Case No: 2201027/17

EMPLOYMENT TRIBUNALS

Claimant: **Ms T. Robinson**

Respondent: **His Highness Shaikh Khalid ben-Saqr al-Qasimi**

London Central Employment Judge Goodman 6 January 2023

ORDER

The claimant's application for reconsideration dated 20 December 2022 has no reasonable prospect of success.
The respondent's application for reconsideration dated 13 December 2022 Both applications are dismissed under rule 72.

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REASONS

Relevant Law

1. Under the Employment Tribunal Rules of Procedure 2013 a request for reconsideration may be made within 14 days of the judgment being sent to the parties. By rule 70 a Tribunal "may reconsider any judgment where it is necessary in the interest of justice to do so", and upon reconsideration the decision may be confirmed, varied or revoked.

2. Rule 72 provides that an Employment Judge should consider the request to reconsider, and if the judge considers there is no reasonable prospect of the decision being varied or revoked, the application shall be refused. Otherwise it is to be decided, with or without a hearing, by the Tribunal that heard it.

3. Under the 2004 rules prescribed grounds were set out, plus a generic "interests of justice" provision, which was to be construed as being of the

same type as the other grounds, which were that a party did not receive notice of the hearing, or the decision was made in the absence of a party,

or that new evidence had become available since the hearing provided that its existence could not have been reasonably known of or foreseen at the time. **Ladd v Marshall (1954) EWCA Civ 1** set out the principles on which evidence could be admitted after the judgment: it could not have been obtained with reasonable diligence before the hearing; it would have an important influence on the outcome; the evidence was apparently credible. The Employment Appeal Tribunal confirmed in **Outasight VB Ltd v Brown UKEAT/0253/14/LA** that the 2013 rules did not broaden the scope of the grounds for reconsideration (formerly called a review); the ET will generally apply the **Ladd v Marshall** criteria, although there is a residual discretion to permit further evidence not strictly meeting those criteria to be adduced if for a particular reason it is in the interests of justice to do so.

4. When making decisions about claims the tribunal must have regard to the overriding objective in rule 2 of the 2013 regulations, 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, and seeking expense.

The Claimant's Application to Reconsider

5. On 14 and 15 June 2022 there was a hearing to decide (1) remedy for unfair dismissal (2) costs applications made by each party against the other, and (3) an application by the respondent that the claimant's solicitor and counsel pay wasted costs. Judgment was reserved, and sent to the parties on 6 December 2022.

6. On 7 December the claimant's solicitor, Jacqueline McGuigan, wrote asking for an amendment to the judgment to reflect (1) that when counsel (David Stephenson) broke down on 14 June she had sent a message that it was inappropriate to continue with the wasted costs hearing and (2) that she had been asked in the hearing whether she had replied to a particular email, and could not answer because of privilege.

7. On 13 December the respondent's solicitor wrote querying whether this was an application to reconsider. At the same time they made their own application to reconsider the amount awarded to be paid in wasted costs by the claimant's solicitor. They asked for a finding on their argument that the claimant's solicitor's conduct was improper in relation to disclosure during the hearing of the 2007 mortgage application. They also wanted clarification whether the £20,000 award was in addition to or inclusive of £6,750 plus VAT.

8. On 14 December the claimant's solicitor clarified that she would send an application to reconsider later, and on 20 December she sent her 30 page application, which is summarised below

9. Later on 20 December counsel for the claimant (D. Stephenson) wrote dissociating himself from the claimant's solicitor's account of events on the afternoon of 14 June 2022.

10. On 23 December the claimant's solicitor wrote adding to her representations.

11. There has been no response to the respondent's application to reconsider.

12. The 20 December application covers the following: Bias

13. The application, which is addressed to the regional employment judge, begins with a request that the judgment is reconsidered by another judge or by the regional employment judge. It was put more forcefully in the letter of 14 June which said: the way in which Judge Goodman has conducted proceedings from start to finish is below any reasonable or rational international standard on human rights. There was a pattern of refusing adjournments on no reasonable basis...causing significant injustice and unfairness the claimant and the claimant solicitor right to a fair trial under article 6". This goes on to discuss the day of the liability trail when the claimant produced her 2007 mortgage application, the refusal to postpone the costs hearing on 25 June 2019, and the refusal to adjourn (the word used, not postpone) 14 June 2022.

14. Rule 72(3) provides: "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". "Practicable" suggests practical reasons, such as the unavailability, short or long term, of the relevant judge or tribunal panel. If there is an allegation of bias, that is properly dealt by the tribunal itself, or on appeal. Parties cannot choose their tribunals.

15. I understand that bias did not form part of the grounds of appeal against the November 2018 liability judgment. This was made clear by Mr Stephenson at the January 2022 case management hearing, which was held to clarify why the claimant's solicitor asserted that the EAT had remitted the case to a different tribunal (it became clear it had been remitted to the same tribunal) when the counsel for the claimant argued that the tribunal would be partial (but not biased) because of their November 2018 finding that the claimant could not always be taken at her word. It is not clear why it is raised now.

16. Reasons were given in June 2019 not to postpone the costs hearing. It is not clear why those reasons are not challenged. The claimant was not represented at that hearing because the claimant's solicitor had emailed the day before saying she was no longer on the record.

17. Reasons were given in the December 2022 judgment why the postponement application was refused, and this reconsideration application does not lay out any matter to show why this should be reconsidered. As for adjournment on 14 June, when Mr Stephenson was overcome and unable to continue, my note shows that everyone was invited to turn off their cameras and for Mr Stephenson to turn his on again if he felt able to continue. Mr Stephenson's email of 20 December 2022 gives his account of this episode. The claimant's solicitor argues that she was not given a fair hearing on the wasted costs application against her "when it was clear (he)..was not fit". The claimant's solicitor would be expected to have arranged a means of communicating with counsel during the hearing had she wished him to seek a longer adjournment, or could have switched on her microphone to speak herself.

18. The hearing note shows that once we moved past the point about misleading the tribunal, Mr Stephenson made other submissions calmly, including, by reference to **Ridehalgh**, that the claimant's solicitor should have the benefit of the doubt because of possible conflict. After making a number of points, counsel was asked if there was to be any evidence of the claimant's means. Then Ms McGuigan spoke (from 4.46 pm) about production of the 2007 mortgage application. As she had made this point, she was asked if she also wanted to comment on the respondent's submission that she was not asking the claimant about disclosure points, while specifically told she did not have to answer, and was not giving evidence. She then said the claimant was aware of all correspondence from the respondent, she had acted always on instructions, there was no intention to mislead (this must have been a reference to the mortgage application, and that she did not let the client control the process. I have reproduced this because it shows that if Ms McGuigan considered counsel unfit, or was for some reason unable to communicate with him, she had the opportunity to seek an adjournment so she could communicate with him, or to adjourn to the following day (which the panel had set aside for decision making), or to a later date to be fixed, or to add submissions herself.

19. Ms MsGuigan suggests she could not speak because muted. Participants are always asked to mute themselves unless speaking, to reduce the risk of extraneous noise, but they are only muted by the tribunal exceptionally, as where there are large numbers of observers coming and going. This is because it can be laborious to mute all participants and then unmute those who may wish to speak at some point, while asking them to mute themselves.

20. If bias is a ground for overturning any part of the costs and remedy judgment, it should have been raised at the costs and remedy hearing, or should now be addressed on appeal.

Witness Statements and Hearing Bundles

21. The application complains the tribunal did not hear evidence at the remedy and costs hearing. Directions for filing witness statements were made in the January 2022 case management orders, but nether side did, so the tribunal relied on its 2018 findings and inferences made from those. As for a complaint that the respondent had selected and omitted relevant documents from the bundle, we had the original trial bundle as well as the bundles filed for the costs and remedy hearing and it was open to the claimant to point out relevant omissions. The claimant did attach to her written submissions of 1 June 2022 hearing a letter from

    the respondent's solicitor of 9 July, and later emails (e.g.16 July) but not the 9 July emails which she says were omitted. The tribunal does not know what these emails say. Remedy

22. There are short points on remedy. These include a protest that it was "absurd" to find conduct a reason to reduce the award when the appeals had concluded the contract was not illegal at the time of dismissal. In the context of an application to reconsider, whether there was misconduct is an appeal point. This appears to be an appeal point. It is suggested that illegality in 2014-2017 (found not to bar enforcement of the contract after 2014), rather than misconduct or dishonesty, was the reason for the reduction. Illegality is not the same as misconduct. Otherwise, this is an appeal issue. The arguments were made at the June hearing.

23. On the ACAS uplift award, it is pointed out that the claimant had asked for an appeal and did not get a reply. There was no mention at the hearing that this was the case. The submission (both in writing and oral) for the claimant was that she was not invited to a meeting or to an appeal meeting, asking for a 20% award. We knew she was not invited to appeal, as well as not being offered a dismissal meeting, and we decided in the round to award 10%, for the reasons given. It is not clear how not offering an appeal when it was requested, the point now being made, was worse than not offering one to begin with. Costs

24. There is a complaint that the tribunal ordered wasted costs against Ms McGuigan because of the 2007 mortgage application. In paragraph 95 the suggestion that there was pressure on counsel to apply to redact the document in a misleading way was explicitly discounted as speculative, and paragraph 104 says the 2007 mortgage application was not taken into account.

25. There is an argument that the wasted costs order is wrong because the claimant's solicitor cannot breach privilege. This is matter for appeal, rather than reconsideration. The arguments was made at the hearing and considered by the tribunal and if we were wrong, that is for an appeal.

26. There is an argument that the tribunal held it against the claimant that she had "improved" the staff list document while ignoring that she was being asked to prove her status. The dispute here was not whether she was employed, but what the term of the contract was as to remuneration,

and in our (2018) finding she had (dishonestly) "improved" the document after the event in order to boost her case that the agreed term was net of tax. We found that the claimant's solicitor had had drawn to her attention that the document had been altered and asked to show when and how this occurred, and we inferred that the claimant's solicitor had failed to supervise disclosure properly by not dealing with this.

27. There is an argument that the reasoning for making a wasted costs order fell short of the standard required, by reference to the decision in **Wentworth-Wood v Maritime Transport (2018) UKEAT/0184/17.** It for an appeal tribunal to decide whether the reasons are adequate to explain the order made.

28. There is an argument, having regard to **SW v UK 87/18** that the wasted costs order relied on findings arising outside the original judgment and was therefore unfair. In SW damage was done by a judge's direction to inform local authorities and professional bodies of a finding that had not been alleged in the hearing so that the social worker, who was not a party but a professional witness had no opportunity to be heard. Dealing with the points made in the reconsideration application (57), the respondent raised the disclosure point about Mr Kitching and the claimant's diaries or notes produced to him; this was part of their disclosure application, the claimant's solicitor cannot have been taken unawares by this; the notes of cross examination are in the supplemental bundle for the costs hearing, the relevant passage is on page 269. The claimant's solicitor, unlike SW, was aware there was an application against her and was represented and present. On HMRC, the claimant's tax adviser's letter about giving her national insurance number was before the tribunal at the costs hearing, and we had heard what she said at the June 2019 hearing, mentioned in the written reasons prepared at the request of the claimant's solicitor. In the bundle is the respondent's December 2018/January 2019 correspondence with HMRC. The argument that the tribunal should have made a finding of its own initiative that disclosure had not been properly supervised is not understood, the respondent made the point in the December 2018 costs application. The claimant could have made this argument at the costs hearing. Finally, there is a complaint the tribunal made new findings of illegality, but it is not clear what these are said to have been.

29. The point about witness statements about Peter Cathcart was made in the liability hearing, and we made a finding on that – see paragraph 18 point 3. We were not referred to anything on this at the June 2022 costs hearing.

30. On what costs were caused by any failings, we were aware of the guidance in **McPherson** and **Yerrakalva**; if the reasons are inadequate this is probably better addressed on appeal.

31. In the letter of 23 December it is said the June 2022 hearing should not have been postponed on grounds of potential delay because the judge

knew she was about to take a 3 month sabbatical. I comment on this that there was no sabbatical, nor was I away for 3 months. Insofar as I was absent it was by reason of ordinary annual leave, and the difficulty in completing the written judgment was the listing of several multi-day hearings from September. Instructions were given to the administrative staff on 26 August that a judgment could be expected by the end of September, and on 9 November to write to say two writing days had been allocated for 24/25 November and a decision could be expected thereafter.

32. I conclude there is no reasonable prospect of showing it is in the interest of justice to reconsider the judgment. Some of the points made were or could have been made at the hearing, and there must be finality. Others are more appropriate for an appeal.

Respondent's Application to Reconsider

33. The respondent's brief application concerns the brief fee of Mr Laddie QC for half a day when the 2007 mortgage application was unexpectedly produced and an application was made to redact it prior to production. The amount is found in paragraph 92 of the costs judgment. The tribunal decided not to make a wasted order for this against Mr Stephenson. The respondent seems to ask whether this amount should be ordered against Ms McGuigan in addition to the £20,000 ordered. Our finding on failings in disclosure was to leave the mortgage application on one side (paragraph 104), and we had discarded as speculative the question of whether there was pressure on or from the solicitor to make the redaction application, or to make it for reasons other than the risk of selfincrimination. There is no reason to later that in the interests of justice.

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Employment Judge GOODMAN

Date 9th Jan 2023

JUDGMENT SENT TO THE PARTIES ON

09/01/2023

FOR THE TRIBUNAL OFFICE