EMPLOYMENT TRIBUNALS

Claimant: Mrs J Climer-Jones

Respondent: Cardiff and the Cale University Local Health Board

Heard at: By video **On:** 20 June 2022

Before: Employment Judge S Moore
Mr P Bradney
Mrs L Bishop

Representation
Claimant: In person
Respondent: Mr Sendall, Counsel

UPON a reconsideration of the judgment dated 15 April 2021 on the Tribunal's own initiative under rule 73 of the Employment Tribunals Rules of Procedure 2013

JUDGMENT

The last sentence of paragraph 184 is revoked.

REASONS

Background and Introduction

1. In a judgment dated 21 January 2020 the tribunal upheld the claimant's claims of unfair dismissal and unlawful detriments on the grounds of protected disclosures. A preliminary hearing took place on 12 March 2020 to discuss case management and listing of a remedy hearing. The respondent was subsequently granted a three month stay due to the Covid-19 pandemic. A further preliminary hearing took place on 12 October 2020. The remedy hearing was listed for five days on 15, 16, 17, 18, 19 and 22 March 2021 and the judgment ("first remedy judgment") was reserved. The first remedy judgment dated 15 April 2021 was sent to the parties on 21 April 2021[1]. It is this judgment that was the subject of this reconsideration hearing. It provided that further amounts requiring calculations and pension

[1] This was corrected in a judgment dated 3 September 2021

loss, interest and grossing up would be awarded at the next hearing.

2. On 5 May 2021 the respondent applied for a reconsideration of the first remedy judgment. This application did not encompass a request to reconsider paragraphs 184. This was refused in a judgment dated 12 May 2021. The respondent also applied for the second stage remedy hearing and costs hearing to be stayed pending the outcome of an appeal to the EAT. This was also refused. The claimant subsequently cross appealed to the EAT.

3. On 11 May 2021 the Tribunal ordered the parties to agree draft orders in respect of assessing the pension loss and submit them to the Tribunal within 21 days. This order was not complied with by either party.

4. On 29 June 2021 amended orders were made, including the repeated order that parties agree draft orders in respect of assessing pension loss and submit these to the Tribunal. Neither party complied with this order.

5. A second stage remedy hearing was listed on 22 July 2021. At that hearing there was a discussion as to whether the pension loss could be addressed. The respondent's position was that it should be assessed using the contributions method under the Employment Tribunals: Principles for Compensating Pension Loss Fourth Edition (third revision) 2021 ("the Principles"). If contrary to that assertion the Tribunal decided to use the "complex" approach the respondent submitted the Tribunal did not have the appropriate information on which to make the calculations as the claimant had not provided disclosure of her employer's pension contributions in the schemes enrolled since her dismissal.

6. The Tribunal informed the parties we would hear submissions and adjourn to decide if the pension issue could proceed or not. The claimant later sought an adjournment of the pension loss calculation to obtain expert actuarial advice. This was resisted by counsel for the respondent who suggested and proposed two routes; an adjournment or the tribunal make a calculation using the "simple approach". That judgment ("the second remedy judgment") was also reserved.

7. Whilst deliberating the second stage remedy judgment the Tribunal considered that the first remedy judgment should be reconsidered of its own initiative. In particular, the sentence at paragraphs 184 the sentence that read "Pension loss is to be calculated from 30 September 2017 to 30 June 2023." The parties were informed of this in a letter dated 3 September 2021 and a partial stay in the proceedings (relating to pension loss only) was ordered with a reconsideration hearing to be listed after the outcome of the appeals. The reasons were as follows:

"The Tribunal concluded at paragraph 177 that the claimant will never be able to return to a permanent clinical nursing role within the NHS. The conclusion[2] that the pension loss should end in 2023 was reached without considering the age at which, but for the dismissal, the claimant would have retired, nor had the Tribunal determined withdrawal factors

[2] In paragraph 184 (not 177)

or the likelihood of the claimant securing a DB scheme in future employment. All of these factors have led the Tribunal to conclude that pension loss should end on 30 June 2023 should be reconsidered".

8. The second stage remedy judgment was subsequently sent to the parties on 18 October 2021. This was reconsidered on application by the respondent dated 9 and 10 November 2021 with a number of paragraphs revoked where interest on the injury to feelings award had been erroneously ordered.

9. Following the dismissal of the respondent's appeals by the EAT this reconsideration hearing was listed.

The Law

10. The Tribunal's power to reconsider judgments are contained within Rules 70 to 73 of the Employment Tribunal Rules of Procedure 2013. Rule 70 provides it may confirm, vary or revoke the judgment where it is necessary in the interest of justice. The process is contained with Rule 72. Rule 73 deals with the tribunal's ability to reconsider a decision of their own initiative. Where the tribunal proposes to do so, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72 (2) as if an application had been made and not refused.

11. The Tribunal must follow Rule 72 in the order provided for within that rule **(TW White & Sons Ltd v White UKEAT 0022/21).** In exercising the power the Tribunal must do so in accordance with the overriding objective.

12. In **Ministry of Justice v Burton and another [2016] ICR 1128,** Elias LJ approved the comments of Underhill J in **Newcastle upon Tyne City Council v Marsden [2010] ICR 743,** that the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. Further, that the courts have emphasised the importance of finality **(Flint v Eastern Electricity Board [1975] ICR 395)** which militates against the discretion being exercised too readily.

13. In **Liddington v 2Gether NHS Foundation Trust UKEAT/0002/16** Simler P held:

"..a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered. Tribunals have a wide discretion whether or not to order reconsideration, and the opportunity for appellate intervention in relation to a refusal to order

reconsideration is accordingly limited.

[35] Where, as here, a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application. It seems to me that the Judge was entitled to conclude that reconsideration would not result in a variation or revocation of the decision in this case and that the Judge did not make any error of law in refusing."

14. Mr Sendall also referred us to the following authorities:

15. **TCO in-Well Technologies UK Ltd v Stuart UKEATS/0016/16.** In this case the claimant had applied out of time for reconsideration of a judgment in his favour on the basis the compensatory award should have been "grossed up". Subsequent to receipt of the application the Tribunal decided of its own initiative to effect reconsideration and gross up the award. The appeal was upheld. When an application has been made by a party for reconsideration this must be dealt with by the Tribunal. There is no scope for a hybrid process so that such an application is then commenced by a party and taken on by the Tribunal of its own initiative.

16. **Newcastle Upon Tyne City Council v Marsden UKEAT/393/09** was a case where claimant had been advised not to attend a pre hearing review to determine whether he was a disabled person. The judge dismissed the claim on the basis the claimant had failed to provide evidence. On a later application for reconsideration, the decision was revoked on basis that counsel for the claimant had misled the tribunal. This decision was upheld by Underhill, J who discussed the importance of finality of litigation at paragraphs 17:

"*The principles that underlie such decisions as Flint and Lindsay remain valid, and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles. In particular, the weight attached in many of the previous cases to the importance of finality in litigation or, as Phillips J put it in Flint (at a time when the phrase was fresher than it is now), the view that it is unjust to give the losing party a second bite of the cherry seems to me entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunals decision on a substantive issue as final (subject, of course, to appeal)"*

17. In **Ladd v Marshall 1954 3 All ER 745, CA t**he Court of Appeal established that, in order to justify the reception of fresh evidence, it is necessary to show:

- that the evidence could not have been obtained with reasonable diligence for use at the trial:

- the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive:

- the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

18. **Outasight VB Limited v Brown UKEAT/0253/14** is a case about reconsiderations where a party wishes to adduce fresh evidence. In this case the EAT held that the approach in **Ladd v Marshall** would in most cases encapsulate what is meant by "the interests of justice". There might be cases where the interest of justice would permit fresh evidence to be adduced notwithstanding that the principles laid down in **Ladd v Marshall** were not strictly met.

Discussion and conclusions

19. The respondent objected to the reconsideration on the tribunal's own initiative. Mr Sendall made the following submissions:

20. Firstly that the respondent had already applied for a reconsideration of the proposed reconsideration and the Tribunal had refused that request. This was incorrect. The respondent's application for a reconsideration of the first stage remedy judgment dated 5 May 2021 did not encompass paragraph 184 and therefore that part of the judgment had not been refused a reconsideration.

21. Secondly that the claimant had "been looking for a reconsideration" of the mitigation of loss conclusion in her position paper lodged before the second stage remedy hearing. This was referred to in the respondent's position paper where they asserted that "in effect the claimant's position statement invites the Tribunal to reconsider findings in the judgment on remedy" and "advances the position notwithstanding that she failed to make any application for reconsideration on remedy within 14 days ".

22. This was not a submission we could entertain as the claimant's position paper had not at any stage been treated by the Tribunal as an application for reconsideration. None of the procedures set down under Rule 72 of the Tribunal Rules had been followed. We therefore do not agree that the subject matter of this reconsideration had already been advanced and refused by the claimant. We do not agree that the authority in **TCO in-Well Technologies UK Ltd v Stuart** is relevant as there was no application for a reconsideration by the claimant which the Tribunal adopted.

23. Thirdly that the claimant is still pursuing an appeal to the EAT which overlaps the pension point.

24. We do not consider the fact that there is an outstanding appeal to amount to grounds on which we should not reconsider the judgment. It is established that if there are elements if a judgment that can be reconsidered this could

mean the appeal falls away. In terms of the overriding objective it will save expense and be more proportionate to reconsider a judgment rather than not and await an appeal outcome.

25. Fourthly that having regard to the need for finality of judgments it is wrong in principle and contrary to the overriding objective bearing in mind the history of this claim (**Flint v Eastern Electricity Board , Newcastle Upon Tyne City Council v Marsden) and Ministry of Justice v Burton.**

26. Mr Sendall also submitted that the consequence of revoking the judgment contemplates new findings of evidence and this would fall foul of the principles in **Ladd v Marshall**. Such evidence should and could have been available at the first time around and the reconsideration of paragraph 184, if revoked amounts to giving the claimant a second bite of the cherry and completely undermines the finality principle. The claimant had the opportunity to adduce evidence and put forward her loss.

The claimant's submissions

27. Whilst the claimant had not made the application for reconsideration, the claimant made submissions that it was undeniable that she would never be in receipt of a DB pension scheme and this will place her at a massive disadvantage in her old age. The principle of the Tribunal judgment should have been to put her back in the position she should have bene in but for the dismissal. To limit the pension loss would mean she would not be put back in that position.

28. We have given this matter very careful consideration. In regards to the issue of finality of litigation we first of all observe that the issue in relation to pension loss had not been finalised at the point the Tribunal decided the first stage remedy judgment required reconsideration. Even after a second remedy hearing there was still a potential for a further hearing to calculate the pension loss if the Tribunal decided that the complex approach needed to be followed. This was recognised and acknowledged by counsel for the respondent at the second remedy hearing. Indeed, counsel submitted that the complex approach could not be embarked upon as the tribunal did not have the information required to make the calculations (whilst submitting the preferred route should be that the tribunal should adopt the simple approach and determine the matter). The Tribunal informed the parties we would hear submissions and make a decision on whether we could proceed to deal with the pension. The parties were on notice that this issue had therefore not been finally determined at the conclusion of the second stage remedy hearing when the overall decision was reserved. After the second stage remedy hearing, the Tribunal informed the parties on 3 September 2021 that they proposed to reconsider paragraph 184 of the first remedy judgment.

29. Turning now to the issue of whether the claimant should and could have adduced evidence at the earlier hearing and failed to do so. The claimant did not prepare a witness statement for the second remedy hearing albeit she prepared a position paper. This included some of the matters the tribunal would expect to hear evidence upon when assessing pension loss such as the age at which but for the dismissal the claimant would have

retired and the likelihood of the claimant securing another DB pension in future employment. The claimant submitted in her position paper that there had not been any discussions at the first remedy hearing as regards the age the claimant would have left the employment of the respondent but for her dismissal. The claimant submitted that for a number of reasons she would have remained in employment until retirement.

30. Therefore no evidence of this nature was in fact heard. The question is could and should have it been adduced. In the first remedy judgment, other than what we consider to now be an erroneous conclusion at paragraph 184 concerning the end date for pension loss, no findings of fact were made to support that conclusion. It was evidently envisaged that pension loss would be addressed at the second stage remedy hearing as can be seen in the headline judgment that said so.

31. We do not seek to criticise the respondent for entering into the second remedy hearing with an understanding that pension loss ended as of 30 June 2023. This is plainly what the judgment says and the respondent rightly and properly prepared their case on that basis. Notwithstanding this, the tribunal were not in a position to reach any final conclusions on pension loss even after the second stage remedy hearing as the evidence had not been heard and therefore the issue has not been properly ventilated. In our judgment this is plain when the findings of fact in both judgments are considered. Although the parties failed to agree the draft orders to address pension loss, the fault lies with the tribunal for erroneously including the offending sentence, in error and in proceeding with the second stage remedy hearing in the absence of agreed orders to ensure the pension loss was properly addressed. In trying to bring this lengthy and complex case to a conclusion, this tribunal accepts that mistakes were made and this is why it is in the interests of justice that the judgment be revoked.

32. We have considered the balance of prejudice and the need for finality of litigation. We have decided the balance of prejudice would weigh very heavily on the claimant if the judgment is not revoked. It cannot be in the interest of justice that usual factors to determine pension loss have not been properly considered due to an error by the Tribunal in the first remedy judgment. This could have the potential of the claimant being significantly under compensated (particularly as the tribunal found the claimant would never work in the NHS again). The tribunal makes a frank admission that the inclusion of that sentence was an error by the Tribunal. The sentence is wholly at odds with the other finding that the claimant will never work in the NHS again and is not based on any evidential findings.

33. The prejudice to the respondent is to lose the finality of the judgment and have to prepare for a further pension remedy hearing. If we did not revoke the judgment we consider the respondent's position would be advantageous to the prejudice of the claimant.

34. For these reasons the judgment limiting the claimant's pension loss to June 2023 is revoked.

Employment Judge S Moore
6 July 2022

JUDGMENT SENT TO THE PARTIES ON 7 July 2022

FOR THE TRIBUNAL OFFICE Mr N Roche