EMPLOYMENT TRIBUNALS

Claimant: Ms O Ba

Respondent: Royal National Orthopaedic Hospital NHS Trust

JUDGMENT

The claimant's application dated **15 October 2022** for reconsideration of the judgment, sent to the parties on **2 August 2022** is refused as it has no reasonable prospects of success.

REASONS

1. Rules 70-72 of the Tribunal Rules provides 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.

2. The Tribunal has discretion to reconsider a judgment if it considers it in the interests of justice to do so. Rule 72(1) requires the judge to dismiss the application if the judge decides that there is no reasonable prospect of the original decision being varied or revoked. Otherwise, the application is dealt with under the remainder of Rule 72.

3. In deciding whether or not to reconsider the judgment, the tribunal has a broad discretion, which must be exercised judicially, having regard not only to the interests of the party seeking the 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. Under the current version of the rules, there is a single ground for reconsideration being, *"*where it is necessary in the interests of justice*".* This contrasts with the position under the 2004 rules, where there were several specific grounds upon which a tribunal could review a judgment.

5. When deciding what is "necessary in the interests of justice", it is important to have regard to the overriding objective to deal with cases fairly and justly, which includes: ensuring that the parties are on an equal footing; dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense.

6. In Outasight VB Ltd v Brown 2015 ICR D11, the EAT explained that the revision to the rules had not been intended to make it more easy or more difficult to succeed in a reconsideration application. In the new version of the rules, it had not been necessary to repeat the other specific grounds for an application because an application relying on any of those other arguments can still be made in reliance on the "interests of justice" grounds.

7. The situation remains, as it had been prior to the 2013 rules, that it is not necessary for the applicant to go as far as demonstrating that there were *exceptional* circumstances justifying reconsideration. There does, however, have to be a good enough justification to overcome the fact that, when issued, judgments are intended to be final (subject to appeal) and that there is therefore a significant difference between asking for a particular matter to be taken into account before judgment (even very late in the day) and after judgment.

The Claimant's application

8. The Claimant submitted an application, within the relevant time limit (written reasons having been sent on 3 October 2022), seeking reconsideration.

9. Her email of 15 October included an attachment with 11 number paragraphs. References below to "App x" are the paragraph number in that document. Whereas references to "Paragraph x" are to the paragraph number in the

written reasons.

10. App 1 and 8 refer to the termination of Mr Anyadioha's agency assignment which we referred to in Paragraphs 5 and 17 and 32. The Claimant asserts that, based on our findings of fact about the termination of that assignment (and about the lack of consultation with the Claimant about that, and the lack of a replacement), we ought to have decided that the burden of proof had shifted in relation to one or more of her complaints. Throughout our reasons (including in paragraph 164) we sought to apply the burden of proof provisions correctly, and the Claimant's assertion that we failed to do so does not contain any information which might be grounds for the panel to change its mind.

11. App 2 asserts that the Claimant disagrees with the finding of fact made in Paragraph 14. App 10 effectively repeats the same point. That finding was based on the evidence at the hearing (and, in particular, Ms Mahal's oral evidence, on which she was challenged by the Claimant). There are no reasonable prospects that the panel would change that finding of fact.

12. App 3 refers to Seema Ahmed and Paragraph 146. Ms Ahmed was said to be a comparator for two allegations, as set out in paragraph 137. These were 3(a) and 3(d).
    12.1. We decided that item 3(d) failed on the facts, that is that the Claimant had not proven that the alleged acts/omissions did in fact occur. See paragraphs 159 and 165.
    12.2. We decided that 3(a)(i) and (iii) were out of time. See Paragraph 196.
    12.3. We decided that 3(a)(i) failed on the facts. See Paragraph 138.
    12.4. The analysis re 3(a)(ii) is in Paragraph 140 and re 3(a)(iii) is in Paragraph 139, and for both is Paragraph 141 to 145.
    12.5. We stated in Paragraph 146 that we found that there was no actual comparator (including Ms Ahmed), and there is nothing in the Claimant's application to specifically address the basis of her assertion that that decision was wrong.

13. In any event, in Paragraphs 147 to 150, we asked ourselves why the treatment as per items 3(a)(ii) and (iii) occurred and we decided that it was nothing to do with the Claimant's race. There are no reasonable prospects of the panel changing that conclusion.

14. App 4 refers to the fact that, in Paragraph 10, we rejected what two of the Respondent's witnesses said on a particular issue. It is true that we did that, and it is something that we were aware of throughout our decision-making in relation to all the findings of fact which we made, and the inferences which we drew. There are no reasonable prospects of the panel deciding that it paid insufficient regard to this particular finding of fact.

15. App 5 is an assertion that we ought to have reached a different finding of fact. There are no reasonable prospects that the panel would change that finding of fact.

16. App 7 refers to Paragraph 147 of our reasons, which has been mentioned above in this document, when responding to App 3. There are no reasonable

prospects of the panel changing the analysis and conclusion at Paragraphs 147 to 151.

17. App 7 refers to the findings made at Paragraphs 44 to 61. In fact, the analysis of the facts of what happened for this issue includes that at Paragraphs 29 to 43, as well as the discussion about the policy documents in Paragraphs 25 to 28. The factual conclusions reached were based on the oral evidence we heard, and the documents themselves, and are explained in our reasons. There are no reasonable prospects that the panel would change those findings of fact.

18. Further, we did take into account the fact that the Claimant had not agreed to what the Respondent had counter-proposed as a revised job description. See paragraphs 139 to 142. We also took into account, and rejected, the Claimant's opinion that the Respondent was obliged to agree to (and/or have evaluated) her own 22 October version, and we discussed in detail the fact that the Respondent had not agreed to that version.

19. App 9 refers to Joy King. We read Ms King's statement and gave it such weight as we saw fit. It was up to the Claimant to call her as a live witness if that is what she wanted to happen. The Respondent was entitled to challenge the witness statement if they wanted to. To the extent that the Claimant is suggesting that we should have reached a different decision on the documents because they were late, there are no reasonable prospects of the panel deciding either (a) that we should have reached a different decision or (b) our decision on any of the issues in the case would have been different had we reached a different decision on those documents.

20. App 11 refers to the finding we made in Paragraph 96. That finding was not based solely or mainly on how Mr Dingley and the Claimant spoke to each other during the tribunal hearing (though that was something we were entitled to, and did, take into account). We had the contemporaneous emails which they had written to each other and about each other. Our analysis at paragraphs 186 to 189 explains why the Claimant lost on the allegation that Mr Dingley's rudeness was a contravention of the Equality Act, and there is no reasonable prospect of the panel changing its decision.

21. For the reasons stated above, having considered the Claimant's application, I am satisfied that there is no reasonable prospect of the original decision being varied or revoked, and the application is refused.

Employment Judge Quill

Date: 2 December 2022

JUDGMENT SENT TO THE PARTIES ON

7 December 2022

FOR THE TRIBUNAL OFFICE