EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4109212/2021 and 4113686/2021

Reconsideration Hearing held in chambers in Glasgow remotely by CVP on 30 September 2022

Employment Judge I McPherson

Tribunal Member Mr G Doherty

Tribunal Member Ms M McAllister

Ms K Scobie	**Claimant per Written Representations by Neil MacDougall, Advocate (instructed by Sacha Carey, Solicitor)**
The Scottish Ministers (as representing Scottish Prison Service)	**1st Respondent per Written Representations by Kenneth McGuire, Advocate (instructed by Robin Turnbull, Solicitor)**
Mr A Wells	**2nd Respondent per Written Representations (as above)**
Mr P McFarlane	**3rd Respondent per Written Representations (as above)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The reserved judgment of the Employment Tribunal is that: -

(1) Having considered both parties' written representations on the claimant's opposed application for reconsideration of the Tribunal's

Judgment dated 24 May 2022, and sent to parties on 25 May 2022, refusing, by majority, the claimant's application of 23 May 2022 to be allowed to amend the paper apart to the ET1 claim form in claim 4113686/2021, to add in a complaint of automatically unfair dismissal contrary to Section 103A of the Employment Rights Act 1996, the Tribunal, after private deliberation, at the Reconsideration Hearing held in chambers on 30 September 2022, decided it was not in the interests of justice to grant the reconsideration sought by the claimant, and so the Tribunal has refused that reconsideration application.

(2) The Tribunal, on reconsideration, has confirmed the original Judgment dated 24 May 2022, without variation, and amplified its reasons, as set forth in the following Reasons for this Reconsideration Judgment, to address the points arising from both parties' written representations.

REASONS

Introduction

1. This case called before the full Tribunal again on Friday, 30 September 2022, for an in chambers Reconsideration Hearing, held remotely by CVP, with the Judge in the Glasgow ET, and the two non-legal members at home, all as per Notice of Reconsideration Hearing issued by the Tribunal to both parties on 27 June 2022.
2. Parties had previously agreed that the opposed reconsideration application brought by the claimant could be dealt with by the Tribunal on the papers, and neither party had requested an oral Hearing.
3. The reconsideration application arose out of the Tribunal's majority judgment on 24 May 2022 to refuse the claimant's application to amend the claim. The majority were the Judge and Mr Doherty, Ms McAllister being the panel member in the minority.

4. 30 September 2022 was the earliest mutually convenient date for the full Tribunal to meet again, on account of other commitments, including annual leave.

Tribunal's original Judgment

5. On 24 May 2022, on what was day 2 of a listed 11-day Final Hearing in person at the Glasgow Tribunal Centre, the Tribunal, by majority, refused the claimant's application to amend her claim, and we did so for the reasons given at the time in our oral ruling, the terms of which were then reproduced in our written Judgment and Reasons issued to parties the following day.
6. The claimant's application to amend, intimated by an email from the claimant's solicitor sent to the Tribunal, and copied to the respondents' solicitor, at 16:10 on 23 May 2022, after the close of day 1 of the Final Hearing, was expressed as follows:

   "The Claimant motions the Tribunal to allow the following amendments to be made to the paper apart of the ET1 to claim 4113686/2021. At the end of paragraph 30 [page 90 of the joint bundle] insert the following:

   "I believe the Respondents carried out all the acts and omissions hereinbefore described that led to my resignation because of my initial protected disclosures to the Second Respondent made in the period between 2 October 2020 and 7 October 2020. The detail of these disclosures is contained in section 1(a) of the Further and Better Particulars at pages 33 and 34 of the bundle."

   Add a new section 31(a)(iv) in the following terms:

   "That I have been automatically unfairly dismissed within the meaning of section 103A of the ERA 1996."
7. For present purposes, it will suffice to note here the specific terms of our Judgment only, issued in writing on 25 May 2022, as follows:

   (1) The majority judgment of the Employment Tribunal, Ms McAllister being in the minority, having considered the claimant's opposed

application by email of 23 May 2022 @ 16:10 to be allowed to amend the paper apart to the ET1 claim form in claim 4113686/2021, by adding new text to the end of paragraph 30, and add a new paragraph 31(a)(iv), at page 90 of the Joint Bundle, is to refuse the claimant's application, on the basis that it is not in the interests of justice to allow that amendment, nor is it in accordance with the Tribunal's overriding objective to deal with this case fairly and justly to allow that amendment; and that for the following reasons.

(2) The unanimous judgment of the Tribunal thereafter, having heard both parties' counsel, after delivering the oral judgment (now committed to writing as below), and adjournment for further private deliberation in chambers, was as follows: Given Mr McDougall's intention to appeal against the Tribunal's majority judgment to refuse leave to amend, and counsel for the respondents not objecting to the claimant's application to adjourn the listed Final Hearing, the Tribunal adjourned the Final Hearing, to be relisted before the same Tribunal, in due course, after conclusion of any appeal to the Employment Appeal Tribunal ("EAT"), and directs the claimant's solicitor to intimate to the Tribunal, and to the respondents' solicitor, when application is made to the EAT, and to update the Tribunal as to progress of that appeal.

Claimant's reconsideration application

8. On 6 June 2022, the claimant's solicitor, Ms Sacha Carey, of Ergo Law, Edinburgh, applied to the Tribunal, further to Rule 70 of the Employment Tribunal Rules of Procedure 2013, for reconsideration of the Tribunal's Judgment dated 24, and issued on 25 May 2022. Her application was copied to the solicitor for the respondents.

9. Ms Carey's reconsideration application read as follows:

"1. Introduction

1.1 This application relates to the judgment of the employment tribunal refusing the Claimant's application to amend dated 25 May 2022 ("the Judgment").

1.2 As is correctly noted in paragraph (2) of the Judgment [page 2] it is the Claimant's intention to appeal. However, having had the opportunity to consider the Judgment the Claimant believes that there are incomplete or inadequate reasons given for certain key considerations in the decision.

1.3 The Claimant's application for reconsideration is made on the grounds of the interests of justice. In particular, in making this application the Claimant seeks to avoid delay, formality of proceeding and save expense for all parties.

2. The Judgment

2.1 As a pre-cursor to the substantive submissions made below the Claimant notes that the basis for the refusal of her application set out in paragraph (1) [page 2] was that:

2.1.2 first, it was not in the interests of justice to allow it; and

2.1.2 secondly, it was not in accordance with the Tribunal's overriding objective to deal with cases fairly and justly.

*2.2 The only test which the Tribunal should apply is the interests of justice. The factors which the tribunal should take into account in making that decision are those set out in **Selkent Bus Co Ltd v Moore [1996] ICR 836**. There may be elements of the overriding objective that feature in those factors. However, the tribunal would fall into error if it applied the broader elements of the overriding objective in its decision making of the application to amend.*

Procedure leading to decision

2.3 The Tribunal has provided a detailed and accurate account of the procedure by which the application was to be made and the deliberations that then followed. The Claimant does not take any issue

with what is noted in the Judgment in any procedural sense and is grateful to the Tribunal for its prompt consideration.

Reasons

2.4 The Tribunals' reasons for its decision are set out from page 5 of the Judgment. The Tribunal correctly notes that the paramount considerations in applications to amend are the relative injustice and hardship involved in granting or refusing the application [lines 23-25 page 5]. The parts of the Judgment that the Claimant asks the Tribunal to reconsider are set out below.

3. Case management process

3.1 The first issue the Claimant wishes the Tribunal to consider is the case management process. The Tribunal expressed the view that the Claimant has had extensive time to particularise her claim in the case management process [lines 26-27 page 5]. However, the Tribunal does not then consider what particularisation had been made.

3.2 It is trite to say that the section 103A head of claim was not in the paper apart to the ET1; that is the reason that the application to amend was required. However, case management did not begin and end with the drafting of the paper apart to the ET1.

3.3 The Tribunal issued an initial consideration of claim and response and completed case management orders on 26 January 2022. Paragraph (4) of that order required the Claimant to provide a PH Agenda within seven days. Paragraph (5) of that order required the Claimant to provide 'further specification and a Scott Schedule' along with the agenda.

3.4 The Claimant produced the agenda as ordered. That agenda was not placed before the tribunal for consideration of the application to amend at first instance. A copy is attached to this application. The Tribunal's attention is drawn to section 2.6 and 2.7. Box 2.6 asks what disadvantage is said to have been suffered as a result of making a disclosure. The last entry in that box is 'constructive unfair dismissal'.

Box 2.7 asks whether there are 'any other' complaints. The Claimant completed that box to confirm there was another complaint and advise of a constructive unfair dismissal under section 95(1)(c). It is submitted that from the beginning of the case management process of the conjoined claim and thereafter throughout the Claimant engaged with the Tribunal and the Respondents on the basis there was a claim for automatic unfair dismissal.

3.5 The Scott Schedule was considered by the Tribunal as part of its deliberations at first instance. In particular, the express proposition that 'The Claimant's position is therefore that her dismissal was contrary to section 103A of the ERA 1996 and is automatically unfair' [page 103 of the joint bundle]. However, the full text of that document does not appear to have been considered. The end of that document ends with 'Further particulars' [page 112 of the joint bundle]. The fifth line of paragraph 3 provides 'The Claimant continued to be employed by the Respondent and suffered detrimental treatment and discrimination after this date, leading her to resign on 24 September 2021 on the basis she had been constructively dismissed'. Whilst that does not expressly refer to section 103A it is submitted fair notice has been provided of a claim for automatically unfair dismissal in the further particulars and agenda.

3.6 In these circumstances it is submitted that the Claimant had not failed to particularise her claim for automatically unfair dismissal. Even if the tribunal does consider the absence of express reference to section 103A or 'automatically unfair dismissal' in the 'Further particulars' section as being a failure to particularise (which it is invited not to do) the manner of particularisation should be considered. The Respondent asked for a Scott Schedule and further and better particulars. The Tribunal ordered it. The Claimant provided it. No issue was taken with a lack of particularisation by either the Tribunal or the Respondents after the aforementioned documents were produced and discussed at

a case management hearing on 17 February 2022. Or indeed, no issue was taken by the Respondents at any time after the intimation and lodging of documents that tended to show a claim for automatically unfair dismissal was thought to have been made. These documents were all considered against the background of a schedule of loss claiming future losses for whistleblowing; a remedy that could only be available in a claim for automatic unfair dismissal.

4. Nature of amendment

4.1 The Tribunal states it does not accept the categorisation of the absence of a section 103A claim as one of simple omission or administrative error [para (1) page 6]. However, no reasons are given for the rejection of that proposition.

4.2 It appears that the Tribunal may have misunderstood the Claimant's purpose in referring to the Scott Schedule and other documents referred to above so far as the nature of the amendment is concerned. The fact of the Scott Schedule expressly referring to it, the Further Particulars either referring to it or alluding to it and the Schedule of Loss all objectively point to an understanding and belief of the Claimant and the Claimant's agents that a section 103A ground was part of the claim.

4.3 If the Tribunal does accept that as an objective and reasonable conclusion then it is submitted it necessarily follows that the absence of a section 103A claim was one of simple omission. If the Tribunal does not accept that it is invited to provide reasons for rejecting it.

5. Hesketh

5.1 The Tribunal appears to have rejected to attach any weight to the ***Hesketh v Glasgow Caledonian University (UKEATS/0009/21/BA)*** *judgment on the basis it 'sits at odds' with the dicta of* ***Chandhok v Turkey*** [sic] ***2015 ICR 527 EAT*** *[para (2) page 6]. The Claimant submits that these authorities are not at odds with each other.*

*Paragraph 18 of the **Chandhok** was carted* [sic] *as being particularly important and is in the following terms:*

> *"In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."*

*5.2 The relevant parts of the **Hesketh** judgment are in the following terms:*

> *"21. The Scott Schedule states, amongst other things, that the appellant "was denied the same pay and conditions as the person whose job she was covering (Jo Buckle)". Objectively, that is an equal pay claim. It was not, however, a claim that was made in the original ET1, as amended by October 2018. For the reasons already noted in relation to ground 3, as at November 2018, it was an entirely new basis of claim. As such, an application to amend was required in order to introduce it.*
>
> *22. In considering the equal pay claim involving Dr Buckle as a comparator, the Employment Judge correctly noted that such a claim was first mentioned in the November 2018 Scott Schedule. Whilst no formal application to amend was made at*

that time, the inclusion of that claim in the November 2018 Scott Schedule can be taken, by implication, to be an application to amend to introduce the new claim."

*5.3 The key dicta of **Chandhok** is that tribunals should not be persuaded that an essential part of the case is outwith the pleadings. There is no conflict between that core proposition and what is said in **Hesketh**. **Hesketh** expressly recognises the requirement for an amendment to the pleadings in order for the new claim to be competently heard by the tribunal. However, where that new claim was referred to in a Scott Schedule it can be implied that an application to amend to introduce a new claim has been made. There is no conflict. Both cases recognise the need for a basis of claim to be in the pleadings.*

*5.4 The application to amend in the present claim was made in accordance with the principle set out in **Chandhok**. However, **Hesketh** tells us that it can be implied that the application to amend was made at the time when the Scott Schedule was lodged. In the present case, that was February 2022.*

6. Balance of hardship

6.1 The Tribunal rejected the Claimant's proposition that the balance of hardship was neutral and accepted the Respondent's agent's proposition that the balance of hardship weighs heavily against the Respondent [para (4) page 7].

6.2 The only reason given in support of that acceptance was the Respondents' exposure to potentially higher liability in compensation. However, the tribunal then notes 'we can see (as does the minority member Ms McAllister) that if the amendment is refused, the claimant will suffer potential hardship…with the potential of uncapped compensation'.

6.3 Having identified those factors on hardship the Tribunal does not give any reasons as to why it says the balance of hardship not only favours the Respondent but 'weighs heavily' in favour of it. It is submitted that

there is no objective or reasonable basis for that conclusion. That is hugely significant when, as recognised by the tribunal, the balance of hardship is of paramount importance.

7. Timing and manner of application

*7.1 As discussed above, the Claimant seeks to derive support from **Hesketh** not in terms of the nature of the amendment but in terms of the timing of the application. The section 103A claim has been by no means hidden from the Respondent nor did it only occur to the Claimant's agent at a late stage. As soon as the omission was realised the application to amend was made.*

*7.2 Although the formal application was only made late on day one of the hearing **Hesketh** tells the Tribunal it can be treated as being impliedly made months earlier in February 2022. At that time, the Tribunal and the Respondents had a Scott Schedule expressly referring to it and a Schedule of Loss based upon it. Fair notice has, it is submitted, been present since that date. It is precisely in those very restricted and particular circumstances that Hesketh makes the implication it provides for.*

7.3 The Tribunal states that 'No real or satisfactory explanation has been provided, on the claimant's behalf, as to why the application has only been made at this late stage, and why it was not made much earlier' [para (5) page 7]. Presumably, that proposition is made upon the basis of the rejection of the proposition noted in paragraph (1) that this a case of simply omission or administrative error. The Tribunal is invited to reconsider its position on that given what is submitted above.

8. Cost

*8.1 The Tribunal also considered the potential for costs to be increased as a result of the application [para (6) page 7]. Cost is not one of the express factors to be considered under **Selkent.** It is submitted that any injustice to the Respondents as a result of increased costs could*

be remedied by an award of costs rather than refusal of the amendment itself.

*8.2 That being so, not a lot of weight should be attached to this as a factor weighing in the interests of justice. If significant weight should be attached, it is submitted it would be an express factor in **Selkent**; which it is not.*

9. Further enquiry

9.1 The Tribunal expressed the view that allowing the Claimant to run an automatically unfair dismissal head would be 'very likely to require further enquiry'. There is already a claim for ordinary constructive dismissal. The evidence would explore all the acts and omissions leading to the Claimant's decision to resign. The Tribunal's determination on a claim for automatic unfair dismissal would simply turn upon whether those acts and omissions (if giving rise to liability) were caused by the making of a protected disclosure or disclosures. It is difficult to see what further enquiry the Respondent could make in that regard. It is a submissions point.

10. Application

10.1 The Tribunal recognised that its decision was a tight one in the Judgment. The Claimant submits that the issues noted above render it in the interests of justice for the tribunal to reconsider its Judgment and allow the amendment."

10. The claimant's application was referred to the Judge, who did not refuse it on initial consideration (under Rule 72), and by letter from the Tribunal, sent to both parties' representatives, on 8 June 2022, the respondents were invited to provide any response to the application by 15 June 2021, and, by that date, both parties were invited to express a view as to whether the reconsideration application could be determined without a Hearing, during August or September 2022.

Respondents' objections to reconsideration

11. By email to the Glasgow ET on 15 June 2022, Mr Robin Turnbull, senior associate from Anderson Strathern, Edinburgh, the respondents' solicitor, provided his response (with copy sent to Ms Carey, as the claimant's solicitor), and, in particular, Mr Turnbull stated, in his covering email, that the respondents considered that the claimant's application for reconsideration could be determined without a Hearing.

12. The respondents' response, prepared by their counsel, Mr Kenneth McGuire, advocate, read as follows:

RESPONSE TO APPLICATION FOR RECONSIDERATION

"Respondents' Motion

1.The application for reconsideration of the judgment of the Employment Tribunal of 25 May 2022 ("the Judgment") refusing the Claimant's application to amend her claim should be refused. The Claimant ("C") has not established that it would be in the interests of justice for the Judgment to be revoked and for the amendment to be allowed.

The law

2. The relevant law is well known and not controversial. By virtue of rule 70 of the Employment Tribunal Rules of Procedure ("the 2013 Rules") a tribunal has power to reconsider a judgment. The 2013 Rules do not list specific categories or grounds on which an application for reconsideration of a judgment can be made. A judgment can only be reconsidered if C can show that it is in the interests of justice to do so.

3. The Employment Appeal Tribunal (HHJ Eady QC) noted in ***Outasight VB Limited v Brown UKEAT/0253/14/LA*** *that case law on the interests of justice category under the previous (2004) rules remains relevant to the exercise of the tribunal's discretion under rule 70 of the 2013 Rules. The tribunal's discretion under the 'new' rules is not wider; the same basic principles apply. HHJ Eady QC stated at paragraph 33:*

> *The interests of justice have thus long allowed for a broad discretion, albeit one that 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.

4. The approach to be taken to the 'interests of justice' reconsideration of case management orders under Rule 29 of the 2013 Rules was analysed in ***Serco Ltd v Wells [2016] ICR 768****. The Employment Appeal Tribunal in* ***Serco*** *observed that the 2013 Rules must be taken to have been drafted with the principle of finality of litigation in mind. That observation, in my submission, would also apply to the application of the tribunal's discretion under Rule 70 of the 2013 Rules.*

C's application

5. It is difficult to discern from C's written application the reasons why it is said to be in the interests of justice for the tribunal to revoke its carefully reasoned Judgment and allow the amendment. As a general observation, it is submitted that C's application amounts to nothing than 'second bite of the cherry' and in all material respects is simply a re-run of the submissions made at the Tribunal hearing in support of the amendment. The application offers nothing new in terms of legal principle or factual analysis which should cause the tribunal to depart from its Judgment.

6. More specifically the following points are made:-

Case management process

(i) It is indisputable that the tribunal thoroughly and comprehensively applied the correct legal test to the determination of C's amendment application. The tribunal's judgment considers the relevant factors set out in the leading case of ***Selkent Bus Co Ltd v Moore [1996] ICR 836*** *and does not take into account any irrelevant factors. C's apparent criticism of the tribunal's approach in referring to the 'overriding objective' is spurious. It is clear that the tribunal applied the correct test. In any event Rule 2 of the 2013 Rules mandates a tribunal "to seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules". It is generally*

accepted that the Tribunal's power to allow an amendment forms part of its case management powers under Rule 29. The Tribunal was entitled to refer to the overriding objective.

*(ii) C asserts that although the tribunal expressed the view that she had had extensive time to particularise her claim, it failed to consider what particularisation had been made. It is submitted that there is nothing of merit in this assertion. In making the application to amend, C's counsel referred to the particularisation of the claim. In particular, reference was made to the Scott Schedule. The Tribunal was well aware of the process through which C's claim was particularised. C now seeks to rely on her PH Agenda. C did not, however, seek to rely on her PH Agenda when her application to amend was made. C's application does not offer any explanation for this omission. Strictly speaking, C is now seeking to rely on fresh evidence that was not produced at the time her application was made. The Tribunal should not consider that evidence. The earlier case law under the old review procedure cannot be ignored (**Ministry of Justice v Burton and another [2016] EWCA Civ 714**) requiring, in respect of fresh evidence, the party making the application showing that the new evidence could not have been obtained with reasonable diligence for use at the original hearing (**Ladd v Marshall [1954] 1 WLR 1489**) – that cannot be said here. In any event (and more importantly), the reliance on the PH Agenda does not advance C's assertion that the amendment should be allowed. The points C makes about the PH Agenda are essentially the same points that were made about the Scott Schedule when the application to amend was made. Those points were taken into account by the Tribunal in deciding to refuse the application to amend. The fact remains that C had not made a claim for automatic unfair dismissal under s.103A of the Employment Rights Act 1996 ("the ERA 1996").*

(iii) C asserts that the full text of the Scott Schedule does not "appear" to have been considered by the tribunal. There is no merit in this

assertion. The tribunal accepted that the Scott Schedule refers to C being automatically unfairly dismissed in terms of s.103A 1996. The Tribunal took this into account in refusing the application to amend. C's reference to a further provision of the Scott Schedule adds nothing to the submission made on her behalf when the application to amend was refused.

Nature of amendment

(iv) C criticises the tribunal for not accepting the submission that failure to plead a claim under s.103A in the ET1 was a simple omission or administrative error. C offered no evidence in making the application to amend to support this assertion. The tribunal was entitled to reach the conclusion it reached on this point. In any event, it is clear from reading the tribunal's judgment as a whole that the application to amend would have been refused even if it had accepted C's position on this point.

Hesketh v Glasgow Caledonian University [2022] EAT 33

*(v) C seeks to rely on the judgment of Lord Fairley in **Hesketh**. The recent decision in **Hesketh** was drawn to the attention of both parties by the Employment Judge when C made her application to amend. Both parties were given the opportunity to make submissions on **Hesketh** and did so. Once again, C's application for reconsideration merely repeats the submissions previously made in the application to amend her claim. It is submitted that the tribunal properly considered **Hesketh** and how it related to the well-known authority of **Chandhok v Tirkey 2015 ICR 527 EAT**. C asserts in her written application that there is no conflict between the core proposition in Chandhok and the more recent **Hesketh** decision (paragraph 5.3). If that is the case, the tribunal was entitled to refer to and rely on **Chandhok**.*

Balance of hardship

(vi) The tribunal's reasoning on this point is not open to criticism. The tribunal accepted that the amendment (if allowed) weighed against the

*Respondents ("R") and that the exposure to a potentially higher level of compensation was a hardship. The tribunal also accepted that if the amendment is refused C would suffer hardship. This does not mean, as suggested by C, that the balance of hardship was neutral. The important point in terms of the **Selkent** principles and the application to amend was that the tribunal considered the potential hardship to C and R and took this into account in reaching its decision. In such circumstances the tribunal's approach cannot be faulted.*

Timing and manner of application

*(vii) C's argument on this point relies on **Hesketh**. It is submitted that the tribunal properly applied the law and took all relevant factors into account (and did not consider irrelevant factors) in its analysis of the timing and manner of the application to amend. The application was made during the first day of the tribunal proceedings. C did not give any indication in the lead up to the hearing that the application would be made despite, for example, there being communication between the parties for the purposes of producing a Joint List of Issues. The tribunal's approach cannot be criticised.*

Cost

*(viii) C appears to criticise the tribunal for referring to the potential for costs to be increased if the amendment was allowed. The tribunal is entitled to take into consideration issues such as increased costs for one party and delay in determining whether to allow an amendment. The factors set out in **Selkent** are not an exhaustive list. The tribunal has a wide discretion in determining an amendment application.*

Further enquiry

(ix) C criticises the tribunal's view that to allow her to run an automatically unfair dismissal case is very likely to lead to 'further enquiry'. C says this is not the case because there is an existing claim for constructive dismissal. C's written application accepts, however, that the tribunal

would be required to reach a conclusion on whether the acts and omissions relied upon by her were caused by her making protected disclosures. This would not be the case in relation to a claim for 'ordinary' constructive dismissal. There is therefore likely to be the need for further witness evidence either in the form of cross examination or examination in chief. R would also have to consider whether it required further witness evidence if the amendment was allowed. This could also lead to further enquiry being necessary at the tribunal hearing.

7. C's application should be refused. In essence, it is a re-run of the submissions made at the time when the application to amend was made. The interests of justice include the interests of the parties and the public interest in the finality of litigation. The application falls well short of demonstrating that it would be in the interests of justice for the tribunal to revoke its carefully reasoned Judgment and allow the amendment.

8. R reserves its position to make an application for costs in relation to C's application for reconsideration.

9. R considers that the application can be determined without a hearing."

Claimant's reply to respondents' objections

13. In further representations made on 18 July 2022, after receipt of the respondents' objections, it was stated on the claimant's behalf that:

"Introduction

1.1 These further representations address the points raised by the Respondents' in their response document dated 15 June 2022 ("the Response") where appropriate. Rather than reflect specific numbering,

these representations will use the headings from the Response to provide the further representations.

2. The Law

2.1 There is no dispute between the parties that the test for reconsideration is one of the interests of justice. That test bestows upon the tribunal a broad discretion to determine what is and what is not in the interests of justice. The Tribunal is free to attach such weight to such factors as it considers appropriate.

3. C's application

3.1 The Claimant's original application makes certain propositions about the judgment under particular headings. Largely speaking, these propositions arise from what the Claimant has submitted are either errors or omissions of the tribunal in the decision making process.

3.2 On reconsideration, the tribunal may disagree with those submissions. That would be the end of the reconsideration process. However, if it is accepted that errors or omissions were made, it is clearly in the interests of justice to correct those errors or omissions. If corrected, the tribunal should then reconsider its decision on the basis of the corrected judgment.

3.3 The Claimant has made various submissions about the weight that should and should not be attached to certain factors. If the tribunal agrees with the Claimant, then it is submitted that it is in the interests of justice to change its decision. Put short, if the tribunal accepts that errors or omission were made that led to one decision, and having reconsidered matters another decision should be made, then it is clearly in the interests of justice to do so.

4. Case Management Process

4.1 The Tribunal is under a duty to provide reasons for its decision. One factor expressly identified by the tribunal as being taken into account was the case management process. As a factor, the Tribunal are under a duty, and the Claimant is entitled to the reasons why the tribunal factored this into its decision.

4.2 The Tribunal did not give reasons for the inference that there had been a lack of particularisation of the claim during the case management process. The Claimant has identified the various parts of the case management process in which particularisation was given both to the tribunal and, importantly, to the Respondents. As stated in the original application, there is no dispute the reference to 103A did not include it in the Paper Apart. But the comment by the tribunal attached to the much broader case management process.

4.3 The assertion by the Claimant is that the tribunal does not appear to have taken certain matters into account. It is not for the Claimant or any other party to 'guess' what has and what has not been taken into account. It is for the tribunal to give reasons.

5. Nature of amendment

5.1 No evidence under oath was led by those responsible for the omission. However, it is submitted that is the only inference that can be made when one properly considers the case management process and all of the documentary evidence.

5.2 The Tribunal is free to find that the inference does not arise from the circumstantial evidence. However, if it does so it should provide reasons for that; particularly given the importance of the factor and that it is, in the submission of the Claimant, clear and obvious.

6. Hesketh

*6.1 The Claimant's position on **Hesketh** is set out in the application for reconsideration. It is that there is no conflict between **Hesketh** and **Chandhok** for the purposes of the Claimant's application. That being so, both can happily apply. The Claimant's position is that **Hesketh** does apply and in a favourable manner. The Tribunal took a different view at first instance but has not provided reasons for doing so.*

7. Balance of hardship

7.1 The Claimant rests upon the submission made in the application for reconsideration.

8. Timing and manner of application

8.1 The Claimant rests upon the submission made in the application for reconsideration.

9. Cost

9.1 The Claimant rests upon the submission made in the application for reconsideration.

10. Further enquiry

10.1 The Claimant rests upon the submission made in the application for reconsideration.

11. Closing comment

11.1 The Respondents' response is peppered with terminology referring to 'criticisms' of the Tribunal. There is no criticism of the Tribunal. The Claimant believes that errors or omissions have been made in the making of and provision of the judgment. She is entitled to ask for those alleged errors and omissions to be addressed and the judgment as a whole to be reconsidered."

Respondents' response to claimant's reply

14. In further written representations for the respondents, made on 4 August 2022, it was added that:

> *1. The Claimant's ("C") representatives have made further representations in relation to the previously made Application for Reconsideration of the Tribunal's Judgment refusing C's application to amend. Those representations to a large extent repeat the representations previously made on behalf of C. In particular, the further representations suggest that the Tribunal has failed to give adequate reasons for its decision to refuse the application to amend made on behalf of C.*
>
> *2. It is not asserted on behalf of C that the Tribunal has failed to comply with any aspect of Rule 62 of the Employment Tribunals Rules of Procedure ("the Procedure Rules"). Rule 62(4) provides that "The reasons given of any decision shall be proportionate to the significance of the issue and for decisions other that judgments may be very short". It is submitted that the Tribunal's Judgment and Reasons complies with Rule 62.*
>
> *3. More generally it is submitted that the Tribunal's judgment is 'Meek compliant': **Meek v City of Birmingham District Council** [1987] IRLR 250, CA**.** The Tribunal' conclusion on the particularisation of C's claim is accurate and unobjectionable. The Tribunal notes that C had extensive time and ability to particularise her claim (which is correct) and that the application to amend was presented on the first day of the final hearing (which is also correct). In such circumstances it is difficult to understand C's difficulty with the Tribunal's approach to this issue.*
>
> *4. For these reasons and the reasons stated in the Respondent's previous submissions, the application for reconsideration should be refused."*

15. Those further representations for the respondents also addressed their costs application, at paragraphs 5 to 14, but that text is not reproduced here, because it is not a live issue for this Tribunal, at this stage, parties having agreed that it be left to a later date, for submissions at the end of the substantive Merits Hearing in due course. Suffice it to note here that the respondents sought wasted costs of **£3,024**, under Rule 80 or, in the alternative, an expenses award under Rule 76.

Claimant's reply to respondents' response

16. Finally, on 23 August 2022, the claimant's solicitor intimated the claimant's costs representations, and response to the respondents' further submissions of 4 August 2022. Those representations, on the costs application, at paragraphs 1.1 to 3.1, are not reproduced here, as that matter is not before us at this stage, as previously explained above. That reply, so far as material for present purposes, at paragraphs 4.1 to 4.4, related to the reconsideration application, stated as follows:

> **"4. Claimant's response to parts 1-4 of the Respondents' response**
>
> *4.1 The Respondents have made submissions upon that which it states is a 'suggestion' that the Tribunal has failed to give reasons on certain key matters. There is an important distinction to be made between reconsideration and an appeal.*
>
> *4.2 The Claimant is asking the Tribunal to reconsider its decision. Inherent in making such an application is the fact that the Claimant does not agree with the Tribunal's decision. Part of that lack of agreement is an absence of understanding of the Tribunal's reasoning on certain key matters. It may be that on reconsideration of those thought processes and reasoning that the Tribunal arrive at a different decision - a power that the Rules provide the Tribunal with.*

4.3 Rule 62 imposes a duty upon the Tribunal to provide reasons for its decisions. Failure to discharge this duty can found the basis for an appeal. That is not an issue for this Tribunal so the Claimant has not made any such assertion to this Tribunal on that matter.

*4.4 Similarly, the Respondents' reference to **Meek** is erroneous. In the first place, the Claimant is asking the Tribunal to reconsider its reasoning - not whether the reasoning in the Judgment meets a particular threshold. In the second place, the reasoning is only one factor to be taken into account as part of the reconsideration process as a whole."*

17. Following referral to the Judge, an email was sent to both parties' representatives, on 26 August 2022, acknowledging their recent correspondence, and stating that the Judge agreed with both parties' representatives that the respondents' wasted costs application would not be addressed at this Reconsideration Hearing.

Claimant's appeal to the employment appeal tribunal

18. On 29 August 2022, the claimant's solicitor, Ms Sacha Carey, emailed the Glasgow ET and advised that the claimant had appealed the Tribunal's judgment dated 25 May 2022, however this had been "*stayed*" by the EAT to enable the reconsideration to be dealt with first by this Tribunal.

19. The Tribunal was not alerted to the claimant's appeal at the time by the EAT office in Edinburgh, due to administrative error there. It only came to light during ongoing correspondence with the claimant's solicitor in connection with this reconsideration application.

20. The claimant's appeal to the EAT was, in fact, intimated by her solicitor on 6 July 2022, under EAT reference EA-2022-SCO-000065-JP**,** and acknowledged by the EAT as received on 8 July 2022. It is yet to go to a sift before an EAT Judge.

21. Ms Carey, the claimant's solicitor, advised the Glasgow ET, on 29 August 2022, that the claimant had appealed to the EAT. A copy of the appeal was

provided to the Glasgow ET by the EAT office on 31 August 2022, with an apology that it had not been intimated before, at the time of the EAT's letter of 8 July 2022 to both parties.

22. Specifically, the claimant's appeal was advanced on the following grounds, namely:

"The grounds upon which this appeal is brought are that the employment tribunal erred in law in that:

Inadequate reasons for decision

6.1 The Tribunal's reasons for its decision are set out from page 5 of the Judgment. The Tribunal correctly notes that the paramount considerations in applications to amend are the relative injustice and hardship involved in granting or refusing the application [lines 23-25 page 5]. The parts of the Judgment that inadequate reasons have been provided are as follows.

6.2 The Tribunal appears to have placed significant weight upon the view that the Claimant has had extensive time to particularise her claim in the case management process [lines 26-27 page 5]. However, the Tribunal does not then consider what particularisation had been made or when it was made. The Tribunal ordered the Claimant to produce an Agenda and a Scott Schedule containing further and better particulars at the CMO. These were produced by the Claimant on 2 and 7 February 2022, over three months prior to the Final Hearing commencing on 23 May 2022. The Tribunal failed to give reasons as to why the resulting Agenda and Scott Schedule did not particularise a claim for automatic unfair dismissal.

6.3 The Tribunal states it does not accept the categorisation of the absence of a section 103A claim as one of simple omission or

administrative error [para (1) page 6]. However, no reasons are given for the rejection of that proposition.

6.4 The Tribunal rejected the Claimant's proposition that the balance of hardship was neutral and accepted the Respondents' agent's proposition that the balance of hardship weighs heavily against the Respondents [para (4) page 7]. The only reason given in support of that acceptance was the Respondents' exposure to potentially higher liability in compensation. However, the tribunal then notes 'we can see (as does the minority member Ms McAllister) that if the amendment is refused, the claimant will suffer potential hardship…with the potential of uncapped compensation'. Having identified those factors on hardship the Tribunal does not give any reasons as to why it says the balance of hardship not only favours the Respondents but 'weighs heavily' in favour of it.

Misdirection or misapplication of law

6.5 The Tribunal appears to have rejected to attach any weight to the ***Hesketh v Glasgow Caledonian University*** *(UKEATS/0009/21/BA) judgment on the basis it 'sits at odds' with the dicta of* ***Chandhok v Turkey*** [sic] *2015 ICR 527 EAT [para (2) page 6]. The Claimant submits that these authorities are not at odds with each other.*

6.6 The key dicta of ***Chandhok*** *is that tribunals should not be persuaded that an essential part of the case it* [sic] *outwith the pleadings. There is no conflict between that core proposition and what is said in* ***Hesketh****.* ***Hesketh*** *expressly recognises the requirement for an amendment to the pleadings in order for the new claim to be competently heard by the tribunal. However, where that new claim was referred to in a Scott Schedule it can be implied that an application to amend to introduce a new claim has been made.*

There is no conflict. Both cases recognise the need for a basis of claim to be in the pleadings.

*6.7 The application to amend in the present claim was made in accordance with principle set out in **Chandhok.** However, **Hesketh** tells us that it can be implied that the application to amend was made at the time when the Scott Schedule was lodged. In the present case, that was February 2022.*

Perversity

6.8 The Tribunal rejected the categorisation of the absence of a section 103A claim as one of simple omission or administrative error [para (1) page 6]. In circumstances where reference to that claim was either expressly or impliedly made in the Claimant's Agenda, Scott Schedule, Further and Better Particulars and Schedule of Loss that rejection is perverse.

6.9 In rejecting the categorisation of the amendment as an administrative one the Tribunal went on to state that 'No real or satisfactory explanation has been provided, on the claimant's behalf, as to why the application has only been made at this late stage, and why it was not made much earlier' [para (5) page 7].

6.10 Clearly, the Tribunal made this observation on the basis of its refusal that the failure to include a section 103A claims was one of omission or oversight. It has then placed weight upon a subsequent failure to provide a 'real or satisfactory' explanation for the claim not being provided. The refusal to accept the proposition that reference to the section 103A claim was omitted from claim 4113686/2021 because of an administrative error is perverse and appears to have weighed heavily in the Tribunal's subsequent decision.

6.11 The combination of the above led the Tribunal to make a decision that no reasonable tribunal would have made in refusing the application to amend.

Order sought

6.12 The EAT is invited to overturn the Tribunal's decision and allow amendment of claim 4113686/2021 in the terms sought. Thereafter, to remit the claim to the tribunal at first instance to hear the substantive claim."

Issues for determination by this Tribunal

23. The only live issue for determination by the Tribunal at this Reconsideration Hearing was the claimant's opposed application for reconsideration of our Judgment dated 24 May 2022, as per Ms Carey's application of 6 June 2022, and Mr Turnbull's objections of 15 June 2022, and their respective further written representations, all as each reproduced earlier in these Reasons.

24. On 25 August 2022, following referral to the allocated Judge, Employment Judge McPherson, of Ms Carey's email of 23 August 2022 at 14:09, the Tribunal clerk wrote to both parties, on the Judge's instructions, to advise parties that the case would proceed to the in chambers Reconsideration Hearing by the full Tribunal on 30 September 2022, as previously intimated to parties, where parties were not required to attend.

25. However, in that same correspondence from the Tribunal , the Judge invited written comments from both parties, within the next 14 days at latest, as to whether or not, in light of their written representations to date, they wished to add to the case law on reconsideration that they have so far cited, and, in particular, whether they wish to say anything about the EAT judgment in ***Wolfe V North Middlesex University Hospital NHS Trust*** [2015] UKEAT 0065_14_0904 ; [2015] ICR 960, which has not been cited by either party, but which the Judge has identified as being relevant to the scope of a

reconsideration application to the Tribunal, as opposed to an appeal against an ET judgment.

26. As regards the respondents' wasted costs application against Ergo Law/expenses against the claimant, in light of both parties' written submissions on that matter, Judge McPherson had confirmed that that application would not be addressed by the Tribunal, at the same time as the opposed reconsideration application on 30th September, and he directed that it shall be reserved for determination by the same Tribunal at some later stage, namely at the end of the substantive Hearing on the merits in due course.

27. On that basis, we did not, at this Reconsideration Hearing, concern ourselves with the opposed wasted costs application.

Relevant law: reconsideration

28. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 set out the Rules of Procedure in Schedule 1, and those in relation to the reconsideration of judgments are at Rules 70 – 73. Those provisions are as follows:

> **"*70 Principles***
>
> *A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ('the original decision') may be confirmed, varied or revoked. If it is revoked it may be taken again.*
>
> ***71 Application***
>
> *Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record,*

or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

72 Process

(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a

Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part."

29. When considering such an issue regard must also be had to the Tribunal's overriding objective in Rule 2. The Tribunal's *"overriding objective"* under Rule 2 is to deal with the case fairly and justly. The precise terms of Rule 2 of the Employment Tribunals Rules of Procedure 2013, are as follows:

"*Overriding objective*

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

(a) ensuring that the 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 with the Tribunal."

30. In ***Serco Ltd v Wells*** [2016] ICR 768, the EAT observed that the Rules of Procedure must be taken to have been drafted in accordance with the principles of finality, certainty and the integrity of judicial orders and decisions, which usually means that a challenge to an order should take the form of an appeal to a higher tribunal rather than being reconsidered by another Employment Judge "*save in carefully defined circumstances".*

31. Under the heading of "*The fundamental principle*" the following was stated by the EAT judge, His Honour Judge Hands QC, in ***Serco***:

> *"24….. I need to recognise that the topics of certainty and finality in litigation and of the integrity of judicial orders and decisions are both antique and far reaching. Even in the relatively narrow statutory jurisdiction of the employment tribunal the topic covers all kinds of orders and directions; examples are to be found in the context of strike out, reconsideration (formerly review) and what is nowadays called 'relief from sanction' all of which might involve variation of previous directions and orders, as well as in cases, like the present, which might be described as 'set-aside cases', where the only issue is variation of a previous direction and order."*

32. The issue of reconsideration was therefore specifically in contemplation. The EAT held that a Tribunal should interpret the words '*necessary in the interests of justice*' in what is now Rule 70 as limiting reconsideration to where: (a) there has been a material change of circumstances since the order was made; (b) the order was based on a misstatement or omission; or (c) there is some other 'rare' and 'out of the ordinary' circumstance.

33. Specifically, at paragraph 43, Judge Hand, in ***Serco***, stated that:

> *"43. In my judgment the following emerges from the above consideration of the Rules and authorities relating to the CPR and the Employment Tribunal Rules:*

a. the draftsmen of both sets of Rules must be taken to have drafted them with the same universal principle in mind, namely what I have described as finality and certainty of decision and orders and the integrity of judicial decisions and orders; this principle, as the authorities in both jurisdictions illustrate, usually directs any challenge to an order towards an appeal to a Tribunal of superior jurisdiction and discourages seeking the same Judge or another Judge of equivalent jurisdiction to look again at an order or decision, save in carefully defined circumstances;

b. although the only reference in either set of Rules to a "change in circumstances" is in a Practice Direction to the CPR and not in the CPR itself (and there is no explicit reference to a "material change in circumstances" in either) the principle, as it emerges from the authorities referred to above is that before a Judge can interfere with an earlier order made by a Judge of equivalent jurisdiction there must be either a material change of circumstances or a material omission or misstatement or some other substantial reason, which, taking account of the warning Rix LJ gives against attempting exhaustive definition, it is not possible to describe with greater precision;

c. when it comes to long standing procedural principles such as this, unless the rubric of the Rules clearly indicates the contrary, that principle should be taken to have been in the mind of the draftsmen when the Rules were drafted and the Rules must be interpreted so as to take account of such a principle;

d. the draftsmen of the current Employment Tribunal Rules have used the expression "necessary in the interests of justice"; in my judgment that should be interpreted through the prism of the principle I have just articulated; variation or revocation of an order or decision will be necessary in the interests of justice where there has been a material change of circumstances since the order was made or where the order has been based on either a misstatement (of fact and possibly, in very

rare cases, of law, although that sound much more like the occasion for an appeal) or an omission to state relevant fact and, given that definitions cannot be exhaustive, there may be other occasions, although as Rix LJ put it these will be "rare … [and]... out of the ordinary".

34. The EAT also held that the issue of whether or not an order should be varied or set aside was a matter of jurisdiction and not an exercise of discretion by the Tribunal. The question of whether there has been a material change of circumstances was to be decided, according to Judge Hand, at paragraph 45 in ***Serco***, "*from an objective standpoint … not from the point of view of a band of reasonableness but from the point of view that either the factual matrix can support that view or it cannot*".

35. The previous statutory formulation of the terms of Rule 70 was based on the test laid down in ***Ladd v Marshall*** [1954] 3 All ER 745, for determining the admissibility of fresh evidence in the Court of Appeal (therefore a matter of English law and practice), and the substance of the ***Ladd v Marshall*** test has been held to be applicable to what had been a review procedure in employment tribunals in ***Wileman v Minilec Engineering Ltd*** [1988] IRLR 144.

36. Following the implementation of the 2013 Rules, the EAT held that the ***Ladd v Marshall*** test (in conjunction with the overriding objective) continues to apply where it is sought to persuade a Tribunal, in the interests of justice, to reconsider its judgment on the basis of new evidence (***Outasight VB Ltd v Brown*** UKEAT/0253/14).

37. The ***Ladd v Marshall*** test has three parts. It must be shown: (a) that the evidence could not have been obtained with reasonable diligence for use at the original hearing; (b) that it is relevant and would probably have had an important influence on the hearing; and (c) that it is apparently credible.

38. There is one authority on the former provisions as to review being in ***Stevenson v Golden Wonder Ltd*** [1977] IRLR 474 in which the EAT stated that those provisions were not intended to provide parties with the

opportunity for "*further evidence [to be] adduced which was available before"*.

39. The EAT in ***Outasight*** acknowledged that there might be cases where the interests of justice would permit fresh evidence to be adduced notwithstanding that the principles were not strictly met. What is not permitted under the 2013 Rules, the EAT held, is the adoption of an altogether broader approach whereby fresh evidence may be admitted regardless of the constraints to be found in the established test.

40. This reconsideration application, however, does not involve us in considering any "*new evidence*". As at day 2 of the Final Hearing before us, we had not started to hear any evidence from the claimant, or any other witness. While most reconsideration applications tend to come after evidence has been led, and a Judgment issued on the merits of a case, this reconsideration arises from our interlocutory ruling on day 2, and our decision then on the claimant's opposed application to amend her claim.

41. The claimant's application on 6 June 2022 proceeded as a reconsideration application in terms of Rule 70, no doubt because our interlocutory ruling, or decision, refusing the claimant's amendment was set forth in a written Judgment. The competency of that approach was not commented upon by the respondents in their response to the reconsideration application, nor by the Tribunal.

42. We note and record here, however, that we see from a recent EAT judgment, by His Honour Judge Auerbach, in ***Ms Elly Zhang v (1) Heliocor Ltd and (2) Heliocor Consulting Ltd*****,** heard on 16 August 2022, and the EAT judgment published on the Gov.Uk website on 17 October 2022, as [2022] EAT 152, that the learned EAT Judge has stated, at paragraph 50 of his judgment, that:

> *"50. I observe that Rule 70 (reconsideration of judgments) has no application to a decision on amendment, which is a case management decision and not a judgment. Rather, an application can be made to revisit a case management decision at any time, but this ought not to*

*be entertained unless there has been a material change of circumstances since the previous decision was taken (see **Hart v English Heritage** [2006] IRLR 915, EAT and the recent discussion in **Liverpool Heart and Chest Hospital NHS Foundation Trust v Dr Michael Poullis** [2022] EAT 9)."*

43. As the Tribunal's decision on the claimant's amendment application is thus to be categorised as a case management decision, and not a judgment, the proper route to have it revisited by the Tribunal, as opposed to appealed against to the EAT, should have been an application to vary, suspend or set aside, as per Rule 29, which provides that:

"29. The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order… A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."

44. In the present case, of course, the claimant made a written application for leave to amend, on 23 May 2022, and the Tribunal heard oral argument from both parties' counsel on 24 May 2022, before retiring for private deliberation in chambers, and then giving an oral ruling, refusing the application, by a majority decision.

45. A reconsideration application requires to be dealt with as per Rules 70 to 73 of the Employment Tribunals Rules of Procedure 2013. We have set out its full terms above for ease of reference. As this was an application for reconsideration by the claimant, Rule 73, relating to reconsiderations by the Tribunal on its own initiative, does not fall to be considered further. Further, as always, there is the Tribunal's overriding objective, under Rule 2**,** to deal with the case fairly and justly.

46. For present purposes, while the recent ***Zhang*** judgment by the EAT refers, as detailed above, the practical effect of the claimant's solicitor proceeding

under Rule 70, rather than Rule 29, has no practical effect, because the relevant test for the Tribunal is whether variation, suspension or set aside of the case management decision of 24 May 2022, refusing the claimant's amendment application, is "*necessary in the interests of justice**."***

47. The previous Employment Tribunal Rules 2004 provided a number of grounds on which a judgment could be reviewed (now called a reconsideration). The only ground in the current 2013 Rules is that the judgment can be reconsidered where it is necessary "*in the interests of justice*" to do so. That means justice to both sides.

48. However, it was confirmed by Her Honour Judge Eady QC (as she then was, now Mrs Justice Eady, the current EAT President) in ***Outasight VB Limited v Brown*** [2014] UKEAT/0253/14/LA, reported at [2015] ICR D11**,** that the guidance given by the Employment Appeal Tribunal in respect the previous Rules is still relevant guidance in respect of the 2013 Rules and, therefore, we have considered the case law arising out of the 2004 Rules.

49. The approach to be taken to applications for reconsideration was also set out more recently in the case of ***Liddington v 2Gether NHS Foundation Trust*** [2016] UKEAT/0002/16/DA in the judgment of Mrs Justice Simler, then President of the EAT, and now Lady Justice Simler in the Court of Appeal. The Employment Tribunal is required to:

> "1*. identify the Rules relating to reconsideration and in particular to the provision in the Rules enabling a Judge who considers that there is no reasonable prospect of the original decision being varied or revoked refusing the application without a hearing at a preliminary stage;*
>
> *2. address each ground in turn and consider whether is anything in each of the particular grounds relied on that might lead ET to vary or revoke the decision; and*
>
> *3. give reasons for concluding that there is nothing in the grounds advanced by the (applicant) that could lead him to vary or revoke his decision."*

50. In paragraph 34 and 35 of the Judgment, the learned EAT President, Mrs Justice Simler, stated as follows:

> *34. In his Reconsideration Judgment the Judge identified the Rules relating to reconsideration and in particular to the provision in the Rules enabling a Judge who considers that there is no reasonable prospect of the original decision being varied or revoked refusing the application without a hearing at a preliminary stage. In this case, the Judge addressed each ground in turn. He considered whether was anything in each of the particular grounds relied on that might lead him to vary or revoke his decision. For the reasons he gave, he concluded that there was nothing in the grounds advanced by the Claimant that could lead him to vary or revoke his decision, and accordingly he refused the application at the preliminary stage. As he made clear, 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 reconsideration accordingly.*

51. There is a public policy principle that there must be finality in litigation and reviews or reconsiderations are a limited exception to that principle. In the case of ***Stephenson v Golden Wonder Limited*** [1977] IRLR 474 it was made clear that a review (now a reconsideration) is not a method by which a disappointed litigant gets a "*second bite of the cherry*". Lord Macdonald, the Scottish EAT Judge, said that the review provisions 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 produced which was available before".*
52. The Employment Appeal Tribunal went on to say in the case of ***Fforde v Black*** EAT68/80 that this ground does not mean "*that in every case where a litigant is unsuccessful 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 even more exceptional cases where something has gone radically wrong with the procedure involving the denial of natural justice or something of that order."*
53. "*In the interests of justice*" means the interests of justice to both sides. The Employment Appeal Tribunal provided further guidance in ***Reading v EMI Leisure Limited*** EAT262/81 where it was stated "*when you boil down what it said on [the claimant's] behalf it really comes down to this: that she did not do herself justice at the hearing so justice requires that there should be a second hearing so that she may. Now, "justice", means justice to both parties. It is not said, and, as we see it, cannot be said that any conduct of*

the case by the employers here caused [the claimant] not to do herself justice. It was, we are afraid, her own inexperience in the situation."

54. The 2013 Rules came into force on 29 July 2013 and introduced the new concept of reconsideration of judgments rather than a review of judgments as it was entitled under the previous 2004 Rules of Procedure. In the 2004 Rules there were five grounds on which a review could be sought and the last of the five was the single ground that now exists for a reconsideration under the 2013 Rules namely that the interest of justice render it necessary to reconsider.

55. We consider that any guidance on the meaning of "*the interests of justice*" issued under the 2004 Rules (and the earlier Rules) is still relevant to reconsiderations under the 2013 Rules. We also remind ourselves that the phrase "*in the interests of justice*" means the interests of justice to both sides.

56. Further, we have also reminded ourselves of the guidance to Tribunals in ***Newcastle upon Tyne City Council – v- Marsden*** [2010] ICR 743 and in particular the words of Mr Justice Underhill when commenting on the introduction of the overriding objective (now found in Rule 2 of the 2013 Rules) and the necessity to review previous decisions and on the subject of a review:

> "*But it is important not to throw the baby out with the bath-water. As Rimer LJ observed in Jurkowska v Hlmad Ltd. [2008] ICR 841, at para. 19 of his judgment (p. 849), it is "basic" "… that dealing with cases justly requires that they be dealt with in accordance with recognised principles. Those principles may have to be adapted on a case by case basis to meet what are perceived to be the special or exceptional circumstances of a particular case. But they at least provide the structure on the basis of which a just decision can be made."*
>
> *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 tribunal's decision on a substantive issue as final (subject, of course, to appeal").

57. Further, we have also considered the further guidance on the 2013 Rules from Her Honour Judge Eady QC (as she then was, now Mrs Justice Eady, EAT President) in her judgment in ***Outasight VB Limited –v- Brown*** [2014] UKEAT/0253/14. We have considered that guidance and in particular have noted what is said about the grounds for a reconsideration under the 2013 Rules:

"In my judgment, the 2013 Rules removed the unnecessary (arguably redundant) specific grounds that had been expressly listed in the earlier Rules. Any consideration of an application under one of the specified grounds would have taken the interests of justice into account. The specified grounds can be seen as having provided examples of circumstances in which the interests of justice might allow a review. The previous listing of such examples in the old Rules - and their absence from new - does not provide any reason for treating the application in this case differently simply because it fell to be considered under the "interests of justice" provision of the 2013 Rules. Even if it did not meet the requirements laid down in Rule 34(3)(d) of the 2004 Rules, the ET could have considered whether it should be allowed as in the interests of justice under Rule 34(3)(e). There is no

reason why it should then have adopted a more restrictive approach than it was bound to apply under the 2013 Rules".

58. In considering matters in the present case, at an earlier stage, the Judge invited both representatives to comment upon an EAT judgment that neither party had cited to the Tribunal, namely the EAT judgment in ***Wolfe v North Middlesex University Hospital NHS Trust*** [2015] ICR 960 ; [2015] UKEAT/0065/14, and we have noted, from that judgment, at paragraph 75, what the EAT judge, His Honour Judge Serota QC, stated: "*There is now a long line of authority to the effect that where a would be Appellant believes there has been a material omission on the part of an Employment Tribunal to deal with a significant issue or to give adequate reasons in respect of significant findings, the proper course is not to lodge a Notice of Appeal, but to go straight back to the Employment Tribunal and ask that the omission be repaired. If reasons are given orally, this should be done as soon as practicable on the completion of delivery of the judgment, and if Written Reasons are later handed down as soon as practicable after the Judgment is received. I would like to make clear that it is the duty of advocates to adopt this course in litigation in the Employment Tribunal."*

59. So too have we noted and taken into account what both parties' further written submissions had to say about ***Wolfe*****.** For the respondents, in their further written submissions, intimated by their solicitor to the Tribunal on 2 September 2022, it was stated by their counsel, Mr McGuire, that:

    1. *"Parties have been invited by the employment tribunal, if so advised, to make submissions on the decision of the Employment Appeal Tribunal ("the EAT") in* ***Wolfe v North Middlesex University Hospital NHS Trust*** *[2015] ICR 960. The EAT in* ***Wolfe*** *(Judge Serota QC sitting alone) held that if it is claimed by an appellant (to the EAT) that the tribunal has failed at all to deal with an issue which was before it, or to give adequate reasons for part of its decision – which is essentially the position in the present case – the proper*

course is to apply to the employment to the tribunal by way of reconsideration of its judgment and reasons. This could result in a tribunal amplifying the reasons for its decision if necessary.

2. *In the present case, the focus of the Claimant's application for reconsideration is on (allegedly) incomplete or inadequate reasons given by the tribunal for "certain key considerations in the decision" (see Claimant's Application for Reconsideration at para 1.2). The Respondents' position – as set out in the Response to the Application – is that there is no merit whatsoever in the Claimant's application for reconsideration, and that the tribunal provided clear and concise reasons for its decision. The tribunal could – and this appears to be envisaged in the **Wolfe** case – determine the Claimant's application by varying its decision to the extent that further reasons are provided for its findings. This would not involve the tribunal's judgment being revoked.*
3. *For completeness, it should be stated that the Respondents understanding is that the Claimant has lodged an appeal with the EAT."*

60. For the claimant, it was stated, in counsel for the claimant's submission, intimated by her solicitor to the Tribunal on 9 September 2022, that:

> **"1.** ***Application of Wolfe***
>
> *1.1 Parties have been invited by the Tribunal to provide comment on the relevance of **Wolfe v North Middlesex University Hospital NHS** Trust [2015] UKEAT 0065_14_0904; [2015] ICR 960 to the application for reconsideration.*
>
> *1.2 The Claimant submits that no reading of **Wolfe** should be taken to restrict the scope of the tribunal's powers of reconsideration. The ratio and dicta of **Wolfe** concern the scope of the jurisdiction of Employment Appeal Tribunal under section 21 of the Employment Tribunals Act 1996 ("the Act").*

That is an entirely distinct procedure to reconsideration by the Employment Tribunal.

1.3 The rules governing reconsideration are set out in Rules 70-73 of the Employment Tribunal Rules of Procedure 2013 ("the Rules"). The discretion given to a Tribunal to reconsider a decision by the Rules if broad and unqualified. The writer is not aware of any authority which restricts that discretion or the jurisdiction of the Tribunal.

*1.4 Of course, the ability to seek reconsideration is not completely unfettered and the Rules do contain some limitations. The Tribunal can only be asked to reconsider a 'decision'. That is where there could be similarity between the present application and the decision in **Wolfe**. The fundamental issue in that case was the interpretation of the term 'decision' for the purposes of the Act. It not being a defined term for the purposes of the Act the Employment Appeal Tribunal based its interpretation on the definition of 'judgment' in the Rules being (Rule 1(3)):*

> *"…a decision, made at any stage of the proceedings…which finally determines -*
>
> > *(i) a claim, or part of a claim, as regards liability, remedy or costs…*
> >
> > *(ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so…"*

1.5 The Claimant does not understand there to be any dispute that the application for reconsideration is against 'a decision' of the tribunal. That being so, it cannot be said to be incompetent in

*any way. Beyond that, it is submitted that there is no dicta in **Wolfe**, or indeed anywhere else, that restricts the scope of the matters the Tribunal can consider as part of the reconsideration process.*

*1.6 Put short, the Claimant's position is that **Wolfe** has no application for the ongoing process of reconsideration in this claim.*

*1.7 It is worth emphasising that the main grounds for **Wolfe** was an alleged failure to give adequate reasons. The application for reconsideration contains a number of grounds which must be addressed. Those include reasons which have been stated but which the Claimant does not agree with (paragraphs 3.6 and 7.3 of the application for reconsideration); apparent use of authority (paragraph 5.4); and the apparent weight attached to certain factors (paragraph 8.2)*

2. Appeal

2.1 The Claimant has lodged an appeal given the applicability of the relevant timescales for doing so. Part of that appeal does include a failure to give reasons. It is emphasised that is only part of the appeal just as it forms only part of the application of reconsideration. There are other matters which are of equal significance that must be addressed.

2.2 If the Tribunal exercises its discretion to overturn the original decision the need for the appeal will fall away in its entirety. Alternatively, if the tribunal decides to adhere to its original decision but, in doing so, provides adequate reasons for it then that part of the appeal will fall away."

61. Further, in considering this reconsideration application, we have also taken into account the helpful judicial guidance provided by Her Honour Judge Eady QC, then EAT Judge, and now EAT President, in her judgment in ***Scranage v Rochdale Metropolitan Borough Council*** [2018] UKEAT/0032/17, at paragraph 22, when considering the relevant legal principles, where she stated as follows (underlining is our emphasis): -

> *"The test for reconsideration under the ET Rules is thus straightforwardly whether such reconsideration is in the interests of justice (see Outasight VB Ltd v Brown UKEAT/0253/14 (21 November 2014, unreported). The "interests of justice" allow for a broad discretion, albeit one that 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."*

62. ***Outasight VB Ltd v Brown*** is, of course, an earlier EAT authority [2014] UKEAT/0253/14, now reported at [2015] ICR D11, also by Her Honour Judge Eady QC, where at paragraphs 27 to 38, the learned EAT Judge (now Mrs Justice Eady, EAT President) reviewed the legal principles. The EAT President, then Mr Justice Langstaff, in ***Dundee City Council v Malcolm*** [2016] UKEATS/0019-21/15, at paragraph 20, states that the current Rules effected no change of substance to the previous Rules, and that they do not permit a claimant to have a second bite of the cherry, and the broader interests of justice, in particular an interest in the finality of litigation, remained just as important after the change as it had been before.
63. Further, we have also taken into account the Court of Appeal's judgment, in ***Ministry of Justice v Burton & Another*** [2016] EWCA Civ.714, also reported at [2016] ICR 1128, where Lord Justice Elias, himself a former EAT President, at paragraph 25, refers, without demur, to the principles "*recently*

affirmed by HH Judge Eady in the EAT in ***Outasight VB Ltd v Brown*** *UKEAT/0253/14."*

64. Specifically, at paragraph 21 in ***Burton***, Lord Justice Elias had stated that:

> *"An employment tribunal has a power to review a decision "where it is necessary in the interests of justice": see Rule 70 of the Tribunal Rules. This was one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, as Underhill J, as he was, pointed out in Newcastle on Tyne City Council v Marsden [2010] ICR 743, para. 17 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. In particular, 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…"*

Discussion and Deliberation

65. We have now carefully considered both parties' written submissions, our own notes of the oral submissions made by counsel for both parties at the Final Hearing on 23 and 24 May 2022, and also our own obligations under Rule 2 of the Employment Tribunal Rules of Procedure 2013, being the Tribunal's overriding objective to deal with the case fairly and justly.

66. We consider that both parties have been given a reasonable opportunity, in advance of this Reconsideration Hearing, to make their own written representations pursuing, and opposing, as the case may be, the claimant's application for reconsideration of our original Judgment dated 24 May 2022.

67. On the test of *"in the interests of justice",* under Rule 70, which is what gives this Tribunal jurisdiction in this matter, there is now only one ground for "*reconsideration*", being that reconsideration "*is necessary in the interests of justice*." That phrase is not defined in the Employment Tribunals Rules of Procedure 2013**,** but it is generally accepted that it encompasses the five

separate grounds upon which a Tribunal could "*review*" a Judgment under the former 2004 Rules.

68. While there are many similarities between the former and current Rules, there are some differences between the current Rules 70 to 73 and the former Rules 33 to 36. Reconsideration of a Judgment is one of the two possible ways that a party can challenge an Employment Tribunal's Judgment. The other way, of course, is by appeal to the Employment Appeal Tribunal.

69. Rule 70 confers a general power on the Employment Tribunal, and it stands in contrast to the appellate jurisdiction of the Employment Appeal Tribunal ("EAT"). In most cases, a reconsideration will deal with matters more quickly and at less expense than an appeal to the EAT.

70. Here, in the present case, the claimant has chosen to pursue both routes. The EAT will decide next steps in that appeal after it, and both parties, have given consideration to this our Reconsideration Judgment.

71. In considering parties' competing arguments in their written representations to us, on the opposed reconsideration application, we have also reminded ourselves, by self-direction from the Judge, about the relevant law on amendments, where our undernoted summary of the relevant law is more extensive, in case law references, than the case law to which we were referred by counsel at the Final Hearing.

72. In his written submission on amendment, handed up to us on 24 May 2022, Mr MacDougall, counsel for the claimant, referred us to the IDS Employment Law Handbook, volume 5, Employment Tribunal Practice & Procedure, chapter 8 – Amendments, at paras 8.17 to 8.37; ***Selkent Bus Co Ltd v Moore*** [1996] ICR 836; ***New Star Asset Management Holdings Ltd v Evershed*** [2010] EWCA Civ. 870; and ***Pruzhanskaya v International Trade and Exhibitors (JV) Ltd*** [2018] UKEAT 0046/18.

73. In the course of discussion with counsel, the Judge referred to, and invited their submissions, upon the EAT judgment by Lord Fairley, the Court of

Session judge sitting in the EAT, in ***Hesketh v Glasgow Caledonian University*** [2021] UKEATS/0009/21; [2022] EAT 33.

74. For the purposes of our discussion on this reconsideration application, the Judge has also given us, and we have taken into account, this concise summary of the relevant law on amendments, as follows:

Relevant law – amendment

(a) There is no issue that under Rule 29 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Tribunal Rules), this Tribunal has discretion to allow an amendment at any stage of the proceedings. However, such discretion must be exercised in accordance with the overriding objective of dealing with cases justly and fairly under Rule 2 of the Tribunal's Rules.

(b) In ***Chandhok v Tirkey*** [2015] IRLR 195 the (former) President of the EAT, Mr Justice Langstaff said, at paragraphs 16, 17 and 18, as follows:

"16….The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.

17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a

minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to

know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

(c) In the Court of Appeal judgment in ***Kuznetsov v The Royal Bank of Scotland Plc*** [2017] EWCA Civ 43, Lord Justice Elias stated this, at paragraphs 19 and 20, as follows:

"19. First, employment tribunals have a broad discretion in the exercise of case management powers and the appellate courts will not interfere unless there is an error of law or the decision is perverse: Carter v Credit Change Ltd [1980] 1 All ER 252 (CA). Errors of law include failing to take into account relevant considerations and having regard to irrelevant ones.

20. Second, in the case of the exercise of discretion for applications to amend, a tribunal should take into account all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it: see the observations of Mummery J, as he then was, in ***Selkent Bus Co. v Moore*** *[1996] ICR 836 (EAT). Factors to be taken into consideration include the nature of the amendment, so that for example an amendment which changed*

the basis of an existing claim will be more difficult to justify than an amendment which essentially places a new label on already pleaded facts; the question whether the claim is out of time and if so, whether time should be extended under the applicable statutory provision; and the extent of any delay and the reasons for it. As Underhill LJ pointed out in ***Abercrombie v Aga Rangemaster Ltd*** *[2013] EWCA Civ 1148; [2014] ICR 209 at para.47, these are neither intended to be exhaustive nor should they be approached in a tick-box fashion."*

(d) Further, despite it being unreported, there is also Lady Smith's EAT judgment in the Scottish appeal of ***Ladbrokes Racing Ltd v Traynor*** [2007] UKEATS/0067/07. It is detailed in chapter 8 of the IDS Handbook on Employment Tribunal Practice and Procedure, at Section 8.50**.** At paragraph 20 of her judgment, Lady Smith, as well as noting the ***Selkent*** principles, stated as follows:

"When considering an application for leave to amend a claim, an Employment Tribunal requires to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing. That involves it considering at least the nature and terms of the amendment proposed, the applicability of any time limits and the timing and the manner of the application. The latter will involve it considering the reason why the application is made at the stage that it is made and why it was not made earlier. It also requires to consider whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs whether because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if they are unlikely to be recovered by the party who incurs them. Delay

may, of course, in an individual case have put a respondent in a position where evidence relevant to the new issue is no longer available or is of lesser quality than it would have been earlier."

(e) The correct approach to adopt when considering an application to amend was recently considered and outlined by His Honour Judge Tayler in the EAT in the case of ***Vaughan v Modality Partnership Limited*** [2020] UKEAT 0147/20; [2021] ICR 535, who stated as follows, at paragraphs 21 to 28, which are well worth quoting from, in full: -

*"21. Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting the **Selkent** factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim.*

22. Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence. This is not a risk-free exercise as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek a discretionary amendment later.

*23. As every employment lawyer knows the **Selkent** factors are: the nature of the amendment, the applicability of time limits and the timing and manner of the application. The examples were given to assist in conducting the fundamental balancing exercise. They are not the only factors that may be relevant.*

*24. It is also important to consider the **Selkent** factors in the context of the balance of justice. For example:*

24.1. A minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing.

24.2 An amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim.

24.3 A late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs.

25. No one factor is likely to be decisive. The balance of justice is always key.

26. Rather like Charles Darwin who, when pondering matrimony, wrote out the pros and cons, there is something to be said for a list. It may be helpful, metaphorically at least, to note any injustice that will be caused by allowing the amendment in one column and by refusing it in the other. A balancing exercise always requires express consideration of both sides of the ledger, both quantitively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice.

27. Where the prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it.

28. An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice."

(f) The key test for considering amendments has its origin in the decision of ***Cocking v Sandhurst (Stationers) Ltd*** [1974] ICR 650 at 657BC:

> *"In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case*

have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused."

(g) In ***Selkent Bus Co Limited v Moore (1996)*** ICR 836 at 843D it was said:

"Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it."

(h) In ***Transport and General Workers Union v Safeway Stores Ltd*** [2007] UKEAT/0092/07, Mr Justice Underhill, then President of the Employment Appeal Tribunal, concluded that on a correct reading of ***Selkent*** the fact that an amendment would introduce a claim that was out of time was not decisive against allowing the amendment, but was a factor to be taken into account in the balancing exercise.

(i) The list that Mr Justice Mummery gave in ***Selkent*** as examples of factors that may be relevant to an application to amend ("*the **Selkent** factors**"***) should not be taken as a checklist to be ticked off to determine the application, but are factors to take into account in conducting the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment.

(j) The factors identified in ***Selkent*** should be used to identify matters that pertain to the vital issues on the balance of hardship and injustice.

(k) In ***Abercrombie v Aga Rangemaster Limited*** [2014] ICR 209, Lord Justice Underhill, in the Court of Appeal, stated this important consideration, at paragraph 48:

"Consistently with that way of putting it, the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

(l) Lord Justice Underhill focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise and one needs to start by considering what the real practical consequences of allowing or refusing the amendment are. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence? If permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions.

(m) Refusal of an amendment will of course always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason.

(n) Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence.

(o) Similarly, the prejudice to a respondent will be that they have to respond to an additional claim that otherwise they would not have to meet. That will be the same for any amendment application so one has to look at prejudice over and above the base prejudice on both sides.

(p) The ***Selkent*** factors are still relevant and they are:

1. the nature of the amendment.
2. the applicability of time limits.
3. the timing and manner of the application.

(q) The examples were given to assist in conducting the fundamental balancing exercise. They are not the only factors that may be relevant. The ***Selkent*** factors must also be considered in the context of the balance of justice. For example, a minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing.

(r) An amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim. A late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs.

(s) No one factor is likely to be decisive and the balance of justice is always key. The prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it.

(t) An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited Tribunal time and resulting in additional cost; but while maintenance of discipline in Tribunal

proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice.

Disposal

75. Having assessed the submissions and representations made to us by both parties' counsel, we are of the majority view (the Judge, and Mr Doherty) that this reconsideration application should be refused because it is not in the interests of justice to grant the claimant's application.
76. The majority is of the view that it is not in the interests of justice to allow the claimant's amendment, and nor would it be in accordance with the Tribunal's overriding objective to deal with the case fairly and justly to allow that amendment.
77. In reaching this view, as a full Tribunal, we have again carried out the balancing exercise in accordance with ***Selkent***, and subsequent case law authorities, and we have taken account of all of the relevant circumstances in doing so.
78. We do not believe that we have made any error of law, as suggested by the claimant's submissions, but we do recognise that that matter is ultimately a matter for the Employment Appeal Tribunal to decide upon, and not for us.
79. As we see things, in considering the oral arguments of counsel for both parties, at the Final Hearing on 24 May 2022, we thereafter took all that they said then into account, during our private deliberation in chambers, taking into account all relevant considerations, and we do not believe that we had regard to anything irrelevant.
80. We sought to take into account all of the circumstances of the case, and to balance the injustice and hardship to the respondents of allowing the amendment sought by the claimant against the injustice and hardship to her of refusing it. It was a balancing exercise, and we came to a view, by majority.
81. Now, on reconsideration, the majority of the Tribunal does not consider it is in the interests of justice to vary our original Judgment and allow the claimant's amendment. Put simply, the claimant's arguments put to us in the

reconsideration application have not established for the majority that it would be in the interests of justice for the original Judgment to be varied or revoked on reconsideration, and the claimant's amendment allowed by the Tribunal.

82. Ms McAllister, the member in the minority in our original Judgment, remains of the view that she had then, when she would have allowed the claimant's amendment, for she felt then, and still does now, that the claimant would have been more heavily prejudiced than the respondents if the amendment was refused. However, she recognises that the other two members of the full Tribunal have a different view, and that the majority view stands as the Tribunal's decision.

83. The majority's view remains essentially the same as it was expressed in the reasons given at the time in the Tribunal's oral ruling on 24 May 2022. That ruling, written up by the Judge, and agreed in chambers with both members of the Tribunal, before it was read out verbatim, was the product of in chambers private deliberation by the full Tribunal and, of necessity, it was not written as it might have been if matters had been adjourned for a reserved decision the following day, for example.

84. As the Employment Appeal Tribunal has made clear, in many other instances, when reviewing any Judgment of an Employment Tribunal, parties should know why they have won or lost, but the Tribunal's decision is not required to be an elaborate formalistic product of refined legal draftsmanship – it must give adequate reasons for its decision, and failure to do so can amount to an error of law giving rise to an appeal to the EAT.

85. We believe that we gave adequate reasons at the time, when the Judge delivered our oral ruling but, in light of the claimant's reconsideration stating that incomplete or inadequate reasons have been given for certain matters, we take the opportunity to amplify those earlier reasons here in the Reasons for this Reconsideration Judgment.

86. In considering this reconsideration application, this Tribunal has had careful regard to the judicial guidance from the Court of Appeal in ***Kuznetsov***, and

we have taken into account all the circumstances of the case, and again conducted a balancing exercise.

87. We do not believe that we have failed to take into account relevant considerations, and we do not believe that we have had regard to irrelevant considerations.

88. While the claimant's counsel has suggested that *"cost"* is irrelevant, we disagree, as there is a cost to all things, and so that is a relevant factor for us to take into account.

89. The reconsideration application, at paragraph 8.1, submits that "*any injustice to the Respondents as a result of increased costs could be remedied by an award of costs rather than refusal of the amendment itself."*

90. We were not addressed at all at the Final Hearing, on 24 May 2022, by either party's counsel, on whether any prejudice in allowing the claimant's amendment could be ameliorated by an award of expenses to the respondents.

91. The respondents have now intimated their wasted costs application, and that matter has, of consent of both parties, been reserved for determination at a later date.

92. What that costs application shows, however, and what is relevant for our consideration at this Reconsideration Hearing, is that the respondents seem to see fault lying here with the claimant's legal advisers. In the wasted costs application, the respondents state that the claimant's representatives acted unreasonably in making an application to amend the claim on the first day of the substantive Hearing, and not before, at an earlier stage in the proceedings.

93. The claimant's submissions, in response, submit that it was an "*oversight which could befall any member of the profession"*, and that it was not improper, unreasonable or negligent, and they describe it as an "*error*". That language, of course, mirrors the submissions made at the Final Hearing by the claimant's counsel that it was a case of "*simple omission or administrative error."*

94. As the majority of the Tribunal made clear, in point (1) of our oral reasons for refusing the amendment application, we did not accept counsel's categorisation. We adhere to that view, as also to the view that we expressed, at point (3), that the Tribunal was not dealing with an unrepresented, party litigant, but with a claimant who had throughout these two combined claims been legally represented. That was a relevant factor for us to take into account, as agreed by both counsels.

95. As we then stated, in the preamble to our 8 stated points, the claimant had had extensive time and ability to particularise her claim, throughout the case management process, yet her application to amend was only presented on day 1 of an 11-day Final Hearing and continued for further argument from both parties' counsel on day 2.

96. As ***Vaughan*** makes clear, the ***Selkent*** factors are not the only factors that may be relevant. No one factor is likely to be decisive, and the balance of justice is always key. Equally, we are entitled to have regard to the Tribunal's overriding objective under Rule 2, which includes the avoidance of delay, and the saving of expense. We were on day 2 of a listed 11-day Final Hearing.

97. On reflection, since the original decision was made, on 24 May 2022, we can now accept that there is no real conflict between the core proposition in ***Chandhok***, that a party's essential case is not to be found outwith the ET1 and ET3 pleadings, and Lord Fairley's approach in ***Hesketh***. We accept that inclusion of a new head of claim in a claimant's Scott Schedule can be taken, by implication, to be an application to amend to introduce the proposed new head of claim. However, as per ***Selkent***, we still need to have regard to the manner and timing of the application to amend.

98. We were aware then, and remind ourselves again now, that this case was listed on 24 February 2022 for an 11-day Final Hearing in person on dates between 23 May and 8 June 2022. That said, the application for leave to amend was only intimated on day 1 of 11. As counsel for the respondents then observed, that "*beggars belief*".

99. We agree with counsel for the respondents' submission (at paragraph 5 of his 15 June 2022 response) that the claimant's reconsideration application amounts to "*nothing* (more) *than 'second bite of the cherry' and in all material respects is simply a re-run of the submissions made at the tribunal hearing in support of the amendment. The application offers nothing new in terms of legal principle or factual analysis which should cause the tribunal to depart from its Judgment."*

100. The claimant's reliance on the PH Agenda ordered on 26 January 2022, and provided on 2 February 2022, is noted, albeit it was not placed before the full Tribunal on 24 May 2022 when the claimant's application to amend was raised and argued by her counsel. Yes, it was in the Tribunal's casefile, as part of the ongoing correspondence with the Tribunal, but it was not part of the 12 ET documents included by parties in the Bundle provided to the Tribunal.

101. In reading it, for the purposes of this reconsideration application, we note that, at section 2.1, it refers to complaints under the Equality Act 2010; at section 2.2, it states "*Yes*" to the question "*We think you are making a complaint that you have been dismissed or otherwise disadvantaged because you have made a protected disclosure (often called whistleblowing). Is that right?*"; and at section 2.7, when asked if any other complaint was being made, the claimant's answer was "*Yes, constructive unfair dismissal under s95(1)(c) ERA 1996."* There is no reference to any complaint of automatically unfair dismissal under Section 103A.

102. That Bundle did, however, include a List of Issues, dated 10 December 2021, as document 7, at pages 63 to 73. However, as had been pointed out to parties' agents by the Tribunal, by email sent on the Judge's instructions on Friday, 20 May 2022, that was a draft, and not the revised List emailed to the Tribunal on 12 May 2022. Hard copies of the correct List of Issues were brought to the Final Hearing on the Monday morning, 23 May 2022, and inserted in the Bundle, replacing the redundant draft.

103. That Agreed List of Issues included direct discrimination, harassment, victimisation and failure to make reasonable adjustments (Sections 13, 26, 27, and 21, Equality Act 2010), PIDA detriment (S47B Employment Rights Act 1996), and constructive unfair dismissal (s.95(1)(c) Employment Rights Act 1996), but there is no reference to any complaint of automatically unfair dismissal under Section 103A.

104. Neither party's Counsel made reference to the List of Issues in support of, or in resistance to, the claimant's application to amend, although, in preliminary discussion with the Judge, its terms had been raised, as also the need for possible revision, and inclusion of a proposed new paragraph 31, and it was that discussion on the afternoon of Monday, 23 May 2022, that led into the claimant's application to amend. The proposed paragraph 31 was to read: "*Was the principal reason for dismissal that the claimant made a protected disclosure and was therefore automatically unfairly dismissed for the purposes of Section 103A of ERA 1996."*

105. The original ET1 claim form alleged that the claimant had suffered detriment contrary to Section 47B of the Employment Rights Act 1996, and sought compensation for detriment suffered during employment. The further ET1 claim form, presented on 10 December 2021, after her employment had ended on 24 September 2021, complained of unfair dismissal, disability discrimination, and whistleblowing detriment.

106. The claimant sought a declaration that she had suffered a detriment contrary to Section 47B of the Employment Rights Act 1996; that she had been subjected to unlawful disability discrimination contrary to Sections 13, 21, 26 and 27 of the Equality Act 2010; and that she had been constructively unfairly dismissed within the meaning of Section 95(1)(c) of the Employment Rights Act 1996. She sought compensation for detriment suffered during employment. There is no reference to any complaint of automatically unfair dismissal under Section 103A.

107. The reconsideration application refers to the Scott Schedule dated 2 February 2022. It was included in the Bundle as document 10, at pages 101

to 112. It lists qualifying disclosures, and detriments, relied upon by the claimant, and claims protection under Section 43B, Employment Rights Act 1996, although, against the first qualifying disclosure, of 2 October 2020, at item 9, it is stated that termination of her employment on 24 September 2021 amounts to a constructive unfair dismissal, and "*her dismissal was contrary to s103A of the ERA 1996 and is automatically unfair."* That wording is then repeated ("*As above*") for all of the other listed qualifying disclosures.

108. The mere fact that there was reference there to Section 103A does not assist the claimant, as it is accepted on her behalf that the ET1 claim form contains no express reference to automatically unfair dismissal for having made a protected disclosure. We do not accept that that oblique reference to a statutory provision gives proper fair notice to the respondents – the only dismissal claim pled is constructive unfair dismissal under a completely different statutory provision at Section 95. That is why an application to amend, to bring in a Section 103A complaint, was made on day 2.

109. Further, the reference in section 3.5 of the reconsideration application, to the Further Particulars produced for the claimant, on the last page of the Scott Schedule, does not assist the claimant either. Those further particulars stated: '*The Claimant continued to be employed by the Respondent and suffered detrimental treatment and discrimination after this date, leading her to resign on 24 September 2021 on the basis she had been constructively dismissed'.*

110. There is no reference in those further particulars to any complaint of automatically unfair dismissal under Section 103A. Indeed, counsel for the claimant accepts that, because the application then goes on to say: '*Whilst that does not expressly refer to section 103A it is submitted fair notice has been provided of a claim for automatically unfair dismissal in the further particulars and agenda.'*

111. The majority of the Tribunal, as stated at point (5) of our reasons, looking at the timing and manner of the claimant's application to amend, stated that:

(5) The timing and manner of the application support it being refused. While an amendment can be proposed at any stage, and the lateness of the application in itself is not a good ground for refusing the amendment, it is that, taken together with its practical consequences, which makes the majority of the Tribunal refuse the application. No real or satisfactory explanation has been provided, on the claimant's behalf, as to why the application has only been made at this late stage, and why it was not made much earlier. When the Scott Schedule and Schedule of Loss were prepared, referring to Section 103A, that should have set alarm bells ringing that an application to amend should be progressed without delay.

112. Clearly, the alarm bells did not ring then, in February 2022, with the Scott Schedule, or any anytime in the following 3 months after the case was listed for Final Hearing. The lack of a satisfactory explanation was not, however, the only factor taken into account, for we considered the practical consequences too, as highlighted at our point (6), where we noted that to allow the amendment, the respondents would require time to reply, and to consider further witnesses, and that put the listed Hearing in jeopardy. We did not then, and do not now, accept the claimant's argument that the balance of hardship is neutral.

113. Further, and as we noted at our point (7), to open up the claimant's pled case, and allow her to also run an additional head of complaint, was very likely to require further enquiry by the respondents, and thus time and expense, and all that at a relatively late stage in the proceedings.

114. The amendment application was fully ventilated and argued before the full Tribunal on 24 May 2022 and, by majority, it was refused. In coming to that decision, and as recorded then in our oral ruling, we recognised that the issues involved in considering the opposed amendment application were "*complex and finely balanced, resulting in a 2:1 split across the full Tribunal."*

115. If the lodging of the Scott Schedule in February 2022 was an "*implied*" application to amend the ET1 claim form to expressly add a Section 103A

head of complaint, it is still not fully explained to this Tribunal why it was not raised expressly by the claimant's legal representatives prior to the start of this Final Hearing on 23 May 2022, when that Hearing had been listed as far back as 24 February 2022.

116. In the majority's view, it belittles the seriousness of the matter for the claimant's counsel to have categorised the absence of a Section 103A head of complaint as a "*simple admission, or administrative error*", and the fact that the agreed List of Issues, intimated to the Tribunal on 12 May 2022 included no issue relating to any alleged automatically unfair dismissal for having made a protected disclosure is telling.

117. The only dismissal head of complaint that was there referenced in the List of Issues was constructive unfair dismissal, the only pled dismissal head of complaint. The only pled whistleblowing complaint was detriment, not automatically unfair dismissal.

118. The proper and full specification of any claim brought before the Tribunal is the primary responsibility of the claimant and, as in this case, her solicitor. It is the fundamental duty of any solicitor to articulate their client's case appropriately, and the Tribunal has a great deal of sympathy for the claimant, and the situation she has found herself in. The issue is who has let her down, and it is clear to us that that is not the Tribunal.

119. There are many examples, in the Tribunal's experience, where an unrepresented party litigant has not sought to amend their case to put it on a legal basis that might succeed, and so their claim to the Tribunal has fallen, after a substantive evidential Hearing, as being not well-founded, as a potentially sound claim has not been pled.

120. Here, of course, the claimant was and is legally represented. If a professional adviser, such as a solicitor, has been instructed by a claimant to advise or act for them, then any wrongful or negligent advice or conduct on the solicitor's part which results in a time limit for bringing a claim being missed will be attributed to the claimant with the result that they will ordinarily

not be able to rely on any escape clause to argue that a time-barred claim should be allowed to proceed.

121. In ***Dedman v British Building and Engineering Appliances Ltd*** [1973] IRLR 379, Lord Denning MR stated (at 381): "*If a man engages skilled advisers to act for him — and they mistake the time limit and present [the complaint] too late — he is out. His remedy is against them.*"

122. We do not know the circumstances in which the claimant gave instructions to her solicitors, nor what information she gave them, when instructing them to act on her behalf. It was not suggested to us, by counsel for the claimant, that if there had been any fault by the claimant's solicitors, then it should not be visited upon the claimant.

123. Having carefully considered the points made by both parties' counsel in this opposed reconsideration application, the majority of the Tribunal does not consider that it is in the interests of justice to revoke or vary our earlier Judgment, and we adhere to it, for the reasons given then in our oral ruling, and as now amplified in these Reasons. As such, the refusal of the claimant's amendment application stands, and we do not set it aside

124. Accordingly, the majority of the Tribunal do not vary or revoke our original Judgment, as we confirm it, that being the appropriate disposal having refused the claimant's reconsideration application.

Intimation to EAT and ACAS

125. In issuing this Reconsideration Judgment and Reasons, we have instructed the clerk to the Tribunal to send a copy to ACAS, and to the EAT Registrar, for their respective information.

Further procedure

126. Given there is still live an appeal to the EAT, where proceedings were sisted pending our determination of this reconsideration application, it is not appropriate for us to make any further orders or directions as regards any further procedure before the Employment Tribunal.

127. **Within 21 days of issue of this our Reconsideration Judgment**, we invite both parties' legal representatives to update the Tribunal on their specific proposals for further procedure, and relisting of the Final Hearing before this full Tribunal in the proposed fresh listing period of **February/April 2023**.

128. Should any other matters arise between now and the start of the relisted Final Hearing, on dates to be hereinafter assigned by the Tribunal, then written case management application should be intimated, in the normal way to the Tribunal, by e-mail, with copy to the other party's representative, sent at the same time, and evidencing compliance with Rule 92**,** for comment/objection within seven days.

129. Dependent upon subject matter, and any objection / comment by the other party's representative, any such case management applications may be dealt with on paper by the allocated Employment Judge, or a Case Management Preliminary Hearing fixed, either in person, or by telephone conference call, as might be most appropriate.

130. In accordance with Rule 3 of the Employment Tribunal Rules of Procedure 2013 the parties are reminded of the services of ACAS, judicial and other forms of mediation and the many other means of resolving the dispute by agreement.

Employment Judge: Ian McPherson
Date of Judgment: 24 October 2022
Entered in register: 26 October 2022
and copied to parties