



**IN THE EMPLOYMENT TRIBUNAL (SCOTLAND)**

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**Determination of the Tribunal in Case No: 4104879/2022, Issued Following Consideration, in terms of Rule 72(1) of Application made under Rule 71, for Reconsideration of the Tribunal's Judgment dated 10<sup>th</sup> and issued to parties on 11<sup>th</sup> January 2023**

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**Employment Judge J G d'Inverno**

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**Ms Sophie Archer**

**Claimant  
In Person**

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**ABR Training Limited**

**Respondent  
Represented by:-  
Susan MacKinnon –  
Director**

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**DETERMINATION OF THE TRIBUNAL**

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The Employment Judge, upon consideration in terms of **Rule 72(1)**, of the Application dated 11<sup>th</sup> and 15<sup>th</sup> January 2023 made in terms of **Rule 71**, for Reconsideration of the Tribunal's Judgment of 10<sup>th</sup> January 2023 ("the Judgment"), considering, on the grounds of application presented, that there is no reasonable prospect of the original decision (the Judgment) being varied or revoked;

**(FIRST)** Refuses the application in terms of Rule 72(1)

**(SECOND)** Directs that parties be informed of the refusal by the issuing to them of this Determination together with the Note of Reasons attached to it.

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**Employment Judge: J d’Inverno**  
**Date of Judgment: 21 February 2023**  
**Entered in register: 28 February 2023**  
**and copied to parties**

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**I confirm that this is my Determination in the case of Archer v ABR Training Limited and that I have signed the Determination by electronic signature.**

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## **REASONS**

1. This is a Determination following consideration in terms of Rule 72(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1, of the respondent’s Application, made in terms of Rule 71, on 15<sup>th</sup> January 2023. An earlier version of the Application, which could not be considered because Rule 92 (copying to other parties) had not been complied with, was tendered on the 11<sup>th</sup> of January 2023. The claimant having been reminded of the requirement to comply with Rule 92 did so in terms of the subsequent version of the Application submitted on 15<sup>th</sup> January 2023.

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2. The two versions fall to be read together as the earlier version, (11<sup>th</sup> January), provides what would otherwise be a lack of specification in the 15<sup>th</sup> January 23 version.

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3. The Rule 92 compliant version of the Application is in the following terms and is made by the respondent’s representative and Director Ms Susan MacKinnon:-

**“From:** Susan MacKinnon [REDACTED]@[REDACTED]  
**Sent:** 15<sup>th</sup> January 2023 15:50  
**To:** Glasgowet; [REDACTED]@[REDACTED]  
**Subject:** Re: Case Number: 4104879/2022 – Sophie Archer v  
ABRTraining Ltd  
**Categories:** C

Dear Sirs

*We are writing in order to have a reconsideration on Judgment on the following grounds.*

*Evidence used by the other party was not given to ourselves before the hearing. Therefore we were not given the opportunity to provide valid and solid evidence that this was indeed false. Evidence used was in the way of stating a 3rd party was present one of which we had been made aware was being used as evidence we would have called as a witness in order to discredit this piece of information.*

*In the hearing the Judge did not allow for myself to obtain further evidence and advised that the hearing was in process but allowed the other party to do so.*

*In the verdict the Judge advised that the other parties evidence was more believable however declined to postpone in order to allow solid medical and witness evidence that would have proven this to be a lie. In the verdict the Judge has stated that the other parties evidence was more believable, However acknowledging that the forms submitted to the Tribunal gave false and misleading information.*

*Proof of contract states that there would be a new contract given at 5 Glenburn Road this was never done again solidifying my version of events however this was ignored.*

5           *The Judge has taken into account the other party suffers from anxiety however appears to have ignored the fact that during that March I was under supervision after a suicide attempt and was pretty harsh on my recollection on activity on days one of which was the day I could medically prove I attended to take my own life.*

10           *The Judge also seems to have ignored the fact that I advised the person who is named to have been mentoring Miss Archer was not an employee, which now with the current judgement I can firmly advise id she was in Causewayside Street, this would be breaking and entering and I will be seeking further police advice as entering a premises without permission of the owner which neither party had on these dates would be unauthorised.*

15           *I do however understand you do not appear to wish to take any of these matters into account and I don't feel that by allowing evidence that I wasn't privy to before the trial, and also disregarding the fact that the I initial forms were lied on did not give me adequate preparation.*

20           *As a matter of formality I am officially looking for a reconsideration before appeal in order for me to submit the adequate evidence I was not allowed to do so during the hearing. Even though the other party was allowed to submit evidence during the hearing.*

25           *Regards*  
*Susan*

30           *Sent from Outlook for iOS"*

4. The earlier submitted non Rule 92 compliant version of the Application was in the following terms:-

**"From:** Susan MacKinnon [REDACTED]@[REDACTED]

**Sent:** 11<sup>th</sup> January 2023 12:10  
**To:** Glasgowet  
**Subject:** Re: Case Number: 4104879/2022 – Sophie Archer v  
ABRTraining Ltd

5 **Categories:** C

*Dear Sir/Madam*

10 *I am submitting an application to reconsider. The grounds on which I  
am applying for this is that evidence submitted in the hearing was not  
made aware to me in order to give sufficient evidence in order to  
prove this as false. The main point being Miss Clare Bacon  
mentoring Miss Archer, had I been given notice of Miss Bacon being  
15 used I would have been able to submit evidence proving this to be  
false. I was not given any time to prepare for this evidence so  
therefore it was unfair.*

20 *I have lodged a notice to appeal in order to have witness and medical  
information submitted to prove that this has been false and  
inaccurate statements given under oath.*

*Kind Regards*

25 *Miss Susan MacKinnon*

*Sent from Outlook for iOS*

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5. The quotations set out above accurately reproduce the wording, syntax and punctuation appearing in the second and first versions of the Application.
  6. Reading the two versions together, the issues giving rise to the Application for Consideration are identified by the respondent as:-

- 5 (a) the fact that in answering questions put to her in cross examination, including questions as to how she could be certain that she was in the respondent's premises working on particular dates if she, the respondent's Director, was not also present to supervise/mentor her, the claimant stated in relation to certain dates, that she was being mentored, in the respondent's Director's absence, by a Miss Clare Bacon.
- 10 (b) That that was an answer which the respondent's representative was not expecting as the claimant had not previously given notice in her pleadings that she was mentored by any particular individual on any particular date.
- 15 (c) That had she been aware that the claimant might give such an answer during cross examination, it being an answer that she considered was unlikely to be true because by the particular dates in question Clare Bacon had started her own business and was no longer supporting the respondent in its, she would have lead Clare Bacon as a witness to give evidence on the
- 20 point.
- (d) *"I was not given any time to prepare for this evidence so therefore it was unfair."* – (version 1 11<sup>th</sup> January 23 4<sup>th</sup> line)
- 25 (e) *"In the hearing the Judge did not allow for myself to obtain further evidence and advised that the hearing was in process but allowed the other party to do so."*
- 30 (i) The reference to *"but allowed the other party to do so"*, is understood to be a reference to the claimant being allowed to give the answer which she gave during cross examination. (That criticism might more relevantly be focused as one of the Employment Judge attaching any

evidential weight to the answer once it had been elicited by the respondent's representative in cross examination.)

5 (ii) The statement "*In the hearing the Judge did not allow for myself to obtain further evidence and advised that the hearing was in process*" is understood to be a reference to the Judge advising parties, in response to the respondent's statement that she believed that Clare Bacon would not support the claimant's answer if she were giving evidence, that the Final Hearing being in process it was at this Hearing that relevant evidence should be presented. The respondent's representative did not state following the claimant's answer that she wished to make arrangements to bring Clare Bacon as a witness that day to give evidence at the Hearing which was in process. No application for  
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20 postponement of the Hearing was made.

(f) The statement, appearing in the 14<sup>th</sup> line of the second version of the Application:- "*And I don't feel that by allowing evidence that I was privy before the trial .... did not give me adequate preparation*" and the last sentence of version 2 at lines 15 and  
25 16:- "*Even though the other party was allowed to submit evidence during the hearing*" are reiterations of the same point.

7. For ease of reference the above matters at paragraph 6(a) to (f) inclusive are  
30 referred to hereafter as "The ground of alleged procedural unfairness".

8. The alleged procedural unfairness ground comprises the totality of the first version of the Application (11<sup>th</sup> January 23).

9. The remainder of the second version of the Application (15<sup>th</sup> January) that is the lines 5 to 16 inclusive with the exception of the two passages quoted at paragraph 6(f) above, take issue on various grounds with the Tribunal's assessment of the credibility and reliability of the evidence of the respective witnesses (the claimant and the respondent's representative), and the application by the Tribunal of the "balance of probabilities" test to the evidence presented at the Hearing.

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10. Criticisms advanced are variously:-

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(a) That the test was applied by the Judge in the absence of "*solid medical and witness evidence that would have proven this*" (this is a reference to the claimant's evidence that she was mentored on particular days by Clare Bacon, on the one hand, and the respondent's representative's position in evidence that she believed that on some of the days claimed for by the claimant she, the respondent's Director, could not have been present because she was attending medical appointments.

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(i) The respondent's representative's general evidence in respect of her attendance in March of 2022 at a number of medical appointments was unchallenged in cross examination, it was accepted by the Tribunal and did not need to be proved by medical records. The Tribunal considered it to be not fundamentally incompatible with and to a degree supportive of, the claimant's position.

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(b) That the Judge found the claimant to be a generally credible witness despite her acknowledgement that when she first drafted her claim form ET1 she did not include in it express reference to the payments which she had received from the respondent against



5 outstanding wages which, in the respondent's representative's submission made at the Hearing and already addressed in the Judgment at pages 12, 13 and 14, amounted to perjury and should result in the whole of the claimant's evidence being rejected as untruthful. For ease of reference that ground is referred to going forward as "the Defence of Perjury Ground".

10 (c) Alleged failure to take account of the fact that the respondent's intention was that the claimant be given a new contract at the 5 Glenburn Road premises, something which did not in fact occur and which should have been regarded as undermining the whole of the claimant's evidence.

15 (d) The assessment of reliability of the respondent's representative's evidence notwithstanding the fact that in or about March 2022 the respondent was under medical supervision after having made a suicide attempt.

20 (i) That evidence of the respondent's representative given when answering questions in cross examination and referred by her in submission, was taken account of by the Tribunal when assessing credibility and reliability. No adverse assessment of the respondent's representative's credibility was made in light of it regarding reliability. Notwithstanding that explanation advanced in evidence and accepted, the reliability of the evidence was impacted by those circumstances, something which the Tribunal was entitled to, and indeed bound to, take account of.

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(e) Clare Bacon (the alleged mentor) was not/no longer an employee of the respondent in March of 2022 having left to start her own business.

5 11. For ease of reference going forward, I hereafter refer to the above set out at paragraphs 9(a), 9(c) and 9(d) as “**the assessment of the evidence and application of the balance of probability test ground**”.

10 12. In the penultimate line of version 2 the claimant summarises her position as follows “*As a matter of formality I am officially looking for a reconsideration before appeal in order for me to submit the adequate evidence I was not allowed to do so during the hearing.*” That, in the context of version 1, is understood to be a reiteration of the lack of procedural fairness ground.

### 15 **Applicable Law Reconsideration in Overview**

13. The Tribunal’s current powers to reconsider its Judgments are set out in Rule 70 which is in the following terms:-

#### 20 **“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  
25 revoked it may be taken again.”

14. The present Rule 70 evolved out of old Rule 34 of the 2004 Employment Tribunal Rules of Procedure. Some brief consideration of the old Rule is  
30 appropriate because the Higher Courts have, from time to time, confirmed that some of the jurisprudential guidance given in respect of the old Rule 34 continues to apply to the new Rule 70 and have also, from time to time, in the context of the emergence of the “Overriding Objective”, indicated that some

of the emphasis placed previously on the requirement for the existence of “exceptional circumstances” was less applicable.

### **The Position under the old Rules**

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15. Under old Rule 34 of the 2004 Employment Tribunal Rules, there were 5 grounds upon which a Tribunal could review a Judgment (not including a default Judgment). These were:

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- That the decision was wrongly made as a result of an administrative error - old Rule 34(3)(a)

- That a party did not receive notice of the proceedings leading to the decision – old Rule 34(3)(b)

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- That the decision was made in the absence of a party – old Rule 34(3)(c)

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- That new evidence had become available since the conclusion of the Tribunal Hearing to which the decision related, the existence of which could not have been reasonably known of or foreseen at the time – old Rule 34(3)(d) and/or

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- That the interests of justice required a review – old Rule 34(3)(e)

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16. Under the 2013 Rule (Rule 70), only one of these grounds is carried forward namely, that a reconsideration is *necessary in the interests of justice*. That sole ground however falls to be regarded as broad enough to embrace the other 4 specific grounds previously expressed under old Rule 34. In seeking to apply the Rule 70 ground – *is reconsideration necessary in the interests of justice* the Tribunal must consider the interests of both parties and the underlying public policy principle that in all proceedings of a judicial nature there should be finality in litigation.

17. Reconsiderations are thus seen as limited exceptions to the general rule that Employment Tribunal decisions should not be reopened and relitigated. It is not to be viewed as a method by which, nor is the Tribunal's power to be exercised for the purposes of affording to, a disappointed party to proceedings, "a second bite of the cherry". In **Stevenson v Golden Wonder Limited** [1977] IRLR 474, EAT, Lord Macdonald said of the old review provisions that they 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 adduced which was available before.*'

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### **Interests of Justice**

18. Under Rule 70 of the 2013 Employment Tribunal Rules, a Judgment will only be reconsidered where it is "*necessary in the interests of justice to do so*". This ground gives an Employment Tribunal a wide discretion but the case law suggests, that it will be carefully applied. '*It does not mean that in every case where a litigant is unsuccessful he or she is automatically entitled to a reconsideration: virtually every unsuccessful litigant thinks that the interests of justice require the decided outcome to be reconsidered. The ground only applies where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order – Fforde v Black* EAT 68/80.

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### **Exceptional Circumstances Required?**

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19. 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 of the 2013 Rules. The same requires an Employment Tribunal to seek to give effect to the Overriding Objective (to deal with cases fairly and justly) whenever it exercises a power conferred by the Rules or is required to interpret its provisions. That however does not result in any rule of law that the interests of justice ground do not have to be construed restrictively. The Overriding Objective to deal with cases justly requires the application of recognised

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principles. Those principles include finality of litigation which is in the interests of both parties and in the public interest.

### **The Interests of Justice require to be considered from both sides**

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20. It is clear that the interests of justice as a ground for reconsideration relate to the interests of justice to both sides. In **Reading v EMI Leisure Limited** EAT 262/81 the claimant appealed against an Employment Tribunal's rejection of her application for a review of its Judgment. She argued that it was in the interests of justice to do so because she had not understood the case against her and had failed to do herself justice when presenting her claim. The EAT observed that: *'when you boil down what is 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 this situation.'* Accordingly, the claimant's appeal failed.

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### 20 **Consideration**

21. Turning, against the above background to the consideration of the Application in the current case and looking first at the ground of:-

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#### **Alleged Procedural Unfairness**

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(a) It is discernible from the respondent's representative's articulation of this ground that she does say that the unfairness she complains of (her inability to counter the claimant's evidence that she was mentored by Clare Bacon on particular days arises from the claimant's conduct in choosing to include that evidence in the answer to questions put to her in cross examination. It is also discernible from the articulation of the ground that the respondent's representative considers that her inability to "prove" that that evidence was untruthful was compounded by a failure on

the part of the Tribunal to discontinue the part heard Final Hearing and fix an adjourned date at which she could have led evidence from Clare Bacon in contradiction of the claimant's evidence.

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(b) Dealing with the first of those propositions;-

Parties are referred to paragraph 4 appearing at page 3 of the Note of Reasons attached to the Tribunal's Judgment which is the subject of the application ("the Judgment") and to paragraphs 6(l), (m), (n) and (o) appearing at pages 6 and 7 of the Note of Reasons attached to the Judgment and which, for ease of reference, are reproduced below viz:-

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4. Each of the parties had lodged a bundle of documents to some of which reference was made in the course of evidence and or submission. The claimant's bundle contained a Schedule ("the claimant's Schedule") or ("the Schedule") setting out, by reference to date and hours worked the amounts of money which she claimed by way of arrears of wages (unauthorised deduction). Reference was made to the Schedule by both parties and by the Tribunal in the course of the Hearing, and it is by reference to and adjustment of it that the sums due as set out in the Tribunal's Judgment are calculated.

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(l) The total gross amount, as brought out in the claimant's Schedule, which parties are agreed for the purposes of the Hearing the claimant had entitlement in law to be paid for, is **£2,161.46**.

(m) The remainder of the wages claimed in terms of the claimant's Schedule were put in dispute by the respondent.

5 (n) The sole basis upon which the respondent denied the claimant's entitlement to be paid in respect of those hours claimed was the respondent's assertion that the claimant did not work on those days, or at least the respondent's adoption of the position of putting the claimant to her proof that she had worked on those days.

10 (o) It was a matter of agreement between the parties that in the event that the Tribunal were to hold, on the preponderance of the evidence and on the balance of probabilities, that the claimant had worked on any of the disputed dates, the claimant would be entitled to the wages claimed, the "salary due" amounts set out in the claimant's Schedule against any  
15 particular date.

22. The claimant's case, as set out in her initiating Application ET1, included at page 12 section 15; *"I have a PDF file of an exact breakdown of amounts owed however it's not a place to upload this. If there is a way to send this to  
20 anyone I am happy to do so ..."* The PDF file to which the claimant referred is the Schedule described by the Tribunal at paragraph 4 of its Note of Reasons attached to the Judgment.

23. In its Form ET3 lodged with the Tribunal on 19<sup>th</sup> September 2022 the  
25 respondent at paragraph 6.1 gave notice of evidence which the respondent intended to lead in defence of the claims as follows:-

30 (a) "Proof of money sent to Miss Archer  
Proof of closure of the salon due to flooding  
Proof of work being done in the new salon  
Messages of proof of advising staff *"I could not continue employment if they wanted to look for work elsewhere I would provide ref."*

(b) And at paragraph 7.3 *"no contract given at 5 Glenburn Road"*

(c) and at page 8 continuation sheet *"Miss Archer's claims of no payment differ to those that she has had payment to ACAS. I have and would never be gifting money in the current climate"*.

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The statement in the first paragraph of the page 8 continuation sheet was a disclosure by the respondent's representative of what she understood the claimant had said to ACAS in the pre litigation conciliation process namely that she, the claimant, had received some payments from the respondent. Those payments were payments which are reflected in the Schedule (PDF file) referred to in her ET1 and disclosed, produced and relied upon by the claimant.

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15 24. Regarding the asserted lack of fair opportunity to present evidence, examination of the case file discloses

(a) that on the 27<sup>th</sup> of September 2022 the respondents wrote to the Employment Tribunal stating; *"We are writing to notify of evidence we will be submitting at trial ..... and in paragraph 2 of that email*

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(b) *"Due to the case against ABR Training stating that there are other employees who have advised Miss Archer that they have had money withheld we would formally like to notify her (the claimant) that we will be calling Miss Nicole McGregor and Miss Clare Bacon as witnesses .... to that we can submit bank transfers and payments as proof to discredit this accusation ...."*; and at paragraph 3,

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(c) *"We are happy to provide medical records that will prove between February and March Miss MacKinnon was under medical supervision, we are able to provide proof of an attempt on her own life. ...."*



5 (i) Although the matters referred to as to be spoken to by Clare Bacon do not include the particular matter which the respondent now asserts gives rise to unfairness, it does communicate to the Tribunal and to the claimant (to whom the letter was subsequently copied by the respondent on the Tribunal's Direction,) clear notice that the respondent would have, amongst others, 10 Miss Clare Bacon available to give evidence as a witness at the Final Hearing. The file discloses no communication departing from that intention or position – for discussion had the respondent's representative led Clare Bacon as she gave 15 notice of her intention to do Clare Bacon would have been available to answer questions put by both parties on the particular matter. The non availability of the oral evidence of Clare Bacon at Final Hearing resulted not from any decision of 20 the Tribunal, but rather from the respondent's representative's decision, known only to her in advance of the Hearing, not to lead Clare Bacon at it.

25 (d) By letter dated 6<sup>th</sup> October the Tribunal's Legal Officer while directing acknowledgment of that correspondence reminded both parties of the terms of the correspondence dated 30 1<sup>st</sup> September (the Notice of Claim Letter) which stated "*If you intend to rely on any documents at the hearing you should put these together into a single "file" with numbered pages and send a copy of the file to the other party and to the Tribunal at least 7 days before the hearing. The file can be in electronic or paper format. If you are going to ask any of your witnesses*

*about the documents, you must ensure that you also provide them with a copy of the file.”*

5 25. By email dated 12<sup>th</sup> October 2022 the claimant lodged and intimated a bundle of documents including the Schedule itemising payments claimed by her from the respondent and payments received by her from the respondent. By email dated 2<sup>nd</sup> November 2022 the claimant intimated and lodged a further copy of a bundle. By email dated 2<sup>nd</sup> November the respondent asserted that the claimant should be regarded as having committed perjury in submitting her  
10 initiating Application ET1, it not having contained express specification of the payments which she had received from the respondent but as now itemised in her Schedule which was included in her bundle.

15 26. By correspondence dated 2<sup>nd</sup> November the respondent’s representative wrote to the Tribunal again referring to the same point made in relation to the claimant’s ET1 (the respondent’s representative) and stating *“I would direct you to review all Miss Archer’s evidence which 100% proves that she has lied on court documents. .... I would specifically also direct you to the document submitted to the Tribunal.* (That is a reference to the Schedule contained  
20 within the claimant’s bundle).

*“Prior to Miss Archer submitting the above mentioned document we would be submitting all evidence to defend the claim as false, however by admission of Miss Archer’s own evidence we will purely be defending the case on the  
25 basis of perjury being committed – perjury is a criminal act and this has been committed by false submissions of statements on the original document submitted to the Tribunal.*

30 *Furthermore we fully intend to pursue taking legal action for the above criminal offence. I don’t believe we need to submit any evidence of this as it has all been submitted.”*

27. The decision of the respondent to give notice of restricting its defence to that single ground, which the Tribunal ultimately considered to be misconceived,

was wholly a decision of the respondent. It was not one prompted or induced by the Tribunal or the claimant.

5 The respondent's representative submitted no further documents prior to the Hearing other than those attached to the Response Form ET3 being extracts from the respondent's representative's Director's bank statements showing the payment to the claimant of the sums itemised by her as received on the Schedule. Such additional copies of documents which the respondent's representative brought to the Hearing and which she sought to lodge before  
10 the hearing of evidence were received and considered by the Tribunal.

28. Both parties were given ample opportunity in advance of the Hearing to decide on the evidence, documentary or oral, which they wished to present at the Hearing. The respondent's representative had formally put the claimant  
15 and the Tribunal on notice that the respondent would be leading, amongst others, Miss Clare Bacon as a witness. She departed from that position at the outset of the Hearing confirming that only she would be giving evidence. While the respondent's representative gave no explanation for that change in position she had separately stated in her communication sent to the Tribunal  
20 on the 2<sup>nd</sup> November and copied to the claimant "*We will purely be defending the case on the basis of perjury being committed – perjury is a criminal act and this has been committed by false submissions of statements on the original document submitted to the Tribunal*" [the ET1] "*Furthermore we fully intend to pursue taking legal action for the above criminal offence. I don't*  
25 *believe we need to submit any evidence of this as it has all been submitted.*"

29. The "defence of perjury" was one fully advanced by the respondent and addressed by her in her evidence and submission and was put by her to the claimant in cross examination at the Final Hearing. That defence was  
30 considered by the Tribunal and rejected as misconceived, as is set out at paragraphs 24 and 25 of the Note of Reasons attached to the Judgment. Read shortly, on the evidence presented by both parties including the claimant's explanation as to:-

- (a) how she had come to not expressly specify at the stage of initiating her claim all of the payments which she had received; and,
- 5 (b) that from the point at which the respondent had set out the assertion in its Form ET3, she had acknowledged in every communication with the respondent and the Tribunal the payments which the respondent had made including the receipt of the £400 payment which, in her assertion, had been made to
- 10 her by the respondent's representative as a personal loan, the Tribunal considered that there was no evidence of a crime of perjury having been committed before the Tribunal.
30. On that evidence, the Tribunal held that there was no basis made out upon
- 15 which the whole of the claimant's evidence on any matter should be dismissed as untruthful. The Application for Reconsideration contains nothing new or additional in respect of the defence of perjury. In seeking to have the Tribunal reconsider its determination in that regard, the Application advances substantially the same proposition advanced by the respondent at
- 20 Hearing and already refused by the Tribunal. The Employment Judge considers that there is no reasonable prospect, on the Grounds of Application set out, of the original decision being varied or revoked, insofar as it relates to the "defence of perjury" *per se* or, insofar as it relates to the fact that beyond referring in her ET1 to her PDF document (Schedule) which she was unable
- 25 to upload with her ET1, the claimant did not specify all of the payments received by her and which were set out and expressly specified in that document, as providing a basis in fact and in law for disregarding the whole of the claimant's evidence as incredible.
- 30 31. Regarding the alleged procedural unfairness Ground of Application, the respondent's representative's inability to lead evidence from Clare Bacon at the Final Hearing resulted not from any procedural unfairness on the part of the Tribunal, or from the claimant's answer to a question put to her in cross examination, but rather from the respondent's representative's own decision

not to have Clare Bacon in attendance at the Hearing contrary to the formal notification given by her, on 27<sup>th</sup> September 2022, that she would. That in turn would appear to result from misconception of the defence of perjury to which, in terms of her email of 2<sup>nd</sup> November she gave notice that the respondent's defence would be restricted to.

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32. The same applies insofar as the respondent may have wished to produce and rely upon medical records to prove that between February and March she was under medical supervision and or had attempted to take her own life. In the same email of 27<sup>th</sup> September 2022 the respondent's representative gave notice that she was in a position to produce such medical records but ultimately chose not to do so, despite being reminded by the Tribunal on a number of occasions, including on 4<sup>th</sup> November following her email of 2<sup>nd</sup>, that beyond what was attached to the Forms ET1 and ET3, any other documentary evidence required to be supplied in a single bundle of documents as previously advised, regardless of whether it had already been sent to the Tribunal. Notwithstanding the respondent's representative chose not to produce such additional documentary evidence. There is nothing in the Application which goes to show or suggest that the respondent's representative's decision not to have Clare Bacon in attendance as a witness at the Hearing, a decision taken by her in advance of the Hearing, was taken as a result of something going wrong with the procedure, followed by the Tribunal in advance of the Hearing and which involved a denial of natural justice or something of that order".

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33. While the respondent's representative states in the Application that this ground arises from the fact that she had not been provided in advance of the Hearing with a witness statement or precognition of the claimant in which the claimant indicated that she would state in evidence that Clare Bacon had mentored her on particular days, this was not a case in which any Order was made authorising the use of witness statements, nor are parties required to plead evidence at length in their forms ET1 or ET3 but rather, to give the other fair notice of the case which they have to meet. The case which the claimant gave notice of was an offer to prove that she had worked for the

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respondent on each of the days set out in the Schedule referred to in the ET1 as the PDF document when first submitted, and produced to the respondent and the Tribunal on 12<sup>th</sup> October 2022.

5 34. It was separately open to the respondent's representative, as it is open to any party should they wish to know more of what a particular witness is likely to say in evidence, to seek to take a precognition from that witness. No such attempt or request was made of the claimant by the respondent's representative and neither was any application made to the Tribunal in that  
10 regard.

35. Separately, and in the event, the absence of oral confirmation or denial by Clare Bacon at the Final Hearing of whether she mentored the claimant on any of the identified days in March was not a factor upon which the Tribunal's  
15 decision ultimately turned. The issue of "mentoring by Clare Bacon" relates only to the period in respect of which the claimant seeks payment for hours allegedly worked on the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> March 2022 and on the 18<sup>th</sup>, 22<sup>nd</sup>, 23<sup>rd</sup> and 25<sup>th</sup> March 2022. The claim in respect of those days is dealt with by the Tribunal at paragraph 31 and 32 of the Note of Reasons attached  
20 to the Judgment. As can be seen from those paragraphs, it was not the claimant's evidence, and the Tribunal has made no Finding in Fact to the effect that, she was mentored by Clare Bacon on each of those days.

36. Whether the claimant was or was not mentored by Clare Bacon on any one of  
25 those days was not the basis in fact upon which the Tribunal's application of the balance of probabilities test and its determination of whether the claimant had or had not worked on those dates, were made. On the evidence presented the Tribunal did not consider it necessary to make a Finding in Fact as to whether Clare Bacon did or did not mentor the claimant on any one  
30 of the particular dates. Rather, as is set out at paragraph 31 of the Reasons the Tribunal noted the respondent's reasons, given in evidence, for denying liability which included, amongst other matters,

5 (a) the fact that the person whom the claimant asserted supervised her on occasions when the respondent's representative was not present, namely Clare Bacon, had, as at the 1<sup>st</sup> of March opened her own business in different premises and had commenced trading that business and,

10 (b) the fact that at that time the respondent's Director had various health issues and medical appointments to keep which resulted in her being in the premises for part of the day only (generally resulted).

15 37. The Tribunal considered the respondent's representative's evidence, including, as to those matters and which it accepted as credible, to be not incompatible with the claimant's evidence. As set out at paragraph 32 of the Note of Reasons, taking the evidence as a whole, including the evidence of both parties, the Tribunal found on the preponderance of the evidence that it considered it more probable than less that the claimant's version of events was correct. That Determination was not reached as a result of any finding that the evidence of the respondent's representative in so far as it related to matters of fact was not credible.

20 38. Having found the claimant to be a generally credible witness and her evidence to be generally reliable and finding the respondent's evidence to be not incompatible with the claimant's in relation to the period in question, the Tribunal considered it to be insufficient, in terms of its reliability, to undermine the credibility and reliability of the claimant's. Taking the evidence in relation to the period as a whole, the Tribunal concluded on the preponderance of the evidence and on the balance of probabilities, that the claimant had discharged her burden of proof in respect of having worked on those dates.

30 39. For the avoidance of doubt, it is confirmed that the Tribunal accepted the respondent's representative's oral evidence, which was not challenged in cross examination, that in the period in question she had various medical

issues and appointments to keep, which generally resulted in her being in the premises for only part of each day.

5 40. The Application attaches no affidavit or other statement of Clare Bacon which goes to the issue of mentoring on particular days, nor does it confirm what Clare Bacon has said and will say on the matter. It does not identify new evidence that was not or could not reasonably have been available to the respondent at the time of the Final Hearing. Rather, what the Application appears to seek is a second opportunity to have Clare Bacon attend a  
10 Hearing and give evidence with a view to discovering what she may say or have to say on the point of mentoring. On the discrete issue of mentoring the opportunity to lead Clare Bacon in evidence was one available to the respondent in advance of and at the Final Hearing and, as previously noted the respondent's representative had formally given notice that she would be.

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41. That in the respondent's consideration the decision not to have Clare Bacon attend the Hearing appears, in retrospect, to be a wrong decision does not, of itself, provide a basis upon which a further Hearing and second opportunity to lead a witness in evidence should be granted. Such an approach if generally  
20 applied would not be consistent with the Overriding Objective which requires that cases be progressed expeditiously, would be inconsistent with the public policy interests that there be finality in litigation, and to the general rule that Employment Tribunal decisions should not be reopened and relitigated.

25 42. Separately, and in any event, let it be assumed that at a further Hearing on Reconsideration Clare Bacon attended and gave evidence to the effect that the claimant was mistaken in her belief that in March of 2022 she was on occasions supervised by her, the answer to such a question not having formed the basis upon which the Tribunal determined any of the issues  
30 before it as recorded at paragraph 7 of the Reasons attached to the Judgment that of itself would not materially change the preponderance of the evidence or the Tribunal's application of the balance of probabilities test. The Tribunal considers that there is no reasonable prospect, on the Grounds of



Application as presented, i.e. of the absence of evidence of Clare Bacon, of the original decision being varied or revoked.

5 43. The remaining elements of the “application of the balance of probabilities test” discerned ground, are to be discerned from a consideration of lines 5 to 16 inclusive of the second version of the Application.

44. At lines 5, 6 and 7 of the Application it is stated:-

10 *“In the verdict the Judge advised that the other parties evidence was more believable however declined to postpone in order to allow solid medical and witness evidence that would have proven this to be a lie. In the verdict the Judge has stated that the other parties evidence was more believable, however acknowledging that the forms*  
15 *submitted to the Tribunal gave false and misleading information.”*

45. Insofar as this statement can be seen to refer to the question of Clare Bacon giving evidence reference is made to paragraphs 24 to 43 above where the matter is dealt with at length. In relation to “solid medical evidence”, as  
20 already stated the Tribunal accepted the respondent’s representative’s oral evidence, unchallenged in cross examination and in the absence of the medical records which in her email of 27<sup>th</sup> September 2022 the respondent’s representative indicated where available to her and could be produced. No part of the Tribunal’s Determination turned upon that matter. In relation to  
25 line 7 parties are referred to the paragraphs of the Reasons attached to the Judgment in which the Tribunal’s rejection of the “perjury defence”, including the proposition that what was not expressly set out in the Form ET1 provided any basis for rejecting the whole of the claimant’s evidence as untruthful. There is nothing new in this regard contained within the Application. Rather,  
30 it is a reiteration of an argument already advanced at the Hearing and considered and disposed of by the Tribunal.

46. Line 8, *“Proof of Contract states that there should be a new contract given at 5 Glenburn Road this was never done again solidifying my version of events*

5 *however this was ignored*". The literal meaning of the phrase "proof of contract states" which is one that appears in the ET3 and was repeated by the respondent's representative in evidence, was never fully explained by her. Notwithstanding the proposition that on the one hand the respondent's intention was to issue, amongst others the claimant with new contracts at 5 Glenburn Road following a change in trading premises but on the other hand did not ultimately provide such a contract to the claimant was a matter stated in evidence by the respondent's representative and stated at paragraph 7.3 of Form ET3. That evidence was not ignored, nor was the  
10 typewritten statement contained within the first page of the claimant's "Outline of written statement of terms and conditions of employment" at paragraph 4.A, produced at page 3 of the claimant's bundle) viz;-

15 "4.A) Your place of work is (address of workplace)  
49 Causewayside Street, Paisley, PA1 1YN with move date to 5 Glenburn Road, Paisley to be confirmed."

47. The claimant did not offer to prove that she had been given a second contract but rather relied upon the first which, in its terms quoted above recognised a  
20 move to the new premises with only the date to be confirmed. The Tribunal did not consider the fact that the respondent did not issue to the claimant a second or substituting Contract of Employment following the opening of the premises at 5 Glenburn Road as materially determinative of whether the claimant had or had not worked on any of the days in dispute. Nor did the  
25 Tribunal consider that it materially impacted upon the reliability or credibility of the evidence of either witness. The Employment Judge considers that there is no reasonable prospect of the original decision being varied or revoked on that ground.

30 48. Lines 9 and 10 of the second Application – *"The Judge has taken into account that the other party suffers from anxiety however appears to have ignored the fact that during March I was under supervision after a suicide attempt and was pretty harsh on my recollection on activity on days one of which was the day I could medically prove I attempted to take my own life."*

49. Parties are referred to paragraph 3 “Adjustments” of the Reasons attached to the Judgment where there is the claimant’s intimation that she suffered from anxiety is recorded and the respondent’s intimation that she suffered from ADHD and had advised, in advance of the Hearing, that she did not anticipate that it would impact upon her ability to participate in and conduct the Hearing on behalf of the respondent. The Ground of Application given notice of is that in some manner when assessing either the reliability or credibility of the evidence the Tribunal took account of the claimant’s intimated anxiety but on the other hand had not taken account of the respondent’s representative’s statement, made in the course of her oral evidence, that during March she was under medical supervision following a suicide attempt. That is a proposition which is misconceived. Parties are referred to the Tribunal’s general assessment of the claimant’s evidence at paragraph 26 of the Note of Reasons attached to the Judgment. It can be seen there that the Tribunal accepted the claimant’s evidence as truthful and, with one exception in relation to one particular set of disputed dates, sufficiently reliable at first instance to discharge the onus of proof. In so doing the Tribunal made no mention and gave no credit to the claimant for the nervousness of which she gave notice at the commencement of the Hearing. The Tribunal did not find the claimant’s delivery of her evidence to be affected by nervousness on her part and thus it was not a factor taken into account by it.

50. The Tribunal’s overall assessment of the respondent’s evidence is to be found at paragraph 27 of the Note of Reasons attached to the Judgment viz; “I found the respondent’s representative’s evidence to be vague and unreliable in respect of the beginning and end of the time periods which she put in dispute. I found the reasons given by her in evidence for concluding that the claimant “could not” have worked on certain of the dates in dispute to be; general, in parts unreliable and in parts not fundamentally inconsistent with the claimant’s version of events and thus, not excluding the conclusion that the claimant could have worked on those dates if the Tribunal found her evidence to be credible in that regard.”

51. At paragraph 31 of the Reasons attached to the Judgment, the Tribunal records and takes account of, amongst other reasons advanced by the respondent for denying liability, the fact that in or about March of 2022 the respondent's representative was having various health issues and had medical appointments to keep with the consequence she was only in the premises for part of the day in that period. As already stated, the Tribunal accepted as credible the respondent's representative's evidence in that regard, unchallenged in cross examination and including her evidence that on one of the days in dispute she had sought to take her own life. The fact that those matters provided one explanation for the general nature and unreliability of parts of the respondent's representative's evidence which explanation the Tribunal accepted, did not cure the unreliability of that evidence.

The Employment Judge considers that there is no reasonable prospect of the original decision being varied or revoked on any of the above Grounds of Application advanced and, accordingly, Refuses the Application in terms of Rule 72(1) and Directs that parties be informed of the Refusal.

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**Employment Judge: J d'Inverno**  
**Date of Judgment: 21 February 2023**  
**Entered in register: 28 February 2023**  
**and copied to parties**

**I confirm that this is my Determination in the case of Archer v ABR Training Limited and that I have signed the Determination by electronic signature.**

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