EMPLOYMENT TRIBUNALS

Claimant: **Ms Sheila Moorcroft**

Respondent: **SHC Clemsfold Group Limited**

Heard at: London South (by Cloud Video Platform)
On: 21 March 2022

Before: Employment Judge Street
Dr S Chacko
Ms J Saunders

Representation
Claimant: Mr Henman, friend and lay representative
Respondent: Mr Cater, Peninsula

Judgment on reconsideration having been promulgated with oral reasons given on 21 March 2022, the following written Reasons are prepared at the request of the claimant.

The Application for Reconsideration

1. In brief summary, this application is primarily about the respondent's attempts to force the claimant's representative to stand down from representing her shortly before the final hearing of this claim.
2. The application made was for reconsideration of the remedy judgment promulgated on 30 July 2021. It was made by Mr Henman who has represented Mrs Moorcroft throughout this matter.
3. Mr Henman presents the application on the basis of harassment and victimisation which he describes as unambiguous impropriety, blackmail, interference with the due administration of justice and misleading the Tribunal. These include references to the exception that permits without prejudice documents to be admitted as evidence.
4. Essentially, it is an application for reconsideration based on harassment in the course of the proceedings, and an attempt to subvert the proceedings by securing the withdrawal of Mr Henman as the claimant's representative – which both say would have prevented her from proceeding – shortly before the final hearing. The

allegations are not against the respondent's representatives in these proceedings but by the respondent and their representatives in defamation proceedings brought by Mrs Parris. Mrs Parris is Mr Henman's wife.

5. The application was directed at securing an increased award for injury to feelings or aggravated damages, a further preparation time order and a penalty order against the respondent, plus potentially other additional penalties.
6. The application to reconsider the refusal by the Tribunal of a penalty order was withdrawn. The additional penalties proposed lay outside the jurisdiction of the Tribunal. The Tribunal therefore considered the grounds for reconsideration, and on finding them satisfied, varied the award by adding an award for aggravated damages but dismissing the application for a preparation time order.
7. There was also an application in respect of the Respondent's failure to disclose evidence. Difficulties over disclosure had been reflected in the earlier preparation time order and the Tribunal had had the central evidence required.

Evidence and Documents

8. The Tribunal had before them the amended application for reconsideration; Mr Henman's affidavit dated 13 August 2021 with exhibits; Mr Henman's further affidavit dated 17 September 2021; Mrs Moorcroft's witness statement and a bundle provided by Mr Henman of 45 pages. Mr Henman's first affidavit exhibits an index and the main documents relied on, running to 91 pages.
9. The Tribunal heard evidence from Mrs Moorcroft.
10. The Tribunal read the documents referred to. Page numbers below are to the exhibits to the affidavit, unless otherwise described.

Findings of Fact

11. The claimant, Mrs Moorcroft, was represented in the Employment Tribunal by Mr Henman, a lay representative and a friend of hers.
12. Mr Henman has represented other employees of the respondent against the respondent in the Employment Tribunal, including his wife, Mrs Parris.
13. Mrs Moorcroft's case was listed for the liability hearing on 27 April 2021 for four days. Another case against the respondent and where Mr Henman was the representative was due for final hearing, seven days being allocated, shortly before Mrs Moorcroft's final hearing.
14. Mrs Parris was engaged in separate litigation, as listed at para 6 of Mr Henman's affidavit. In particular, she was the claimant in a defamation claim made against this respondent and two others, represented by Messrs Mills and Reeve LLP. Mr Henman does not represent Mrs Parris in those proceedings: she is represented by IRH Solicitors in Horsham.
15. Mr Henman is not a party to those proceedings. Mrs Parris brought that claim and the respondents were Olan Ajayi, SHC Clemsford Group (the respondent in this case) and SHC Rapkyns Group (45).

16. Settlement proposals were made in the defamation case in correspondence endorsed "without prejudice". They included proposals that Mr Henman cease to represent the respondent's employees in the Employment Tribunal.
17. The first letter proposing that Mr Henman withdraw as representative in Mrs Moorcroft's case is dated 4 March 2021 (page 45). The proposal was that he cease his involvement with all current Employment Tribunal claims against the respondent and did not participate or assist in any future complaints, allegations or litigation brought by employees of SHC Clemsford Group Ltd. The copy seen by the Tribunal is substantially redacted but the terms relating to Mr Henman are not.
18. Included in the terms of the proposals is,

> "7…. There is a very real risk that anything other than a prompt settlement of this claim will lead to Ms Parris losing her home and/or her bankruptcy. Our clients, on the other hand, while they have no wish to be involved in this or any litigation, have the resources to fund it properly and to meet any awards made against them.
> 8 On the basis of the reality of the parties' positions, our clients are willing to put forward a further settlement proposal. …. The terms of the proposal are as follows:
> 8.1 *(redacted)*
> 8.2 The above payment will be in full and final settlement of and the parties/ Mr Henman will release all claims that the parties/Mr Henman may have against one another;
> 8.3 *(redacted)*
> 8.4 Mr Henman will withdraw any existing, and agree not to participate in any future, complaints or allegations against Mr Ajayi to third parties, including but not limited to his University, professional bodies and employers;
> 8.5 Mr Henman will withdraw from any existing, and agree not to participate or assist (whether directly or indirectly) in any future complaints, allegations or litigation brought by SHC employees;
> 8.6 *(redacted)*
> 8.7 *(redacted)"*

19. The proposal would be automatically withdrawn at 4 pm on 11 March 2021, if not accepted.
20. The letter is to IRH Solicitors, representing Mrs Parris. They were not acting for Mr Henman and no such letter went to Mr Henman.
21. IRH Solicitors replied on 8 March. They point out that terms set out at paragraphs 8.4 and &.5, lay outside of and were wider than this litigation (48). They confirm they are not acting for Mr Henman. He was aware of those paragraphs.
22. In a further without prejudice proposal from Mills and Reeve LLP dated 11 March 2021, paragraphs 8.4 and 8.5 above are repeated at paragraphs 5.4 and 5.5, with the addition of the following:

> "Please note that the inclusion of the terms at 5.4 and 5.5, and the inclusion of Mr Henman as a party to the agreement, is of the utmost importance to our clients. Achieving a clean break is a red line issue for our clients."

23. They proposed to join Mr Henman as a party.
24. IRH solicitors confirmed in response on 12 March 2021 that Mr Henman was not a party to this litigation and that they did not represent him.
25. On 16 March 2021, Mills and Reeve responded,

> 25.1.1. "Our clients' position is that Mr Henman must be joined as a party to the settlement agreement; otherwise there can be no deal." (54)

26. They go on,

> 26.1.1. "He is Ms Parris's husband and has been heavily involved in this claim and Ms Parris's 4 year campaign against our clients. He has been acting as her proxy in a number of situations."

27. Mr Henman was placed in a difficult position. He was faced with balancing his wife's interests as a litigant with the position of two other individuals for whom he had already undertaken representation in the Employment Tribunal, both of whom had final hearings within a few days or weeks – one on 29 March and the other on 27 April, both substantial cases. His wife's interests were also his own – it had been put to her that she might face bankruptcy or the loss of her home.
28. He spoke to Mrs Moorcroft. He did not show her the correspondence. He explained the dilemma, enough to alert her to the possibility that he would have to withdraw from representing her.
29. She was devastated and told him so. She relied heavily on Mr Henman. She did not feel able to handle the case on her own. She is not a confident user of technology and has limited access to computers. She has no experience of such proceedings. She felt out of her depth, faced with handling this case without assistance,

> "I would be unable to continue my employment tribunal claim on my own" (ws para 6).

30. We accept that. It is supported by our observation of her over the four days of the liability hearing.
31. As she explained further in her witness statement,

> "I have now tried to put in words how I felt in March and early April 2021 when Mr Henman told me that he may not be able to continue to represent me in my case. My first thought was sheer panic as I would not have had the knowledge and experience to do the employment tribunal on my own.

> I was also not in any financial position to employ a solicitor to assist me as all my savings had been exhausted…
> My partner and I are extremely vulnerable due to poor underlying health conditions due to my partner's emphysema and my ongoing cancer, anxiety and depression treatment. I became extremely distressed with these new circumstances that I faced and I was being badly affected even though I had nothing to do with any legal proceedings of Mr Henman's wife. Yet again I felt I was being made to suffer once more by the actions of my former employer….
> There was a lot of uncertainty for me during the several weeks following, when he was trying to work out whether he had to stop his representation of my claim or if he could resist the coercion he was facing. As a result of this lingering doubt, which was no fault of Mr Henman, my panic attacks, unhealthy eating habits and insomnia began to take a grip again at the thought of what might happen if I was left on my own to deal with my claim." (ws paras 7 – 9)

32. She described frequent panic attacks during this time, and an impending sense of doom. Her diet control is very important to the management of her health and her prospects for further surgery. She was unable to control her eating during these weeks of stress and anxiety.
33. As Mr Henman put it, if she had accepted that he could not represent her, it would have made things easier for him. But she was at a loss as to how to manage without his help. She explains that she feared her health and well-being would be severely adversely affected if she had to face or conclude the tribunal proceedings on her own. It would also leave her in financial difficulties.
34. On 19 March 2021, Mr Henman wrote to the Employment Tribunal in this case, 2304931/2019, on behalf of Mrs Moorcroft. He headed the email "Reporting coercive third party impermissible behaviour against a lay representative". He complained of an interference with justice and unambiguous impropriety. He attached a report citing the proposals made on 11 March, and pointing out that he was currently representing three individuals in claims before the Tribunal who would be affected by a requirement that he withdraw. The first such hearing was listed to begin on 29 March, for 7 days. He spoke of irreparable prejudice to Mrs Moorcroft's claim and that of the other employees he was representing - "The Claimants are now scared witless by the thought of being unrepresented and doing it on their own" - and equally of the "massive implications for his wife if he failed to withdraw".
35. His email and report was not copied to those representing the respondent, SHC Clemsfold Group Ltd, on the express basis that Mr Henman feared retribution against his wife (57). We accept that that was his reason.
36. That email and report to the Tribunal received no response. It was put on the Tribunal file. It was not referred to a Judge.
37. IRH Solicitors responded to Mills and Reeve LLP on 22 March 2021 (60) asking that the paragraph relating to Mr Henman be amended to permit him to remain the representative in current Employment Tribunal proceedings, there being two

coming to hearing in April 2021, including Mrs Moorcroft's. That, they said, was to avoid interference with the administration of justice in those claims. They referred to section 6 of the Employment Tribunals Act 1996 conferring the right to a representative of the claimant's choice..

38. A draft agreement was put forward by Mills and Reeve on 12 April 2021, which authorised Mr Henman to continue to represent Mrs Moorcroft "up to and including the final hearing but not in any consequential hearings for example concerning the handing down of a judgment or dealing with costs) or subsequent appeals)." (The punctuation is as set out) (71). The draft barred either Mr Henman or Mrs Parris from representing any other employee of the SHC Group or any "Related Parties" in any actions, claims, demands, complaints or allegations. It therefore barred Mr Henman from any further involvement as a lay representative of past or current employees in the Employment Tribunal. By this time, one of the three claims in which Mr Henman was representing had concluded and judgment was awaited. The bar on his further involvement in that case was not lifted.

39. Mr Henman decided that he would continue to represent Mrs Moorcroft. It was his decision that he would not bring the matter to the knowledge of the Tribunal, not having heard any response from his application of 19 March, until after the proceedings had concluded, but that he would then do so. Mrs Moorcroft agreed that at that stage, she would support him. Mrs Moorcroft was immediately relieved by his decision and felt very much better.

40. Mr Henman feared that pursuing his application of 19 March, renewing it or making any other application based on the correspondence might lead to a postponement of the hearing, contrary to Mrs Moorcroft's interests. He understood the without prejudice heading on the correspondence to preclude any reference to it unless he could demonstrate that there had been impropriety and that should he pursue his application, it could lead to the panel recusing themselves and the case being relisted. In so believing, he relied on a previous instance from which he had understood that an application he had made which had rested on without prejudice correspondence had risked such consequences. He had felt compelled to withdraw that application.

41. His primary concern was the risk of prejudice to Mrs Moorcroft's case if he mentioned the pressure he was under.

42. The hearing in this case progressed remotely. The Tribunal Judge did not have access to the file and the email and report were not included in the Tribunal bundle put together by the parties. Mr Henman did not mention it when the hearing commenced. It was not referred to in this litigation prior to the reconsideration application.

43. The liability hearing in this case started on 27 April 2021. It concluded on 30 April 2021. Judgment was reserved. The claimant was successful and the remedy hearing took place on 12 July 2021.

44. Judgment on remedy was promulgated on 30 July 2021 (91). The award for injury to feelings was £17,750. The overall award for disability discrimination and unfair dismissal including grossing up was £80,865. A preparation time order of £1,173.67 was made.

45. The application for reconsideration was signed and submitted on 13 August 2021.
46. The application was amended on 17 September 2021.

Law

The Right to a Representative

47. By section 6(1) of the Employment Tribunals Act 1996,

> "A person may appear before an Employment Tribunal in person or be represented by –
> (a) Counsel or a solicitor
> (b) A representative of a trade union or an employer's association
> (c) Any other person whom he desires to represent him.

48. A claimant therefore has an unqualified statutory right to be represented by the person of his or her choice (Bache v Essex CC [2002] All ER 847).

Reconsideration

49. The Tribunal may, on its own initiative or on application 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 (Rule 70, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013). If revoked, it may be taken again.
50. The discretion conferred must be exercised judicially. It is wide but not boundless. It must be exercised judicially and with a view to the interests of both parties. In considering the application, the Tribunal must have regard to Rule 2, setting out the Overriding Objective, and to common law principles of natural justice and fairness.
51. In *Outasight VB Ltd v Brown 2015 ICR D11, EAT,* Her Honour Judge Eady QC*,* accepted that the wording "necessary in the interests of justice" in rule 70 allows employment tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances,

> "which means having regard not only to the interests of the party seeking the review or reconsideration, but also the 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."

52. There is an underlying public policy principle in all proceedings of a judicial nature that there should be finality in litigation (*Flint v Eastern Electricity Board [1975] ICR 395 at page 401)*. In *Stevenson v Golden Wonder Ltd 1977 IRLR 474,* Lord McDonald said of the previous review provisions that they were "not intended to

provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before". The weight and importance given to the finality of litigation, was endorsed in *Newcastle Upon Tyne City Council v Marsden [2010 ICR 743* and in the Court of Appeal in *Ministry of Justice v Burton [2016] EWCA Civ 714.*

Fresh evidence

53. The case of *Ladd v Marshall CA [1954] 1 WLR 1489* established a widely-applied test that to justify the reception of fresh evidence or a new trial, it had to be shown that the evidence could not have been obtained with reasonable diligence at the original trial; it would probably have had an important influence on the result, though it need not be decisive and must be apparently credible though not incontrovertible.
54. In *Ministry of Justice v Burton,* the principle is again approved, that "it will only be in the interests of justice to allow fresh evidence to be introduced on review if the well-known principles in *Ladd v Marshall* have been satisfied. The first of these is that the evidence could not have been obtained for the original hearing."
55. There are exceptions as to when evidence might be adduced albeit that the strict requirements *of Ladd v Marshall* might not be met. In *General Council of Shipping v Deria EAT [1984] 19 WLUK 80*, it was held that such circumstance or mitigating factors had to be related to the failure to bring the matter within the paragraph (of the previous rules relating to the availability of new evidence) – ie that the evidence had become available since the conclusion of the hearing provided that its existence could not have been reasonably known of or foreseen at the time of the hearing. It is not enough that the so-called new evidence would probably have won the day for the claimant or that an issue of widespread public importance was involved**.**
56. The *Outasight* case is authority that the same approach applies to the interests of justice test for reconsideration.
57. In *Outasight*, a further consideration that might be applicable to an exercise of discretion in the interests of justice could arise from the right to a fair hearing laid down by Article 6(1) of the European Convention of Human Rights, as incorporated into UK law by the Human Rights Act 1998. There might be circumstances where that might amount to an additional circumstance such as to mean that the interests of justice would require new evidence to be adduced in circumstances that might not otherwise strictly meet the requirements of *Ladd v Marshall*. The examples given there are perhaps where a party has been ambushed at the hearing, or an issue has arisen over disclosure. At paragraph 50, in a fuller discussion, Her Honour Judge Eady says,

> "As to what circumstances might lead an Employment Tribunal to allow an application to admit fresh evidence, that will inevitably be case-specific. It is of course, always dangerous to try to lay down any general principles when dealing with specific facts, particularly where – as here – one party is not represented and where the point was not fully argued below. That said, it might

be in the interests of justice to allow fresh evidence to be adduced where there is some additional factor or mitigating circumstance which meant that the evidence in question could not be obtained with reasonable diligence at an earlier stage (Deria). This might arise where there are issues as to whether there was a fair hearing below; perhaps where a party was genuinely ambushed by what too place or, as in Marsden, where circumstances meant that an adjournment was not allowed to a party when otherwise it would have been."

58. Addressed in evaluating the merits of that case were the question of whether the claimant had been denied a fair hearing.
59. Events occurring subsequent to a hearing may justify a reconsideration in the interests of justice, where those events undermine or falsify the basis of the Tribunal's reasoning.
60. In *Atef Hossaini v EDS Recruitment Ltd (t/a J and C Recruitment) and anor 2020 ICR 491,* the late submission of evidence showing that the translation of "babaji" was capable of being offensive on the basis of race or religion. That had been omitted in the document before the Tribunal. That evidence was held to be admissible; the claimant cannot be expected to investigate every document relied on.
61. Usually, evidence must be produced before the end of the case, and it will not be permitted as a ground for review if it is later relied on but could have been presented in time.
62. In every case, the applicant needs to explain why the evidence was not produced beforehand and why it is now in the interests of justice to consider that evidence.
63. In addition to being a sufficient ground, the evidence must meet a threshold sufficient to show that the new evidence would have influenced the decision.

Without Prejudice Privilege

64. The general rule of the law of evidence is that all evidence relevant to an issue in proceedings is admissible and may be ordered to be disclosed.
65. The "without prejudice" privilege is itself part of the law of evidence and is an exception to that general rule. It prevents either party to negotiations genuinely aimed at resolving a dispute between them from giving evidence of those negotiations.
66. For the principle to apply there must be a dispute between the parties, though it is not necessary that litigation should have begun. The question is whether there is an attempt to compromise actual or impending litigation. That means that the parties must be conscious of at least the potential for litigation, even if neither side intends it as an outcome. The rule must therefore relate to correspondence that seeks to settle the particular dispute that has been raised.
67. The rule applies to exclude from evidence all negotiations genuinely aimed at settlement, whether oral or in writing. The underlying public policy is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiation may be used to their prejudice (*Rush & Tomkins Ltd v Greater London Council and Another [1989] 1AC 1280).*

68. Conduct inconsistent with the maintenance of the confidentiality which the privilege is intended to protect may give rise to implied waiver. However, waiver requires the agreement of both parties.
69. The privilege may be lost by a party who has abuse it by "unambiguous impropriety", that is where exclusion of the evidence would otherwise act as a cloack for perjury, blackmail or similar impropriety (*Unilever plc v Procter and Gamble Co 2000 1 WLR 2436).*
70. Unambiguous impropriety means "something far more than being disadvantaged by the exclusion of evidence" (*Portnykh v Nomura International plc [2014] IRLR 251 EAT).* It requires something amounting to fraud, blackmail or perjury *Brodie v Ward t/a First Steps Nursery EAT [2007] WL4947475.* Knox J in *Independent Research SERvices v Catterall [1933] ICR1* referred a threat to persist with dishonest proceedings or "other more extreme examples are given of threats in the nature of blackmail and other wholly undesirable and indeed criminal activities which cannot be indulged in cloaked under the privilege of without prejudice".
71. In *Pedropillai v PricewaterhouseCoopers LLP ET case no 230068/10,* a tribunal found it was an unambiguous act of victimisation for the claimant to be told in a meeting that he would not be able to continue as a partner in the company if he continued with his race discrimination proceedings. They concluded he was threatened with expulsion of he pursued his claim. This was an act of victimisation that triggered the "unambiguous impropriety" exception. In contrast, pointing out that there may be a problem with HMRC and the use of dividend is not victimisation.
72. Mr Henman refers us to to *Ferster v Ferster, Ferster and Interactive Technology Co Ltd CA [2016] EWCA Civ 717* where the impropriety arose from the nature of the threats themselves. A without prejudice offer with regard to the sale of shares on the basis that the vendors knew of alleged wrongdoing that could lead to the company taking committal proceedings against the other party had amounted to blackmail, and that was unambiguous impropriety.
73. Mr Henman provided other cases which need not be more fully referred to here, including *Tchenguiz and Rawlinson and Hunter Trustees S A v Thornton UK LLP and others High Court [2017] EWHC 310; Grosvenor Chemicals Ltd, Whyte Chemicals Ltd and Melvyn Whyte v UPL Europe Ltd and others [2017]; ECU Group plc v HSBC High Court [2018_ EWHC 3045.*

Aggravated Damages

74. Aggravated damages may be awarded in particularly serious cases of discrimination. They are compensatory only and should not be awarded to punish the respondent.
75. They are seen as part of injury to feelings and Tribunals should avoid compensating claimants under both heads for the same loss.
76. In *HM Prison Service v Salmon 2001 IRLR 425 EAT* it is said that,

> "Aggravated damages are awarded only on the basis and to the extent that the aggravating features have increased the impact of the discriminatory act or conduct on the applicant and thus the injury to his or her feelings".

77. In general, they are only appropriate in cases where the respondent has behaved in a high-handed, malicious, insulting or oppressive manner in committing the discriminatory act *(Alexander v Home Office 1988 CA ICR 685).*
78. In *Zaiwalla and Co and anor v Walia 2002* IRLR 697 EAT, it was said that damages are available for the manner of conducting the tribunal proceedings. In that case it was the inappropriate and monumental effort put into the defence of the proceedings in a manner deliberately designed to be intimidatory and cause the maximum unease and distress to the claimant.
79. There must be some causal link between the conduct and the damage suffered: high-handed conduct on its own is not enough to lead to an award of aggravated damages. The ultimate question according to the then President of the EAT, Mr Justice Underhill, in Commissioner of Police of the *Metropolis v Shaw [2012] ICR 464 EAT* is whether the overall award is proportionate to the totality of the claimant's suffering. It is an aspect of injury to feelings reflecting the making more serious the injury to feelings by some additional element which would fall into one of three categories

    (a) the manner in which the wrong was committed, that is, where it is done in an exceptionally upsetting way – high-handed, malicious, insulting or oppressive way

    (b) bad motive, provided that the claimant was aware of it, for example conduct based on, prejudice, animosity spite or vindictiveness is likely to cause more distress

    (c) Subsequent conduct, such as where the defence is conducted at a trial in an unnecessarily offensive manner, a serious complaint is not taken seriously, where there is a failure to apologise, or the respondent has defended in a way that is wholly inappropriate and intimidatory.

80. Tribunals must be wary of focusing on the quality of the respondent's conduct – that is, assuming that the more heinous the conduct, the more devastating its impact on the claimant. Tribunals must not lose sight of the ultimate purpose of aggravated damages, which is to compensate for the additional distress caused to the claimant by the aggravating features in question.
81. The award overall in respect of non-pecuniary loss must be fair and proportionate (Shaw, above)

Reasons

The application and issues raised

82. The initial application was amended on 17 September 2021. No objection was raised to the Tribunal considering the amended application in place of the initial application.

83. The case had been listed for consideration of whether there were grounds for reconsideration and if so whether the judgment should be confirmed, varied or revoked. There had been no agreed identification of issues.
84. The application was for reconsideration on the basis of the without prejudice correspondence now referred to and in respect of failures to disclose.
85. The following key issues arose from consideration of the application:

    85.1. Whether further evidence now available had been withheld by the Respondent and would have affected the outcome.
    85.2. Whether the correspondence relied on, between Mills and Reeve LLP and IHR solicitors arising in the course of settlement negotiations between the parties to the defamation case was properly to be regarded as privileged in this context, being headed “without prejudice”.
    85.3. Whether it was admissible as evidence in this case.
    85.4. This was not new evidence, although it had not been brought to the attention of the Tribunal; it pre-dated the final hearings and had throughout been in the possession of the Claimant’s representative. Did the failure to draw the Tribunal’s attention to the evidence of the misconduct complained of during the proceedings and prior to the Remedy judgment being given, mean that it should not be considered?
    85.5. If there were grounds to reconsider the remedy judgment, should it be varied and if so in what terms, or revoked?
86. Those issues were outlined at the start of the hearing and agreed.

Fresh evidence

Issue: Whether further evidence now available had been withheld by the Respondent and would have affected the outcome.

87. The evidence now relied on was material relating to a different nurse’s disciplinary hearing in respect of an incident in August 2018. The respondent had been very slow to disclose the statutory nursing notes to Mrs Moorcroft in respect of that incident, in which Mrs Moorcroft had herself been disciplined. The relevance to the Tribunal was the handling of the matter once Mrs Moorcroft saw those notes and knew that the disciplinary action taken had been based on a simple misconception.
88. The Respondent did not disclose to the Claimant or the Tribunal the record of investigation and disciplinary action against another nurse on duty at the time of the incident for which Mrs Moorcroft was wrongly disciplined. The reason given was that the documents were not available, having been searched for, or were irrelevant.
89. That evidence had come into the Claimant’s and Mr Henman’s hands in August 2021, from the other nurse herself. They had been presented by the Respondent in January 2020 to the NMC.
90. The Tribunal had seen the statutory nursing notes and had made findings on the basis of those notes, including that the disciplinary action taken against Mrs Moorcroft had inexplicably not been based on the statutory nursing notes and that

the statutory nursing notes showed that Mrs Moorcroft had not made the errors for which she was disciplined.

91. The Tribunal had not been directly concerned with the disciplinary proceedings after the August 2018 incident, but with Mrs Moorcroft's later grievance, lodged on 16 May 2019, by which time she had gained access to the statutory nursing notes and was in a position to demonstrate that the findings against her were misconceived.
92. The Tribunal had also been in a position to make findings that the other nurse had admitted medication errors and that Mrs Moorcroft had not made such errors.
93. The evidence now presented showed that the documents were available for disclosure by the Respondent and were relevant and disclosable. They should have been disclosed.
94. The evidence did not show that the Tribunal would have reached a different conclusion or would have made a different award, if the documents had been properly disclosed. These documents did not support a reconsideration of the award.
95. There had already been a preparation time order made in respect of the Respondent's known failures to disclose.

The Without Prejudice Correspondence

Issues: Whether the correspondence relied on, between Mills and Reeve LLP and IHR solicitors arising in the course of settlement negotiations between the parties to the defamation case was properly to be regarded as privileged in this context, being headed "without prejudice".

Whether it was admissible as evidence in this case.

96. Very shortly before the final hearing of this case, Mr Henman was put under heavy pressure to withdraw from representing Mrs Moorcroft.
97. That was not done in correspondence to him. It was done in correspondence to his wife's solicitors.
98. It was done in correspondence endorsed as "without prejudice".
99. This is what Mr Henman said, to explain his course of action:

> *"My understanding as that because it was dealing with without prejudice documents, I could not present that to a third party, until there was clarification that blackmail was an exception to the without prejudice communication."*

100. He was asked,

> *Why did you not decide to bring it to the tribunal so we could decide what to do?*

101. His reply was,

> *It is a complex area of law. Risking contaminating the hearing when you don't know the outcome.*

I have already faced a trial where use of WP communications had adverse consequences.
I was concerned about losing Ms Moorcroft's trial, already delayed, the risk of the hearing being vacated, a concern for her."

102. His understanding was that that correspondence could not, in the normal course of things be disclosed or referred to. He had conducted what research he could – he is not a lawyer and has no access to a specialist library. His understanding was that to be able to disclose the correspondence or the pressure he was under required that he establish an exception to the protection given against disclosure of privileged documents. Even to embark on that jeopardised the hearing.
103. That was a reasonable understanding for a lay person.
104. He was faced with a very difficult dilemma. He risked prejudice to his wife if he continued with his representation, and of course potentially to himself. He incurred prejudice to Mrs Moorhouse if he withdrew from representing her at short notice.
105. Courageously, he did not withdraw.
106. He reported the matter to the tribunal. He did not copy it to the respondent's representatives in these proceedings, fearing retribution. He feared that even to explain the pressure he was under and the reasons behind it would prejudice his wife's or Mrs Moorcroft's position.
107. That application, the email of 19 March, with associated documents, was put on the file. It was not referred to a judge. Whether that was due to staffing difficulties due to Covid-19, or because it was not copied to the respondent or for some other reason, no action was taken.
108. Mr Henman did not pursue it further.
109. He did not bring it to the attention of the tribunal at the first hearing.
110. He did not bring it to the attention of the tribunal dealing with remedy.
111. It was because the correspondence was marked without prejudice that he understood that there were obstacles in bringing it to the attention of the tribunal.
112. There was no dispute between him and the respondents in the case being negotiated: he was not a party to those proceedings, the correspondence was not with him.
113. It has been eventually been conceded – contrary to Mr Cater's initial contention - that there was no basis for without prejudice correspondence between the Respondent and Mr Henman – he was not party to any dispute with them to which privilege could attach.
114. It has also eventually been conceded that the correspondence was not without prejudice with regard to him and we so find.
115. Even were the correspondence privileged, Mrs Parris was required to disclose it to him. The undertakings in respect of him could not be given without his knowledge and consent. Both parties must have consented to that disclosure. The respondents must thereby waived any privilege in respect of the conditions to be imposed on him.
116. In our judgment, the correspondence was not privileged in his hands.

117. As a lay person, understandably, he could not reach that view. He was confused about the true position. That made it much more difficult for him to bring it to the Tribunal's attention.
118. His only experience in relation to without prejudice correspondence led him to believe that if he alerted the Tribunal to the pressure he was under, there was a real risk to the hearing being delayed, at the very least.
119. For a non-lawyer, that was not an unreasonable confusion or belief.
120. We cannot see a basis on which the respondents could properly and genuinely believe the correspondence about the conditions he was asked to submit to to be privileged. Unlike Mrs Moorcroft, they had the benefit of legal advice.
121. We have to consider this from Mrs Moorcroft's point of view.
122. She is not well placed to bring a claim on her own account. We are satisfied that she has been very dependent on the assistance of Mr Henman as her representative.
123. Anyone would have been in difficulty, to have their representative withdraw shortly before the full hearing of a complex case.
124. For those who can pay for representation, arrangements can be made for a case to be transferred to a different representative, the disruption and disadvantage limited by the availability of experienced professional advocates.
125. There is no pool of lay representatives who can pick up a case at short notice. It is virtually certain that Mrs Moorcroft would have had to handle the case on her own without representation, or withdraw the claim. She has no experience of Tribunals, very limited understanding of the proceedings, limited access to the technology and had at no stage prepared on the basis that she would be representing herself. She says she was not equipped to do so and we accept that, having seen her during five days of hearings.
126. It is equally clear that that was the intended outcome. She was not an accidental casualty in a strategy targeted at Mr Henman. Her case, and his specific withdrawal from it, was one of the intended goals.
127. The condition was softened a little, to allow him to participate in the forthcoming liability hearing. His further involvement in any later hearing, which would include any costs hearing, reconsideration or appeal, was to be barred. He understood that even his participation on any remedy hearing would be precluded.
128. There is an absolute statutory right to choose your own representative in the Employment Tribunal section 6(1) of the Employment Tribunals Act
129. This was a deliberate and wrongful interference with that right. Mr Henman was being bullied to withdraw and Mrs Moorcroft was being intimidated.
130. On any measure, this is egregious behaviour, deliberately intimidating, likely to derail her preparation for the final hearing or to provoke her withdrawal of the claim.
131. In our judgment, it was also an attempt to interfere with Mrs Moorcroft's right to a fair hearing.
132. She secured a substantial success at the tribunal, with a high award; but the merits of the case are not the issue. There was an attempt to interfere with her right to the representative of her choice, at a point when Mr Henman's withdrawal might have forced her to give up the case, at the very least significantly undermining her

ability to prepare and present the case. That is unfair; an attempt to secure an unfair advantage.

133. What she may not have been aware of is that a late withdrawal could itself have been met by an application for costs against her – with potentially the same difficulty in that she did not have access to the correspondence requiring Mr Henman's withdrawal and the same difficulty in drawing correspondence marked without prejudice to the Tribunal's attention.

134. Mr Henman did not draw the situation to the Tribunal's attention, after his unsuccessful attempt to raise it on an ex parte basis. He gives no reason for that that is unrelated to her case. He acted with her best interests at heart.

135. By contrast, the respondent's attempted to conceal their misconduct, the inappropriate pressure put on Mr Henman to withdraw, under the veil of privilege, making it difficult for him to draw it to the attention of the tribunal. It was that which raised the possibility in his mind that if he even attempted to raise it the hearing, the hearing could not proceed as listed.

136. Applying the law to the facts, we accept the explanation for not bringing forward this evidence at the final hearings on liability and remedy. The evidence was available, but in circumstances in which Mr Henman genuinely believed that to refer to it would potentially prejudice Mrs Moorcroft, at the least risking a delay in the hearing, perhaps a fresh panel – if, for example, he referred to it, but was told that the correspondence and could not be considered. The inappropriate use of without prejudice correspondence created that misunderstanding.

137. We conclude that in this case, exceptionally, it is fair and just to allow this evidence to be adduced at this stage as the basis for reconsideration. This was an unfair attempt to interfere with Mrs Moorcroft's right to representation of her choice and to derail the preparation of her case, perhaps to force withdrawal. It was an interference with her right to a fair hearing. The attempt wrongfully to assert privilege is itself a reason why the attempt could not, as Mr Henman saw it, be brought to the attention of the Tribunal. This was, in our judgment, unambiguous impropriety, an attempt to force Mr Henman off the case.

138. In addition to being a sufficient ground, the evidence must meet a threshold sufficient to show that the new evidence would have influenced the decision.

139. The application relates to the award for aggravated damages, as an aspect of injury to feelings. The Tribunal had been asked to award aggravated damages, but the evidence before them had not merited such an award. Had this evidence been before the Tribunal, it would have influenced the decision. Faced with evidence that the respondent's conduct was inappropriate and intimidatory, the case for an award of aggravated damages would have been made out.

140. It is necessary in the interests of justice and having regard to the overriding objective to reconsider the judgment.

Reconsideration

141. The original award for injury to feelings was £17750

142. The conduct of the Respondent justifies a further award of aggravated damages of £4000.

143. Mr Henman continued to be under pressure to withdraw, the correspondence going on until September 2021. However, Mrs Moorcroft herself was relieved at his decision that he would continue with the case, and had that reassurance before the liability hearing in April.
144. While the period through which she was fearful of his withdrawal was short, she risked severe consequences: possibly the abandonment of the case concerning events from 2018, on a claim brought in November 2019, and in any event, as she saw it, her prospects of a fair hearing in which she was able properly to present her case and challenge that of the Respondent. She was threatened with not being able to cope with the case at all. She describes graphically the frequent panic attacks, sense of doom, the loss of sleep, and the effect on her eating. She suffered of course the anxiety that is normal prior to a long-awaited, contested hearing, but at this point, her anxiety and distress were acute. She was focused on whether she would have Mr Henman's help and what to do if she did not, rather than on preparation for the hearing.
145. We remind ourselves that the purpose of the award is not punitive but compensatory. This is however intimidatory and unfair behaviour and experienced as that.
146. It is that the period of her distress was relatively short, and that Mr Henman did not in fact withdraw, albeit faced with such pressure, that the award is no higher.
147. It is the injury to feelings element in the award that falls to be reconsidered. We add aggravated damages of £4000 to the previous award of £17,750 for injury to feelings.
148. We apply, without change, a 10% for ACAS uplift which makes the aggravated damages £4,400. While the Respondent's failure to follow fair procedures clearly merits an uplift, the same considerations apply as earlier: this is already a high award and a higher uplift is not just and equitable.
149. There are no grounds to reconsider the loss of earnings element in the previous award, which remains at £38,988.
150. Additional interest on the award is £741, from the date of the original discrimination. That is 768 days at 8%, the statutory rate.
151. The previous award was

Injury to feelings	17,750
Loss of earnings	38,988
Interest on discrimination	5,570
Unfair dismissal	5,210
Total	73,192

152. Adding the additional award of £4,400, additional interest, £741, the new total before grossing up is £78,333.

Grossing up

153. The total taxable award is that total figure £78,333 less £30,000, the exemption from tax for termination payments, less the claimant's personal allowance of £12500, and that gives a total taxable figure of £35,833 this year.
154. To find the sum that will leave £35,833 in the claimant's hands after tax, the following calculation produces the necessary taxable figure:

    35,833/80x100 = 44,791.

155. That is the figure that when taxed will leave a figure of £35,833. That means £8,958 (44,791 – 35,833) is the sum that must be added to the award to cover the tax due this year on the sum of £35,833, that the Claimant would not otherwise have paid.
156. Adding the additional sum required to provide for tax on the award in the claimant's hands, the new total after grossing up becomes £87,291.
157. The additional sum payable by the respondent as a result of this award is £6426.

Costs

158. There was an application for preparation time costs in respect of the reconsideration application including the time spent on the disclosure issues. It is not routine for there to be a costs award in the Employment Tribunal. There had been no conduct by the respondent in connection with this application relative to this application that fell within the criteria in the terms of Rule 76. A preparation time order had been made in the earlier remedy hearing based on the respondent's failures to disclose. Some additional material had been obtained in this case from the other nurse disciplined in 2018, material that was disclosable and should have been disclosed by the respondent. Having failed to disclose it, the respondent had provided it to the NMC. However, it did not advance the case for reconsideration. The Tribunal found no basis on which to make a further preparation time order.

Employment Judge Street

Date 20 April 2022