



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Brown

**Respondent:** Isle of Wight Donkey Sanctuary

**Determination of application on the papers**

## **JUDGMENT ON APPLICATION FOR RECONSIDERATION DETERMINED ON THE PAPERS**

**The judgment of the tribunal is that the claimant's application for reconsideration is refused because there is no reasonable prospect of the decision being varied or revoked.**

### **REASONS**

#### **Decision on Claimants Application for reconsideration.**

1. The Claimant's application for a reconsideration of the Judgment dismissing his claims of victimisation is refused. There is no reasonable prospect of the original judgment being varied or revoked.
2. Taking into account the Claimants disability and in order to assist the parties in understanding why I have reached this decision, I provide the following explanations

of the process I have followed in reaching this decision, and the reasons for the decision.

**The Claimants Application**

3. On 28 November 2021 the Claimant wrote to the Employment Tribunal, in response to the receipt of the written reasons for the judgement, which been sent to him on 17 November 2021. His letter was received by the Employment Tribunal on 1 December 2021.
  
4. In his letter the Claimant has requested reconsideration of the Judgement, in respect of the determination made about his claim of victimisation only. The Employment Tribunal found that the Claimant had not been victimised by the Respondent, concluding that the detriment which he alleged, if it occurred, had not been on grounds of him having raised a grievance in 2018, about disability discrimination.
  
5. The Claimant asserts that the reason it is necessary to reconsider the Judgement is as follows

*5.1. I understand that in requesting this something had to have gone wrong with the hearing. My belief is that the points I would wish to have raised in a closing submission, I was unable to, because of my difficulty in addressing groups. On the ET1 claim form I stated I was unable to make long statements. With hindsight I should have requested a reasonable adjustment to provide a written submission, but because of stressful situation I did not think this at the time.*

6. The Claimant then sets out 16 reasons, of fundamental points in respect of his request for a reconsideration.
7. Having set out in detail the points that he would have raised in a written submission, he states that it is *in the interests of natural justice to reconsider the judgement regarding victimisation*. He then goes on to say, *I believe both parties have been treated fairly, but I was unable to provide a closing submissions to the tribunal because of my disability*, and so not related matters contained in this document.
8. Having received the application for a reconsideration, and having carried out an initial analysis of it, I considered that, had the Claimant asked for time to provide written reasons, that the tribunal would probably have adjourned for a short while, probably overnight, to enable him to do this, as the hearing timetable could have accommodated this.
9. One of the observations set out in the final written reasons at paragraphs 262 of our Judgement is that the Claimant was able to set matters out in writing, but had difficulty in verbally expressing himself clearly and concisely, and that this was particularly an issue when he attended meetings with the Respondent.
10. Whilst the claimant was told that he could ask for time or breaks at any time during the hearing, it is accepted that he may not have thought about this at the time.
11. If we had given the claimant time to provide written submissions, the Respondent would have had the opportunity to respond to them.

12. I also considered that the nature and detail of the application the Claimant has made, sets out what his written submissions would have been, had he been given that time.
13. I therefore considered firstly that there was some merit in considering whether or not there was any reasonable prospect of the judgments the tribunal had made being varied or revoked in light of those submissions.
14. In order to make this determination, I considered that I would be assisted by input from my panel members, so that we could consider the additional submissions now provided by the Claimant together, and therefore reconvened a meeting of the panel, on 18 February 2022, to consider whether or not there was any reasonable prospect of us varying or revoking our original decision, as a result of any of the submissions now made.
15. We reviewed each aspect of the application, re read the judgment and referred to the witness statements and our notes of evidence made at the hearing.
16. We also reminded ourselves that the purpose of a closing statement is to summarise evidence given by witnesses or to make comments on the effect and meaning of documents witnesses have referred to or relied upon, and to make legal submissions or statements or to draw the attention of the panel to inconsistencies or potential matters which will assist in making a decision. It is not an opportunity for either party to introduce new evidence or to raise new allegations with the panel.

**The Claimant's Claims of Victimisation**

17. We started by reminding ourselves of the claims of victimisation made by the claimant, which we had to determine. These had been identified at a case management hearing and had been agreed by the parties as follows

17.1. Did the Claimant do a protected act by issuing a grievance in October 2018?

17.2. Did the following things happen?

17.2.1. managers lied during the grievance investigation;

17.2.2. the grievance report was biased ;

17.2.3. reasonable adjustments for the FVTL role were refused;

17.2.4. the Claimant was not informed about his right to request reasonable adjustments for the FVTL role when it was initially offered to him;

17.3. by doing so, did the Respondent subject the Claimant to a detriment?

17.4. if so, was it because the Claimant had done protected act?

18. We then reminded ourselves of the findings we had made and our conclusions.

19. Firstly, the Respondents accepted that the grievance was a protected act for the purposes of the Equality Act 2010. This is recorded at paragraph 68 and 74 of the judgement.

20. We considered that the allegation that Mrs Foote and Mr Needham lied during the investigation of his 2018 grievance at paragraphs 75 to 81 of the judgement and the conclusions are at paragraphs 82- 90 of the judgement. We concluded that whilst both had made errors and been wrong in respect of some matters, that neither had lied, but rather both had made honest mistakes. We found that it was not proved that either had lied, or that any inconsistency or error made or wrong information was on grounds of the claimant having raised a grievance about disability discrimination.

21. The findings in respect of the grievance report being biased at 6.2.2 above, are addressed at paragraphs 92 to 97 of the judgement and our conclusions are at

paragraph 98 of the judgement. We found that there were failures to address every aspect of what was a long and detailed grievance, but that there was no evidence that the process was other than fair and independent. We concluded that the cause or grounds of any inaccuracies was not bias on the part of Mrs Newton.

22. The third and fourth victimisation claims are in respect of the Respondents failure to make reasonable adjustments during the restructuring process.
23. We have made findings of fact and drawn conclusions that there were reasonable adjustments that could and should have been made to the FVTL role. These are set out at paragraph 275-278.
24. We also concluded at paragraph 279, that the refusal to make the adjustment was unfavourable treatment and that it arose because of a lack of clarity of the roles and also because of the misunderstanding that both Respondent managers had of the Claimants disability. We concluded that there was no justification for the Respondent failing to make the necessary adjustment, see paragraph 279 -280.
25. Our conclusion of whether the failure to make reasonable adjustments or failure to discuss them with the Claimant was anything to do with him having raised a grievance previously is set out at paragraph 281. We concluded that it was not any thing to do with him having raised a grievance about discrimination, but that the failures arose because they had focussed on the wrong matters when carrying out the restructure and subsequent trial periods.
26. It is these decisions and conclusions that we have been asked to reconsider.

**The legal provisions – the process of reconsideration**

27. Regulation 70 of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 states that the Tribunal may, either on its own initiative or on the application of the party, reconsider any judgement 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.
28. Regulation 71 sets out the process for the application and states as follows..... *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 was sent and shall state set out why reconsideration of the original decision necessary*
29. Regulation 72 requires that the Tribunal consider whether or not there is *any reasonable prospect of the original decision being varied or revoked*. If we consider that there is no reasonable prospect of that happening, then the application is refused and the parties so informed.
30. It is only if we consider that there is some reasonable prospect of the original decision being varied or revoked that the tribunal sends a notice to the parties in response to the application, seeking the views of the other party , in this case the Respondent, on the application and asking whether the application for reconsideration can be determined on the papers and without a hearing.
31. The Claimant has made a valid application and the first stage, which the tribunal has copied to the respondent. It is therefore for the Judge and in this case, the panel

members, to consider whether or not there are any reasonable prospects of our judgement in respect of victimisation being reconsidered on any of the 16 grounds set out by the Claimant.

**The Claimants grounds of application for a reconsideration**

31.1. The first point the Claimant makes is that he was not able to make these points verbally and that he should have asked for an adjournment so that he could make written submissions. We all agree that detailed and clear submissions which he has now provided are the submissions he would have wanted to make about victimisation. However we are also aware that he has made them after having received and with the benefit of our judgment.

31.2. In some parts, the criticism made is, on a fair reading, that the evidence was not taken into account when we reached our judgment.

31.3. In general terms we observe that we were referred to a large number of documents by the Claimant in his witness statement, and we read them. Many but not all formed the basis of the claimants cross examination.

31.4. In our judgment we have addressed the principle parts of evidence which supports our conclusions. This does not mean that we did not consider other evidence. We did, but we have not referred to each and every piece of evidence considered as it would not have been proportionate to do so.

31.5. If we had concluded that there was any reasonable prospect that any of the claimants submissions individually, or taken together might have any



reasonable prospect of us varying or revoking the original decision, we would have taken the next steps in a reconsideration, on the grounds that it would be in the interests of justice to do so. We did not consider, in light of the current submission, that it was in the interests of justice, or proportionate at this stage, to reconsider, and ask the respondent to incur additional costs at this stage, unless we were satisfied that there was a reasonable prospect of variation or revocation.

**Issue 1**

31.6. The first criticism is in respect of bias in the report of Mrs Newton. The claimant alleged that certain witnesses were not interviewed as part of his 2018 grievance and this supported the allegation that Mrs Newton had been biased. He says that JM, the farm manager should have been interviewed. He would have said to us, that that Mrs Newtons evidence to the ET was that had she known that JM was the farm manager, that she would have been interviewed. He says, she did know this because she was told this by other witnesses to the investigation in 2018.

31.7. We reviewed the evidence we had had before us and all agreed that what Mrs Newton had said in evidence when questioned, was that she had not needed to interview JM, because she had all the information she needed from others.

The allegation that Mrs Newton was lying about her reasons for not interviewing JM, if they had been made in closing, would not, according to the notes of evidence we have, have been supported, and therefore the conclusion that the claimant invites us to draw, that this was evidence of bias, would not succeed.

31.8. There is no reasonable prospect that of a variation or revocation of the conclusions on the basis of this submission. The fact that he had not put this in writing does not made any difference to our determination.

**Issue 2**

31.9. The second matter is a submission that C Foote was fully aware of the Claimants disability at the time that the second restructure was being planned, because he says that there was evidence she had looked at the OH report when the first restructure took place.

31.10. He suggests that she denies that he was disabled, because he had brought his grievance in 2018.

31.11. We have looked again at the issue we were determining and asked whether or not this submission would have affected it. We all agree that it would not have done so. Our findings are not that Carol Foote denied that the Claimant was disabled. Our findings are that Carol Foote and Derek Needham did not understand the implications of the Claimants disability on his ability to do the job. Even if it was right that Carol Foote had read the OH report in the past, the facts we found led us to conclude that she did not understand the Claimant's disability or its impact on the Claimant. Our conclusion was that it was this that was the cause of the failure to make reasonable adjustments, not the fact of the grievance in 2018, and we all agree that there is no reasonable prospect of variation or revocation of the conclusion on based on this submission , alone or with other submission.

**Issue three**

31.12. The Claimant seems to assert that J Newton failed to acknowledge that the Claimant was disabled when she wrote her report and that this failure was an act

of bias. This is a new allegation, but could be a fact to be relied upon when considering whether the claimant had been subject to detriment, and or whether the burden of proof in the victimisation claim had shifted.

31.13. We have therefore taken this as being a submission which is part of the general allegation of bias. However, we all agree that Janet Newton was not asked in cross examination why she had failed to state in her report that the Claimant was disabled, and it was not suggested to her that it was because the Claimant had raised a grievance about discrimination. Whilst it may have been evidence which might support a finding of bias, and therefore that the bias was because the Claimant had filed a grievance about disability, we all agree that this submission would not have made any difference. The reason is that we accepted that the investigation was not perfect, but that Mrs Newton had done her best to carry out a full investigation into a lengthy and complex complaint. She was aware that the claimant was suffering with a mental health condition, and this was the background to her investigation.

31.14. Even if Mrs Newton had not specifically stated that the Claimant was disabled, this would not have made any difference, in the light of all the other evidence before us, to our conclusion that she was not biased. We all agree that there is no reasonable prospect that we would vary or revoke our conclusion that her approach was fair, and that any errors were not, on the evidence we had, anything to do with the fact that the claimant had done a protected act.

**Issue 4**

31.15. The Claimant suggests that there was bias, and that this is supported by correspondence from Janet Newton using the charity's letterhead. The Claimant

says that he pointed this out to Mr McDevit, counsel for the Respondent. We had the evidence in front of us and we considered this. The question for us is, is there any reasonable prospect of us revoking or varying our conclusions that Janet Newton was not biased, on the basis of the submission that a letter had been written on the charities headed paper, and we all agree that there is not.

**Item 5**

31.16. The Claimant refers to the way that other people were spoken to about disability during the course of the restructuring. This was not a matter that was ever before us as part of the Claimants claim or as part of his evidence to support his claim. He made no mention of this in his questioning of the Respondent witnesses.

31.17. Whilst treatment of others may have been relevant to a determination of the claim in general, we do not consider that this assertion by the claimant would have made any difference to our conclusions on victimisation. We all agreed that the claimant had been discriminated against, but we could find no causal link, between the grievance in 2018 and the way that the claimant was treated in the restructuring, and this submission does not provide it.

31.18. Further an assertion by the Claimant of different treatment without evidence in support, would not have been a matter we could take into account and would have had no effect on our conclusions.

**Item 6**

31.19. The Claimant states that he was not treated fairly in the restructure, despite the Respondent asserting in its paperwork that it would treat people fairly. This submission is one which underpins the Claimants claims. We considered the claims of discrimination, and bore in mind that unfairness alone is not the same

as discrimination. Whilst much of what the claimant says has some validity, we took into account concerns about fairness and this was part of the reason for our conclusion on discrimination.

31.20. There is no causal link proven between the 2018 grievance and the treatment of the claimant by Mr Needham and Mrs Foote, and this submission makes no difference to that conclusion.

31.21. There is no prospect of us varying or revoking our conclusions on this basis.

**Issue 7**

31.22. The Claimants point 7 is a submission about a lack of fairness in the appointment of Janet Newton to investigate his 2018 grievance. We have addressed the questions of fairness as part of our determination about victimisation. There is no new matter set out in these submissions and we all agree that there is no prospect of us varying or revoking our conclusions on this basis.

**Issue 8**

31.23. The Claimant submits that both Carol Foote and Derek Needham read his grievance prior to their interviews. He asserts that Janet Newton did not ensure that he was treated equally by giving him access to their witness statements and this was bias. This is not something referred to in the Claimants own statement, and the Respondent witnesses were not questioned about this. This submission refers to matters which were not before us, and could not have influenced our decision making. We all agree that there is no prospect of us varying or revoking our conclusions on this basis

**Issue 9**

31.24. The Claimant submits that Derek Needham or Carol Foote appear to have leaked information about the Claimant's diary to other staff members and he says that this constituted victimisation, and that Janet Newton did not attempt to enquire why his evidence had been leaked. This is a new allegation, or a statement of a new point of evidence that is not in the Claimants witness evidence and is not something that any of the Respondent witnesses were asked questions about. This was not something that the Claimant has identified as being an issue of fairness in evidence before the Employment Tribunal. The written submission is not an opportunity for new matters to be raised, and this matter would not have altered our fact finding for that reason. We all agree that there is no prospect of us varying or revoking our conclusions on this basis

**Issue 10**

31.25. Paragraph 10 is a submission about the Claimants diary. The Claimant submits that Derek Needham gave evidence to the ET that he had received complaints about the Claimant keeping a diary. He submits that this must mean that DN had leaked the fact of his keeping a dairy to other staff, and that this was victimisation.

31.26. This is, we think, a new allegation about DN, or a submission about facts which may be relevant to a finding of victimisation. We remind ourselves that the two allegations of victimisation against DN are first, that he lied in the initial investigation into the 2018 grievance, and secondly that his treatment of the Claimant in the second reorganisation was victimisation on grounds of the 2018 grievance.

31.27. The submission about the diary is a criticism of the behaviour of DN in 2018. The Claimant invites us to find that the only explanation is that DN leaked the diaries to staff. There was no evidential basis on which we could have made such a finding as DN had not been asked about this and the Claimant does not refer to it in his witness statement, although he does make reference to his diary entries and does refer to Derek having them and does set out his concerns about that.

31.28. If this is a submission that the act of DN is a standalone act of victimisation, it is a new allegation which was not before us for consideration. It was not an issue in the case and any written submission would not have altered our finding of facts or our determinations in respect of victimisation. If it is put forward as evidence to support the acts of victimisation, we all agree it would have made no difference. We all agree that there is no prospect of us varying or revoking our conclusions on this basis

**Issue 11**

31.29. At .11 the Claimant challenges the evidence of Derek Newton in respect of an assertion by Derek Needham, saying that he had made medical appointments for the Claimant. The Claimant did not challenge this in questioning Mr Needham, and his application for reconsideration is not made on the basis that he was unable to cross-examine or question witnesses, but that he was unable to make full submissions. If the evidence was not challenged, we would not have been able to make any findings of fact in respect of this matter, and therefore it would not have made any difference to our findings and conclusions.

**Issue 12**

31.30. Paragraph 12 is a criticism of the evidence given, and is the sort of matter and criticism of facts that may well have been included in written submissions. The question is therefore whether these submissions have a reasonable prospect of leading us to reconsider our judgement. We have considered the matters set out and do not consider that any of them would have altered our findings of fact or the conclusions which we drew in respect of victimisation.

31.31. The criticisms of Derek Needham and the suggestion that he was misleading the tribunal were not questions or challenges out to Mr Needham. We all agree that the submissions, which were not canvassed in cross examination would not have altered our fact finding or conclusions.

**Issue 13**

31.32. At paragraph 13. The Claimant asserts that minutes of the meeting were falsified, and that this is evidence because Mr Needham was not at the meeting, but is recorded as having been present. This is new evidence from the Claimant, but it is a matter which could have been raised in cross examination and questioning of Mr Needham. Again, the Claimant does not ask for reconsideration on the basis that he was not able to ask questions. We all agree that this submission would have made no difference to our fact finding or conclusions. There is no prospect of use reconsidering our decision on this basis.

**Issue 14**

31.33. Paragraph 14 is a criticism of the contents of a letter written by DN to Dr Browne in 2018. The Claimant had every opportunity to raise this in his questions to Mr Needham, but did not do so. He had the documents in advance, and he had put together a supplementary bundle of his own additional documents. His



application for reconsideration is made on the grounds that he did not have full opportunity to make submission in writing, not that there is new and different evidence which he was unable to put forward. Reconsideration is not an opportunity for the Claimant to have a second go at challenging the respondents evidence, or of giving his own evidence , where no challenge has been raised in the course of the hearing.

**Issue 15**

31.34. Paragraph 15 is a criticism of Mr Needham, and a suggestion that Mr Needham sought to conceal matters from the investigator in 2018. This is a new point, not raised in evidence before us, but is a fair submission point to make. It is a point that the claimant could have made. However, the claimant had the documents and could have asked Mr Needham about this, or made the point in his own witness statement, and could have pointed to documents or events that he thought supported his submission. He did point to documents and events which he said pointed towards Mr Needham having lied to the investigator. We rejected those arguments, and concluded that Mr Needham had done his best, albeit that he had made some ill-advised and offensive remarks, and had been wrong about some matters.

31.35. If it had been raised in written submission, we could not have made any additional or different findings of fact, on the basis of the Claimants assertions alone. Therefore, there is no prospect at all of us varying or revoking our conclusions on this basis.

**Issue 16**

31.36. The Claimants submission is about the time sheets in the bundle. He is critical about the disclosure provided to him by the Respondent. The point is that part of the Claimants grievance in 2018 was about the allocation of overtime, and he had wanted the overtime sheets. He says that Carol Foote said the overtime sheets were in the bundle. He says that she was wrong about this. However, he did not challenge her or raise this issue with the tribunal. He had the evidence in his own supplementary bundle and could have made this point at the time. The Claimant says this is a continuing act of discrimination by victimisation.

31.37. Firstly, we note that this submission, if it had been made, would not have assisted in determining whether or not Carol Foote had lied to the investigation. The issue is about the time sheets in the bundle and whether they were the ones relevant to an issue in the grievance. This is not the same question. We do not see how this piece of information, if flagged up to us would have made any difference to our conclusion that CF had not lied, but had made mistakes, and that the fact of the grievance was not the grounds or cause of her failures and actions when carrying out the restructure later in the chronology.

31.38. On that basis, there is no reasonable prospect of the conclusions being varied or revoked on this basis.

32. In conclusion , we have carefully considered the matters that the Claimant says he would have put into written submissions and we have considered what effect they would probably have had on our fact finding and the conclusions we drew.

33. We all agree that none of the matters set out would have made any difference to our fact finding, or in our consideration of the grounds of treatment of the claimant, or on our conclusions in respect of victimisation . Part of the reason for this is that in respect of Carol Foote, Derek Needham, we made findings that their failures and their actions and omissions, which we found to be disability discrimination were caused by other factors .
34. Whilst all tht is required for a victimisation claim to succeed is that the protected act was part of the cause of the treatment, we found no facts from which we could have concluded that any detriment was on grounds of the protected act. We did not consider that the fact that the Claimant had brought a grievance in 2018 about disability discrimination had any impact at all on the subsequent treatment of him by Derek Needham or Carol Foote . None of the information that the Claimant has subsequently provided would make any difference to any of those conclusions, and therefore there is no reasonable prospect of the decision about victimisation in any respect, being varied or revoked.
35. We did make findings that the Claimant was discriminated against and we gave detailed reasons why we made those findings. Part of our reasoning was that both Derek Needham and Carol Foote, though perhaps well-intentioned, had not understood the impact of the Claimants disability on him and had failed to take the necessary steps to gain advice or assistance from other sources.
36. We are grateful to the Claimant for taking the time to set out in detail in writing his thoughts and submissions and hope that he will accept that we have now looked carefully at his submissions when determining that there are no grounds for reconsidering our judgement and therefore dismissing his application.

Employment Judge Rayner  
Date: 24 February 2022

Judgment sent to the parties: 3 March 2022

FOR THE TRIBUNAL OFFICE