EMPLOYMENT TRIBUNALS

Claimant: **Mr. S Lazarou**
Respondent: Retail Motor Industry Federation (RMIF)

JUDGMENT ON RECONSIDERATION

Rules 70-73 and 74 to 84 of the Employment Tribunal Rules of Procedure 2013

(1) Pursuant to Rule 72(1) there is a reasonable prospect that the claimant's application dated 17th November 2021 for reconsideration of the remedy judgment issued on 19th November 2021, will result in that original decision being varied to include compensation for the claimant's company car.

(2) Pursuant to Rule 72(1) it is my provisional view that that there is no reasonable prospect that the claimant's application dated 17th November 2021 for reconsideration of the remedy judgment issue on 19th November 2021, will result in that decision being revoked or varied save for (1) above.

(3) The claimant's application for costs is refused.

REASONS

1. I would first like to apologise to the claimant for my delay in making and sending this decision on his application for reconsideration and for costs. This was in part due to my illness in December followed by periods of annual leave in early December and over the Christmas and New Year holiday and my judicial responsibilities in a different jurisdiction. The claimant had requested written reasons for the remedy judgment issued on 19th November 2021. Those written reasons ran to 19 pages and were issued on 20th December 2021.

2. The chronology of this matter is as follows. The liability hearing of the claimant's unfair dismissal and breach of contract claims took place from 27th to 29th January 2021. Judgment was reserved. My judgment was issued to the parties on 22nd March 2022.

3. A remedy hearing which included consideration of the costs application made by the respondent at the liability hearing took place on 15th November 2021. The judgment was issued on 19th November 2021. The claimant requested written reasons. As stated above, my written reasons for the remedy judgment were completed on 20th December 2021 and sent to the parties on the same date.

4. On 17th November 2021, the claimant wrote to the Tribunal asking for a review of the remedy judgment and for his legal costs. His letter is copied below:

> "I will await for your full judgement notes so that I can carefully consider this in detail and then request from the court on what my options would be on challenging the outcome. I fell that the amount awarded does not seem to reflect what I have gone through considering I was found to be Unfairly Dismissed for many failures on behalf of the Respondent.
>
> In the meantime, so that I don't far short of the deadline for any objections to the final judgement (which I recall for the hearing is 14 days), I write to inform of my intention to have the award reviewed under the following points:
>
> 1. My Statement and supporting documents explaining the background throughout
>
> 2. The Respondent's pressure to provide my Statement prior to the Courts Instructions [Letter 11th Nov]
>
> 3. Following my questioning, Mr James admission and change of verbal statement regarding events at Southam Academy
>
> 4. The fact the Respondent only ever produced dubious documents on dismissal 2 years after events and accusations made
>
> 5. Under *Polkey,* I sort of understand you judged that I would have been unable to continue being employed due to the breakdown of working relationships with management.
>
> 6. If this the reason my award was limited to a few months post dismissal then as I see it, they caused this situation and breakdown in relationship due to their unfair and unjust processes in dealing with grievances and not adhering to employment law regarding correct procedure for employees with health difficulties.
>
> *
>
> The schedule of loss amounted to over £91,000 capped at a year's salary of £30,900. I was out of my depth in following your discussions regrading the award costs.

Because of this, I was not aware or asked for my expenses which includes consulting a solicitor prior to the remedy hearing. Below are some of my expenses incurred.

6. Invoices for these legal services amounting to **£1,215** [see 3 attachments]

7. In addition, I incurred basic stationary costs [printer ink, paper etc.] since the start of around **£165**

8. From what I can see, Loss of a company car was not included in the award

9. I would kindly ask the court to please consider the award and include my above costs as I have had to pay the Respondents claim for their costs as awarded and so avoid any further legal proceedings.

10. As mentioned above, I'll await your full notes on the Judgement before moving forward."

The Law

5. Rules 70, 71 and 72 of the Employment Tribunal Rules of Procedure 2013 provide as follows:

RECONSIDERATION OF JUDGMENTS

Principles

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.*

Application

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.*

Process

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.*

6. Rule 70 therefore gives the Tribunal the power to reconsider a judgment where it considers it is in the interests of justice to do so. Rule 72(1) stipulates that the application to reconsider a judgment must be refused if the Tribunal considers there is no reasonable prospect of the original decision being varied or revoked; ***TW White & Sons Limited v White (UKEAT0022-23/21/VP***). Otherwise, the Tribunal must consider whether a hearing is necessary in the interests of justice. Under Rule 72(2) if the Tribunal determines that it is in the interests of justice to decide the application without a hearing, the parties must be given a reasonable opportunity to make written representations. The Tribunal may set out its provisional views on the application; Rule 72(1).

7. The Tribunal has a broad discretion to decide whether or not to reconsider any judgment which it must "exercise judicially … having regard not only to the interests of the party seeking 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"; ***Outasight v Brown [2015] ICR D11.***

8. Elias LJ confirmed the importance of finality in litigation in ***Ministry of Justice v Burton [2016] EWCA Civ 714***:

> "the discretion to act in the interests of justice is not open-ended… 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..."

9. In ***Liddington v 2Gether NHS Foundation Trust EAT/0002/16***, Simler P (as she then was) stated that:

> "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…

10. In exercising the power to reconsider judgments, a Tribunal must give effect to the overriding objective and "deal with cases fairly and justly"; Rule 2. Rule 2 also requires a Tribunal to deal with cases "in ways which are proportionate to the complexity and the importance of the issues" and to avoid delay. Ensuring that litigation is concluded is part of fair and just adjudication.

11. The interests of justice test (Rule 70) necessarily means the interests of justice to both sides; ***Reading v EMI Leisure Ltd EAT262/18.*** In that case, the EAT considered a reconsideration application by a claimant who wanted a second chance to put the same unsuccessful arguments:

> "…when you boil down what is 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, it is not said, and as we see it, cannot be said that any conduct of the case by

> the employers here caused [the claimant] not to do herself justice. It was, we are afraid, her own inexperience in the situation."

12. The EAT examining the predecessor review power (in the 2004 Rules) to the Tribunal's reconsideration power in the 2013 Rules in ***Fforde v Black EAT68/80*** noted that:

> "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."

13. If an obvious error has been made which may lead to a judgment or part of it being corrected on appeal, it will generally be appropriate for it to be dealt with using the reconsideration power; ***Williams v Ferrosan Ltd [2004] IRLR 607*** and approved in ***Newcastle Upon Tyne City Council v Marsden [2004] IRLR 607*** at paragraph 17.

The claimant's application

14. The claimant's application was made within time under Rule 71 as it was received within 14 days of both the date on which the original reason namely the remedy and cost judgment and the written reasons for that judgment were sent to the parties. The same does not apply however to the liability judgment which was sent to the parties on 22nd March 2021. No application for reconsideration was made in relation to that judgment.

Provisional views; Rule 72(1)

15. I have considered the claimant's application for reconsideration, and it is my provisional view that with the exception of the question of the inclusion of compensation for the claimant's company car which I deal with below that there is no reasonable prospect of the decision reached on 15th November 2021 being revoked. The interests of justice include a desire and need for finality in litigation. The purpose of reconsideration is not to enable parties to reargue the case which they have already put as the claimant now seeks to do.

16. Ground 1 of the claimant's application for reconsideration is a reference to his statement it is presumed for the remedy hearing on 15th November 2021.

17. Grounds 2 to 4 of the claimant's application were not referred to in his statement for the remedy hearing and relate to the arguments which the claimant made at the original liability hearing in January 2021. Those arguments and documents

were fully considered at that hearing as set out in the liability judgment issued in March 2021. No application was made by the claimant for reconsideration of that original decision within the time limit specified by Rule 71. Those grounds will therefore not be considered. In so far as the claimant made general criticisms of the respondent's treatment of him in his oral submissions at the remedy hearing and relied on this to justify his own poor conduct, I consider this below.

18. Grounds 5 and 6 relate to ***Polkey.*** I found that the claimant would have been dismissed due to his belligerent behaviour within four months of his dismissal applying ***O'Donoghue v Redcar and Cleveland BC [2001] IRLR 615***. The claimant appears to challenge this aspect of the original decision on two grounds. First, he says that his escalating poor behaviour and lack of self-control in the workplace were a result of the respondent's treatment of him. Second, he says that he was out of his depth at the hearing.

19. The arguments made by the claimant in his letter of 17th November 2021 to excuse his lack of self-control on the basis of the respondent's treatment of him and on which he now seeks reconsideration were made at the remedy hearing and also outlined in his witness statement for that hearing. The application therefore attempts to relitigate matters which I have already considered and decided. The claimant's reconsideration application does not give any clear reasons why it would be in the interests of justice to reconsider the ***Polkey*** aspects of the original remedy judgment.

20. Dealing with the claimant's second reason for requesting reconsideration of the Polkey decision, he says that he was out of his depth at the hearing. I note that the claimant was specifically invited in writing before the hearing to make submissions on ***Polkey***. His witness statement for the hearing on 15th November 2021 specifically addressed the possibility that his compensation award might be reduced. He was also directed to resources on the internet which explain how Employment Tribunals deal with remedy. The claimant also had the benefit of the respondent's written submissions on remedy which included a submission that the claimant's award be reduced by 100%. It now appears that he also sought legal advice on remedy.

21. I directed the respondent's counsel to assist the Tribunal by explaining the relevant law in addition to providing my own explanation to the claimant of ***Polkey*** and the possible scenarios in ***Software 2000 Ltd v Andrews [2007] IRLR 568*** (as summarised in paragraphs 24 to 27 of the remedy judgment). I ensured that the claimant had a break to the claimant so that he could reflect on the respondent's oral submissions and the advice on the law provided by myself and the respondent's counsel before he made oral submissions.

22. The claimant is therefore seeking a second bite of the cherry and saying that he

could now put forward better arguments on remedy. It is clear that the power of review in the 2004 Rules as now encapsulated in the power of reconsideration in the 2013 Rules is not "intended to provide parties with the opportunity of a rehearing at which the same evidence can be produced with different emphasis…: Lord Macdonald in ***Stephenson v Golden Wonder Limited [1977] IRLR 474.*** The claimant now seeks to recast his arguments on remedy.

23. My provisional view is that the claimant's application on grounds 5 and 6 has no reasonable prospect of the remedy judgment being revoked.

24. Accordingly, my provisional view is that save for the company car issue described below that the claimant's application has no reasonable prospect leading to the revocation of the original remedy decision.

Company car

25. The claimant's updated schedule of loss dated up to February 2022 of claimed the sum of £4,486 for his company car taken from his 2018/19 P11D. No breakdown of this calculation was provided.

26. It appears that I may inadvertently have@ failed to reflect the loss of the claimant's company car in the remedy judgment. I ran through the heads of loss in giving judgment at the remedy hearing on 15th November and it appears that neither party noticed this omission.

27. This means that my provisional view is that there is a reasonable prospect that the claimant's application for reconsideration of the judgment issued on 15th November 2021 may result in the decision being varied to reflect compensation for loss of the company car.

Costs

28. The claimant's application for reconsideration does not seek to revoke the costs award made against him and from his letter of 17th November 2021 the claimant has now paid the costs awarded to the respondent.

29. The claimant now however makes a costs application against the respondent. That application was made on 17th November 2021 which was within 28 days of the "after the date on which judgment finally determining the proceedings in respect of that party was sent to the parties: Rule 77. That application is therefore within time.

30. Regulation 76(1) of the 2013 Rules states that a costs order may be made where a Tribunal considers that- *'(a) a party (or that party's representative)*

has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success.'

31. Rule 77 states that no such order may be made unless the paying party namely the respondent has had a reasonable opportunity to make representations.

32. I will not restate the legal principles concerning the award of costs by the Employment Tribunal which were set out at paragraphs 89 to 97 of my written reasons which were sent to the parties on 20th December 2021. In summary, when considering an application for costs Employment Tribunals should have regard to the two-stage process as outlined in ***Monaghan v Close Thornton EAT/0003/01 (unreported) 22/02/02*** by Lindsay J at para 22:

> a. is the costs threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? ; and if so,
>
> b. ought the tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?

33. The claimant has not provided any grounds in his application to say why the respondent's conduct was unreasonable. The threshold of unreasonableness is not therefore reached. In the circumstances, the claimant's cost application is refused.

Case Management Orders

34. Pursuant to Rule 72(1), I therefore invite the parties by 4pm on **17th February 2022** to write to the Tribunal, copied to the other party:
    a. giving any response to the application for reconsideration taking into account my provisional views as set out above. In the respondent's case, if the application is opposed, it may wish to give brief reasons for its opposition,
    b. providing their views as to whether the application for reconsideration can be determined without a hearing; and
    c. indicating if they consider the original decision on 15th November should be varied to reflect the loss of the claimant's company car, and if so, they are asked to specify how the original decision is to be varied with calculations and an explanation if necessary.

Case Number 2201491/2019 & 2203114/2019

Employment Judge B McKenna

Date: …19th January 2022……

Sent to the parties on: .....

21/01/2022

For the Tribunal Office