EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	Respondent
Mrs N Leeks		Kings College Hospital NHS Foundation Trust

RECONSIDERATION JUDGMENT

1. The application for reconsideration is refused and dismissed pursuant to rule 72 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, because there is no reasonable prospect of the original decision being varied or revoked.

2. The Respondent is to provide the Claimant with a hard copy of the PHR Bundle within 7 days of the promulgation of this decision.

REASONS

Background

1. The Claimant brought four claims against the Respondent between 2017 and 2018: (2302989/2017 (hereinafter the "First Claim"), 2300701/2018 (hereinafter the "Second Claim"), 2300721/2018 (hereinafter the "Third Claim") and 2304009/2018 (hereinafter the "Fourth Claim")). On 20 April 2020, the Claimant completed an ACAS Early Conciliation Notification form with regard to a fifth claim. On 19 May 2020, the Early Conciliation period was extended, and on the 27 May 2020, ACAS issued the Early Conciliation Certificate. The ET1 in this fifth claim was issued on 2 June 2020 (case number 2302214/2020: herein after the Fifth Claim)]. The Respondent filed its ET3 Response on 14 August 2020.

2. In the Grounds of Resistance accompanying its ET3 Response, the Respondent said the Claimant's claims were misconceived. It asked for the Claimant to provide Further and Better Particulars of her complaints of race, religion or belief, sex, and disability discrimination as well as with regard to any complaint of whistleblowing detriment, and the claim for "other payments". The Respondent also raised four jurisdictional arguments with regard to the totality of the Claimant's Fifth Claim, and

sought a strike out of it. The Respondent made an application in the Grounds of Resistance, [at paragraph 13] for an urgent Preliminary Hearing in order to determine these matters. The Respondent argued that it was incumbent upon the Tribunal to determine any matters of a jurisdictional nature and that it was proportionate and reasonable for that determination to take place in advance of the resumed Hearing on the First – Fourth Claims in August 2021, because the outcome of the Preliminary Hearing may have a bearing on the Hearing in August 2021

3. That application was heard by me on 1 June 2021. I found that the Fifth Claim should be struck out in its entirety under Rule 37 on the basis that it was an abuse of process and / or that the matters pleaded were duplications and were already being litigated and / or were out of time, with no reason having being advanced as to why the time limit should be extended.

The Application for Reconsideration

4. By email dated 9 July 2021, the Claimant asked for a reconsideration (under Rule 70 of the Rules of Procedure set out in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) of that strike out decision.

5. In her reconsideration application, at paragraphs 1- 6, the Claimant set out a number of factual matters. At paragraph 17 she set out what she referred to as errors of law in making that decision. These were that:

> 18. The Judge erred in law in that the issue of Resta Judicata only applies where a previous case has been concluded – hence the rule says that no one should be tried for a second time for an offence that they have been either convicted of and or acquitted.
> 19. The Judge erred in law in not taking into account the issue of a series of conduct, and the fact that claimant gave a chronology accounts of detriment prior to giving account of the event that led to the bringing claim 2302214 against the Respondent (refer paragraph 19 of Claimant's statement of claim for lodging ET1 against the Respondent)
> 20. Finally the Judge erred in law in carrying out a collateral review of the ET1 claim forms in cases 2302989/2017 & 2300701, 2300721, & 2304009 (2018) Leek v King's College Hospital NHS Foundation.
> 21. The Claimant hereby strongly contends that EJ Philips erred in law in carrying out the a collateral review of ET1 claim forms 2302989/17,2300701,2300721, 2304009 all of which claims are part sub Judice and part heard and have been listed for resumption of Final hearing before EJ Tsamados.
> 22. The Claimant hereby strondly contends that EJ Philips action of collateral review of the above ET1 claims is coram non Judice.

6. The Claimant also submitted that "during the strike out hearing, Even the Respondent's Barrister had argued that the Claims like 2302214/2020, can be looked at, in the event of claimant's success (that could lead to considering remedies in favour of the claimant) in any of the earlier claims against the Respondent".

7. Further she asked that, in the interest of Justice, openness and transparency, the Tribunal direct "the Respondents to serve the PHR hearing bundle of the 01 June PHR in the above claim, to serve that PHR bundle on the claimant within the next 14 days, especially as she intended to appeal the strike out judgment to the EAT, and said it was in the interest of Justice for her to be provided with the full PHR hearing bundle as was put before the judge on the 01 June 2021.

Relevant law and rules of procedure

8. All Tribunal rules are subject to the overriding objective, which is set out at Rule 2, Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, (the 2013 Rules), as follows:

> "2. 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; (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) 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."

9. The previous 2004 Employment Tribunal Rules (2004) provided a number of grounds on which a judgment could be reviewed (now called a reconsideration under the 2013 Rules). The only ground in the 2013 Rules is that the judgment can be reconsidered where it is "necessary in the interests of justice" to do so. However, it was confirmed by Justice Eady in *Outasight VB Limited v Brown* UKEAT/0253/14/LA that the guidance given by the Employment Appeal Tribunal in respect of the previous Rules is still relevant guidance in respect of the 2013 Rules. Therefore, I have considered the case law arising out of the 2004 rules.

10. The relevant rules are now set out at Rules 70-73 of the 2013 Rules. So far as relevant and material to this application, these are set out below.

> **70.** 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.** 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.**—(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.

11. There is a public policy principal that there must be finality in litigation and reviews or reconsiderations are a limited exception to that principal. In the case of *Stephenson v Golden Wonder Limited* 1977 IRLR474, it was made clear that a review (now a reconsideration) is not a method by which a disappointed litigant gets a "second bite of the cherry". Lord Macdonald said that the review provisions were "not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence produced which was available before". The EAT went on to say in the case of *Fforde v Black* EAT68/80 that this ground does not mean "that in every case where a litigant is unsuccessful is automatically entitled to have the Tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in even more exceptional cases where something has gone radically wrong with the procedure involving the denial of natural justice or something of that order."

12. The phrase "in the interests of justice" involves the consideration of the interests of justice to *both* sides. The EAT provided further guidance on this in *Reading v EMI Leisure Limited* EAT262/81, where it was stated "when you boil down what it said on [the claimant's] behalf it really comes down to this: that she did not do herself justice at the hearing so justice requires that there should be a second hearing so that she may. Now, "justice", means justice to both parties."

13. In *Flint v Eastern Electricity Board* [1975] ICR 395 QBD, a case also decided under the 2004 Rules, Phillips J stated with regard to the "the interests of justice":

> "… First of all, they are the interests of the employee. …. One also has to consider the interests of the employers, because it is in their interests that once a hearing which has been fairly conducted is complete, that should be the end of the matter. ….. it has to be remembered that the same principles have to be applied either way because one day a case may arise the other way round. So, plainly, their interests have to be considered.

> But over and above all that, the interests of the general public have to be considered too. It seems to me that it is very much in the interests of the general public that proceedings of this kind should be as final as possible; that is should only be in unusual cases that the employee, the applicant before the tribunal, is able to have a second bite at the cherry." (404E - 405A)"

14. It is also apparent that the overriding object must also be taken into account when reconsidering. This requires Employment Tribunals to deal with cases fairly and justly, which includes, so far as practicable— (a) ensuring that the parties are on an equal footing; (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) saving expense.

15. The interests of justice have thus long allowed for a broad discretion, albeit one that must be exercised judicially, which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation.

16. In the recent EAT decision of *White v TW White and Sons Limited*, UKEAT/0022/21, before his Honour Judge James Tayler, it was held that 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).

17. Judge Tayler held that 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.

<u>Analysis of the grounds and matters in the Application</u>

18. The first point that the Claimant raises is that I erred in law "in that the issue of Resta Judicata only applies where a previous case has been concluded –

hence the rule says that no one should be tried for a second time for an offence that they have been either convicted of and or acquitted". I do not accept that the description given by the Claimant of the res judicata principle is as narrow as she sets out (§61). In my judgment (§58-61), I found that many of the claims raised by the Claimant in her Fifth Claim had already been raised and were in the process of being determined. In terms of the interests of justice, I found that the Claimant would not be losing out by striking out these claims, because they were going to be determined in the part-heard hearing listed for August. Further, my judgment rested not only the "res judicata" point but also on the issue of an abuse of process and certain matters being out of time, with no explanation having been provided.

19. The second point that the Claimant raises is that I erred in law "in not taking into account the issue of a series of conduct, and the fact that claimant gave a chronology accounts of detriment prior to giving account of the event that led to the bringing claim 2302214 against the Respondent (refer paragraph 19 of Claimant's statement of claim for lodging ET1 against the Respondent)". At paragraph 63 of my judgment, I specifically considered the issue of continuing acts. I also considered this in the context of the rest breaks at §66. I noted, and I note likewise with this application, no specific acts have been identified or set out and no details are provided as to what are said to be potentially continuing acts. I do not accept that the claimant has raised any or any sufficient indication of an error of law here.

20. The third point the Claimant raises is that I erred in law in carrying out a collateral review of the ET1 claim forms in the other cases she is bringing against the Respondent; she says that these claims are part sub Judice and part heard; and that my actions in conducting a collateral review is coram non Judice. I do not believe there was an error of law in carrying out a collateral review of the other cases she was bringing. This was a specific issue raised by the Respondent and was at the heart of the "abuse" argument. It was not possible to consider the issue of abuse without undertaking such a review. The Claimant does not cite any authorities in support of this head of challenge. I did not make any finding on the merits of her other claims, I merely noted what issues were raised by them.

21. The Claimant also submitted that "during the strike out hearing, Even the Respondent's Barrister had argued that the Claims like 2302214/2020, can be looked at, in the event of claimant's success (that could lead to considering remedies in favour of the claimant) in any of the earlier claims against the Respondent." I believe this point was reflected by me in paragraph 65 of my judgment.

22. Finally, the Claimant asks that "in the interest of Justice, openness and transparency", the Tribunal direct the Respondent to serve the PHR hearing bundle on the Claimant within the next 14 days, so as to enable the Claimant to pursue her appeal against the strike out judgment to the EAT. This is not per se a ground for reconsideration. However, if the Claimant still does not have a copy of the bundle prepared for the PHR hearing, this should clearly be provided to her as a matter of urgency. Given that there appeared to be an issue with the provision of an electronic version of the bundle, a hard copy of the PHR Bundle should be provided to the Claimant as soon as possible and in any event within 7 days of the promulgation of this decision.

Conclusion - the Rule 72(1) decision

23. As per His Honour Judge James Tayler in *White*, there is a structured and mandatory process for the consideration of applications for reconsideration, of which the first, mandatory, requirement, (rule 72(1) of the Employment Tribunal Rules 2013), is for an employment judge to determine whether there are reasonable prospects of a judgment being varied or revoked. If the employment judge decides there are "no reasonable prospect of the original decision being varied or revoked the application is to be dismissed. If I decide the application has a reasonable prospect of success, then the application can proceed further.

24. I have accordingly considered the arguments and documents submitted by the Claimant on a "without notice" basis without inviting any comments from the Respondent, in accordance with Rule 72, as set out above. In doing so, I have taken the Claimant's application at its highest as revealed by the document sent in by the Claimant. I also bear in mind that when considering the interests of justice, that it is important to look at this not just with reference to the interests of the Claimant, but also to the interests of the Respondent and additionally to the public interest that there should be, as far as possible, certainty and finality of litigation.

25. The Claimant has not provided any details of how the errors of law she sets out impacted on any particular matters, nor has she provided any case law or authority in terms of the propositions she advances. I have taken into account when considering this Application, that the Claimant conducted this case in person without assistance and was unrepresented at the preliminary hearing and remains unrepresented.

26. In my original judgment, I held that the Fifth Claim should be struck out in its entirety for a number of overlapping reasons. Even if there had been an error of law made by me on any of the underlying grounds set out - which as set out above I do not accept there has been - I believe my original judgment would still stand on the basis of the other findings made – namely that it was an abuse of process and / or that the matters pleaded are duplications and/or are out of time, with no reason having being advanced as to why the time limit should be extended.

27. The overriding objective of the Tribunal Rules is to enable Employment Tribunals to deal with cases fairly and justly, which includes dealing with cases in ways which are proportionate to the complexity and importance of the issues and avoiding delay, so far as compatible with proper consideration of the issues; and saving expense. I believe that taking these matters into account it is appropriate for the Claimant's Fifth Claim to have been struck out.

28. I also note that the Claimant has intimated she intends to appeal and as the matters she has raised in this application are stated to be errors of law, those are matters that are in any event, appropriate for the Employment Appeal Tribunal to determine.

29. On balance, taking the various matters I have set out above into account, I did not consider that there was any reasonable prospect of success of the original Judgment being varied or revoked. In my judgment and assessment, none of the matters raised by the Claimant are such as to give rise to the need for a reconsideration in the interest of justice. Looking at all the issues raised by the

Claimant in his Application, and for the reasons set out in more detail in the analysis of those issues above, my conclusion is that none of the matters raised by the Claimant in his application for a reconsideration have any reasonable prospect of success, whether individually or taken collectively. Accordingly, I refuse this application.

Employment Judge Phillips
25 July 2021
London South