EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr L E Veintimilla Briceno	**OCS Group UK Limited**

Heard at: London Central **On**: 22 February 2022

Before: Employment Judge Lewis
Mr P Alleyne
Mr S Godecharle

Representation

For the Claimant: Mr S Bennett, UVW

For the Respondent: Ms R Kight, Counsel

Spanish Interpreter: Mr H J P Ronquete

RESERVED JUDGMENT ON RECONSIDERATION APPLICATION AND REMEDY

1. The application for reconsideration is granted. The judgment is amended to read as follows:

   The claim under section 145A TULRCA 1992 is upheld. The claimant was made two offers to transfer sites for a higher rate of pay, the sole or main purpose of which was to induce him not to take part at an appropriate time in the activities of an independent trade union, ie an offer which would take effect on 1 November 2019, and an offer was contained in a letter dated 17 June 2020.

2. The claim in respect of each offer is in time. The claim for the 17 June 2020 offer was in time, and the 1 November 2019 offer was part of a series of offers, the last of which was 17 June 2020.

3. The tribunal awards a total of **£8487**, (ie £4193 in respect of the 1 November 2019 offer and £4294 in respect of the 17 June 2020 offer).

4. The tribunal makes no uplift for any breach of the ACAS Code on Disciplinary and Grievance Procedures.

REASONS

Application for Reconsideration

The application

1. At 19.17 on 21 February 2022, the evening before the remedy hearing, the respondent submitted a written application for reconsideration under Sch 1 rule 71 of the ET Rules of Procedure. The judgment and reasons had been sent out to the parties on 31 January 2022. The application was therefore outside the deadline for applying for reconsideration. The respondent applied for an extension of time under rule 5.

2. It was agreed that a sensible way to proceed was for the tribunal to hear all the submissions of each party on whether to extend time under rule 5; if so, whether to reconsider the decision and what fresh decision to make; if still applicable, remedy. The tribunal would then reserve its decision and send it out.

3. The claimant was asked whether he wished the Spanish interpreter to interpret everything. He said it was sufficient that the interpreter was available if he asked or if he had to give evidence for any reason. He was told to put his hand up if he wished anything to be translated at any point. The Judge also summarised the issues for him and the procedure being followed at certain points through the interpreter.

4. The ground for the reconsideration application was time-limits. The respondent argued that the tribunal should reconsider its decision, because it had made a finding that the relevant offer under s145A was the offer to transfer on 1 November 2019, and because the tribunal did not identify any further unlawful offer such as made in the 17 June 2020 letter. We should clarify that what we all referred to as the ‘1 November 2019’ offer was in fact made several weeks earlier, but nothing turns on that.

5. The claimant accepted that the 1 November 2019 offer was well out of time standing alone. However, he argued that there was also an unlawful offer in the letter dated 17 June 2020, which was in time on its own terms, plus would also bring the 1 November 2019 offer in time as part of a series of similar offers in accordance with s145C(1)(a). The respondent accepted that if the 17 June 2020 was also an unlawful offer, it would be in time and would potentially bring the 1 November 2019 offer also in time as part of a

series of offers. However, the respondent argued that there was no 'offer' on 17 June 2020.

Law on reconsideration

6. Under Sch 1 rule 71 of the ET Rules of Procedure Regulations 2013, an application for reconsideration must be presented within 14 days of the date when the written judgment and reasons were sent out. Rule 5 gives the tribunal general power to extend time. On several occasions the EAT has suggested it may be more sensible for a tribunal to deal with a late application for reconsideration if it can address the matter in question and avoid a more expensive and time-consuming appeal on the same point.

7. Rule 70 states that a tribunal may reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the original decision may be confirmed, varied or revoked.

8. In dealing with the question of reconsideration, the tribunal should seek to give effect to the overriding objective set out in rule 2.

9. The respondent cited several authorities to us for the proposition that time-limits were a matter of jurisdiction and therefore a reconsideration application should be made and granted, even if late, if the position was still open. In particular, we were referred to Dedman v British Building and Engineering Appliances 974 ICR 53, CA and Radakovits v Abbey National plc [2010] IRLR 307, CA. The respondent pointed out that it was still within the deadline for going to the EAT on the matter.

10. On the substantive matter, time-limits for a s145A claim are set out in s145C of the Trade Union and Labour Relations (Consolidation) Act 1992, which states:
    (1) An employment tribunal shall not consider a complaint under section 145A or 145B unless it is presented -
    (a) before the end of the period of three months beginning with the date when the offer was made, or where the offer is part of a series of similar offers to the complainant, the date when the last of them was made.

11. There is a potential extension of time for late claims under s145C(1)(b), but the claimant did not wish to argue this point.

12. The respondent relied on Scottish Borders Housing Association Ltd v Caldwell and ors EATS 0001/12, a case under s145B, for the proposition that the 17 June 2020 letter was not an offer. We discuss below our analysis of that case and comparison ith the present case.

Conclusions on reconsideration

13. The claimant pleaded in his ET1 that an offer was made to take effect on 1 November 2019 and (at paragraph 9) that an offer was made on 17 June

2020 to transfer to Old Admiralty Building, effective from 23 June 2020.The respondent was represented throughout by solicitors and Counsel. It had not pleaded the time-limit point in its ET3 nor taken it up at the liability hearing including when issues were agreed and during final submissions.

14. The claimant and his representatives had hardly any time to prepare to defend this application for reconsideration. The tribunal asked whether they wished to seek a postponement. They did not. As had been discussed at length at the end of the liability hearing, this remedy hearing had been fitted in very fast because the claimant wishes to leave for Ecuador for an unknown duration in order to be with his wife. He is uncertain about his ability to return from there because of Covid restrictions. The claimant had therefore been put in a difficult position by this last minute application.

15. Had the application not concerned time-limits which are a matter of jurisdiction, and had it not been for the authorities cited to us (Dedman v British Building and Engineering Appliances 974 ICR 53, CA and Radakovits v Abbey National plc [2010] IRLR 307, CA), we would not have considered it in the interests of justice to allow the reconsideration application. It was made outside the time-limit, at the very last moment, giving the claimant virtually no opportunity to prepare without losing the remedy hearing date; it had not been pleaded or raised at any point previously, and the respondent has been represented by solicitors and Counsel throughout. However, the respondent did raise the matter, albeit belatedly, before the remedy hearing and before the deadline for an appeal, and, since it concerns a matter of jurisdiction, we consider we are effectively bound by the authorities to allow the reconsideration application.

16. We now move on to the substance of the application. We agree that the offer of a move to take place on 1 November 2019 ('the 1 November 2019 offer'), if standing alone, is out of time. The claimant did not seek to argue that it was not reasonably practicable to have presented the claim in time.

17. However, we consider that a further offer was made by letter dated 17 June 2020, and that such offer was part of a series of similar offers, the first in the series being the 1 November 2019 offer. Both the 17 June 2020 offer and the 1 November 2019 offer are therefore in time.

18. We should make it clear that the tribunal never found the 17 June 2020 offer was not an offer. Having found that there was an offer as defined to take effect on 1 November 2019, and having failed to appreciate there was any significance in terms of time-limits, we had not made a specific finding about 17 June 2020. The respondent did not make any technical argument at the original hearing that the 17 June 2020 was not an offer. The whole focus of the evidence and submissions was on the purpose of the offer.

19. The respondent argued on reconsideration that the 17 June 2020 letter was not an offer, but (had it not been delayed) an imposition of a transfer of employment. It also argued that the offer had already been made and accepted and that this was simply an extension of the timing. It argued that the position was similar to Scottish Borders Housing Association Ltd v Caldwell and ors EATS 0001/12.

20. We do not consider the facts here resembled those in Caldwell. In Caldwell, the employees were initially offered an inducement to accept a change of terms and conditions and when they did not accept. A letter was sent to them, announcing that the change would be unilaterally imposed anyway. That second letter was obviously not an offer which was open to acceptance or rejection. In the present case, there was no unilateral imposition of a move at any stage. The initial offer of a move was to take effect on 1 November 2019. The claimant accepted it. A contract was formed. The respondent unilaterally breached that contract. Mr Melo emailed the HR Service Centre to cancel it. No new date was substituted at that point.

21. An entirely new letter was written on 17 June 2020, some considerable time later. Although the letter used the word 'application', that word had no meaning. Ms MacDuff was using a standard template. It was a new offer, whose timing was suspicious because of events and actions at that time, as we explain in paragraphs 93 – 94 of our decision. It was not a repeat of the same offer, though it was similar. It was still to OAB, but it had a new date.

22. The claimant could have refused this new offer. The original contract he had signed had been cancelled. For all these reasons, we believe that the 17 June 2020 letter contained a new offer.

23. As an aside, we add that Carlos wrote a statement in June 2020 indicating that he would now prefer to stay put and he would not sign a new contract until he had done a test shift. Given that he had received the same offers as the claimant, it is interesting that he understood he had the right to refuse. We also know that, in the event, he never was forced to move.

24. The 17 June 2020 offer was made to the claimant with the sole or main purpose of inducing the claimant not to take part, at an appropriate time, in the activities of an independent trade union, ie voting in a recognition ballot, attending the access meetings and seeking to persuade colleagues to vote for recognition. Our reason for inferring this is the same as our reason for inferring the 1 November 2019 offer had that purpose, as already set out in our original decision. Indeed the timing of events as at 17 June 2020, with the pending ballot, amid the access meetings, and letters from OCS to the CAC stating the claimant was leaving the bargaining unit, particularly highlight that date.

Remedy

25. The parties agreed that remedy is as set out in s145E of TULRCA 1992 and that the award is fixed according to the year in which the offer was made. The figure for the 1 November 2019 offer is £4193 by reason of the Employment Rights (Increase of Limits) Order 2019 and for the 17 June 2020 offer is £4294 by reason of the Employment Rights (Increase of Limits) Order 2020. Under s145A, we therefore award a total of £8487.

26. We are not sure whether the parties appreciated that the consequence of such fact findings on reconsideration would be two awards, one for each offer complained of. However, we can see no other way of reading s145E. Nevertheless, if the parties wish to apply for reconsideration solely on this point, they should provide the tribunal with written submissions addressing the matter and seeking reconsideration on that aspect within 14 days of the date this judgment is sent out.

27. The other matter put to us on remedy was the claimant's application for an uplift for breach of the ACAS Code on Disciplinary and Grievance Procedures. The claimant sought a 15% uplift on grounds set out in his updated schedule of loss. These all relate to the respondent's handling of the claimant's grievance and grievance appeal. The respondent did allow a grievance, investigate it, and deal with an appeal. There were a large number of complaints. Only a very small part of the subject of the grievance related to the inducement offer.

28. Under s207A of TULR(C)A 1992 if the employer unreasonably fails to comply with the Code in relation to a matter to which the Code relates, the tribunal can increase any award it makes by up to 25% if it considers it just and equitable in all the circumstances of the case.

29. The claimant relied mainly on paragraphs 43 and 45 of the ACAS Code. He argued that Mr Gilmour should not have been appointed to hear the grievance appeal, as he was a witness interviewed at the first grievance stage. We agree this was extremely bad practice. OCS is a large organisation and would easily have been able to find an alternative person to deal with the appeal. Arguably it breached paragraph 43 of the Code. However, although Mr Gilmour handled the procedure initially, he left the organisation and a different manager ultimately heard the appeal. Taken together with the fact that only a small part of a large grievance related to the s145A offer, we do not think it just and equitable in all the circumstances to award an uplift on this ground.

30. Regarding paragraph 45 of the Code, we are not in a position to say whether there was unreasonable delay in the outcome of the grievance appeal because the reasons for the delay were scarcely mentioned during the liability hearing. We had little more than what was contained in the witness statements. There appears to have been some to-ing and fro-ing at the time between the union and the company regarding how the grievance appeal should be progressed, including unavailability of the claimant's representative on certain dates and requests by her for

information before a hearing could go ahead. There were longer delays at the end of that process, but it is impossible to look at that without far more detail than we were given. Once again, we also bear in mind that the offer we have upheld under s145A was only a small part of a very lengthy grievance. We therefore do not think it just and equitable in all the circumstances to award an uplift on this ground.

Employment Judge Lewis 23.2.22

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Employment Judge Lewis

Judgment and Reasons sent to the parties on:

23/02/2022..

For the Tribunal Office