, and so forth.

19 As De Keyser explains, the CPR do not apply to litigation in employment tribunals as such. Nevertheless, in this area, the provisions of CPR Pt 35 and the associated practice direction may provide a useful source of guidance by way, at least, of analogy. The opening section within para 36 in De Keyser, and the discussion there under sub-point (i), make clear that in the employment tribunal, as in the civil courts, permission is, in principle, required for expert evidence to be adduced. That is, in essence, because it is opinion evidence rather than evidence of fact. However, the discussion in the remainder of that paragraph in De Keyser is largely devoted to the second of the two types of question that I have identified. It does not specifically explore, in any detail, the first of those questions, namely, what the threshold test is for it to be appropriate, in principle, to admit expert evidence in relation to a given issue.

20 As to that, counsel before me agreed, rightly, that the position under the CPR is clear. Rule 35.1 states: "Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings." The "reasonably required" formulation is also repeated, I observe, in paragraph 1 of Practice Direction 35 Experts and Assessors (21 December 2017).

21 I also observe that the Civil Procedure 2019 commentary cites a number of authorities which have addressed particular, specific problems and scenarios, but the "reasonably required" test is a constant mantra. References, for example, to what is, "Necessary to ensure fairness" or "Necessary to resolve the proceedings justly" do not, in my view, signify a different test, but merely express in different words, or flesh out, the same test.

22 The authorities also, unsurprisingly, indicate that whether expert evidence is "reasonably required" should be approached consistently with the overriding objective. However, that is not a separate or additional test. It merely informs the overall assessment of whether expert evidence is reasonably required. In my judgment, the starting point is to consider such matters as the degree to which the issue in question inherently turns on expert evidence, the likely significance of the contribution that expert evidence may make, and/or the importance of the issue itself in the context of the overall issues in the case. If the overall contribution of expert evidence by reference to such criteria would be low or marginal, then that might be outweighed by the cost, time, and/or complication that would be involved in obtaining it, when judging whether it is reasonably required. However, if the contribution of expert evidence would, on any view, be appreciably significant, then such considerations ought not ordinarily to tip the balance against allowing it to be adduced.

23 As the authorities establish, in some areas not otherwise covered by express provision in the Employment Tribunals Rules of Procedure 2013, there are good reasons for employment tribunals to follow their own distinctive approach from that taken by the CPR. However, in this particular area, both counsel agreed before me that the tribunal was right to take the CPR approach as its guide. I see no good reason why an employment tribunal should not also apply the "reasonably required" test, informed by the overriding objective in the form in which it appears in the tribunal's own rules.

55. HHJ Auerbach went on to state at paragraph 26:

> **"26 I add that, when considering the first of my above two questions, the starting point should be to identify and, as necessary, clarify with precision, the particular issue or issues in the case in relation to which expert evidence is sought to be adduced. That will give the tribunal the essential foundation it needs in order to decide, first, whether expert evidence should be permitted; and, if it is, it will provide a clear point of reference for instructions and/or questions to the expert(s)."**

56. Mr Sethi in his oral submissions (a point not made in his skeleton argument) contended that in the employment tribunal there is no requirement to obtain permission to rely on expert evidence. He contrasted the ET Rules 2013, that do not specifically provide for expert evidence, with the Employment Tribunals (Equal Value) Rules of Procedure 2013 in which there is a requirement to obtain the permission of the employment tribunal to rely on expert evidence. Later is his submissions, he somewhat modified that argument to suggest that there is nothing in the rules requiring a party to obtain the permission of the employment tribunal before instructing an expert. While a party can choose to instruct an expert for their own purposes, if they wish to rely on expert evidence they should follow the guidance given in **De Keyser**, which was given because of the lack of any rules dealing with expert evidence in the employment tribunal. If there was any doubt about the issue, it was conclusively determined by HHJ Auerbach in **Morgan** that the permission of the employment tribunal is required to rely on expert evidence.

Analysis and determinations

The decision to determine the reconsideration application on the papers (grounds 1-3)

The mandatory structure for reconsideration applications

57. At the outset of the hearing, I raised with the parties my concern as to whether EJ Hyams-Parish had adopted the structured approach mandated in applications for reconsideration. An employment judge must first consider whether there are reasonable prospects of the judgment being varied or revoked (i.e. take the rule 72(1) decision) before seeking a response from the

other party and, if appropriate, giving a provisional view; and seeking the views of the parties on whether the matter can be determined without a hearing. This is clear from the wording of Rule 72(2) which provides that the employment judge "shall consider any application made under rule 71" and that "If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked …, the application shall be refused and the Tribunal shall inform the parties of the refusal." This provides an important protection to the opposing party in that they should not be put to the time and expense involved in responding to an application for reconsideration if the employment judge does not consider there are "reasonable prospects of the judgment being varied or revoked". Provision for making the rule 72(2) decision should not be made before the rule 72(1) decision has been taken.

58. Once the rule 72(1) decision has been taken, the employment judge must set a time for a response from the other party, and seek the parties views to whether the application can be determined without a hearing. The fact this is a mandatory is clear from the wording of the rule: "Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing".

59. In a case such as this, that was originally determined by an employment judge sitting with members, the rule 72(2) decision is to be taken by the full panel whether it is dealt with at a hearing or on the papers. I have some concern that EJ Hyams-Parish may have been proposing to take the rule 72(2) decision on the papers alone, rather than together with the members as is required.

60. The management of a reconsideration application is a little more complicated if there is also an issue about whether it has been submitted in time ("the time point"). There will be a question at to whether the rule 72(1) decision should be taken before or after the time point. In some circumstances it might be necessary to consider the time point at a hearing. It would be open to an employment judge to take the rule 72(1) decision and then fix a hearing to determine the time point and, if appropriate, to take the rule 72(2) decision. Alternatively, an employment judge could determine the time point before taking the rule 72(1) decision. What is not open to an employment judge is to list a hearing to determine the time point and take the rule 72(2) decision, if the rule 72(1) decision (on the papers) has not yet been taken.

61. I am concerned that EJ Hyams-Parish may have adopted this impermissible hybrid approach. The original order EJ Hyams-Parish made on 27 September 2020 to fix a reconsideration hearing did not state that he had already decided that the application should not be dismissed on the basis that there were no reasonable prospects of the judgment being varied or revoked (the rule 72(1) decision). In my experience that is not unusual. While there was a letter setting a time for response, it did not seek the views of the parties on whether the application could be determined without a hearing, as is required by Rule 72(2). This request should always be made. I consider it would be good practice for the letter to state in terms that the judge has decided that the application should not be dismissed because "there is no reasonable prospect of the original decision being varied or revoked" (i.e. to make it clear that the rule 72(1) decision has been taken).

62. What has given me considerable pause for thought, is what was said by EJ Hyams-Parish at paragraph 9 of his reasons for the determination made at the preliminary hearing on 12 February 2021: "I decided to hear the application in person notwithstanding the fact that I could

have dealt with it on the papers pursuant to Rule 72(1)". This suggests that the rule 72(1) decision has not been taken.

63. Ms Masters contends that this is simply an error, and that the reference to consideration on the papers is to the rule 72(2) decision. We ended up in an unusual situation in which Ms Masters, for the claimant, who seeks to resist the application for reconsideration, contends that the judge has determined that there are reasonable prospect of the original decision being varied or revoked, whereas Mr Sethi, for the respondent, contends that decision has not been taken. He contends that it is a matter of jurisdiction and, even if disadvantageous to his contentions, if the rule 72(1) decision has not been taken, it must now be taken.

64. It seems hard to understand why a two-day listing would have been fixed if the rule 72(1) decision has not been taken. The two day listing suggests that EJ Hyams-Parish may have made the rule 72(1) and decided to go on to determine the timepoint and, if appropriate, make the rule 72(2) decision.

65. There are, of course, only two possibilities: either EJ Hyams-Parish has taken the rule 72(1) decision, or he has not. EJ Hyams-Parish should inform the parties as soon a practicable after receipt of this judgment whether he has taken the rule 72(1) decision, or not. If not, the rule 72(1) decision should be taken as soon as practicable.

Was there a material change in circumstances (ground 1)

66. It was common ground between the parties that the question of whether a case management order should be revisited in the interests of justice is jurisdictional, in the sense that

whether there are circumstances that render it necessary in the interests of justice to change a case management order is to be assessed objectively. If there has been no material change since the order was made, there is no basis for it being varied or revoked. As HHJ Hand QC held in **Serco** this involves consideration of (1) whether there has been a change of circumstance, and (2) whether it is material. Both of these question are to be answered on an objective basis.

67. The parties differed as to which determination EJ Hyams-Parish was varying. Ms Masters contended it is the original order of 17 September 2020, when EJ Hyams-Parish first directed that there would be a reconsideration hearing, whereas Mr Sethi contended it was the direction of 14 December 2020 when EJ Hyams-Parish decided that the hearing that been listed for 15 and 16 of December 2020 would be postponed for it to be relisted as soon as possible in the New Year. While I accept Mr Sethi's contention that both of these decisions were judicial decisions, the determination of 14 December 2020 did not involve redetermining the point of principle, taken on 17 September 2020, that the reconsideration application would be dealt with at a hearing. It was merely postponing the hearing that had been fixed. Accordingly, I considered that it is the first decision (made on 17 September 2020) that EJ Hyams-Parish decided to vary.

68. Since the date of that order there had been a change of circumstances in that as a result of the ill-health of the respondent's Counsel there would be a significant delay in a hearing taking place. Even if I was wrong, and the determination that was varied was that of 14 December 2020, there had been a further change of circumstance in that it had become apparent that the respondent's Counsel's ill-health was considerably more serious than had been appreciated initially, with the consequence that it would be necessary to instruct new Counsel and delay any oral hearing still further, taking account of his dates of availability.

69. Furthermore, I consider that it is clear from the documentation, as considered above, when the determination was made by EJ Hyams-Parish on 14 December 2020 to relist the oral hearing he had not seen the application by the claimant of 11 December 2020 for the reconsideration to be dealt with on the papers. The fact that a determination has been made without being aware of an application, or relevant material provided by one of the parties, could itself be a reason why it would be in the interests of justice to revisit the determination. Rule 29 provides that the fact that a decision has been made without one of the parties having an opportunity to make representations is a specific basis upon which it may be necessary to revisit a decision.

70. Whatever the analysis, there was a change of circumstance in that there was going to be delay if the rule 72(2) decision was to be taken at a hearing. However, I consider the question of whether that was a "material" change is more difficult. It is in the nature of litigation that there are delays that may result from matters such as appeals; and may occur because of circumstances outside the control of any of the parties. Such delay is highly regrettable, but is part and parcel of normal litigation, and generally will not represent a material change in circumstances that should result in an order being revisited. At heart, justice either required that the reconsideration be determined at a hearing, so as to give the parties the fullest opportunity to make submissions on matters of importance and to answer any question raised by the employment tribunal, or it did not. It is hard to see how delay could substantially change that equation. That is the point made by DJHC Kavanagh in **Dobson**. On balance, I consider that although there was a change in circumstances in this case, it was not material.

The determination that a hearing is not necessary in the interests of justice (ground 3)

71. However, even if I am wrong, and the delay does constitute a material change in circumstances, I do not consider that EJ Hyams-Parish carried out the balancing exercise that was necessary to decide whether that change in circumstances meant that it was in the interests of justice that a hearing should no longer take place. This is litigation that is of considerable importance to the parties. The application for reconsideration seeks to persuade the tribunal that it should have determined that the allegations of discrimination made by the claimant were not only not made out (so were false within the meaning of section 27(3) of the Equality Act 2010), but were also made in bad faith. Furthermore, the respondent seeks to persuade the tribunal that the claimant was guilty of "unconscionable conduct". While consideration of these matters will not involve hearing new evidence that might result in factual findings of impropriety of the sort that led HHJ Richardson to consider a reconsideration application should be dealt with at a hearing in **Opara** and the other cases relied on by the respondents, it does seek reconsideration of the determinations that should have been made on evidence in a way that could have profound consequences for either party. An oral hearing will give them full opportunity to make their submissions. It is also important to bear in mind; and I am not certain that EJ Hyams-Parish did have this in mind; that were the rule 72(2) decision to be taken on the papers, it must be taken by the full tribunal, rather than the employment judge alone. A paper determination would mean not only that EJ Hyams-Parish would not have the opportunity to question Counsel, but also the members be prevented from testing the oral submission. I consider there could be considerable practical difficulties in dealing with a reconsideration on the papers when the determination is to be made by the full panel.

72. The determination of whether the interests of justice required a change to a paper determination had to be determined in the round, considering the consequences for both parties: **O'Cathail**. This required consideration of the overriding objective. While the avoidance of delay is a factor within the overriding objective, the complexity and the importance of the issues is also a relevant factor. EJ Hyams-Parish failed to take this into account. It was a fundamental component of the key requirement to deal with the matter fairly. EJ Hyams-Parish focused only on the issue of delay. Even if it was a material change of circumstance, I do not consider that the decision taken was permissible as it failed to weigh up the competing factors. I also consider that the potential high value of the claim was a factor that required at least some consideration. I conclude that on a proper application of the law, the only conclusion that could reasonably be reached was that the rule 72(2) decision should be taken at an oral hearing as originally listed.

73. The disposal of the appeal is a little complex because it is not clear to me whether EJ Hyams-Parish has taken the rule 72(1) decision. I have provided for EJ Hyams-Parish to state whether that determination has been made and, if not, to make the decision. I have full confidence in the professionalism of EJ Hyams-Parish, and that if the rule 72(1) decision is still to be taken, it will be determined on a careful consideration of the material and there will be no question of short-circuiting to ensure that the determination of the reconsideration application is taken without a hearing if there is on proper consideration reasonable prospects of the judgment being varied or revoked.

74. If either EJ Hyams-Parish has already taken the rule 72(1) decision, or now takes it, and decides that the application should progress for the rule 72(2) decision to be taken, the matter will have to be determined at a hearing. The decision can be taken at the hearing listed for 6 and 7 April 2021. That hearing is in the diary, and the members will have been booked.

The starting point is that the rule 72(2) decision should be determined at a hearing (Ground 2)

75. The claimant accepted that the structure of rule 72(2) is such that the starting point is that the rule 72(2) decision should be taken at a hearing. However, the 2013 rules were amended to require that the parties must be asked for their view as to whether the rule 72(2) decision can be taken without a hearing. The key issue will always be what is in the interests of justice. In the employment tribunal important determinations should generally be taken after the parties have had an opportunity to make submissions at a hearing. I am not persuaded that EJ Hyams-Parish did not appreciate that the starting point is that the rule 72(2) decision will be taken at a hearing. In any event, I did not need to rely on this point to determine the appeal.

The refusal to grant permission to the respondent to rely on expert evidence (ground 5)

76. I do not consider that EJ Hyams-Parish erred in law in refusing the application of the respondent to rely on expert evidence. The respondent wished to instruct a person from an agency that specialises in the appointment of a wide range of finance directors, including those without chartered qualifications who wish to work part-time, such as the claimant.

77. The parties agree that the employment tribunal has power to case manage expert evidence. Mr Sethi did not pursue with any vigour his suggestion that there is no requirement for permission to rely on expert evidence in the employment tribunal. The decision of HHJ Auerbach in **Morgan** is clear authority that the employment tribunal must grant permission before expert evidence is adduced.

78. Mr Sethi relied on a passage in **Morgan**, in which HHJ Auerbach stated, at paragraph 22, that if the overall contribution of expert evidence would be low or marginal, it might be outweighed by the cost, time or complication that would be involved in obtaining it, but that if the contribution would be "appreciably significant", such consideration ought not ordinarily to tip the balance against allowing it. In that passage, HHJ Auerbach was not setting out a new test. The test is the well established test of whether expert evidence is "reasonably required" to resolve the issue in the proceedings. HHJ Auerbach was also considering the approach to medical evidence, in particular; although the general points he made are pertinent to all expert evidence.

79. As HHJ Auerbach noted at paragraph 26, the starting point is to identify and, as necessary, clarify with precision, the particular issue or issues in the case in relation to which expert evidence is sought so as to consider the first question of whether expert evidence will be permitted at all. In this case it is contended that the expert will be able to give evidence as to the availability at the relevant time of jobs for a person who is not professionally qualified and wishes to work part-time as a finance director. Like EJ Hyams-Parish, I cannot see how the type of evidence proposed by the respondent will materially assist. I have considerable doubts about whether it really would be expert evidence at all. The respondent has not identified the specific individual that they intend to instruct, or stated what qualifications that person has that makes it appropriate for her/him to give independent expert evidence. As EJ Hyams-Parish noted, this is essentially a factual issue. It may be possible for the respondent to show that there were a number of roles for which the claimant could have applied that she did not apply for, in which case it can be argued that there has been a failure to mitigate loss. The respondent may find it helpful to instruct a person from a recruitment agency to help them to obtain the factual material on which such an argument can be based, but that does not mean such a person should be called to give "expert" evidence.

80. In their detailed submission in favour of being granted permission to call expert evidence, the respondent contended that as the claimant was not proposing that there be a joint instruction of an expert, and did not intend to call an expert herself, the cost would be incurred entirely by the respondent. Their expert had indicated an ability to produce a report in a short period of time. None of those points go to the fundamental issue of whether such an expert was likely to give evidence that would materially assist the Tribunal. Even though the claimant would not be put to expense by the respondent calling an expert, hearing such evidence is necessarily time consuming. EJ Hyams-Parish was entitled to conclude that this could, potentially, affect the ability of the tribunal to determine the remedy issues in the time available.

81. In their detailed submissions the respondent reminded the tribunal that when considering the differential in pay between finance directors and managing directors at the liability hearing the tribunal had been referred to research material that showed significant variations, that changed over time. The tribunal noted that they had not been able to question the authors of the report, so had no basis for understanding why there was such differential, and why it varied over time. That was a point about statistical evidence. It is different to the factual question at the remedy hearing; namely, whether there were roles available for the claimant that she should reasonably have applied for in order to mitigate her loss.

82. The respondent also seeks to rely on the fact that the claimant has now decided on a change of career to work in human resources. It will be factual question for the tribunal to determine whether the decision of the claimant to change career is such that it can be shown by the respondent that the claimant has failed to take reasonable steps to mitigate her loss; I do not consider it is a matter for expert evidence.

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83. The respondent contends that EJ Hyams-Parish did not have sufficient regard to the potential value of the claim, particularly because of his reference to the fact that the factual determination would not be different to that the employment tribunal has to conduct when determining unfair dismissal compensation. I do not accept that he did not take account of the potential value of the claim; although I have little doubt that the respondent will contend that the claimant's valuation is excessive at the remedy hearing. The general point that the basic approach to assessing loss of earnings is essentially the same irrespective of the type of claim (and whether there is a cap on compensation) is a good one. Accordingly, I find no error of law by the employment judge in determining that he would not permit the respondent to call expert evidence in this case.

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Conversion of reconsideration hearing to a remedy hearing (ground 4)

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84. The issue of the conversion of the reconsideration hearing to a remedy hearing is academic in the light of the above determinations, unless EJ Hyams-Parish has not previously made the rule 72(1) decision, and determines it against the respondent. If that occurs, I consider that it is likely to be a proportionate and a proper use of resources for the hearing currently listed for 6 and 7 April 2021 to go ahead as a remedy hearing, as currently listed. That is likely to be the best use of limited resources, particularly in circumstances where the parties have now substantially prepared for the remedy hearing, and because I have not accepted that there was any error in law in EJ Hyams-Parish refusing permission for the respondent to call expert evidence. Of course, case management is a matter for the employment tribunal.

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The refusal to stay the case management orders pending the appeal (ground 6)

85. I agree with the submission of the respondent that consideration of what should happen in respect of ongoing case management pending the determination of an appeal involves weighing up the justice or injustice of granting a stay to both parties. These are difficult, and often finely balanced, decisions. They are a particularly good example of where an attempt has to be made to find the least bad solution. As far as possible, the respondent to the appeal should not be prejudiced so that even if the appeal fails the appellant will have gained what he or she wanted. Similarly, the appeal should not be rendered otiose because even if successful it will be too late.

86. It is helpful to distinguish between the stay of the directions in respect of the preparation for reconsideration and for the remedy hearing.

87. The preparations for the reconsideration involved providing detailed written submissions and responses. The extent to which it involved much more than would have been produced in writing for an oral hearing is open to question; as is, perhaps, demonstrated by the skeleton arguments in this appeal that were very much in the nature of written arguments. In an appeal against a judgement of 8 pages the respondent's "skeleton" was 15 pages and the claimant's 22 pages. I very much doubt that the continuation of the orders to prepare for the reconsideration on the paper has significantly altered what would be produced for a hearing. The appeal is not otiose. If the rule 72(2) decision is to be taken it will be taken at an oral hearing, and the respondent will have the ability to make oral submissions and to answer questions from the employment judge and tribunal members.

88. In respect of the orders for the remedy hearing, it is to be remembered that the ideal is for remedy to be dealt with at the same hearing as that at which liability is determined. The fact that a tribunal may decide that they should move ahead to determine remedy, particularly in the case like this where there has been a substantial period of delay since dismissal, even pending an appeal, is a matter that falls within the tribunal's case management discretion. I do not consider that there was an error of law in the employment tribunal failing to stay the orders pending the disposal of the appeal, even in circumstances in which the appeal had been expedited. The main point of expediting the appeal was so that it could be determined before the hearing listed for 6 and 7 April 2021.

89. The parties are well advanced in their preparation for the remedy hearing. I consider it is proportionate that the final steps be taken to prepare for a determination of remedy. The potential waste of cost should the reconsideration go in he respondent’s favour is outweighed by the possibility that either the hearing on 6 and 7 April 2021 will go ahead as a remedy hearing or there will still need to be a remedy hearing at a later date for which the parties will be fully prepared. While I appreciate that the listing difficulties in South London mean that there may be a substantial delay, on occasions slots become available because of settlement, and it is in the interests of all parties that remedy is ready for determination at the earliest available opportunity. Preparation for the determination of remedy can also promote settlement.

90. The hearing listed for 6 and 7 April 2021 can still be used either to make the rule 72(2) decision or to deal with remedy, if the rule 72(1) decision has not yet been taken, and goes against the respondent when it is taken.