



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Grzegorz Wiszniowski

**Respondent:** County Durham and Darlington NHS Foundation Trust

**Heard at:** By CVP (in chambers)      **On:** 21 March 2022

**Before:** Employment Judge Beever  
Ms S Don  
Mr K Smith

## **RECONSIDERATION JUDGMENT**

The claimant's application for reconsideration of the judgment of the tribunal sent to the parties on 22 September 2021 is refused and is dismissed

## **REASONS**

1. By an ET1 presented on 22 July 2020 the claimant brought claims for race discrimination and for being subjected to detriment for making protected disclosures. The claimant later withdrew his claim of race discrimination which was subsequently dismissed by a judgment of the tribunal on 25 September 2020.
2. The tribunal held a liability hearing by CVP on 1-3 September 2021 and in a written decision sent to the parties on 22 September 2021 dismissed the claimant's claims.

### **The Application to Reconsider**

3. The claimant applied by email dated 6 October 2021 for a reconsideration of the decision. The application for reconsideration was as follows: "in relation to "Was the claimant subjected to a detriment – the decision not to re-engage in contract discussions – on the ground that he had made a Protected Disclosure?". The

application is in respect of part only of the decision of the tribunal. The claimant contends that reconsideration is “necessary in the interests of justice to do so”.

4. Pursuant to rule 72 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the ET Rules”), the tribunal sought the parties’ views on whether the application can be determined without a hearing. The claimant sought a hearing; the respondent contended that no hearing was necessary. Following on from the parties’ responses, the tribunal considered that a hearing was not necessary in the interests of justice and provided the parties with an opportunity to make further written representations.
5. The tribunal received further written representations from both the claimant and the respondent on 18 November 2021 and has taken them fully into account in reaching its decision. The Panel met in Chambers on 21 March 2022 by CVP for its deliberations on the claimant’s application.

### The Law

6. Rule 70 of the ET rules provides that a tribunal may reconsider its judgement where it is necessary in the interests of justice to do so. On reconsideration, the decision may be confirmed, varied or revoked.
7. The tribunal is guided by the overriding objective to deal with cases “fairly and justly”, including ensuring that the parties are on an equal footing and dealing with cases which are consistent with common law principles of natural justice and fairness. HHJ Eady QC in Outasight VB Ltd v Brown [2015] ICR D11, said that rule 70 - “interests of justice” - provided the tribunal with a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. She held that the discretion must be exercised judicially, which meant, “having regard not only to the interests of the party seeking the review or consideration, 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 in litigation”.
8. In determining this application, the tribunal has also had regard to Fforde v Black EAT 68/80 and Newcastle Upon Tyne City Council v Marsden [2010] IRLR 743, on the basis for a reconsideration application. It has also had regard to the caselaw asserted by the claimant, including Fecitt, Jhuti and the University Hospital of North Tees & Hartlepool NHS Trust v Fairhall UKEAT/0150/20.

### The claimant’s application

9. The claimant’s application dated 6 October challenges the decision made by PBM not to re-engage in contract discussions with the claimant and the tribunal’s determination in relation to that decision.
10. In challenging PBM’s decision, the claimant’s application highlights his belief that there were institutional flaws arising from the failure of the respondent to provide

adequate training to deal with whistleblowing matters and the suggestion that PBM was in fact an innocent decision maker who was manipulated by others.

11. The challenge that the claimant faces in his application for reconsideration is that the tribunal had fully noted his arguments at the substantive hearing (for example at §105) that he had repeatedly complained of institutional failures. Further, that the claimant had consistently identified that the “protagonist” was PBM and that despite the claimant’s attempts in both in evidence and in submissions, the tribunal found, at §117, that the decision not to re-engage in contract discussions was made by PBM and it was also satisfied that (§117), “she had not been instructed or unduly influenced by another as to the decision she should take”.
12. The claimant had at the least a reasonable opportunity to maintain an assertion that PBM was manipulated by others. In fact, he did so, and the tribunal has then reached a finding (§117) in that regard which in short is a conclusion that she was not manipulated and that, perhaps just as in Fairhall, this is not a Jhuti situation.
13. The claimant argues in his written submissions (paragraph 59) that the information provided by PBM did not “stack up”. This is simply an attempt by the claimant to re-argue the point that her reasons for not wanting to re-engage the claimant were insubstantial. The claimant was entitled to and did make such arguments regarding PBM at the hearing and the claimant has not provided new evidence that the tribunal should take into account or any other reason that might lead the tribunal to the view that it would be in the interests of justice to reconsider its decision.
14. The tribunal was well aware of the claimant’s history of engagement with the respondent but the tribunal did reach a clear conclusion that the claimant had expressly said that he did not accept a contract extension (page [140] of the trial bundle) and that the investigation of the concerns that had been communicated by a senior police officer to PBM were a barrier to her re-engaging the claimant.
15. The claimant in his application places great reliance on an argument that the contract, after 9 years, had not come to a natural end. This does not represent a new argument or allegation and (even if it was to any extent) in any event it was a matter that the claimant had a reasonable opportunity to raise at the hearing. The tribunal firmly discounts any prospect that it misunderstood or overlooked matters because of the circumstance that the claimant’s first language is not English. As it expressly set out, at §3, it has no doubts that the claimant fully understood the proceedings. This does not provide the claimant with any realistic basis for persuading the tribunal that it would be in the interest of justice that the judgment should be reconsidered.
16. The tribunal had engaged with the claimant’s argument in relation to the ending of the contract. The tribunal rejected the claimant’s assertion that he had in fact agreed, conditionally or otherwise, to an extended contract. It found that he had not done so, for example, at §50. His reasoning was fully explored and outlined by the tribunal (§50). It is important again to note that the claimant had told the tribunal that he had been given advice (§50) to deal with the suspension in priority. That may well have been imperfect advice in hindsight but nevertheless the tribunal was fully

appraised of it and the claimant had a reasonable opportunity to persuade the tribunal of the significance and relevance of it.

17. The claimant in his application complains that the alleged misconduct was not investigated and that there was no evidence which would contradict the propriety of the claimant's actions. Again, though, this was a matter that the claimant raised with the tribunal and the tribunal dealt with, for example, concluding that (§57) that a senior police officer described a compromise of the safety and wellbeing of detainees and of putting staff in a compromising position. And see §123, where the tribunal reject the claimant's assertion that the police concerns were not genuine.
18. Furthermore, it was evidently fully understood by the tribunal that PBM had taken the concerns into account but that nevertheless there had been no investigation of those concerns as the tribunal accepted the evidence of PBM (after the claimant had fully cross examined her) that (i) there was nothing untoward in the editing of the concerns by the police officer, which itself amply rejected the claimant's contention that it had been "doctored" and that (ii) (§64) there was no investigation into the concerns raised by the police. In this respect also the tribunal is satisfied that the claimant had the opportunity to raise issues that he considered relevant to his claims and that he in fact did so in the course of the hearing.
19. The claimant in his application makes reference to the revalidation process for doctors. His suggestion that some form of reprisal occurred did not form part of his list of issues nor did it form a material part of his evidence to the tribunal. The tribunal will not reconsider its decision for the purpose of introducing a new alleged detriment which in any event occurred after the events under scrutiny in the claim.
20. The claimant's application does not seek to provide the tribunal with new evidence, let alone evidence that was not available to the claimant at the time of the substantive hearing. The tribunal is satisfied that the claimant fully understood that the tribunal was required to ask itself why the decision not to re-engage in contract discussions with the claimant was taken. The tribunal had indeed rejected the respondent's submission that the detriment should be restrictively interpreted. Thus, the tribunal accepted the claimant's submission and concluded that the detriment alleged extended not just to the expiry of the claimant's contract but also to the decision not to reengage in contract discussions.
21. The tribunal has taken a step back and reviewed again the submissions made by the claimant on 18 November 2021. From paragraph 29 onwards, the claimant suggests that the tribunal should review its decision. In each material respect, the tribunal determines that the claimant is not seeking to adduce a new matter or rely on new evidence or raise a matter that was not (or could not reasonably have been) raised at the hearing itself. The tribunal was well aware of the claimant's lengthy engagement with the respondent (paragraph 29). The tribunal understood the claimant's position regarding the termination of his contract with the respondent (paragraphs 30—47). The contract was a fixed term contract that had over the years been renewed. The claimant (unlike Dr Estemberg) expressly refused to agree to a renewal. Further, the respondent genuinely believed the contract to have come to an end. In any event, the tribunal understood (and both parties understood) that the key

question was not the ending of the existing contract but the detriment arising from the respondent's refusal to entertain an ongoing engagement. Secondly, the claimant's reference to "serious concerns" (paragraph 48-56) raises no new evidence or issues to determine. The tribunal took notice of the respondent's position that it had not investigated the concerns and had considered that the police had raised genuine concerns. The claimant at the hearing sought to persuade the tribunal that the concerns were not genuine and/or unmeritorious. This is not a new issue or new evidence. Thirdly, in paragraphs 57-65, the claimant submits that the tribunal should review the decision made by PBM but this is in reality little more than a repetition of concerns surrounding the ending of the existing contract and/or the merits of the police concerns. The reference made by the claimant to the respondent's letter of 1 May 2020 (paragraph 61) and the question of PBM's response (paragraph 62) is an attempt to unpick those matters which were already the subject of close cross-examination and analysis at the hearing itself.

22. The tribunal reminds itself that it has a broad discretion and in exercising that discretion it must balance the interests of the claimant, having regard to the substance of his application, and the interests of the respondent, having regard to the importance of finality of litigation.
23. The tribunal firmly discounts any realistic prospect that it misunderstood or overlooked matters because of the circumstance that the claimant's first language is not English. As it expressly set out, at §3, it has no doubts that the claimant fully understood the proceedings.
24. The tribunal notes that the claimant has raised no procedural error in the manner in which the proceedings were conducted or in the evidence that was adduced or failed to be adduced.
25. The tribunal concludes that the claimant has not adduced new evidence (nor any reason why such evidence was not available to him at the time of the hearing) for the purposes of his application to reconsider. The claimant's application for reconsideration amounts in substance to a further attempt to argue the points in his favour that might persuade a tribunal that the decision not to engage with the claimant in contract discussions was influenced by his protected disclosures.
26. The tribunal does not consider that it is in the interests of justice to reconsider the judgment in this matter.
27. In any event, were it minded to do so, the tribunal would confirm its judgment. On any fair reading of the detailed reasons, the tribunal fully understood the determination that it had to make, namely, was the claimant subjected to a detriment - the decision not to re-engage in contract discussions - on the ground that he had made a Protected Disclosure? The tribunal concluded that objectively the claimant did not accept the new contract (§110) and furthermore that the determining issue was not in fact the ending of the existing contract but whether the respondent would engage in ongoing contract discussions. The tribunal considers that it provided the claimant with reasons why it was satisfied that PDM made a decision that was in no

sense influenced by protected disclosures. §125 fairly reminded the claimant of the relevant question.

28. The claimant's application for reconsideration is dismissed.

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**EMPLOYMENT JUDGE BEEVER**

**JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON**

**22 March 2022**

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