Case Number: 1600749/ 2017

EMPLOYMENT TRIBUNALS

Claimant: **Ms Peiu**

Respondent: **Leonard Cheshire Disability**

RECONSIDERATION DECISION

The claimant's application dated 14 July 2021 for reconsideration of the Remedy Judgment dated 30 June 2021 is refused.

REASONS

The reconsideration applications

1. I have undertaken a preliminary consideration of the claimant's application for reconsideration of the Remedy Judgment. The claimant says that a Polkey deduction and a deduction for contributory conduct should not be applied in her case because:

   (a) She says that the true "crime" ("corpus delicti is the term used) was the letter that she says Ms Wilkinson "bullied" SU2 into signing, and that without the letter the Tribunal proceedings would not have happened. The situation with SU2 had been resolved with SU2 and Ms Wilkinson in Ms Wilkinson's office and there was no need for Ms Wilkinson to pursue the issue any further;
   (b) All her actions were justified by her previous experience when the respondent suspended her and referred her to the NMC;
   (c) Once the NMC had cleared her at the end of August 2017 she had requested references to safeguard her career and she needed to work and train in order to be able to revalidate. She says that the respondent did not release references for her to be able to practice to train or to obtain another job and they did not support the claimant in any way during the two prolonged periods of suspension between 2015 and 2017. She says that the respondent only dismissed her after she had informed them she had started the Return to Acute Care Programme, not before. She says that LCD not releasing job

references led to other jobs being withdrawn and her only way to return to nursing was through that programme;

(d) The LCD pay rate had increased with more than 50% between March 2014 and 2020 compared with any other UK sector or trade;

(e) The claimant alleges that the respondent needed the claimant on their books so that they had a certain number of nurses on their books for licensing purposes and that is why they kept her suspended for so long without dismissing her or giving her references;

(f) She acted professionally throughout by meeting with Ms Wilkinson and SU2, requesting references to safeguard her career and escalating matters to the manager.

The law

2. An application for reconsideration is an exception to the general principle that (subject to an appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70).

3. Under Rule 72(1) I may refuse an application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked.

4. The importance of finality was confirmed by the Court of Appeal in Ministry of Justice v Burton and anor [2016] EWCA Civ 714 where it was said:

> *"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. In particular, 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; and in Lindsay v Ironsides Ray and Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."*

5. Similarly in Liddington v 2Gether NHS Foundation Trust EAT/0002/16 the Employment Appeal Tribunal said:

> *"a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or reargue matters in a different way or by 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."

Decision

Ms Wilkinson asking SU2 to sign the letter/statement

6. As I explained to the claimant at the remedy hearing, the remedy hearing was not a means by which the claimant could challenge or vary the findings of fact made by the Tribunal at the liability hearing. Likewise a reconsideration application of the remedy judgment cannot do this.

7. The Tribunal did not conclude in the liability judgment that Ms Wilkinson had bullied SU2 into signing a letter about the claimant. We found that the claimant herself had believed, based on what the claimant knew at the time, that Ms Wilkinson had acted inappropriately in some way in asking SU2 to sign a letter/statement but that is not the same thing as the Tribunal finding Ms Wilkinson had actually acted inappropriately or bullied SU2.

8. In terms of our contributory fault conclusions, we carefully balanced our findings of fact about how we considered the claimant's own conduct contributed to her dismissal as against mitigating factors. We took into account the claimant's beliefs about the actions of Ms Wilkinson, as set out in paragraph [59] of the remedy judgment and how that fed into the claimant contacting safeguarding. The issue was therefore before the Tribunal and was properly taken into account in our deliberations and conclusions. The relative weight to be given to all the varying factors is one for the judgement of the Tribunal panel. It is important to also bear in mind that ultimately the assessment of contributory fault is about the Tribunal's assessment of the actions of the claimant, not about the actions of the respondent/ Ms Wilkinson.

9. Turning to Polkey, the actions of Ms Wilkinson in asking SU2 to sign the letter/statement, was not a matter in respect of which we had found there was procedural unfairness at the liability stage.

The claimant's actions being justified by her previous experience / the claimant acting professionally

10. When evaluating the question of contributory fault, the Tribunal took into account and weighed in the balance the impact of the claimant's previous experiences (see for example paragraph 55, 56, 57, 60 and 61 of the Remedy Judgment). It was therefore properly taken into account in our

deliberations and decision. It was not a point that directly related to the Polkey assessment.

11. We did not find as a matter of fact that the claimant conducted herself professionally throughout. We found that the claimant had committed blameworthy conduct (paragraphs 50 to 53 of the Remedy Judgment). We also found there was also mitigating factors (paragraph 54 to 63). These are our findings of fact and are findings of fact for the Tribunal to make. The Tribunal weighed all these factors when reaching our overall conclusion as to contributory fault.

References/ suspensions

12. It is important to bear in mind that the Remedy Judgment was only concerned with the claimant's successful unfair dismissal claim. We could only award compensation for losses flowing from the dismissal. In doing so we calculated the claimant's losses by reference to her earnings based on the Return to Acute Care Programme. The claimant has therefore been compensated for the fact that she did not have the clinical references that she would have needed to return to better paid nursing in the NHS.

13. The length of the period of suspension prior to dismissal was a factor we took into account in our deliberations under Polkey as set out in paragraph 39(c) of the Remedy Judgment. It is therefore something that we have already taken into account and included within our deliberations and decision making. The length of the period of the claimant's first suspension was not a matter we could take into account under Polkey because it related to a different disciplinary process. We did however appropriately take it onto account when considering the issue of contributory fault (see paragraph 55 of the Remedy Judgment).

14. The lack of clinical references was not part of our deliberations relating to Polkey because it was not a matter in respect of which we had found there was procedural unfairness at the liability stage. Whilst it is not expressly set out in the Remedy Judgment, the Tribunal were also aware of and took into account, when deliberating on contributory fault, the fact that the claimant had been seeking to leave but could not obtain clinical references.

LCD rates of pay

15. We took into account the LCD rates of pay in our calculation of the claimant's financial losses.

Keeping the claimant on the books

16. The claimant's allegation in her reconsideration application, that the respondent was forcing her to stay in employment to keep a number of registered nurses on their books is a new allegation. It was not before the Tribunal at the liability stage. A reconsideration application of the Remedy Judgment is not a means by which to introduce a new allegation that could have been made at the start of the litigation. It is not, in any event, clear how this would have altered the conclusions and outcome in the case in any event.

Summary

17. In summary, I am satisfied on the basis of what is before me that there is no reasonable prospect of our original decision being varied or revoked. The matters which the claimant raises are either (a) new matters which could and should have been raised earlier in the proceedings (if relevant at all), (b) are matters that seek to go behind findings of fact already made, or (c) are matters which the Tribunal had already taken into account and weighed up in our deliberations and conclusions. The application for reconsideration is therefore refused.

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Employment Judge Harfield
Dated: 17 September 2021

JUDGMENT SENT TO THE PARTIES ON 20 September 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche