EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
Mr I Tapping	**AND**	**Ministry of Defence**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD IN CHAMBERS AT Bristol ON 15 December 2022

EMPLOYMENT JUDGE J Bax

JUDGMENT ON APPLICATION FOR RECONSIDERATION

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

REASONS

1. The claimant has applied for a reconsideration of the reserved judgment on remedy dated 4 November 2022 which was sent to the parties on 11 November 2022 ("the Judgment"). The grounds are set out in his e-mail dated and received on 5 December 2022.

2. On 17 November 2022, the Claimant asked for a copy of the transcript of the remedy hearing on the basis that he had not been provided with a hearing loop and found it difficult to hear what was said.

3. On 25 November 2022, the Claimant asked for an extension to apply for a reconsideration. On 28 November 2022, the Claimant was sent a link to request a transcript.

4. On 30 November 2022, the Claimant was e-mailed by the Tribunal in which it was said that Employment Judge Bax, directed that it had come to his attention that the Claimant did not have the hearing loop at the hearing and asked for proposals to ameliorate that disadvantage. He was advised to return the transcript request and reminded of the power to extend time limits under the rules. On 5 December 2022, the transcript request was received and the requirement for a fee was waived by way of a reasonable adjustment. The reconsideration request was made without the benefit of a transcript.

5. 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 outside of the relevant time limit, however given the Claimant's family circumstances and the difficulty he said he had with recall it was in the interests of justice to extend the time limit in accordance with Rule 5.

6. 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.

7. The grounds relied upon by the Claimant were set out in a 25 page document and consisted of four issues: (1) no compensation was awarded for age discrimination, (2) Expert Witness evidence had been overturned without clinical cross-examination, (3) the Claimant's costs were disregarded, and (4) other items that materially affect the Judgment.

8. The matters raised by the claimant were considered in the light of all of the evidence presented to the tribunal before it reached its decision.

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

entitled to have the tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in the even more exceptional case where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order".

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

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

Matters of disadvantage raised by the Claimant

12. It is recognised, with hindsight, that the Claimant did not have the hearing loop at the hearing. The Judge had not realised this at the time and neither party drew it to his attention. The hearing was in a small Hearing Room and the Judge had not perceived that the Claimant could not hear properly.

13. The Claimant said that a request for alternative dates, due to his wife's surgery on 4 November, had not been responded to. At the case management hearing on 30 September 2022, the Claimant's wife condition was discussed. On 6 October 2022, the Claimant informed the Tribunal that his wife's surgery was due to be undertaken on 4 November 2022 and they both asserted the hearing on 3 November should proceed. When the hearing was listed at the hearing on 17 March 2022, the evidence and submissions were to be heard on 3 November and deliberations and Judgment given on 4 November 2022. On 14 October 2022, the Claimant was informed that the Judge was concerned about his ability to properly represent himself at the hearing on 3 November, given his home

circumstances and that an application to postpone would be looked upon favourably. The Claimant responded on 14 October 2022 by saying that he did not want to cancel the hearing and in the interests of justice it needed to go ahead. This was reconfirmed on 17 October 2022.

14. The Claimant had an atrial fibrillation incident during the hearing and took time to recover. The Claimant was accompanied by his son. The Judge checked whether the Claimant felt well enough to continue, and he confirmed he was.

15. It was suggested that the Respondent had two barristers at the hearing. The Respondent was represented by Mrs Hornblower and it was understood that she was accompanied by a pupil barrister, for whom she was Pupil Supervisor, who was observing the hearing.

16. The Claimant also provided the Judge with a 5 page written submission and he made further oral submissions at the remedy hearing. The Judge took time to read the written submission before those oral submissions were made.

17. The Claimant also made the point that he did not have sufficient time to consider the Respondent's submissions. The Skeleton argument was sent to him on 28 October 2022 and the Claimant had not seen that it had been sent. The Claimant agreed to break early for lunch and that he would consider it during that time. When the hearing resumed the Claimant confirmed that he had read it and did not suggest he needed further time.

18. It was not considered that these matters affected the fairness of the hearing and the Claimant was keen to proceed.

No compensation award was made for age discrimination

19. The application refers to continuity of events from the comment by Ms Singleton and the complaint resolution attempted which ended in December 2019. The Tribunal was only able to award compensation in respect of the proven acts of discrimination. The Claimant did not succeed in his claims about the grievance process which concluded in December 2019. The reconsideration application appears to be a further attempt to include the effects of the matters not found to be proven acts of discrimination as part of the compensatory award. It was explained at the start of the hearing that compensation could only be awarded for the injury/loss caused by the proven discrimination and not other things. The decision was based on that principal as set out in the Judgment.

20. An award for age discrimination was made. It was dealt with as part of composite award for all the discrimination experienced by the Claimant as

set out at paragraph 87 of the Judgment. The Claimant was given an award in respect of Ms Singleton asking when the Claimant planned to retire. The arguments were considered and the application in this respect is refused on the basis that there is no reasonable prospect of the Judgment being varied or revoked.

Expert Witness has been overturned without Clinical/Medical cross-examination

21. The Claimant essentially challenges the Judgment on the basis that the evidence of Dr Lyle was sufficient to establish personal injury had been suffered. Further that the decision was taken without hearing from Dr Lyle and cross-examination of him. It was for the Claimant to prove that the proven acts of discrimination caused injury and to what extent. The tests to be applied and what was required from Dr Lyle were explained on a number of occasions prior to the remedy hearing. There is no requirement on the Respondent to adduce its own medical evidence and it refused to make a joint instruction. If a Respondent does not obtain its own medical evidence, when the Claimant relies on their own expert, it takes the risk that the evidence would be accepted. Expert witnesses are used to assist the Tribunal, but they are not used to usurp the decision making of the Tribunal. It is not for the Tribunal to make a case for the Claimant by seeking further evidence from a witness, what is adduced is a matter for the parties. It was previously expressed that the Respondent is entitled to know the case it has to meet and not respond to unknown oral expert testimony adduced in chief by a Claimant. The parties had the opportunity to ask Dr Lyle questions and oral expert evidence was not proportionate. The Respondent's comparison to a broken leg was not considered to be a good argument.

22. When considering the evidence, consideration was given to the medical evidence and how it assisted in relation to injury caused by proven acts of discrimination. The matters raised were considered.

23. The application in this respect is refused on the basis that there is no reasonable prospect of the Judgment being varied or revoked.

Claimant's costs have been disregarded

24. It was not clear to the Judge the basis of the application for a preparation time order and the case had not been listed to hear such an application. Costs are not a matter of remedy. Any application for a preparation time order has not been determined. The appropriate time to consider costs spanning the whole of the case is when the case has concluded. If the Claimant wants to make a preparation time order he may do so and it will be listed for a separate hearing. The Claimant is encouraged to take some legal advice on this matter.

25. The application in this respect is refused on the basis that there is no reasonable prospect of the Remedy Judgment being varied or revoked.

Other items materially affecting the Judgment

26. When considering compensation, consideration was given to the injury and losses caused by the proven discrimination. The Claimant is not compensated for injuries or losses caused by other matters.

27. The Claimant referred to the findings in relation to the failure to make reasonable adjustments, which were subject to a previous rejected reconsideration application. The injury and losses caused by the proven failure to make reasonable adjustments, to the PCPs of requiring employees to meet targets and deadlines and to complete projects on time, were considered and taken into account when determining the amount of the award.

28. The Claimant made closing submissions and provided a written submission. The matter raised about time to consider the Respondent's written submission is dealt with above.

29. The decision was made on the basis of documents referred to the Judge and those which were considered relevant within the documentation provided by the parties.

30. In relation to the reason for resignation, this was argued at the hearing and considered in the Remedy Judgment.

31. In relation to appeals against slow process, these were not matters found to be proven acts of discrimination. This also tends to highlight the difficulties with Dr Lyle's report and the Claimant's argument at the hearing, in relation to compensating him for matters not found to be proven discrimination. These matters and the harm from detriment caused by the protected disclosures were divisible and were not compensated for, as set out in the Remedy Judgment.

32. In relation to the Vento guidelines, they are guidelines as to where a case might fall to be compensated. The Claimant referred to matters which were not proven discrimination and that the Respondent had not sought to settle the claim. These were matters which could not be compensated for. The injury to feelings caused by the proven discrimination was considered as set out in the Remedy Judgment.

33. It is not a simple case of making an award of injury to feelings for each proven act of discrimination and adding them together. There was overlap

between the injury/loss caused by various incidents and this was considered in the Remedy Judgment.

34. In terms of date errors, the matters in relation to reasonable adjustments have been considered earlier. The Claimant is correct that the grievance outcome was sent in December 2019 and there was a typographical error in the year recorded at paragraph 50. The correct date was recorded in paragraph 14 and the decision was based on the grievance being dismissed in 2019, as reflected in paragraph 93 of the Remedy Judgment.

35. The level of uplift for breaching the ACAS code was considered and relevant matters were taken into account.

36. The matters raised do not materially affect the Judgment and the application for reconsideration is refused on the basis that there is not reasonable prospect of the Judgment being varied or revoked.

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

Employment Judge Bax
Dated 15 December 2022

Judgment sent to Parties:
23 December 2022

FOR THE TRIBUNAL OFFICE