Case No: 2401934/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr I Efobi

Respondent: Royal Mail Group Limited (1)

Royal Mail plc (2)

UPON APPLICATION made by letter dated 6 October 2021, to reconsider the judgment dated 16 September 2021 under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing,

JUDGMENT

1. The judgment is varied as follows:

   a) Paragraphs 11 and 12 are varied so that any reference to 'Ms Rafferty' is changed to correct name of 'Ms Rossiter'.

2. In all other respects, the claimant's application for reconsideration is refused.

REASONS

Introduction

1. This application was made by the claimant on 6 October 2021 and where he requested that the Tribunal reconsider its judgment dated 16 September 2021.

2. The Tribunal accepted that the application would be heard and both parties agreed in writing that reconsideration could take place without a hearing being required, with the Tribunal considering the claimant's application and the respondent's reply.

3. The full Tribunal met in chambers on 10 February 2022 and considered the application and were able to reach a decision which is provided in this judgment and with reasons provided below.

Nature of the application

4. The claimant provided a lengthy list of submissions within his application, but they can be summarised under the following broad headings which are considered in turn below.

5. Although the claimant referred to the Tribunal failing to apply the correct law, it actually appeared to the Tribunal that the claimant was essentially making a number of submissions concerning his belief that specific matters were recorded incorrectly or that there was a failure to properly apply the overriding objective under Rule 2 of the Tribunals Rules of Procedure.

6. In this respect, the Tribunal found the application for reconsideration somewhat confusing and it was felt that it would be in the interests of justice to describe them under these broad headings to provide greater clarity.

The witness evidence of Mr Tysoe

7. The claimant made a number of references to case management orders made at preliminary hearings by Employment Judge Doyle on 9 April 2021 and Employment Judge Horne on 6 July 2020. It was felt that these did not restrict the Tribunal's discretion to deal with the relevant issues and matters, at the final hearing, and did not consider it necessary to investigate these preliminary hearings for the purpose of considering this application.

8. The claimant asserted that he had made an application to exclude the witness statement of Mr Robin Tysoe who was being called as a witness by the respondents. His concern related to 'without prejudice' communications which were attached to this statement, and he felt that this witness should not be permitted to give evidence as a consequence.

Paragraph 112 of the Amended Response

9. He also expressed concern about paragraph 112 of the amended response which he says contained incorrect assertions. He felt that this should have been mentioned in the Tribunal's judgment.

10. He also argued that he was not allowed to cross examine witnesses concerning the contents of the Amended Response.

11. Apparently in relation to this matter, the claimant referred to the case of ***Giny v SNA Transport Limited*** **UKEAT/0317/16/RN,** although it's relevance was not clear because this decision involved an appeal against the rejection of a claim because the name of the respondent on the ACAS early conciliation form was different to that on the ET1. The minor error test which he refers to involves the consideration by the Tribunal upon presentation of the claim, as to whether it has jurisdiction to accept the claim in accordance with Rule 12. This was not a matter considered by this Tribunal at the final hearing and while the claimant may have a wider principle in mind by referring to this case, the Tribunal was unable to determine its relevance from the submissions provided in his application for reconsideration.

The misnaming of Ms Rossiter and the refusal to recall her to be further cross examined

12. The claimant also expressed concern regarding references made within the judgment at paragraphs 11 and 12 to *'Ms Rafferty',* rather than *'Ms Rossiter'* and this error appears to relate to the Tribunal's refusal to allow the claimant to recall the respondent's witness Ms Rossiter, in order that she could be subjected to further cross examination by him. In this respect, he reminds the Tribunal of the overriding objective under Rule 2(a) and the need to ensure that the parties are on an equal footing and that as a litigant in person and it is contrary to the '*spirit'* of the Equal Treatment Bench Book.

The failure of the respondent to call Robert Fellows to give evidence

13. Although the claimant discusses a number of concerns regarding the judgment, they appear to mainly relate to a general unhappiness with the decision. However, he does raise the question of Robert Fellows not being called to give witness evidence and that this witness's evidence was key to the determination of his case.

The respondent's reply

14. Mr Peacock, on behalf of the respondent, felt that it was disproportionate to provide detailed submissions in reply to the application for reconsideration or to seek a reconsideration hearing in order that those submissions could be made orally to the Tribunal. Instead, he provided an email on 29 October 2021 which included a number of observations about the claimant's application, and which can be summarised below.

15. He reminded the Tribunal that under Rule 70, the claimant only has to show that it is 'in the interests of justice' for the Tribunal to reconsider its decision.

16. He argued that the application does not identify any error of law in relation to 'ground 1' of his application.

17. In relation to 'ground 2', he argued that *'this is no more than the Claimant disagreeing with the findings of the Tribunal. Whilst he may be unhappy as to the dismissal of each of the 30 allegations in the agreed List of Issues, that is not a proper ground for reconsideration.'*

18. He therefore attempted to identify the specific grounds within grounds 1 and 2 and provided a series of comments within the following headings.

<u>The failure to mention in the Judgment the 'application' made by the claimant at the beginning of the hearing to exclude the witness evidence of Robin Tysoe</u>

19. Mr Peacock reminded the Tribunal that Mr Tysoe was a witness for the Respondent and he was the manager who investigated the Claimant's complaint.

20. He acknowledged that annexed to Mr Tysoe's witness statement was an email from the claimant of 16 January 2020 with his *'Complaint Against Victimisation'*. He went on to note that the email was part of a chain that included a follow up email where the claimant had set out the terms of a *'pay off'* in response to Mr Tysoe's enquiry as to what he saw as a resolution.

21. He reminded the Tribunal that at the outset of the hearing, the claimant objected to the inclusion of what he considered a *'without prejudice'* email and that in response, the respondent agreed to remove that part of the email chain that included the *'pay off'* terms put forward by the claimant to Mr Tysoe.

22. Mr Peacock submitted that the respondent's position was that they failed to see how the inclusion of the full email chain had any relevance to the issues. However, they were willing to remove the offending email from the annex to the statement, at the beginning of the hearing and before evidence was heard, in order to resolve the Claimant's complaint about its inclusion.

23. Mr Peacock asserted that he was clear in his recollection that the claimant had indicated to the Tribunal that he was happy to proceed on this basis and he is therefore puzzled as to why this matter has been included as part of the reconsideration application.

<u>The rejection of the claimant's request for Ms Rossiter to be recalled to answer questions about paragraph 112 of the Amended Grounds of Resistance</u>

24. Mr Peacock reminded the Tribunal that paragraph 112 of the Respondent's Amended Grounds of Resistance says:

> 112. *The claimant was provided with an oral outcome to the road traffic accident investigation and was informed that there was no case to answer.*

25. He noted that the background to this paragraph was a Fact-Finding meeting on 16 January 2020 between the claimant and his line manager Ms Rossiter and the Claimant and went on to stress that it is common ground, consistent with Ms Rossiter's evidence throughout, that she did not communicate to the claimant at the Fact-Finding meeting on 16 January 2020 that there was no Conduct Case to answer regarding the road traffic accident. In fact, he suggested that as all parties are aware, she went on to issue a 'Serious Warning', that the claimant did not complain about the 'Serious Warning' that was issued, and it was not one of the issues in the Tribunal claim

26. On this basis, the respondent accepted that paragraph 112 is factually wrong and the claimant had known this to be the case from the Preliminary Hearing before EJ Doyle on 12 April 2021, when the respondent acknowledged paragraph 112 was factually wrong.

27. Mr Peacock recalled that the claimant wanted Ms Rossiter to be recalled '*long after'* she had completed her evidence to ask her about paragraph 112. However, he said that there was no dispute between Ms Rossiter and the claimant: both agreed that she had not communicated to him at the Fact-Finding meeting on 16 January 2020 that there was no Conduct Case to answer regarding the road traffic accident. He therefore asserted that recalling her would serve no purpose other than to agree what both Ms Rossiter and the claimant already knew to be the case.

28. He added that Ms Rossiter had already been subjected to lengthy cross-examination. She had found the experience an ordeal and had suffered stress and anxiety due to it. She did not wish to be subjected to further questions.

29. He submitted that there was no reason why the claimant could not have asked Ms Rossiter about paragraph 112 during the lengthy cross-examination and he had ample time and opportunity to do so.

30. He also reminded the Tribunal that at the end of his day long cross-examination, the claimant was reminded that he had not asked any questions about the Victimisation claim and in particular, about knowledge of the 'Protected Act'. He believed that he was then quite properly given further opportunity to do so, with assistance from Employment Judge Johnson.

31. Mr Peacock believed that the claimant was given every opportunity and far more leeway than would normally be permitted to ask any questions of Ms Rossiter and all of the other witnesses and that it would have been unfair to expect Ms Rossiter to be recalled long after she had completed her evidence and disproportionate to have done so.

32. He added that the respondent objected to Ms Rossiter being recalled and the Tribunal was perfectly entitled to accept the respondent's submissions.

33. Mr Peacock remarked more generally that the respondent had become genuinely concerned by this stage with the way that the claimant was approaching cross-examination, which he described as being *'unfocussed, unstructured, repetitive, lengthy, often irrelevant questions'* and which he might result in the matter not concluding within the 4-day listing provided.

Erroneous references to *'Ms Rafferty'* in various paragraphs rather than *'Ms Rossiter'*

34. Mr Peacock acknowledged a number of references in the Judgment to a 'Ms Rafferty'. He submitted that it was obviously an error and should refer to 'Ms Rossiter' and as a consequence, it is an error which does not cause any difficulty and it can be easily remedied under the 'slip rule'.

Various points which the claimant believes ought to have been determined in his favour

35. Mr Peacock argued that the remaining points in the application are nothing more than the Claimant being unhappy with the decision of the Tribunal.

Discussion

The overriding objective and the Equal Treatment Bench Book

36. In considering this application, the Tribunal did take into account the provisions of Rule 2 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, namely the *'Overriding objective'* and which provides:

'The overriding objective of these Rules is to enable the Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes so far as practicable –

(a) ensuring that parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and the Tribunal.

37. The Tribunal also took account of the relevant provisions of the *Equal Treatment Bench Book ('ETBB'),* which can be found within chapter 1 and which is entitled *'Litigants in Person and Lay Representatives'.* It is unnecessary to repeat the whole chapter within this decision, but for the avoidance of doubt, the Tribunal would reassure the parties that it reminded itself both at the final hearing and during its consideration of the reconsideration application, that the claimant was an unrepresented party. We noted that each litigant in person must be considered based upon their own personal circumstances and that their ability to deal with the litigation process can vary based upon social and education background as well as their experience of litigation. We particularly took into account the reminder within the ETBB that *'The key is to maintain a balance between assisting, and understanding what the litigant in person requires, while protecting their represented opponent against the problems that can be caused by the litigant in person's lack of legal and procedural knowledge'.*

38. With this in mind, the Tribunal believes that it acknowledged the balancing act which exists within the hearing process, where one party is represented and another is not both within the context of the ETBB and also the overriding objective. Account should be taken of the unrepresented parties' additional needs and attention that should be given towards explaining the basic rules and procedure at the start of the hearing, together with assistance that may be required as the hearing progresses.

39. The need to ensure that any decision is made is proportionate and in the interests of justice. This means that while the Tribunal may have made

decisions and taken steps which may appear to be more favourable to the unrepresented party, they cannot involve allowances being made which disproportionately prejudice the represented party and make it difficult for that representative to represent their client. By way of example, this can include the Tribunal allowing the unrepresented party to create confusion, have multiple opportunities to deal with particular issues or to prolong the hearing so that the hearing of evidence and submissions cannot be concluded within the listing provided.

40. Moreover, the overriding objective provides a duty upon both parties whether represented or not, to cooperate and in general, behave reasonably towards each other, towards witnesses called by either side and towards the Tribunal. While there may be occasions where specific allowances need to be made for those unrepresented parties who have a mental disability or mental capacity impairment, this was not one of those cases. The claimant appeared to have a good understanding of the litigation process and was articulate.

41. The Tribunal acknowledged that he was unrepresented and made allowances for that, but he was able to represent himself throughout the hearing and simply required introductory explanations and reminders of what was expected of him at appropriate stages of the proceedings, together with a reminder of the importance of the list of issues when considering what questions need to be asked by way of cross examination.

<u>General observations</u>

42. It appeared that the essence of the claimant's application was that he was unhappy in not being allowed to re-examine Ms Rossiter and that he was unhappy with the overall findings against him. However, we have considered the broad headings which are referred to above in relation to the contents of his application

<u>Mr Tysoe's witness statement and the supplemental documentation</u>

43. The Tribunal did not discuss the question of 'without prejudice' information attached to Mr Tysoe's statement within its judgment. However, any

without prejudice information was not included within the actual statement and it accepts Mr Peacock's contention that any such documentation was not used as part of Mr Tysoe's evidence. Indeed, the Tribunal did not place any weight upon these documents when reaching its decision. Accordingly, there was no prejudice to the claimant in Mr Tysoe giving evidence in this case on behalf of the respondent.

44. The Tribunal is satisfied that Mr Tysoe was entitled to give witness evidence and it dealt with the relevant parts of his evidence in paragraph 37 to 49 concerning his involvement with the grievance process which formed part of the issues for consideration. As we described in paragraph 43 of the judgment, we found that Mr Tysoe was a credible and reliable witness.

<u>The Amended Response paragraph 112</u>

45. The Tribunal acknowledges that the respondent accepted the error identified by the claimant in paragraph 112 and that the claimant had been aware of this concession for some time before the final hearing.

46. It therefore did not feature as a material consideration by the Tribunal and the claimant had ample opportunity to cross examine Ms Rossiter about her role in the Fact-Finding exercise.

<u>Assistance provided to the claimant as an unrepresented party</u>

47. Having reviewed their notes of the hearing, the Tribunal observes that a great deal of time was spent at the beginning of the hearing dealing with matters of a preliminary nature. This had the consequence of delaying its reading of the hearing bundle and witness statements. The hearing of oral witness evidence was also delayed, and this could not begin until day 2 of this 4-day hearing. While this may be the case, the Tribunal recognised that Mr Efobi was unrepresented and although he appeared to have a good understanding of the Tribunal procedure, including the order of witness evidence and how cross examination was conducted, we nonetheless were keen to ensure that he was ready to proceed with the

substance of the case and any genuine concerns were resolved before the hearing properly began. He was therefore treated fairly and proportionately when taking into account his unrepresented status and entirely within the principles of the overriding objective and ETBB.

48. A great deal of patience was exercised by the Tribunal (and indeed by Mr Peacock) in order that he could properly participate in the hearing. An illustration of this was the considerable time spent dealing with the question of the identity of the correct respondent in these proceedings and Mr Efobi's anxiety that if he accepted that the claim against the second respondent be dismissed, he would be unable to succeed with his claim. Mr Peacock spent a considerable amount of time seeking to reassure him that his clients accepted he was an employee of Royal Mail Group and if the claim succeeded in whole or in part, they would accept responsibility for any failures found against them by the Tribunal.

<u>The cross examination of the respondent's witnesses and Ms Rossiter in particular</u>

49. In relation Mr Efobi's cross examination of witnesses, he was placed under no pressure to conclude cross examination and in fact during the 4-day hearing, the respondent's 3 witnesses gave evidence over more than 1 ½ days. The bulk of this cross examination involved Ms Rossiter who began giving evidence at the end of day 2 following the conclusion of the claimant's evidence. She resumed witness evidence on day 3 and her cross examination only concluded after lunch. It was noticeable that Ms Rossiter who was unaccustomed to litigation, found the giving of evidence to be exceedingly stressful and although she gave convincing and reliable evidence, she was visibly distressed by the time her cross examination concluded.

50. The claimant had not only the evening of day 2 to reflect upon his questioning of this witness, but also the lunch break on day 3. At the end of day 3, Employment Judge Johnson reminded the claimant to keep his cross examination focused upon the list of issues and also to review the

questions and answers that he had already asked, in order to ensure that he had covered everything that he wanted to raise with witnesses.

51. Moreover, Mr Peacock is correct in his submission in reply to this application that in accordance with the overriding objective, he reminded the Tribunal at the end of the claimant's cross examination of the respondent's witnesses, that the claimant that he had not asked questions of witnesses in relation to the complaint of victimisation. He was therefore encouraged to ask those questions of the final witness called by the respondent's Mr Rankin, who as the person who had heard the grievance appeal, would have detailed knowledge of the issues raised by the claimant. This matter was considered in paragraph 11 of the judgment and requires no further reconsideration.

52. Mr Efobi did make an application to recall Ms Rossiter at this stage and the Tribunal's approach to this application and its rejection are described in paragraph 12 of the judgment. The Tribunal has reviewed this decision and remains of the view, that it was not in the interests of justice to recall Ms Rossiter for the reasons that it has already given. It believes that the claimant was aware of the issues being considered during the final hearing, was reminded of their relevance at the beginning of the hearing and had ample opportunity to cross examine Ms Rossiter, which. This included an overnight break (between days 2 and 3 of the hearing), and a lunch break (on day 3), to allow him to reflect before concluding his cross examination of this witness.

53. The decision made was wholly within the overriding objective and did not place him at an unfair disadvantage. Indeed, the Tribunal had allowed the hearing of witness evidence to run until lunchtime on day 4 to ensure that the claimant had adequate time to cross examine witnesses and was willing to sacrifice time, which could have been spent on deliberation, with the consequence that judgment was reserved. But this was the correct approach to take in order that the claimant could have time to cross examine the respondent's witnesses at a sensible pace and without pressure being exerted upon him to rush or limit his questioning.

<u>The erroneous reference to *Ms Rafferty* instead of *Ms Rossiter*</u>

54. The Tribunal acknowledges that 3 references were made to Ms Rafferty rather than Ms Rossiter in the judgment at paragraphs 11 and 12. Mr Peacock correctly asserts that this was clearly a minor error and did not affect the fairness of the overall judgment. It is important to note that there was no other witness in the case or person identified within the witness evidence or hearing bundle *by the name of* Ms Rafferty and as a consequence any erroneous reference to her was clearly intended to apply to the witness Ms Rossiter. Accordingly, the Tribunal finds that this matter amounts to no more than an accidental slip and a copy of the corrected version of the judgment will be sent to all the parties in accordance with Rule 69.

<u>The absence of Mr Fellows as a witness at the final hearing</u>

55. The claimant refers to the absence of Mr Fellows as a witness to proceedings. There is no property in a witness and it is up to each party to call those witnesses whom they feel are necessary to support the arguments they are advancing as part of their case, (or to rebut evidence that may be given to support a case being advanced by the other side).

56. Having reviewed the judgment, the Tribunal would remind the claimant that Mr Fellows was not named in the list of issues and his involvement appeared to be in respect of his dealings with Mr Tysoe. Consequently, the Tribunal would note that Mr Fellows' absence in this hearing was not material and did not prevent a fair hearing taking place and the claimant was able to ask Mr Tysoe questions relating to his involvement in the grievance process and in relation to discussions with Mr Fellows.

57. In any event, there was no reason why the claimant could not have himself called Mr Fellows as a witness and had he refused to do so, the claimant could have applied for a witness order. He clearly did not do this and it appeared to the Tribunal that the claimant simply wanted to ask questions of every person who had some involvement in his various grievances with the respondent, rather than focusing upon the issues which had been agreed as part of case management and which had given the claimant a

clear indication of what was relevant in terms of documents to be produced and witness evidence to be called. As has been mentioned by the Tribunal already, we were satisfied the claimant had sufficient understanding of the Tribunal process and was able to make enquiries concerning potential witnesses if he felt that their attendance was necessary. He was able to engage with the Tribunal in correspondence as the case progressed and this is not a case where he lacked confidence or assertiveness in presenting his concerns.

Conclusion

58. The Tribunal has therefore considered what appear to be the key issues and arguable matters that could be potentially raised as part of the application for reconsideration. While the claimant is unhappy with the overall outcome of the original judgment, he has not raised anything within the application which persuaded the Tribunal to vary its decision, other than in relation to the minor slip involving the misnaming of Ms Rossiter.

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Employment Judge Johnson

17 February 2022

JUDGMENT SENT TO THE PARTIES ON

20 June 2022

FOR THE TRIBUNAL OFFICE