Case No: 2200014/19

EMPLOYMENT TRIBUNALS

Claimant	and	Respondent
Mr R Godfrey		**Natwest Markets PLC**

JUDGMENT ON RECONSIDERATION

Upon the Respondent's application under Rule 71 (Schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) ("Rules") to reconsider the decision to make a costs order in the sum of £3,999.00 in the Claimant's favour, the application to reconsider is refused under Rule 72(1) as there is no reasonable prospect of the decisions being varied or revoked.

REASONS

Introduction

1. This claim has been the subject of several Preliminary Hearings (Case Management) (PHCMs) resulting in case management orders being issued. It is not necessary to set any of them out in detail here. The salient part of the orders for these purposes is to be found in the Orders of EJ Snelson and EJ Spencer, dated 5 August 2020 and 1 February 2021 respectively, in which it was first ordered and then confirmed that witness statements were to be exchanged mutually on 1 March 2021.

2. The Claimant (a litigant in person, represented at the Hearing by Mr Kibling via the Direct Access scheme) emailed his statements to the Respondent's Counsel Mr Zovidavi and to the Respondent's solicitor Mr Brown on 16 April 2021. The Respondent's single witness statement was emailed to the Claimant on the afternoon of Friday 23 April 2021. The full merits Hearing was due to start at 10.00 on Monday 26 April.

Application for reconsideration

3. At the start of proceedings on 26 April, the panel concluded, after hearing representations from both parties, that the Respondent's witness statement should be admitted in evidence but that the Hearing should be adjourned and the Respondent was ordered to pay the Claimant's legal costs incurred on 26 April. Written reasons were requested and were sent to the parties the following day.

4. On 4 May 2021, the Respondent submitted its written request for reconsideration of the decision to award the Claimant those costs. In summary, the Respondent says that it was unable to exchange witness statements mutually on the agreed revised date of 26 March because on 22 March, its witness, Mr Muscatt, withdrew his agreement to give evidence. Mr Brown accordingly applied for a witness order, which was granted on 20 April 2021. Mr Brown then completed the witness statement with Mr Muscatt and served it on the Claimant on the same day that it was signed.

5. The Respondent argues that it was better for the Claimant to have had Mr Muscatt's statement than to have had him attend the Tribunal and give evidence without a statement, that (in terms) it acted reasonably and that the Claimant suffered no prejudice as a consequence of the chronology above.

Rules

6. The relevant Rules for this application read as follows:

RECONSIDERATION OF JUDGMENTS

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.

7. The Tribunal's task at this stage is to consider whether reconsideration of the decision to order the Respondent to pay the Claimant's costs of 26 April 2021 is in the interests of justice. Where it considers there is no reasonable prospect of the decision being varied or revoked, under Rule 72(1), the application shall accordingly be refused.

Conclusions

8. This reconsideration application was considered at the initial (Rule 72(1)) stage on the papers. It was not considered necessary to seek the Claimant's response thereto. The application repeats some of the argument made orally by the Respondent's Counsel at the hearing before the panel made its decision and seeks to re-argue that which has already been considered and decided, yet still fails to provide answers to the entirely reasonable questions posed by Mr Kibling at paragraph 21 of his note objecting to the admissibility of the evidence in question. Even if Mr Zovidavi was unable to answer to these points on the morning of 26 April, having (as the Tribunal accepts) only just received the note, they could and should have been answered since. The Respondent's application provides no clear reason as to why it would be in the interests of justice to reconsider the decision.

9. The Respondent has still failed to explain why it apparently did not commence taking a statement from its "pivotal" (indeed, only) witness until 17 March 2021, more than two weeks after mutual exchange had been ordered to take place and more than two years after the litigation commenced. The fact that the Respondent had "agreed" with the Claimant to extend the date for exchange to 26 March 2021 is irrelevant to this point. The chronology set out in the original decision (not contradicted in the reconsideration application) noted that on 15 March, Mr Brown told the Claimant he was "happy to exchange on [17 March]". On 16 March, Mr Brown then suggested postponing until 26 March. While these postponements were "agreed" by the Claimant, he was in truth left with little choice if he wished to effect mutual exchange as he clearly did, suspecting (as it transpired, rightly) that the Respondent might try to exchange sequentially.

10. Time limits in Tribunal Orders are not a vague and aspirational notion which can, whether by agreement or not, be extended for no good reason; yet no good (or any) reason has been advanced for the extensions prior to 22 March in this case. The Respondent's failure in good time to take a statement and/or to secure the attendance of its witness is a matter that lies squarely with the

Respondent. This was a failure, without good reason, to comply with the Tribunal's Orders and hence unreasonable conduct. Whatever the Respondent's difficulty once Mr Muscatt withdrew his co-operation on 22 March 2021, it was of its own making because in no circumstances should it have failed to secure a statement from its only witness by then.

11. Further, the Respondent continues to maintain that its email of 12 April was neither disingenuous nor misleading. There is no reason however to depart from the Tribunal's previous finding that the two quoted paragraphs in that email should be read together rather than wholly independently of each other; "However" is a conjunctive adverb, even when it is preceded by a full stop and a paragraph space. The 12 April email has also to be read in light of the fact that it was a response to an email of 9 April from the Claimant to Mr Brown in which the Claimant asked the latter to "confirm that you do not intend to call any witnesses to give evidence including making any application to call evidence after I provide you with my witness statements. Otherwise you would be conducting the litigation by ambush and not in accordance with the overriding objective". The Claimant concluded, "On receiving this assurance, I will provide you with my witness statements".

12. That email itself followed a message on 26 March after the Claimant had chased for the Respondent's position, in which Mr Brown had said: "I would be grateful if you could send me your witness statement by return email. I confirm that I do not have any witness statements to exchange with you." This was the first, but disappointingly not the last, time the Respondent through its solicitor endeavoured to obtain the Claimant's evidence while obscuring its own intentions to call a witness.

12. Indeed, it is in all the circumstances quite astonishing to note that on 14 April a further email was sent to the Claimant (as noted above, a litigant in person) by the Respondent's solicitor, in which the Respondent's express position was that if the Claimant's statement dealt only with the matters "pleaded and disclosed" the representative would "not need to consider whether the Respondent needs to call **supplementary** witnesses" (emphasis added), reminding the Claimant of EJ Snelson's order and concluding by stating that if the Claimant did not send his witness statement by midday on 15 April, the Respondent reserved its right to apply to "refuse [him] permission to give evidence at the hearing". Mr Brown expressly stated "…please note that I am <u>not</u> proposing sequential exchange of witness statements".

13. It has been confirmed by the Respondent that it suffered no prejudice by late service of the Claimant's statements and that the statements did not divert from the pleaded issues and the case as the Respondent understood it. Indeed, it appears Mr Zovidavi had not read the Claimant's statements by the morning of 23 April when he spoke to Mr Kibling. To the extent therefore that "special permission" was required for the Claimant to give his evidence, it would have been granted in all the circumstances. By contrast, it was far from inevitable that the Respondent would have been given that permission absent any reasonable explanation for the delay in procuring the evidence on which it now seeks to rely; on balance, Mr Muscatt's withdrawal of co-operation is such an explanation, though only a partial one for the reasons set out above. As the Tribunal understands it, the issue is not that Mr Muscatt says the Claimant was

fired (as the Respondent observes, the Claimant was aware this was a rumour circulating about him) but that Mr Muscatt says the Claimant was asked to leave because of issues around "honesty and reliability". That is an assertion that is clearly potentially prejudicial to the Claimant (and not solely in these proceedings), but on the face of it has not previously been made and is accordingly something on which he is entitled to submit further evidence if so advised.

14. It would not have been reasonable to expect the Claimant to know with any degree of precision at the Hearing on 26 April if evidence in response from a source other than himself would be necessary and/or if so, what that evidence might be, given that he had had almost no time to take advice or give instructions on this significant point. Hence it was not adequate to say the point could simply be dealt with in the course of supplemental questions in chief and the adjournment was granted.

15. The Respondent repeats its argument that the statements in the email correspondence were truthful and accurate as of the dates they were made. The Tribunal maintains and in fact (in light of the 14 April email) reinforces its initial findings that they were at best disingenuous. There was still no mention of the anticipated calling of a witness for the Respondent, and that position continued not only up until and immediately after the Witness Order had been granted on 20 April but also for the rest of that week until the last working afternoon before the Hearing. The 14 April email does nothing whatsoever to assist the Respondent; quite the reverse. The answer in the 12 April email with the simple addition of words along the lines of "Further, the Respondent is awaiting the outcome of an application for a witness order which, if granted, will mean we will have a statement to send you" would have been up front, clear and at least put the Claimant on notice of the intent, if not the content. The complete omission of those words, or anything like them, conveys a very different message indeed.

16. It is not only the only reasonable but the only possible interpretation of the Respondent's position (save in its *ex parte* communication to the Tribunal) until the afternoon of 23 April that the Respondent was calling no witnesses and that it had never intended to call any, unless the Claimant's witness statement (perforce to be served unilaterally since the Respondent had said it had no statements to serve) disclosed matters in respect of which fresh and unanticipated evidence needed to be given by a Respondent witness. The panel agreed unanimously it was so, and clearly Mr Kibling, a hugely experienced barrister of more than 30 years' call, also believed that was the position since the Tribunal was told he expressly mentioned to the Respondent's barrister Mr Zovidavi on the morning of 23 April, without contradiction, his surprise that the Respondent was calling no witnesses.

17. The further assertion is also repeated by the Respondent that it was appropriate for its solicitor to open the Claimant's statements and read them while awaiting the outcome of its application for a Witness Order for Mr Muscatt from the Tribunal. Again, the Tribunal remains entirely unpersuaded. Mr Brown knew (but did not tell the Claimant) that he was in the process of taking a statement from Mr Muscatt and that the Respondent intended to call the latter if his attendance could be secured. Pinsent Masons is a very large, multinational,

firm with many employment lawyers. The Respondent was also represented by Counsel. Had Counsel, on reading the Claimant's statements, considered that instructions needed to be taken, it cannot have been beyond the capabilities of Mr Brown's firm to involve another lawyer either in the finalising of Mr Muscatt's statement once the witness order was made or in any necessary liaison between Mr Zovidavi and the Respondent. In fact, by the time Mr Zovidavi read them, Mr Muscatt's statement had been served so he could then have spoken to Mr Brown if necessary.

18. The fact that in the event the Claimant's statements did not lead to any changes to what Mr Muscatt proposed to say can be no excuse. Mr Brown would have been rather conflicted in his representation of the Respondent if they had, given his repeated (underlined in the original) assertions that the Respondent did not propose to exchange sequentially. The implication of those assertions and the orders behind them is that neither side should know the contents of the other side's statements before exchange.

19. Therefore, Mr Brown should not have read the Claimant's statements before finalising the Respondent's, because the Tribunal's order of August 2020 – reinforced by the Tribunal in February 2021 - was for **mutual** exchange. Mr Brown also knew that the Claimant is a person with a disability – that disability being an autistic condition, specifically Asperger's Syndrome - and had been reminded by EJ Snelson more than a year earlier that he was to behave "carefully, courteously and co-operatively" with the Claimant. If there was a possibility that the Respondent might be calling a witness, not as a "supplementary" witness in response to the Claimant's own evidence but as the "pivotal" and only witness he is, that point should have been made unambiguously clear to the Claimant. That Mr Brown failed even to mention it, although the (unrepresented) Claimant had repeatedly pressed the point in email correspondence that sequential exchange would be "unusual and unfair" and that the Claimant feared "litigation by ambush" is not to his credit.

20. In the circumstances, there is nothing in what is now said by the Respondent which indicates that it is in the interests of justice to re-open matters. This application is refused as there is no reasonable prospect of the decision being varied or revoked.

Employment Judge Norris
Date: 13 May 2021
JUDGMENT SENT TO THE PARTIES ON

.13/05/2021.

FOR THE TRIBUNAL OFFICE