EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr C Jenkins	AND	Compass Group UK & Ireland Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD IN CHAMBERS AT Bristol **ON** 26 July 2022

EMPLOYMENT JUDGE J Bax

JUDGMENT ON APPLICATION FOR RECONSIDERATION

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

REASONS

1. The claimant has applied for a reconsideration of the judgment dated 28 June 2022 which was sent to the parties on 7 July 2022 ("the Judgment"). The grounds are set out in the attachment to his e-mail dated 29 June 2022, received by the Tribunal the same day.

2. The application was made before the written reasons were sent to the Claimant. When the Judgment and Reasons were sent to the Claimant, he

was invited to confirm whether the extant application was maintained or that he could provide a revised application after considering the written reasons. On 7 July 2022, the Claimant confirmed that his original application was maintained.

3. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). Under Rule 71 an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The application was therefore received within the relevant time limit.

4. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.

5. The grounds relied upon by the claimant are these: (1) that a mistake had been made in relation to the finding that there was a Covid-19 safety procedure; (2) that the disciplinary procedure had been breached twice and the serious letter of concern was to be held on his personnel file. An e-mail accompanying the letter was attached, however it did not form part of the evidence in the hearing bundle; (3) that consideration was not given to the question of inconsistent treatment in relation to how Ms Currin was dealt with, after she had issued the warning without a disciplinary hearing.

6. The matters raised by the Claimant were considered in the light of all of the evidence presented to the tribunal at the final hearing before it reached its decision.

7. The earlier case law suggests that the interests of justice ground should be construed restrictively. The Employment Appeal Tribunal ("the EAT") in Trimble v Supertravel Ltd [1982] ICR 440 decided that if a matter has been ventilated and argued then any error of law falls to be corrected on appeal and not by review. In addition, in Fforde v Black EAT 68/80 (where the applicant was seeking a review in the interests of justice under the former Rules which is analogous to a reconsideration under the current Rules) the EAT decided that the interests of justice ground of review does not mean "that in every case where a litigant is unsuccessful he is automatically entitled to have the tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in the even more exceptional case where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order".

8. More recent case law suggests that the "interests of justice" ground should not be construed as restrictively as it was prior to the introduction of the "overriding objective" (which is now set out in Rule 2). This requires the tribunal to give effect to the overriding objective to deal with cases fairly and

justly. As confirmed in Williams v Ferrosan Ltd [2004] IRLR 607 EAT, it is no longer the case that the "interests of justice" ground was only appropriate in exceptional circumstances. However, in Newcastle Upon Tyne City Council v Marsden [2010] IRLR 743, the EAT confirmed that it is incorrect to assert that the interests of justice ground need not necessarily be construed so restrictively, since the overriding objective to deal with cases justly required the application of recognised principles. These include that there should be finality in litigation, which is in the interest of both parties.

9. In Outasight VB Ltd v Brown [2015] ICR D11, EAT, HHJ Judge Eady QC accepted that the wording 'necessary in the interests of justice' in rule 70 allows the tribunal a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially, *'which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation'*.

Conclusions in relation to the grounds of the application

In relation to the Covid-19 Safety Procedure

10. The Claimant based this ground of his application on that there was not a written document called Compass Covid-19 Safety Procedure. It was concluded that there was a procedure, for the reasons set out in the Judgment, albeit there was not one with such a title and that it was created by the use of the other documents and practices referred to in the written reasons. This argument was considered in the Judgment. It was accepted that the reason for the letter of serious concern was because the Claimant had not followed the policy. The Claimant is not entitled to a second bite of the cherry. In the circumstances there is not a reasonable prospect of the Judgment being varied or revoked in respect of this ground.

In relation to the breach of the disciplinary procedure and letter of serious concern.

11. The breach of the disciplinary procedure by Ms Currin was considered within the Judgment. For the reasons given within the Judgment there is not a reasonable prospect of success of the Judgment being varied or revoked in this respect.

12. In relation to the serious letter of concern, the Claimant seeks to rely on an e-mail which was not included within the hearing bundle stating that the letter would be held on his personnel file. The Claimant did not say in his witness statement that he was informed that it would be held on his personnel file and it was not referred to in the witness statement of Mr Law. Mr Law was not cross-examined on this basis. A reconsideration can be in

the interests of justice if there is new evidence which was not available to the Tribunal at the time of Judgment. It is necessary to consider the principles in Ladd v Marshall [1954] 3 All ER 745. To justify the reception of new evidence, it must be shown that: (1) the evidence could not have been obtained without reasonable diligence for use at the original hearing, (2) the evidence is relevant and would probably have had an important influence on the hearing, and (3) the evidence is apparently credible. The e-mail was in the Claimant's possession at the time of the final hearing, it was a document that he could have sought to adduce in evidence, but decided against so doing. It is generally inappropriate that parties should be given a second bite of the cherry because of a failure to adduce evidence in their possession at the original hearing. There is a not a reasonable prospect of success that the Claimant would be given permission to now rely upon the e-mail. The findings of fact were made upon the basis of the evidence adduced at the final hearing.

13. It was found that Mr Law concluded that a disciplinary sanction was not appropriate and for the reasons set out in the Judgment it was concluded that a disciplinary sanction was not imposed. The Claimant is seeking to re-argue the point. There is not a reasonable prospect of success of the Judgment being varied or revoked in this respect.

Inconsistency of treatment

14. This ground for reconsideration was on the basis that inconsistency of treatment was not considered within the Judgment. The argument that the Claimant and Ms Currin were inconsistently treated was not considered to be relevant. The Claimant did not refer to the issue within his grounds of claim, witness statement or oral evidence. There was no evidence adduced by the Claimant that he was aware of how Ms Currin was dealt with before he resigned, or that it had any influence on his decision to resign. In the application for reconsideration, the Claimant accepted that the matters were raised with Ms Currin at her yearly performance meeting sometime after she made the error. The Claimant resigned 13 days after the mistake had been made and before Ms Currin was spoken to. Accordingly any disparity of treatment could not have caused or influenced the resignation.

15. In any event I considered whether this was a case in which there could be said to be inconsistent treatment.

16. In Post Office v Fennell [1981] IRLR 221, Lord Justice Brandon in the Court of Appeal in considering the equity and substantial merits of the case, said: "*It seems to me that the expression "equity" as there used comprehends the concept that employees who misbehave in much the same way should have meted out to them much the same punishment, and it seems to me that [a] tribunal is entitled to say that, where that is not done, and one man is*

penalised much more heavily than others who have committed similar offences in the past, the employer has not acted reasonably in treating whatever the offence is as a sufficient reason for dismissal." However he observed: (1) that it is for the tribunal to decide whether, on the facts, there was sufficient evidence of inconsistent treatment and the tribunal is likely to have less information regarding other cases, and (2) that while a degree of consistency was necessary, there must also be considerable latitude in the way in which an individual employer deals with particular cases.

17. In Hadjiannou v Coral Casinos Ltd[1981] IRLR 352, the EAT held that arguments of inconsistency were to be limited to situations which were "*truly parallel*"; "*Industrial Tribunals should scrutinise arguments based upon disparity with particular care and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for argument. It is of the highest importance that flexibility should be retained and employers and Tribunals should not be encouraged to think that a tariff approach to industrial misconduct is appropriate.*"

18. Hadjiannou, was endorsed by the Court of Appeal in *Securicor Ltd v Smith [1989] IRLR 356, CA* and it was confirmed that the question for the Tribunal is whether the Respondent has acted within the range of reasonable responses.

19. In cases such as Paul-v-East Surrey DC [1995] IRLR 305 CA, Honey-v-City of Swansea [2010] UKEAT/0465/09, General Mills-v-Glowacki [2011] UKEAT/0204/12, and MBNA Ltd v Jones UKEAT/0120/15/MC restated the approach; that the question should simply be whether a reasonable employer could, within the bounds of reasonable responses, have treated them differently. I took also into account the other cases cited by the Claimant.

20. The circumstances between the allegation against the Claimant and the error in procedure made by Ms Currin were different. The Claimant was investigated for a breach of the procedures in relation to Covid-19 safety. Ms Currin issued a sanction under the disciplinary process without properly following the process. The circumstances were different. The investigation into what the Claimant did was in connection with a matter of health and safety in relation to a contagious illness about which many people were very concerned. Ms Currin did not follow the disciplinary procedure, but the procedure allowed for a review of the decision so that errors could be remedied. The allegations were different and could not be said to be truly parallel.

21. There is not a reasonable prospect of success of the Judgment being varied or revoked in this respect.

22. Accordingly I refused the application for reconsideration pursuant to Rule 72(1) because there is no reasonable prospect of the Judgment being varied or revoked.

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Employment Judge J Bax
Date: 26 July 2022

Judgment & Reasons sent to Parties on
02 August 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE