EMPLOYMENT TRIBUNALS (SCOTLAND)

Case numbers: 4105098/2020; 4105099/2020; 4105100/2020; 4105101; 4105102/2020; 4105103/2020; 4105104/2020; 4105105/2020; 4105106/2020; 4105108/2020; 4105109/2020; 4105110/2020 and 4105111/2019

(Multiple Numbers 9530 and 9531 as per attached Schedule)

Hearing held in Glasgow on 14 December 2021

Employment Judge Hoey
Tribunal member N Bakshi
Tribunal member N Elliot

Mr M Cowie

Mr J Murphy

Mr D Gray

Mr M Cahill

Mr P O'Hare

Mr D Harkins

Mr H Young

Ms S Hodge

Ms L Campbell

Ms M Kirkland

Ms M Cassidy

Ms K A McCrone

Claimants
Represented by:
Mr McHugh (Counsel)
Instructed by Messrs Thompsons

Scottish Fire and Rescue Service **Respondent**
Represented by:
Ms MacSporran
(Solicitor)

RECONSIDERATION JUDGMENT

The unanimous judgment of the Tribunal is to refuse the claimants' application for reconsideration submitted under cover the claimant's agent's email of 14 September 2021, it not being necessary in the interests of justice to reconsider the Tribunal's judgment.

REASONS

1. In this case there were 2 sets of claimants: one group alleging breach of section 15 of the Equality Act 2010 and another alleging breach of section 19 of the Equality Act 2010. Both sets of claims arose from the same set of facts, namely the policy adopted by the respondent to deal with the pandemic and its affect with regard to annual leave and time off in lieu (TOIL).

2. Following a 5 day hearing and lengthy deliberations by the Tribunal, a unanimous judgment was issued by the Tribunal on 1 September 2019. The Tribunal found that the section 18 claims were ill founded. The claims under section 15 of the Equality Act 2010 were well founded but from the evidence presented to the Tribunal it was decided that it was not just and equitable to award any compensation to the claimants. This was because no evidence as to specific sums had been led in evidence and having considered matters the Tribunal decided that it was not appropriate to award any compensation.

3. On 14 September 2021 the claimants' agent sought reconsideration of the judgment. That application was not refused and the respondent's agent lodged a response on 30 September 2021. A hearing took place 14 December 2021 at which both parties made oral submissions. The Tribunal

deliberated and reached a unanimous decision in respect of the application. Reference to paragraph numbers are to paragraphs of our judgment.

Law

4. Rule 69 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that an Employment Judge may at any time correct any clerical mistake or other accidental slip or omission in any order, judgment or other document produced by a Tribunal.

5. Rule 70 provides that 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.

The reconsideration application

6. The application was essentially in two parts. Firstly the claimants' agent argued that in respect of the claimants whose claims were successful, compensation should have been ordered (or at least the parties ordered to agree such sums) in respect of accrued TOIL and/or annual leave. Secondly it was argued that the Tribunal should have made a recommendation that the respondent return to the claimants who were successful "the accrued TOIL and/or annual leave they were required to take".

7. Both parties made written and oral submissions on each part of the application, all of which the Tribunal considered in detail. We shall deal with each application, referring where appropriate to the submissions and set out the decision we have reached and why.

Should the Tribunal have ordered the respondent to pay (or the parties to agree) compensation?

8. The claimants in the disability discrimination claim sought both an award for injury to feelings and compensation equivalent to the amount of TOIL/annual leave.

Claimants' submissions

9. Whilst the Tribunal set out its reasons in some detail as to why an award for injury to feelings would be inappropriate (paragraph 421) it was submitted that the reasoning was silent as to whether any award of compensation and/or recommendation should be made. The claimants' primary position was that this is appears to be an inadvertent omission on the part of the Tribunal and requested that the judgment be amended to include reasoning in relation to the issue of compensation and recommendation.

10. In the alternative, if there was a deliberate decision to not award compensation and/or make a recommendation then the claimants' agent submitted that a reconsideration would be in the interests of justice pursuant to Rule 70 for the following reasons.

11. Firstly, it was argued that the Tribunal's decision would create a perverse situation where it acknowledged the claimants had been subject to unlawful discrimination but that it was not appropriate to award any remedy to reflect that discrimination.

12. Secondly, it was submitted that there could be no real factual dispute between the parties as to the amount of relevant TOIL/annual leave taken by the claimants in this case which was (it was suggested) contained within the productions and did not appear to be disputed by the respondent at any point.

13. Thirdly, it was submitted that there was unlikely to be any factual dispute between the parties as the rate at which the claimants would be paid for the relevant TOIL/annual leave.

14. Finally, it was suggested that there was nothing preventing the Tribunal making a decision in principle in relation to the compensation and then allowing the parties to agree the appropriate award for each claimant.

The Tribunal's findings

15. The respondent's agent argued that the Tribunal had considered whether an award should be made, and decided that it should not be. The Tribunal had made the following findings.

16. At paragraph 90:"*We had no evidence setting out what any of the claimants lost in terms of the value, in monetary terms, of a day's or an hour's work*."

17. At paragraph 232: "*The claimant's agent accepted that there was no evidence in the productions as to the specific financial loss for each client*."

18. At paragraph 421, the Tribunal "*clarified with both agents that [sic] the hearing that remedy was a matter we were determining. Remedy had been included in the list of issues and the claimants' agent indicated that he was prepared to deal with remedy in his submissions (rather than adjourning to a different hearing to deal with remedy). We required to consider remedy on the basis of the evidence that had been led*."

19. At paragraph 422: "*The claimants' agent accepted that there was no material before the Tribunal which dealt with the financial position in relation to each claimant. We had no wage information or financial information that would allow us to calculate the value of the time, for example, that the claimants had to use, or what a day's holiday would amount to*."

20. At paragraph 430: "*We also considered whether it would be appropriate to fix another hearing to hear what loss, if any, arose as a result of the discriminatory acts but we concluded it would not be in the interests of justice*

to do so. The parties were aware that the hearing was dealing with both liability and remedy and both parties were ably represented." The Tribunal decided at paragraph 431 that the interests of justice would not be served by a further remedy hearing.

21. We concluded at paragraph 432:"*we do not consider it just or equitable to award Mr Cowie nor any of the claimants any sums*."

Respondent's submissions

22. The respondent's agent argued that the Tribunal had carefully considered whether there was evidence before the Tribunal that would allow a financial award to be made in respect of each of the claimants. There was no evidence before the Tribunal to allow it to do so and no sums were awarded.

23. Although it is suggested in the written application that the Tribunal could have made relevant findings as to the sums in question, the claimants' agent noted in his oral submissions that there was no direct evidence before the Tribunal of the sums sought (nor of the wages of each of the claimants). He noted that within a document submitted during the internal grievance process, which had been referred to in evidence, there was some reference to hours taken by way of TOIL or annual leave. It was argued that this information should inform the Tribunal's decision making when awarding compensation.

Tribunal's reasons terse and full reasons now given

24. We accept that the reasoning in respect of compensation with regard to financial losses was terse. We set out as above why we decided that no compensation should be awarded, which was essentially because no sums had been established in evidence. The Tribunal had unanimously considered this issue and decided in all the circumstances not to make any award. It was not an omission to award compensation but a deliberate and carefully

considered decision. The Tribunal has reconsidered that application from the information presented by the claimants' agent and provide our full reasons.

25. The first issue was the evidence the Tribunal had before it, up to and including the reconsideration hearing. The difficulty with the claimants' agent's submission that the Tribunal should require the parties to reach agreement or assume the parties could reach agreement, was that the purpose of the hearing that was convened was to present evidence to allow the Tribunal to make relevant findings and issue a judgment in relation to all issues – expressly including remedy. The claimants were professionally represented (by a firm of solicitors and barrister). The claimants' agent confirmed, at the submissions stage, that he was content to proceed to deal with remedy and that all relevant evidence on which the claimants rely had been led. The purpose of the hearing was therefore to deal with each of the issues arising, in the usual way in Scotland. No further evidence has been presented.

26. At the hearing the parties had provided a statement of agreed facts. The claimants had the opportunity to provide the specific sums sought by way of evidence. That had not been done. At the reconsideration hearing there was still no detail as to precisely what sums were sought in respect of each of the relevant claimants. The fact the claimants' agent indicated that the matter would require the respondent to consider the sums in question (rather than simply providing the information themselves) gives an indication that the sums are not obviously or easily capable of calculation.

27. We did not consider that assessing the sums in question was straightforward and absent specific evidence on the sums sought we declined to make any order. The claimants had not proved any loss at the hearing.

28. We found at paragraph 324 that not all of the annual leave that required to be taken was unfavourable treatment. Even if there was some evidence as to TOIL and accrued annual leave there was no way of determining which of that leave related to unfavourable treatment. The respondent's agent argued

that there was no evidence before the Tribunal to allow it to order compensation in light of that finding. We agree with that submission. That was the principal reason why we decided not to award any sums to any of the successful claimants, there being no evidence before us to allow us to do so.

29. The respondent's agent also submitted that it is unhelpful to argue that the Tribunal should award compensation when it was accepted by the claimants' agent that the sums to be ordered required to be agreed between the parties. In other words, the claimants' agent was asking the Tribunal to give the claimants a further opportunity to deal with remedy, when they had already had the opportunity to do so. The claimants had the opportunity during the hearing to lead evidence or seek the respondent's agreement as to the relevant figures on which their claims were based. That was not done and it was argued that it was not appropriate to seek reconsideration of the judgment on a presumption that there would be no dispute as to the figures. That submission has merit.

30. We spent a considerable period of time considering whether it was possible to award compensation to the successful claimants from the information presented to the Tribunal. None of the claimants gave evidence as to the sums in question. There was nothing in the statement of agreed facts that dealt with and there was no other direct evidence that assisted us.

31. The only "evidence" was the material presented to the respondent during the grievance process which had been referred to in evidence (but not as evidence *per se* of the sums in question). We did not, however, consider it appropriate to rely upon that information as evidence in respect of each of the claimants. There are a number of reasons for this.

32. Firstly none of the claimants had given evidence to confirm that the information provided via the trade union was accurate.

33. Secondly the information had been presented by the trade union to the respondent. The respondent had not responded to the specific information. That was because the grievance was not upheld. Had the grievance been upheld the relevant amounts would have been met. There was no evidence that the specific figures had been checked and verified by the respondent. At best it amounted to what the claimants said they were due in total. We did not consider it fair to hold the respondent to that document without it being clear that this was the document on which the claimants wished to base their compensation claims. That was not something about which the respondent had fair notice.

34. Even if that document were to be considered, there was no breakdown to allow an assessment of which sums were unfavourable treatment and which were not. The information within that document was, unsurprisingly, basic. It was insufficient to allow the Tribunal to make relevant awards. There was insufficient detail as to the specific sums for each claimant nor of the specific leave or sums due for each claimant in monetary terms. There was no financial information before us to allow us to make any specific awards.

35. Finally the purpose of that document was to provide the respondent with information during the internal collective grievance process as to the dispute at that time. It was not intended to amount to a schedule of loss or information that would subsequently be relied upon to establish remedy in the event of a successful Employment Tribunal claim. The information was general in nature (and entirely lacking in any specification as to the value of each individual period of leave or time in respect of which lieu was granted). It would not be fair to base an order for compensation on such information. It had not been made clear that the claimants would rely upon this document for the purposes of calculating loss and the respondent was not therefore fairly able to consider the position and lead contrary evidence.

36. The information contained in that document did not in any event allow us to calculate the specific sums due. That was because the purpose of the document was to seek an internal resolution to the collective grievance and this was confirmed to the Tribunal by the claimants' agent during submissions.

37. We considered the submission that it was "bizarre" to find in favour of the claimants but award no compensation. We carefully considered whether it was fair to allow the claimants a further opportunity to deal with the lack of evidence on this point. The Tribunal did consider whether the parties should be ordered to resolve matters extra judicially but we did not consider that to be appropriate. The hearing had been fixed to deal with liability and remedy. It was for the parties to lead the evidence on which they wished the Tribunal to assess each of the relevant issues, both parties having been professionally represented and aware of the normal rules as to evidence and burden of proof. The normal rules in that regard apply and it was for the party seeking an order for compensation to set out what sums are sought by the leading of relevant evidence on which a decision could be made. The claimants had failed to do so in this case.

38. Time had been taken at the start of the hearing to focus the issues to be determined. It was accepted at the submissions stage that remedy would be considered. There was no application to lead further evidence and the claimants were content that remedy be dealt with from the information presented to the Tribunal. The Tribunal did so and did not consider it appropriate to leave it to the parties following our judgment to agree upon compensation.

39. We took into account the prejudice the claimants suffered as a consequence of this but we had to balance the impact upon the respondent and consider what in all the circumstances was fair and just.

40. We also considered there to be considerable merit in the respondent's agent's submission that remedy in this case was not straightforward such that the respondent could easily identify the sums in question. That was because the issue was not necessarily about calculating the sums in respect of hours taken given the loss was the loss of a chance to accrue holidays or TOIL. In some respects the loss in this case was the loss of flexibility. The claimants were all paid for the leave that they took.

41. There were no submissions from the claimants' agent as to the specific sums sought by way of compensation with the matter being left to the Tribunal to assess loss from the information before it (which remained the case even at the reconsideration hearing). The respondent's agent had argued that there may be issues as to jurisdiction of the Tribunal given the nature of the losses in question. Absent any submissions with regard to the specific sums sought for each claimant (and absent any evidence of any specific sums or their breakdown) we did not consider it appropriate to leave it to the parties to seek to agree relevant sums. The claimants had failed to establish by the leading of sufficient evidence what, if any, sums had been lost as a result of the discrimination. Without any evidence about the specific sums it was not possible for the Tribunal to make an award and it was not fair to delay the issue further, given the hearing had taken place, which the parties knew (and had agreed) had been fixed to deal with liability and remedy.

42. We considered the claimants' agent's submission that he had regarded this issue as having been agreed with the respondent. If the matter had been agreed, it ought to have been included in the statement of agreed facts, which was the purpose of such a document. It is common to see agreement being reached with regard to remedy with hearings focussing on liability (or parts of remedy). In this case there had been no agreement on remedy.

43. While the claimants' agent may have thought agreement was reached, it was clear from the submissions of the respondent and general context that no

agreement as to remedy had been reached. There was no evidence of any attempt to agree remedy. The statement of agreed facts was the obvious place agreed facts would feature. While the respondent obviously knew the earnings of each of the claimants, proving loss is a matter for the party seeking reimbursement to prove, by the leading of evidence, unless agreement has been achieved. It is not sufficient to assume that agreement has been reached, particularly where the issues arising are not straightforward. Given the hearing had been fixed to hear evidence on remedy and liability and given the claimants' agent expressly confirmed he was content to deal with remedy during his submissions, it was not appropriate to delay matters further to allow the claimants a further chance to provide evidence as to the sums sought.

44. The claimants' agent had been given the respondent's agent's written submissions before delivering his oral submissions which noted that not only had no schedules of loss been produced by the claimants but also that the respondent believed that what was being sought was that leave be reinstated, "which is not something the tribunal has jurisdiction to award". The issue as to remedy and the respondent's position was clearly identified and the claimants had the opportunity to respond, which they did, by confirming they were content for remedy to be dealt with on the basis of the information before the Tribunal. We did so.

45. We considered whether it was in the interests of justice to fix another hearing but we decided it was not appropriate to do so. We were mindful of the overriding objective and of the need to ensure our decision was just and fair – to the claimants and to the respondent and also to the public purse in respect of the time taken to deal with the issues.

46. In all the circumstances of this case, given the absence of sufficient information on which to make any award, no such award was made. We have reconsidered our decision and decided that it is not necessary in the interests

of justice given the foregoing factors to make any award of compensation for the successful claimants. This part of the reconsideration application fails.

Should the Tribunal make a recommendation?

47. The second part of the application is the Tribunal's failure to deal with recommendation as a remedy in its reasons. In the claimants' agent's written submission, it was noted that the claimants sought, by way of remedy, a declaration and compensation. The submission states that: "in addition, the Tribunal indicated to the parties during the course of closing submissions that it would also consider whether it could and/or should make a recommendation pursuant to section 124(2)(c) Equality Act 2010 that the respondent reinstate the accrued TOIL/annual leave the claimants were required to take in order to access paid Special Leave". The claimants' agent submitted it was in the interests of justice to make a recommendation in this case, essentially for the same reasons why compensation should have been awarded.

48. The respondent's agent indicated that the Employment Judge during the oral submissions made a passing remark about a recommendation. It was not something the claimants had sought. The Tribunal considered what was said during the Hearing. The claimants had not sought a recommendation by way of remedy (despite the box being ticked in the ET1). It had only been mentioned in passing during submissions and there was no submission with regard to particular wording for a recommendation. The claimants' agent's written submissions referred only to compensation and declaration as to the remedy sought.

49. It was submitted that given the claimants had not sought a specific recommendation, it was not surprising the Tribunal had not considered it. The respondent's agent argued there was in fact no basis on which to do so, in the absence of any wording from the claimants. The respondent's agent argued that if wording had been put forward, a further hearing would be

needed to consider this and it was not in the interests of justice to fix a further remedy hearing in this matter, as the Tribunal has already determined in the context of the issue of pecuniary compensation for TOIL/annual leave. It was submitted that the claimants and their agent were fully aware that the hearing was intended to deal with liability and remedy, and failed to lead appropriate evidence/make the required submissions in support of the remedy they now say they should have been awarded.

50. The respondent's agent argued that it is not in the interests of justice to make a recommendation now. They responded to the claimants' agent's written submission in turn (which mirrored the claimants' agent's submissions set out at paragraphs 11 to 14 above).

51. Firstly, the respondent's agent noted that the claimants argued that it would be "perverse" to decide that it is inappropriate to award any remedy to reflect the unlawful discrimination to which the Tribunal found the claimants had been subjected. The claimants advanced no authority for this position and it is unfounded. Tribunals can, and do, decide to award no remedy when claimants succeed in their claims. In the present case, the decision to award no compensation is fully explained and no specific recommendation was requested.

52. Secondly, the claimants argued that there could be no real factual dispute between the parties as to the amount of relevant TOIL/annual leave taken by the claimants, for which compensation was required. The respondent disagreed with that proposition for 4 reasons.

i. Whilst there was agreement as to the hours of TOIL that had been accrued, and as to the annual leave taken, there was a dispute as to the amount of "relevant" annual leave that had been taken.

ii. The Tribunal found, at paragraph 324, that it was not unfavourable treatment – and thus not unlawful – to require the claimants to take annual

leave at times when holidays were pre-programmed into a shift pattern. The only unlawful treatment found was requiring the claimants to take "accrued leave" (i.e. leave that had accrued during the portion of the year before the claimants required special leave).

iii. It is apparent from the material before the Tribunal that much of the leave taken by the claimants was taken later in the year, and the claimants at no point led any evidence on, or provided any elucidation of, which of those hours constituted "accrued leave" and which hours were pre-programmed leave, taken in accordance with the programmed shift pattern (and thus not unlawful).

iv. In such circumstances, there was no agreement about the "relevant" leave taken, and no way for the Tribunal to determine any compensation due.

53. Thirdly, the claimants argued that "there was unlikely to be any factual dispute between the parties as [to] the rate at which the claimants would be paid for the relevant TOIL/annual leave". The claimants led no evidence on this issue, and the Tribunal cannot proceed on the basis that there is "unlikely" to be any dispute. It was for the claimants to prove their loss, and they failed to do so.

54. Fourthly, contrary to the claimants' submissions the Tribunal was not in a position, for example, to make findings as to the number of days or hours of "relevant" annual leave in the case of each claimant. The Tribunal considered whether a further remedy hearing should be fixed, but decided it was not in the interests of justice to do so when it had been made clear to the claimants that remedy would be dealt with during the extant hearing. Had such a hearing been fixed, the Tribunal would in any event have had to consider additional points, such as whether it would be appropriate to make any award of compensation at all in circumstances where the claimants had suffered no loss of pay (as they were paid for the days on which they took TOIL or annual leave). The respondent's position is that to do so would be out of kilter with the approach in civil claims where an individual has suffered no pecuniary loss, but only "loss of enjoyment", or loss of a choice, as the Tribunal found.

55. Finally, the claimants argued that the respondent gave no proper explanation as to why a recommendation should not be made. However, the claimants did not request any specific recommendation. The respondent put forward an argument in general terms, upon which it would have provided greater detail had the claimants specified the recommendation they wanted.

56. We considered that each of these 5 points set out at length from the respondent's agent had merit and we uphold these submissions in their entirety. Those reasons in our view show why it is not in the interests of justice to reconsider the decision we took both in relation to awarding specific compensation but also in relation to the absence of a recommendation.

57. The respondent's agent also noted that section 124 of the Equality Act 2010 refers to the fact that the Tribunal *may* make recommendation and is not bound to. The reference to a recommendation being made was part of discussions during oral submissions and was a passing remark. It was noted that it was possible for the Tribunal to make a recommendation but that was not something that the claimants had explicitly sought. As the claimants' agent confirmed, their position was that compensation should be ordered. The position in relation to a recommendation was not developed and no specific discussion took place as to its terms or relevance.

58. Our judgment make no reference to a recommendation because no such specific recommendation was sought. There was no specific wording before the Tribunal. The respondent's agent had referred to a recommendation in her written submissions in anticipation of there being submissions from the claimant's agent with regard to a specific recommendation (given the box was ticked in the ET1) but in the absence of that, it was not pursued.

59. The Tribunal considered the submissions of both parties on this point. We accept there was no mention in our judgment as to a recommendation. This was not due to inadvertence but because there was no application for a

specific recommendation before us. For those reasons we did not consider a recommendation to be appropriate. We have reconsidered our decision and have concluded that it is still not appropriate to make a recommendation.

60. While the Tribunal has a wide discretion and has the power to make a recommendation, the Tribunal was (and is) not persuaded it was in the interests of justice to do so in this case.

61. The parties did not have specific wording before them as to the recommendation. As noted above the issue as to remedy in this case is not straightforward. Not all of the leave or TOIL that was taken was unlawful. A recommendation to pay the sums due to the claimants or to return the time taken would not be sufficient since the respondent (and the claimants) would need to know the specific times or sums. Similarly there may be arguments as to the Tribunal's jurisdiction to award certain sums or at least the sums in question may be illiquid, covering loss of a chance or the restriction of flexibility. A recommendation to pay the sums due would not assist.

62. For similar reasons to those that led the Tribunal to award no sums by way of compensation, it is not in the interests of justice to make a recommendation. The issue as to the sums to be paid (if any) in this case are complex. It is not fair simply to order the parties to agree such sums or seek to agree such sums when a hearing had been fixed to determine remedy and the claimants had failed to establish what their losses were. The matter was left to the Tribunal to determine from the information presented before it. We did so and concluded that no sums should be awarded and no recommendation made.

63. We did not consider it fair to make a recommendation given the uncertainty as to the sums in question. Making a recommendation gives rise to the same challenges the Tribunal faced in making an order for compensation.

64. A recommendation in this case was not specifically sought. The recommendation that is now being sought is being sought to deal with the failure to lead evidence before the Tribunal as to the losses sustained. In the circumstances it is not appropriate to make such a recommendation.

65. In all the circumstances the Tribunal declined to make a recommendation. Having reconsidered that decision, it is not necessary in the interests of justice to make a recommendation and that part of the reconsideration application is refused.

Summary

66. In all the circumstances it is not necessary in the interests of justice to reconsider the judgment that was issued in this case. For the foregoing reasons, the application to reconsider our decision is refused.

Employment Judge: **D Hoey**
Date of Judgment: **20 December 2021**
Entered in register: **21 December 2021**
and copied to parties