EMPLOYMENT TRIBUNALS

Claimant: Mrs J Climer-Jones

Respondent: Cardiff and the Vale University Health Board

JUDGMENT

The respondent's application dated 5 May 2021 for reconsideration of the judgment sent to the parties on 21 April 2021 is refused.

REASONS

1. On 5 April 2021 the respondent made an application for reconsideration of the judgment on remedy sent to the parties on 21 April 2021. The application was made within the appropriate time limit.

2. The Tribunal's power to reconsider judgments are contained within Rules 70 to 73 of the Employment Tribunal Rules of Procedure 2013. Rule 70 provides it may be revoke or vary the judgment where it is necessary in the interest of justice. The process is contained with Rule 72. If the Tribunal considers there is no reasonable prospect of the judgment being varied or revoked the application shall be refused and no hearing will take place. Otherwise the Tribunal shall send a notice to parties setting out a time limit for response and seek views on whether it can be decided without a hearing.

3. The Tribunal must follow Rule 72 in the order outlined above **(TW White & Sons Ltd v White UKEAT 0022/21).** In exercising the power the Tribunal must do so in accordance with the overriding objective.

4. In **Ministry of Justice v Burton and another [2016] ICR 1128,** Elias LJ approved the comments of Underhill J in **Newcastle upon Tyne City Council v Marsden [2010] ICR 743,** that the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. Further, that the courts have emphasised the importance of finality **(Flint v Eastern Electricity Board [1975] ICR 395)** which militates against the

discretion being exercised too readily.

5. In **Liddington v 2Gether NHS Foundation Trust UKEAT/0002/16** Simler P held:

"..a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered. Tribunals have a wide discretion whether or not to order reconsideration, and the opportunity for appellate intervention in relation to a refusal to order reconsideration is accordingly limited.

[35] Where, as here, a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application. It seems to me that the Judge was entitled to conclude that reconsideration would not result in a variation or revocation of the decision in this case and that the Judge did not make any error of law in refusing."

6. The application sets out four grounds. I deal with these in turn as follows.

The Tribunal has failed to make findings that are fundamental if the Tribunal is to properly apply the law to which it was directed and / or to enable the Respondent to understand the Tribunal's reasons for rejecting the Respondent's submissions on the law and evidence. The judgment contains a summary of some of the evidence that was put before the tribunal during the course of the lengthy remedy hearing. However, in its judgement, the tribunal has focused almost exclusively, if not exclusively, on the evidence advanced by the claimants in her witness statement to support its findings. The Tribunal has almost entirely failed to record in its judgment evidence that was unfavourable to the claimants and favourable to the respondent, whether that be evidence that arose during cross examination of the claimant, the respondent's witnesses or the evidence of the joint expert Dr Medley.

7. The Tribunal made findings of fact based on the evidence before it. Most of the evidence naturally came from the Claimant. The Tribunal considered the evidence of the Respondent's witnesses (and documents) and made findings – see paragraphs 44, 78, 79, 80, 83, 84, 85, 86, 87, 89, 90, 91, 92, 9799, 105, 106, 107, 108, 109, 111 and 112. There are other sections of the judgment that set out evidence heard under cross examination and in the conclusions the Tribunal set out why where there was a dispute in evidence which evidence was preferred.

8. The judgment set out extensive evidence of the respondent's witnesses and also included unfavourable evidence arising from cross examination. Accordingly there is no reasonable prospect of the Judgment being varied or revoked on this basis and to do so would in effect result in a rehearing. The Tribunal made findings of fact based on the evidence before it. The appropriate correction for any asserted error is by way of an appeal.

The judgement fails to refer to a number of legal authorities referred to it in the respondent's lengthy written closing submissions and repeated in the respondents oral closing submissions. On the face of it there are reasons to believe that the tribunal failed to have regard to the legal authorities to which it was referred and/or misdirected itself on the law and/or misapplied the law.

9. There is no requirement or authority that the Tribunal must list all of the authorities referred to in a party's submissions and further, it is not always possible or

necessary to list every authority Counsel has referred to. The Tribunal recorded they had been referred to a number of authorities. I consider there is no reasonable prospect of the Judgment being revoked or varied on this basis. Again if it is maintained there has been an error or law this should be corrected on appeal.

The tribunal has failed to give adequate reasons for a number of its conclusions. This not only prevents the respondent from understanding the legal and factual basis for the tribunal's conclusions, it also prevents the parties from even attempting to agree calculations so as to avoid the second stage remedy hearing referred to in paragraph 1 of the judgement. It is also to be noted that the tribunal does not even attempt to calculate any of the pecuniary loss that it has found to be due, which renders agreement between the parties almost entirely, if not entirely, impossible.

10. It had always been agreed and recorded that the parties required a two stage remedy test. The Judgment sets out headline findings and a second stage remedy hearing is due to be listed to finalise any calculations where the parties cannot reach agreement. Reasons are provided in the headline findings and paragraphs 142 – 186. Specific information to enable calculations are at paragraphs 142, 164, 166, 167, 168 and 169. The specific sums were set out in the Claimant's schedule of loss and if they were unable to be agreed they would be determined at the second stage remedy hearing. The parties are expected to assist the Tribunal to further the overrding objective and co-operate with each other and this was the expectation in this case and the purpose of listing the second stage remedy hearing. If they remained unable to reach agreement the Tribunal will determine the matters at the second stage remedy hearing. The application for reconsideration under this heading is therefore premature and not in accordance with the orders which were not objected to by the parties.

The overriding objective requires the tribunal to consider the evidence in a fair and evenhanded fashion and to do justice between the parties. It would be in accordance with the overriding objective for the tribunal to provide additional reasons for their decision on the matters identified below so as to avoid the need for expensive and time-consuming appellate proceedings which inevitably lead to remission, no doubt to a differently constituted tribunal.

11. This ground and the accompanying paragraphs is an assertion of multiple errors in law and the appropriate process is therefore to seek correction on appeal. The volume and number of objections are such that to entertain a reconsideration would amount to a complete re hearing of the remedy hearing and the matter is already the subject of an appeal. In my judgment this is not in the interest of justice and I do not consider there are reasonable prospects of the decision being varied or revoked on this basis.

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Employment Judge **S Moore**

Date: 12 May 2021

JUDGMENT SENT TO THE PARTIES ON 17 May 2021

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FOR THE TRIBUNAL OFFICE Mr N Roche