EMPLOYMENT TRIBUNALS

Claimant: **Mr T Smith**

Respondent: **Tesco Stores Limited**

JUDGMENT

The claimant's application dated **22 March 2021** for reconsideration of the judgment sent to the parties on 18 March 2021 is refused.

REASONS

1. The application for reconsideration submitted by the claimant raises the following grounds for reconsideration:
    a. He says that he did not participate in the hearing *"voluntarily or otherwise*" and that *"any such participation was not conducted by him willingly or with his permission, knowledge, agreement or acknowledgement. The claimant also argues that underhanded means and covert, devious devices were used in trying to trick him into doing something he did not feel comfortable to do";*
    b. That the claimant had not provided his name so that *"no conformation [sic] of the claimant's name was provided, so the EJ could not be sure that the person was who the EJ thought or expected he or she to be*";
    c. That *"the manner in which the former employee of the business claims were struck out were [sic] scandalous because the scheduled hearing was suddenly changed from a PH in person at the ET to one of a CVP hearing, with no prior, clear or adequate notification provided. Nor were there any consideration of the claimant's Protected characteristic of disability, i.e. dyslexia, or his stress and anxiety related illness, which was sure to unsettle and put him at a unfair disadvantage in such a unexpected manner of proceeding*";
    d. That it is alleged that my judgment was unreasonable because it was made on the basis of my *"emotional reaction towards the claimant and not the facts of the former employee of the business claims against his former employer, the very large Multi National Organisation, Tesco PLC/stores LTD*".

e. It is alleged that my judgment was *"vexatious"* because it is alleged that I *"allowed emotions to cloud decision making; it was not the claimant's conduct that was scandalous, unreasonable or vexatious, as he was only exercising his basic human right to not participate in his own destruction or to do something he was not comfortable with doing. Had he participated in the CVP hearing he would have given the EJ Cookson, and possibly the ET and the Respondent's legal representatives, Pinsent Masons, the justification they were planning for from the outset, to issue the strike out that was planned from 2019, to avoid the Respondent from accounting for causing a criminal offence to have been committed, a miscarriage of justice to have occurred and a failure to comply with a legal obligation and duty of care towards its employees"*.

f. In relation to this ground, the claimant goes on to say "*For instance, on Wednesday 17 March 2021, the claimant attended, at 9:45am, what he thought was to be a Preliminary Hearing, as scheduled, at 10.00am, with a (EJ) sitting alone and in person, at the ET. Instead, on arrival the Clark, notified the claimant that the hearing was changed to 9:30am and when he was led into the room it was set up for a CVP hearing, with no prior warning given to the claimant despite receiving a telephone call from Ms Tracy Watkins, of the Tribunal office, on the Monday of that week and also a letter from her which does relate to a CVP but it was not clear to the claimant that the actual PH would be of that nature."*

g. The claimant says that he *"was very upset and uncomfortable with these sudden and unexpected changes and felt he was caught unawares and did not reasonably believe that it would be in his best interest to proceed with something he had not agreed upon. Additionally, the claimant also felt he was being tricked into participating into something that appeared to have been designed more for the Respondent's benefit and to his detriment. As a result the claimant left before the hearing as he believed that the decision or judgement was already made prior to the PH with the (EJ) Miller, on Friday 16 October 2020"*.

h. The claimant also says that he suspects "*foul play*" and *"does not reasonably believe that the manner in which his PH had been changed and rearranged by the ET, was in the best interest of justice as it may have caused a miscarriage of justice to have occurred by perverting the course of justice, to the benefit of the Respondent and the detriment of the former employee of the business, ie. Tesco, PLC/Stores Ltd. Please could you, therefore, provide confirmation of the above to enable the claimant to move forwards to the next stage in this process, i.e. to issue an appeal or a reconsideration of judgement*".

i. Finally the claimant says that the reasons *"put forward by the EJ Cookson did not appear to be based on the facts of the case or on informed decisions but more on subjective, emotional preferences, with regards to race and or gender. The EJ Cookson made claims a. the manner in which the claimant had conducted these proceedings etc. The claimant did not participate in the proceedings. Maybe what the EJ Cookson refers to as being 'scandalous' unreasonable, or vexatious, were just the innocent protestations of an ordinary citizen exercising his basic human right to not be treated less favourably by*

trying to enforce him into doing something he was not expecting or wanted to participate in, isn't that how some people end up committing the criminal offence of rape, by being overly insistent and failing to consider the other person's perspective or feelings...The fact is that these adjectives as used by the EJ Cookson could quite easily also be applied to anyone who share the claimant's, the former employee of the business and the customer's Protected Characteristic of race, i.e. African descent; suggests that the decision or judgement may have been a foregone conclusion. Its a shame that even within the Employment Tribunal as well as in this society we are being perceived as hostile, agitated and aggressive, on sight; sadly, that is the perception too many people still tend to have of us, even those that also claim to be of the same characteristic; if something is wrong it cannot also be right."

The law

2. Rule 70 of the Employment Tribunal Rules of Procedure says this

> "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.

3. Rule 72 says:

> "(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."

Background

4. The preliminary hearing held on 17 March 2021 followed a previous preliminary hearing conducted by Employment Judge Miller. As I have not been asked to provide written reasons of my judgment, I record here some necessary background.

5. The hearing before Employment Judge Miller had been the fourth case management hearing in this case, the hearing before me was the fifth. Since the first case management hearing, conducted by Employment Judge Flood on 4 March 2019 various attempts had been made to particularise the claimant's claims. In his case management summary and orders Employment Judge Miller set out a useful chronology of what happened in this case. The hearing before Employment Judge Miller, conducted in person on 16 October 2020, had been ordered by Employment Judge Flood to finalise a list of issues in relation to the claimant's claims and to make further orders for case management. The respondent had prepared a list of issues which the

claimant had refused to agree but at that the hearing the claimant had been unable or unwilling to explain his objections. Employment Judge Miller sought to give the claimant further time to reflect on the issues and listed this case for a further hearing, that is the hearing listed before me on 17 March 2021.

6. Employment Judge Miller made a number of orders at the hearing which are contained in the order confirmed in writing by him on 20 October 2020 and sent to the parties on 23 October 2020. He required the parties to seek to finalise the list of issues in readiness for the hearing listed for my determination. Employment Judge Miller's orders had been complied with, the matters which were due to come before me should have been relatively straightforward in terms of finalising a list of issues for final hearing and dealing with case management for that final hearing which had been listed for November 2021 by Employment Judge Miller.

7. From the documents in the bundle before me it appears that the respondent had done what Employment Judge Miller had ordered on 16 October 2020. It raised a number of questions with the claimant and presented him again with the neutrally drafted list of issues. I reviewed that list of issues and, despite assertions made by the claimant in correspondence, I can see nothing inappropriate in how that document is set out or how he is referred to. The document seems to me to be entirely consistent with how matters had been expressed by Employment Judge Flood. The claimant however failed to take the steps which Employment Judge Miller had ordered. Rather than engage with the list of issues, on 7 January 2021 he made an application to amend his claim in the following terms

> The claimant would like to further amend his claims to include the following for clarification:
>
> 1. **Victimisation** to his other prohibited conduct claims:
>
> Prohibited conduct claims:
>
> Direct harassment age
> Indirect harassment age
> Direct harassment disability - stress and anxiety related illness
> Indirect harassment disability - dyslexia
> Indirect harassment disability - stress and anxiety related illness
> Direct harassment race
> Indirect harassment race
> Direct age discrimination
> Indirect age discrimination
> Direct disability discrimination - stress and anxiety related illness
> Indirect disability discrimination - dyslexia
> Direct discrimination race
> Indirect discrimination race

2. **To update, add to and simplify the Chronology of events** for ease of use e.g. add page numbers, subsections and diary accounts. (will be forwarded in due course)

3. **To add diary accounts as evidence for the bundle** (will be forwarded in due course)

4. **For disability claims - claimant relies upon dyslexia and stress and anxiety related illness**

5. **Three witness statements from the following perspectives:** (will be forwarded in due course)
   - The Employee
   - The Customer
   - The Claimant

Note: The claimant reasonably believe that none of the above are actually new claims, there are for clarification purposes for the employee's claims against his former employer and to add context, cohesion and ease of navigation for all parties involved.

8. Despite the final comment that "none of these are new claims" the claimant still failed to provide any clarification or comment on the list of issues or to provide comments on the draft sent to him. I have seen nothing to suggest that any meaningful explanation for that failure on his part. His statement that "these are not new claims" was, in any event, confusing in light of the previous discussions about his claims. There is no reference in the orders of Employment Judge Flood to indirect race or indirect discrimination nor indeed to any "indirect harassment", but the claimant did not in any way particularise these matters.

9. Following receipt of that amendment application, the respondent raised concerns about that application and pointed out that in consequence it was still impossible to identify the legal issues which would require determination by the employment tribunal at the final hearing which was now listed for hearing in November 2021. The respondent an application to strike out the claimant's claim on the grounds set out in Rule 37(1) (b) and (e), that is that the way the claimant was conducting the proceedings was scandalous, unreasonable or vexatious, and that because of his conduct a fair trial would no longer be possible. That application had been copied to the claimant and the application was listed to be determined by me at the hearing already listed for 17 March 2021.

10. In anticipation of the hearing, the respondent's counsel Mr Platt-Mills, provided a skeleton argument, a copy of which had been sent to the claimant. That skeleton expanded upon the grounds set out in the respondent's application which refers to a number of matters related to the claimant's conduct including his refusal to cooperate with the respondent to produce a list of issues despite the previous orders of the employment tribunal particularly those made by Employment Judge Miller, and the claimant's continued insistence on raising further new matters more than two years after his claim had been submitted rather than complying with tribunal directions to ensure that this case would be ready for hearing.

11. Turning to the hearing before me, this case had been listed originally for an in-person hearing. It was proposed that this hearing be converted to a video hearing using the HMCTS "CVP" system. That was done at the Employment Tribunal's own initiative reflecting the Tribunal Service's continuing efforts to minimise the number of people attending the employment tribunal given the

current pandemic. I will make clear in light of the claimant's assertions, that was not a decision which I played any part in. It is now usual at the Birmingham Employment Tribunal for as many hearings as possible to be conducted by cvp, in accordance with the approach adopted nationally. It is quite common for claimants, and sometimes respondents, not to have equipment available to them to enable them to join hearings remotely. If that is the case the Tribunal Service will arrangements for individuals to attend the employment tribunal, in essence so that they can use the equipment within the tribunal building to enable them to participate in video hearings. In such cases it is usual for the other parties and the judge, and indeed where appropriate lay members if it is a final hearing, to attend remotely in what is called a "hybrid hearing".

12. Over the last nine months or so, hybrid hearings have become commonplace and I am entirely satisfied that it is possible for hybrid hearings to be conducted fairly and in accordance with the overriding objective. However, if it became clear that any claimant was struggling to participate in a hybrid, or indeed fully remote, hearing and I was unable to take steps to mitigate whatever difficulties they faced, I would not hesitate to adjourn that hearing and relist it for another day and I have done so in the past.

13. Where it is proposed that hearing be converted to cvp, if a claimant indicates that there are other factors which would necessitate a hearing being conducted in-person in addition to them not having the equipment to attend a hearing remotely, that will be arranged. I have conducted a number of those hearings and for a variety of reasons. However, in this case the claimant indicated that he could not attend remotely because he did not have the necessary equipment and for no other reason. He did not suggest any reason why it would be necessary for the respondent and the employment judge to attend in person.

14. Hearing start times are also being staggered in Birmingham to help manage social distancing within the tribunal. The letter to the parties informed that the cvp hearing on 17 March 2021 would be starting at 9.30am. Mr Platt-Mills attended at that time, but the claimant appears to have missed this and he was late for the hearing. I record however that this is a common oversight, and it did not concern me.

15. When the claimant attended the hearing on 17 March 2021 he was upset that the hearing was not being conducted in-person. He asked the clerk to provide some comments to me about that and this was done. I understand that the clerk told the claimant to explain to me what he had said the clerk to when I joined the hearing remotely. The screen which shows remote attendees is to the side of the parties' desks in the hearing room that the claimant was using. I am aware that the clerk had offered the claimant the opportunity to sit at what is usually desk used by the witnesses which would have facilitated his participation in the hearing because he would have been sitting facing the screen and the camera in the tribunal room directly, but that offer was refused.

16. The claimant was informed that the hearing was beginning and that I had joined the hearing remotely. Mr Platt-Mills also joined the hearing remotely.

The clerk asked the claimant to raise his concerns with me. However, the claimant refused to look at the screen, he refused to address me directly and he persisted making representations to the clerk which he required the clerk to address to me. I told him to stop doing that. I told the claimant he must address me and, when the claimant kept talking, I told him to stop speaking over me. The claimant ignored me entirely. In his reconsideration application the claimant says that I was "emotional". At the hearing he told the clerk that I was expressing anger. Neither of those things is true but I did raise my voice in my attempts to get the claimant to desist from seeking to co-opt the clerk into acting as some sort of representative and to get him to address me as the judge hearing the case. In particular I told him to stop talking over me so that I would explain to him how I proposed hearing this case in the circumstances and asked him to listen to me. I was entirely ignored, and the claimant continued to talk to the clerk. The clerk had asked him to stop addressing him and to speak to me. It appeared that the claimant was making comments to the clerk about me. I consider that was wholly unreasonable conduct on his behalf which was highly discourteous to the tribunal and which placed the clerk in an unfair and insidious position.

17. If the claimant had behaved in a proper manner and had raised objections to the hearing going ahead, I would have considered them, but that did not happen. I have no doubt the claimant is aware of the way that parties are expected to behave in tribunal hearings having attended four previous hearings. Having refused to turn to the screen to look at me and continuing instead to address the clerk, the claimant then collected his papers and left the hearing. The claimant gave me no indication that he would comply with my reasonable directions or indeed that he would respect any decision that I made. Based on this conduct I concluded that the claimant had given gratuitous insult to this tribunal.

18. The claimant had not addressed me to offer any good reason for adjourning the hearing. The case had been listed to consider the respondent's application to strike out and it had incurred cost in instructing counsel to attend the hearing on its behalf. I had given the claimant the opportunity to participate in the hearing before me, but he chose not to listen to me or address me, not to give me the courtesy of letting me explain matters to him and had chosen to leave the hearing. In the circumstances I determined that the hearing should continue in the claimant's absence.

19. I heard oral submissions from Mr Platt-Mills and adjourned for some time to consider his written submissions and the decision which I should take in relation to the respondent's application. The judgment sent to the claimant records the judgment which I gave following that adjournment. I gave brief extemporary reasons for my judgment at the time.

20. In reaching my decision to strike out the claimant's claims I recognised that my power to strike out the claim under rule 37(1) (b) or (e) is a highly draconian one and that it is not a power which I can exercise readily. However, I accepted the respondent's submissions that the cardinal conditions for the exercise of that power existed in this case, that there had been a deliberate or persistent disregard of required procedural steps and that the conduct of the claimant had made a fair trial impossible. Having

reached those conclusions I considered whether the striking out of the claimant' claim was proportionate in the circumstances and I concluded that it was.

21. In reaching these conclusions I took into account the guidance of Justice Burton in **Bolch v Chipman** [2003] UKEAT 1149_02 & UKEAT_1905_and I have set out here the particular matters that I considered:

    a. The claimant's behaviour towards the respondent, his disregard for his duty of cooperation, his failure to follow the orders of Employment Judge Miller in relation to the list of issues for this hearing and his behaviour in the tribunal on the day of the hearing could properly be categorised as scandalous, unreasonable or vexatious conduct in the sense that it was abusive of the other side and of process, and this was a course of conduct that this claimant had chosen adopt, not only before me but in these proceedings generally.

    b. I gave careful consideration as to whether, in light of my finding on relation to the claimant's conduct, a fair trial was still possible. I took into account the claimant's failure to do what he had been required to do by Employment Judge Flood and Employment Judge Miller and his refusal to comply with my directions that morning and concluded that this had shown me that he was not prepared to cooperate with the tribunal process. This led me to make the difficult and highly unusual finding that a fair trial in this case was no longer possible because I concluded that the claimant's behaviour in this regard was likely to be repeated if his claim were allowed to continue.

    c. I then considered whether striking out the claimant's claim was the appropriate remedy. I considered whether there was a lesser penalty that I could impose which might ensure compliance and the possibility of a fair trial but I was unable to identify one. My judicial colleagues had have already taken considerable steps to try to identify the scope of the claimant's claims and their attempts to do that had been unsuccessful. A number of orders had been made but not complied with. I concluded that that there was nothing useful that I could do which had not already been done.

    d. I took into account the consequences of this order and what would happen if I did not make it. I recognised that to strike out a claim is the one of the most draconian measures I can take and of course is prejudicial to the claimant, but I also took into account the prejudice to this respondent if these proceedings were allowed to continue. Even after two years, the considerable efforts of my judicial colleagues and its own attempts to identify the matters which required legal determination, as things stood at the outset of the hearing before me the respondent found itself facing significant but unexplained and unparticularised new allegations and a continued refusal to cooperate with a matter as straightforward as agreeing a list of issues in proceedings which have been the subject of four previous hearings and after considerable judicial input into that process, particularly by Employment Judge Flood. I concluded that the attempts by the

employment tribunal and the respondent to deal with this case in accordance with the overriding objective have been frustrated by the claimant and would continue to be so frustrated and that in those circumstances I had no alternative but to strike out the claimant's claim under rule 37 (1) (b) and (e).

The grounds for reconsideration

22. Turning to the grounds out forward by the claimant in his application for a reconsideration I make the following observations and findings:
    a. The correspondence sent to the claimant about converting the hearing to a CVP hearing was the standard correspondence sent to parties. This is correspondence which has led to the conversion of hundreds in the West Midlands Tribunal region alone, and many more nationwide. It was not done the behest of the respondent but it at the tribunal's own initiative for straightforward reasons related to the pandemic. The claimant gave no indication in his reply to that correspondence that he did not understand what was being suggested or that a hybrid hearing would present any difficulty. I find it extraordinary that in those circumstances the claimant should suggest there are grounds to suggest "foul play", whatever he means by that. There was certainly no attempt to trick or mislead the claimant. Those allegations and any suggestion there was some sort of collusion between members of the judiciary, the Tribunal Service and the respondent to frustrate the claimant's claims, are made entirely without any foundation whatsoever and are in themselves vexatious.

    b. The claimant would have identified himself to the security desk and the clerk who introduced him to me. I would not ask any party for proof of their identity. The hearing was clearly convened and both the clerk and I tried to tell the claimant that. A hybrid hearing with a remote judge does not start with the same formality as an in-person hearing, but the fact that the claimant refers to my presence in the hearing shows that he was aware that the hearing had been started.

    c. If the claimant had taken the opportunity to raise any concerns he had with me at the outset of the hearing I would have considered those carefully and I would have adjourned the hearing and relisted it if I had determined that those concerns were well founded and it was in accordance with the overriding objective to do so. Instead, the claimant expressed his frustrations to the clerk, and chose to talk over and ignore me as the judge with conduct of the hearing. It is common of course to see claimants who are tense and anxious. That is understandable and even to be expected. It is very common for employment tribunal judges to have claimants before us who have mental health conditions which can be manifested to us in a number of ways. However, the fact that the claimant has dyslexia, stress and anxiety does not explain to me why the claimant should have chosen to ignore my instructions to raise what he wanted to say about the hearing to me, not the clerk, nor his other behaviour described above and no medical evidence has been produced in support of this

application to evidence this behaviour was because of, or otherwise caused by, his medical conditions.

d. The claimant has also made unfounded allegations that my decision to strike out his claim was that the decision or judgement was *"already made prior to the PH with the (EJ) Miller, on Friday 16 October 2020"* and has made serious allegations of discriminatory bias on my part. I was unaware of the claimant's case until I received the papers on the afternoon of 16 March 2021. I reached my decision on the day, a decision which I took with reluctance. It was my decision, not Employment Judge Miller's, to strike out this claim and Employment Judge Miller played no part in my decision making. I made my decision based on the claimant's conduct in these proceedings both before and at the hearing, on the basis of the application made by the respondent and the submissions made to me, taking into account the relevant guidance from case law and for the reasons I have explained briefly in the background above. I would have taken the same decision faced with conduct of this nature whatever the individual's race, gender, background or other characteristics. The claimant's belief that I categorised his conduct as "scandalous, unreasonable or vexatious" because of his race is unfounded nor did I perceive the claimant as *"hostile, agitated and aggressive, on sight*" which I understand to be his allegation. My use of the words "scandalous, unreasonable or vexatious" is, of course, a reflection of the wording in Rule 37 and I have set out above why I made my findings. I consider it unnecessary to address the claimant's allegations further than this expected to say they are made without any foundation or merit.

23. The claimant has not raised any matter in his application for reconsideration which leads me to believe that it would be in the interests of justice that the original decision be varied or revoked and there is no reasonable prospect of the application succeeding.

Employment Judge Cookson

24 March 2021