EMPLOYMENT TRIBUNALS

Claimant: **Mrs Helen Potgieter**

Respondent: **Lloyds Pharmacy Limited**

Before: Employment Judge Millard

JUDGMENT ON APPLICATION FOR RECONSIDERATION

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

REASONS

1. The claimant has applied for a reconsideration of the judgment originally sent to the parties on 17 January 2022 further to receipt by the claimant of written reasons which were sent to the parties on the same date ("the Judgment"). The grounds are set out in a document headed "Application for Reconsideration of Employment Tribunal Judgement" (sic), sent to the tribunal office by email on 25 January 2022. Unfortunately, due to an administrative error by the Employment Tribunal, this application has only recently been referred to me.

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

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

4. The grounds relied upon by the claimant are set out in her application for reconsideration and I have summarised these as follows,

4.1. The remedy hearing being conducted on 25 November 2021, judgment was not received by the claimant until 14 January 2022 requiring her to make an application for written reasons, which were not provided to her until 17 January 2022. These were readily available and subjected the claimant to further detriment in having to request them.

4.2. The judgment was given more than 28 days after the remedy hearing, showing a clear and unreasonable stance of ensuring the interests of justice.

4.3. The respondent breached case management orders, specifically,

4.3.1. the respondent increased the bundle to 73 pages to include evidence to show that the claimant could have mitigated her losses.

4.3.2. the respondent was to amend their response by 25 June 2021, however this was not done until 21 October 2021.

4.4. The claimant was found to have been unfairly dismissed due to a protected disclosure, but the respondent did not admit this in their amended response.

4.5. The claimant represented herself and was not placed on an equal footing with the respondent. Considerable time was given to the respondent at the remedy hearing in order to assist them.

4.6. The tribunal failed to acknowledge the significant public interest in this case and have failed to protect the public because the tribunal failed to ensure the interests of justice.

4.7. The claimant did prove her financial losses.

4.8. It was unreasonable for the respondent to seek the claimant's tax returns as the claimant derived income from several pharmacy owners and not just the respondent.

4.9. The respondent did not prove what shifts could have been offered to the claimant.

4.10. The COT3 agreement was not reviewed.

4.11. Another pharmacy chain no longer offered the claimant any shifts causing her to suffer 'unmeasurable loss as a result.'

4.12. The respondent acted unreasonably, and £3,500 costs should have been awarded to the claimant.

4.13. The tribunal ignored the case of Cooper Contracting Ltd v Lindsey and the claimant does not have to prove that she mitigated her loss.

4.14. The claimant is self-employed and does not want to take up permanent employment with any other company. The claimant had no other option but to rely on her property portfolio and investments.

4.15. The claimant does not have to take all reasonable steps to mitigate her loss.

4.16. The award for injury to feelings does not reflect the responsibility the claimant has as a pharmacist and the way she was treated by the respondent resulting in the claimant suffering a long period of harm.

4.17. The claimant seeks to put new information before the tribunal that was not before the remedy hearing, namely that the claimant alleges that the respondent is making fraudulent declarations to NHS Providers and the Clinical Commissioning Group (CCG), that they are unable to source pharmacists for branches. However, the claimant has been unfairly removed from the respondent's list of approved pharmacists and remains so. The implication being, that she would be available to work as a pharmacist at these branches, and therefore, that the respondent could source a pharmacist if they chose to employ her.

Interests of Justice

5. Earlier case law suggests that the interests of justice ground should be construed restrictively. The Employment Appeal Tribunal ("EAT") in Trimble v Supertravel Ltd [1982] ICR 440 decided that if a matter has been ventilated and argued then any error of law falls to be corrected on appeal and not by review. In addition, in Fforde v Black EAT 68/80 (where the applicant sought a review in the interests of justice under the former Rules which are analogous to a reconsideration under the current Rules) the EAT decided that the interests of justice ground of review does not mean

> *…that in every case where a litigant is unsuccessful, he is automatically entitled to have the tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in the even more exceptional case where something has gone radically wrong with*

the procedure involving a denial of natural justice or something of that order.

6. More recent case law suggests that the "interests of justice" ground should not be construed as restrictively as it was prior to the introduction of the "overriding objective" (Rule 2). This requires the tribunal to give effect to the overriding objective to deal with cases fairly and justly. As confirmed in Williams v Ferrosan Ltd [2004] IRLR 607 EAT, it is no longer the case that the "interests of justice" ground was only appropriate in exceptional circumstances. However, in Newcastle Upon Tyne City Council v Marsden [2010] IRLR 743, the EAT confirmed that it is incorrect to assert that the interests of justice ground need not necessarily be construed so restrictively, since the overriding objective to deal with cases justly required the application of recognised principles. These include that there should be finality in litigation, which is in the interest of both parties.

Delay in issuing Judgment and Written Reasons

7. Whilst greater than 28 days after the hearing on 25 November 2021, the delay in the written reasons of 3 January 2022 being sent to the claimant on 17 January 2022, this does not of itself give rise to an interests of justice grounds to reconsider judgment.

8. In reaching its decision the tribunal took sufficient time as was required to fully consider all of the witness evidence, the material before it as well as the submissions of the parties.

Compliance with Case Management Orders

9. The respondent amended their response to accept that the claimant had made protected disclosures. This was in favour of the claimant and the issue was not required to be determined by the tribunal. Accordingly, there is no interest of justice ground arising to reconsider judgment.

10. Both parties were invited during the hearing to refer the tribunal to the documents within the bundle that they considered relevant. That the bundle included material to show that the claimant could have mitigated her losses, was relevant to the issues to be determined by the tribunal, although the claimant would no doubt have preferred for such material not to have been before the tribunal. It would not have been practical nor would it have been appropriate for the tribunal to have asked the parties to remove additional pages from the bundle or arbitrarily removed later pages. This would only have led to further delay and a potentially aborted hearing, when the case could be heard and concluded, which was in the interests of both parties, simply by the parties referring the tribunal to the documents they wanted to be considered.

11. No interest of justice ground arises to reconsider judgment.

Unfair Dismissal

12. In correspondence of 21 October 2021, the respondent accepted that the claimant had made protected disclosures and had been removed from a list of approved pharmacists. Accordingly, there was no need for this issue to be litigated at the hearing on 25 November 2021 and the hearing could proceed solely to determine the issue of remedy.

13. That the respondent conceded this only on 21 October 2021 does not provide any interest of justice ground for reconsideration of judgment. Both parties were aware that the only issue to be determined on 25 November 2021 was remedy and there was no unfairness to the claimant in this. The claimant had over a month in which to prepare for a remedy hearing.

14. No interest of justice ground arises to reconsider judgment.

Claimant as a Litigant in Person / Time Afforded to the Respondent

15. The claimant was not legally represented at the hearing, whilst the respondent was represented by counsel.

16. The hearing commenced at 10:20hrs.

17. The respondent conceded that the claimant's protected disclosure was made in good faith and that her conduct did not contribute to her dismissal.

18. The purpose of the remedy hearing was explained to the claimant and it was acknowledged that she was a litigant in person. In dealing with the claimant as a litigant in person, the tribunal kept in mind chapter 1 of the Equal Treatment Bench Book.

19. The structure of the hearing was explained to the claimant. That she would give evidence on oath first and be asked questions by the respondent. The process would be reversed and the respondent would call their witness with the claimant asking her questions. Once the evidence was completed, the tribunal would hear submissions from the both the respondent and the claimant as to the decision on remedy.

20. The claimant was then provided with time to compose herself before giving evidence and a break was taken between 10:40hrs and 11:02hrs.

21. The claimant gave evidence from 11:03hrs until 12:13hrs. The claimant confirmed her statement on oath, and answered questions from both the respondent's counsel and the tribunal.

22. The respondent called their witness Anna Snopkowska at 12:34hrs and having confirmed her statement on oath the respondent asked questions in cross examination until 13:10hrs.

23. It was explained to the claimant that submissions would be heard after the lunch break and that the respondent would go first, solely in order to assist the claimant to see how submissions were made. It also provided her with additional time to consider her submissions.

24. The hearing restarted after the lunch break at 14:14hrs with the respondent making submissions on remedy.

25. A break was taken between 15:05hrs and 15:15hrs to allow the claimant time to consider her submissions in light of the respondent's submissions.

26. The claimant commenced her submissions at 15:15hrs and a time limit was placed on her submissions of 16:00hrs, however, she was permitted to continue until 16:05hrs to conclude her point. Therefore, both the claimant and the respondent were afforded almost identical time to make submissions. This time also coincided with the end of the sitting day, the remedy hearing having been listed for one day with the agreement of the parties that it would be concluded in a day. Judgment was reserved so that the tribunal had sufficient time to deliberate.

27. As far as was possible the claimant was placed on an equal footing with the respondent and additional time was not given to the respondent to assist them. Both parties were given near identical time to make submissions. No interest of justice ground arises to reconsider judgment.

Financial Losses / Duty to Mitigate

28. The matters raised by the claimant in her application were considered in the light of the evidence presented to the tribunal before it reached its decision. The factual and legal basis for the tribunal's decision is set out in the statement of reasons. All the material placed before the tribunal by the parties, was considered. No interest of justice ground arises to reconsider judgment.

Award for Injury to Feelings

29. The award for injury to feelings reflected the claimant's role as a pharmacist, the public interest disclosures, and the manner in which she was treated by the respondent. The sum awarded is intended to compensate the claimant for the hurt and distress she suffered as a consequence of the respondent's actions.

30. The determination of such an award is not a science. The level of the award was determined by the tribunal having considered all the evidence and by reference to the Vento bands.

31. No interest of justice ground arises to reconsider judgment.

Fresh Evidence

32. The test for whether new evidence should be admitted is set out in Ladd v Marshall [1954] 3 All ER 745. The test is whether the evidence could have been obtained with reasonable diligence for use at the original hearing; whether it is and would probably have had an important influence on the hearing; and whether it is apparently credible. However, as the EAT made clear in Outasight VB Ltd v Brown [2015] ICR D11, reconsideration may be permitted on the basis of fresh evidence not meeting the Ladd v Marshall test, but where it is in the interests of justice to do so.

33. In her application for reconsideration the claimant states that she has provided new evidence, she has not in fact done so. There is no evidence provided by the claimant of any declarations by the respondent to either NHS providers or the CCG that they are unable to source pharmacists for their branches let alone any evidence that such declarations are 'fraudulent'. The claimant's submission appears to be that as she was removed by the respondent from their register and is available to work, any such declarations by the respondent that they cannot source pharmacists must be false. Accordingly, both the test set out in Ladd v Marshall does not apply, and the back stop of permission where it is in the interests of justice to do so set out in Outasight, does not apply, as there is no new evidence to consider.

Costs

34. By Rule 76(1) a tribunal shall consider whether to make a costs order, where it considers that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted.

35. The respondent accepted that the claimant had made protected disclosures. This was done in advance of the final hearing and in communication to both the claimant and the tribunal. The final hearing was therefore converted to a remedy hearing saving both the tribunal and the parties, time, and costs. There has been no evidence before the tribunal that the respondent acted vexatiously, abusively, disruptively, or otherwise unreasonably in the conduct of the proceedings.

36. The claimant understandably does not agree with the respondent's decision to initially contest the claim, however, there is nothing procedurally wrong in them

doing so. No doubt most claimants would regard the decision of a respondent to contest a claim as being unreasonable especially when they are successful. However, this is the nature of litigation where two parties cannot agree, and it falls to a tribunal to decide an issue. Such a determination in the favour of one party does not automatically give rise to a claim for costs in favour of the successful party, except where it would be in accordance with Rule 76(1). Such grounds do not exist in this case.

37. Accordingly, for the reasons that I have set out above, I refuse the application for reconsideration pursuant to Rule 72(1), because there is no reasonable prospect of the Judgment being varied or revoked.

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Employment Judge Millard
Dated 11 December 2022

JUDGMENT SENT TO THE PARTIES ON
19 December 2022 By Mr J McCormick

FOR THE TRIBUNAL OFFICE