EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100139/2019

Reconsideration in Chambers on 20 March 2023

Employment Judge C McManus

Members I Ashraf and J McCaig

Miss S Mutter	**Claimant** **Represented by:** **Mr M Fulton -** **Lay Representative**
Turning Point Scotland	**Respondent** **Represented by:** **Mrs R Mohammed -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of this Tribunal dated 19 December 2022, entered in the register and copied to parties on 21 February 2023, is reconsidered in terms of Rules 70 to 72 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, on the application of the claimant's representative. The Judgment is varied only to the following extent:

1. In the parties' details, Mr M Fulton, to be described as 'Lay Representative' rather than 'La Representative'.

2. In the Judgment, the second bullet point deleted and the following instead inserted:

   "The claimant's claim of breach of contract is successful and the claimant is awarded the total sum of **£1,881.60 (ONE THOUSAND EIGHT HUNDRED AND EIGHTY ONE POUNDS AND SIXTY PENCE)** in respect of unpaid notice entitlement. Appropriate deductions may be made from that sum in respect of tax and National Insurance contributions. Any such deductions should be evidenced to the claimant.

3. In paragraph numbered 36 of the decision dated 19 December 2022, at the end of line 12, remove the full stop (‘.’) and replace it with a comma (‘,’) and at the start of line 13 of that paragraph 36, remove the capital ‘F’ in the word ‘Funded’ and replace it with a lower case ‘f’.

4. In paragraph numbered 39 of the decision dated 19 December 2022, at page 12, line 4, remove ‘out with’ and instead insert ‘outwith’.

5. In paragraph numbered 79 of the decision dated 19 December 2022, at page 30, line 1, remove the word ‘newt’ and instead insert ‘new’.

6. In paragraph numbered 79 of the decision dated 19 December 2022, at page 30, line 2, remove the word ‘late’ and instead insert ‘lead’.

7. In paragraph numbered 80 of the decision dated 19 December 2022, at page 30, line 16, after ‘..in the following terms’ insert ‘(JB372 – JB375)’

8. In paragraph numbered 80 of the decision dated 19 December 2022, at page 31, line 1, remove both occasions of the word ‘rule’ and replace both instances with ‘role’.

9. In paragraph numbered 80 of the decision dated 19 December 2022, at page 32, line 1, remove the word ‘distortions’ and replace with ‘discordance’.

10. In paragraph numbered 80 of the decision dated 19 December 2022, at page 32, line 4, include the word ‘who’ in the final sentence, so that it reads ‘I am unsure who I correctly report to’.

11. In paragraph numbered 80 of the decision dated 19 December 2022, at page 32, line 20, delete the word ‘film’ and replace it with ‘full’.

12. In paragraph numbered 80 of the decision dated 19 December 2022, at page 32, line 27, delete the word ‘heart’ and replace it with ‘hurt’.

13. In paragraph numbered 80 of the decision dated 19 December 2022, at page 33, line 2, delete the word ‘six’ and replace it with ‘sickness’.

14. In paragraph numbered 80 of the decision dated 19 December 2022, at page 33, line 4, insert the word ‘if’ after the word ‘regarding’.

15. In paragraph numbered 80 of the decision dated 19 December 2022, at page 33, line 5, delete the word ‘pain’ and instead insert the words ‘paid and’.

16. In paragraph numbered 80 of the decision dated 19 December 2022, at page 33, line 4, insert the words ‘cancelled by my service manager’ after the word ‘latterly’.

17. In paragraph numbered 80 of the decision dated 19 December 2022, at page 34, line 8, delete the words ‘by Angus’ and instead insert the words ‘why I was’.

18. In paragraph numbered 80 of the decision dated 19 December 2022, at page 34, line 9, delete the word ‘think’ and instead insert the word ‘find’.

19. In paragraph numbered 80 of the decision dated 19 December 2022, at page 34, at the end of line 25, after the word ‘the’ insert the word ‘was’, to read ‘I was the only person…’

20. In paragraph numbered 80 of the decision dated 19 December 2022, at page 34, at the end of line 27, after the word ‘and’, delete ‘fine’ and instead insert the words ‘find this’, to read ‘…and find this very selective and unjust.’

21. In paragraph numbered 80 of the decision dated 19 December 2022, at page 35, at the end of line 9, delete the words ‘a speak you’ and instead insert ‘SVQ’, to read ‘…would have to pay back SVQ money.’

22. In paragraph numbered 80 of the decision dated 19 December 2022, at page 35, line 24, delete ‘the words ‘it’s never address the issue’ and instead insert the words ‘it never addressed the issues’

23. In paragraph numbered 80 of the decision dated 19 December 2022, at page 35, at line 26, delete ‘say with a’ and instead insert the words ‘state for the’, to read ‘I wish to state for the record…’

24. In paragraph numbered 80 of the decision dated 19 December 2022, at page 36, at lines 2 - 3, delete ‘I understand you may feel offered and agrees that …’ and instead insert the words ‘I understand you may feel awkward and aggrieved that ….’.

25. In paragraph numbered 80 of the decision dated 19 December 2022, at page 36, at line 8, insert a full stop after 'immediately', delete '..requested initially from a redundancy leave..' and instead insert the words 'My request is initially for my redundancy leave ….'.

26. In paragraph numbered 81 of the decision dated 19 December 2022, at page 36, at line 18, delete 'SB to' and instead insert 'SVQ'.

27. In paragraph numbered 81 of the decision dated 19 December 2022, at page 36, at line 19, delete 'SP' and instead insert 'SVQ'.

28. In paragraph numbered 84 of the decision dated 19 December 2022, at page 38, at line 6 - 7, after '..prior to the 31st..' , delete 'I would formally'.

29. In paragraph numbered 89 of the decision dated 19 December 2022, at page 40, at line 2, after the words '..the fact finding report', delete the full stop ('.') and the word 'that' and instead insert a colon (':')

30. In the section headed 'Comments on Evidence' at the end of paragraph numbered 117 in that decision insert:

"Although Katherine Wainwright was not found to be an entirely credible witness, her evidence was uncontested and found to be credible in respect of some matters. We have outlined above, and in paragraphs 125, 146 and 151 below, the areas where Katherine Wainwright's evidence was not found to be credible. The claimant's representative had the opportunity to cross examine Katherine Wainwright and did not dispute Katherine Wainwright's evidence on the respondent's treatment of a male employee who had required time off work for cosmetic surgery. Her evidence was accepted in respect of the respondent's treatment of that employee, as further commented on in paragraph 152 below.

31. At the start of paragraph numbered 140 of the decision dated 19 December 2022, at page 61, line 30, delete '83.'.

32. In the section headed Decision, under sub-heading 'Equality Act 2010', at the end of paragraph numbered 141 in that Decision, insert these paragraphs:

"141(a) We focused on the reason for the claimant's treatment by the respondent. There was no direct evidence to conclude that the reason for the claimant's treatment was because she is a woman. Section 23 of the Equality Act 2010 is headed 'Comparison by reference to circumstances' and states:

'(*1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.'*

The specific nature of the surgery, i.e. the type of tissue being removed, is a material circumstance. The direct comparator would have been a man who had required time off work for surgery to remove the same body tissue the claimant had removed, on clinical and not cosmetic grounds. There was no direct comparator. We considered the guidance from Mr Justice Linden in *Gould v St John's Downshire Hill 2021 ICR 1, EAT: 'Where a tribunal does construct a hypothetical comparator, this requires the creation of a hypothetical "control" whose circumstances are materially the same as those of the complainant save that the comparator does not have the protected characteristic… The question is then whether such a person would have been treated more favourably than the claimant in those circumstances. If the answer to this question is that the comparator would not have been treated more favourably, this also points to the conclusion that the reason for the treatment complained of was not the fact that the claimant had the protected characteristic.'*

141(b). Following the approach in Vento, which was approved by the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*, we considered the circumstances of employees of the respondent who required to be absent from work because of surgery. We constructed hypothetical comparators and considered the claimant's treatment against those hypothetical comparators. We considered a hypothetical comparator of (1) a man who required to be absent from work for surgery to remove the same type of tissue which the claimant had removed, (2) a man who required to be absent from work because of undergoing surgical removal of the tissue which the claimant had removed, where that

surgery was on clinical and not cosmetic grounds (3) a man who required to be absent from work because of elective surgery which the respondent suspected was not on clinical medical grounds. In order to consider what the respondent's treatment of those hypothetical comparators would have been, we looked at the evidence on the respondent's treatment of other employees who had required time off for surgery. There was evidence before us in respect of the respondent's treatment of a male employee (Dean Kerrigan), who had required time off for surgery which the respondent did not believe was cosmetic surgery. The evidence was that in respect of both of these individuals the surgery was elective, in that it was not carried out as an emergency procedure. There was evidence before us of a male employee who had required time off for surgery on his nose which the respondent understood was cosmetic surgery. The circumstances of these employees were not sufficiently similar for them to be treated as actual comparators. The circumstances of these employees were sufficiently similar for inferences to be drawn from the respondent's treatment of those individuals.

141(c). We considered Katherine Wainwright's evidence on the treatment of the male who had required time off for cosmetic surgery on his nose. The claimant did not seek to contest that evidence. Katherine Wainwright's uncontested evidence on those circumstances was that there had been additional communication with that employee, that that employee's absence from work because of that surgery had resulted in a warning being issued to him, and that he had not received sick pay for all of that absence. That evidence is in Katherine Wainwright's witness statement. We concluded from that uncontested evidence that if the claimant had been absent because of cosmetic surgery, then it is likely that the claimant's absence from work because of that surgery would have resulted in a warning being issued to her and the claimant not receiving sick pay for all of that absence.

141(d) On the basis of the uncontested evidence in respect of the respondent's treatment of those male employees who had required time off for surgery, we found that men in the circumstances of the constructed hypothetical comparators would have been treated in the same way as the

claimant. The reason for the claimant's treatment was not because she is a woman, it was because n the respondent's HR department there was a belief, or at least a suspicion, that the claimant's surgery was on cosmetic grounds. We concluded that had a male employee required time off for surgery to remove the same type of tissue, the respondent would also have suspected that that surgery was on cosmetic grounds. We noted the guidance from Mr Justice Underhill in *Amnesty International v Ahmed 2009 ICR 1450, EAT "The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment".* On application of that guidance, the fact that the claimant is a woman is part of the circumstances leading to the claimant requiring the particular surgery, but was not part of the ground, or reason for, her treatment by the respondent. On the primary facts, in respect of all the matters relied upon by the claimant in her direct discrimination claim, we could not properly draw an inference that the claimant's sex was the reason for the respondent's treatment of her. The claimant's sex was not a significant influence in her treatment by the respondent. The burden of proof did not shift to the respondent.

141(e) We have considered the guidance from the House of Lords in *James v Eastleigh Borough Council 1990 ICR 554, HL*, in respect of the test which should be applied to establish the reason for less favourable treatment. We have considered the guidance of the Supreme Court in *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors 2010 IRLR 136, SC* on the application of the 'but for' and 'reason why' tests. We have considered the decision of the House of Lords in *Nagarajan v. London Regional Transport [1999] IRLR 572.* We have considered the EAT's summary of the principles in *Amnesty International v Ahmed 2009 ICR 1450, EAT.* We have noted the application of these principles by the EAT in *Martin v Lancehawk Ltd (t/a European Telecom Solutions) EAT 0525/03.* We noted that it is essential to enquire why the respondent acted as they did. We did so, approaching this case on the basis of Lord Nicholls' guidance at

paragraph 11 of the decision of the House of Lords in *Shamoon v. Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*, as follows:

"*11. This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former there will usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."*

33. In the section headed Decision, under sub-heading 'Equality Act 2010', in the sentence at lines 25 – 27 of the paragraph numbered 149 in that Judgment dated 19 December 2023, at line 25, after the word 'that' and before the word 'there', insert the words:

"because of the nature of the claimant's surgery"

so that the complete sentence at lines 25 – 27 of the paragraph numbered 149 in that Judgment dated 19 December 2023, then reads:

"From that evidence we concluded that because of the nature of the claimant's surgery there was a belief within the respondent's HR department at the time that the claimant's surgery in January 2018 was for cosmetic reasons"

34. At the end of the sentence at lines 30 – 31 of the paragraph numbered 151 in the Decision dated 19 December 2022, insert:

"….an 'element of choice'."

so that complete sentence then reads:

"She sought to set out what she understood as the meaning of *'elective surgery'* and referred to this as having an 'element of choice'."

35. At the end of the paragraph numbered 151 in the Decision dated 19 December 2022, insert the following additional sentence:

"We concluded that had a man required time off work from the respondent because of surgery to remove the same type of tissue which the claimant had removed, the respondent would also have suspected that that surgery was for cosmetic reasons and would have treated that male in the same way that they treated the claimant."

36. In the section headed Decision, in the Decision dated 19 December 2022, under sub-heading, at the end of paragraph numbered 158 in that Decision, insert:

"There was no evidence before us on the respondent's treatment of employees who raised a grievance who did not share the claimant's protected characteristic. There was no evidence on which we could construct a hypothetical comparator in respect of the treatment relied upon by the respondent as being discrimination in this regard. Following the guidance from the House of Lords in *Shamoon v. Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*, we focussed on establishing the reason for the alleged discriminatory treatment."

37. In the section headed Decision, in the paragraph numbered 163 in the Decision dated 19 December 2022, at line 24, change the word 'if' to 'of', so that the sentence at lines 23 - 24 reads as follows:

"We considered the evidence before us on the reason(s) for the respondent's treatment of the claimant in respect of the trial period."

38. In the section headed Decision, under sub-heading 's13 – Equality Act', in the paragraph numbered 163 in that Decision dated 19 December 2022, at line 29, insert the word 'claimant', so that the sentence at lines 28 – 31 reads as follows:

"The respondent placed the claimant to work providing cover in various services and sought to treat the situation as an extended trial period because they sought to retain the claimant as an employee."

39. In the section headed Decision, under sub-heading ‘s13 – Equality Act’, at the end of paragraph 163 in the Decision dated 19 December 2022, insert:

“At the Hearing, the claimant did not seek to rely on a comparator in respect of the respondent’s treatment of her re the trial period or in respect of non payment of redundancy pay. Following the guidance from the House of Lords in *Shamoon v. Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*, we focussed on establishing the reason for the alleged discriminatory treatment.”

40. In the section headed Decision, under sub-heading ‘s27 – Equality Act (Victimisation)’, at the end of the paragraph numbered 176 in the Decision dated 19 December 2022, insert:

“Protected acts are defined in section 27(2) as

(a) bringing proceedings under the Equality Act 2010;

(b) giving evidence or information in connection with proceedings under t the Equality Act 2010;

(c) doing any other thing for the purposes of or in connection with the Equality Act 2010;

(d) making an allegation (whether or not express) that A or another person has contravened the Equality Act 2010.”

41. In the section headed Decision, under sub-heading ‘s27 – Equality Act (Victimisation)’, at the end of the paragraph numbered 177, at line 30, delete the word ‘both’, with the effect that the full terms of the sentence at lines 7,8 & 9 of that paragraph 177 reads:

“For that reason, we accepted that the claimant’s action in raising her grievance was a protected act within the meaning of section 27 of the Equality Act 2010.”

42. In the section headed ‘Compensation’, insert at the end of paragraph numbered 184 of that decision:

"We also took into account that it is not appropriate to apply an uplift for unreasonable failure to comply with the Code of Practice in all dismissals. We took into account that the claimant was not dismissed because of the application of the Absence Policy. The claimant raised a grievance, which included her concerns about the way in which her absence following her surgery had been handled by the respondent, and their application of the Absence Policy. The claimant resigned following the respondent having failed to deal with all the matters raised in her grievance. For those reasons, we concluded that it was appropriate to apply an uplift in respect of the respondent's unreasonable failure to comply with the Code of Practice in dealing with the claimant's grievance. For these reasons, no uplift was separately applied in respect of the respondent's actions in dealing with the claimant's absence following her surgery."

43. In the section headed 'Compensation', insert at the beginning of paragraph numbered 191 of the Decision dated 19 December 2022:

"The claimant is entitled to an unfair dismissal basic award of (5 x 1 x £376.32) = £1881.60." The claimant started alternative employment at a higher rate of pay and did not claim any wage loss. A compensatory award was made to reflect the claimant's loss of statutory rights, and that she would require to work for two years with her new employer before again acquiring the right to claim unfair dismissal. This compensatory award was calculated in respect of two weeks net wages (2 x £285.23) = £570.46, using the figure in the ET1 in respect of net wages as the basis for this calculation (£1236 x 120 / 52) = £285.23."

44. In the section headed 'Compensation', at paragraph numbered 193 on page 83 of the Decision dated 19 December 2022, at lines 3 – 6, delete:

"…the claimant is entitled to payment in respect of 5 weeks' notice, at net pay (5 x £ £285.23) £1,426.15. The award to the claimant in respect of breach of contract is £1,426.15."

And instead insert: -

"…the claimant is entitled to payment in respect of 5 weeks' notice, at gross pay (5 x £ £376.32) £1,881.60. The award to the claimant in respect of breach of contract is £1,881.60. As that award is calculated based on the claimant's agreed gross pay, deductions in respect of tax and national insurance may fall to be deducted"

REASONS

Introduction

1. The Judgment which is reconsidered is dated 19 December 2022, entered in the register and copied to parties on 21 February 2023, that being the anonymised version of the Judgment dated 19 December 2022, entered in the register and copied to parties on 20 December 2022.

Grounds of Reconsideration Application

2. The claimant's grounds for seeking reconsideration of the Judgment of the Tribunal dated 19 December 2022 are set out in:

- Email from the claimant's representative to the Tribunal office at 23.59 on 10 January 2023 (copied to the respondent's representative)
- Email from the claimant's representative sent to the Tribunal office at 00.00 on 11 January 2023.
- Attached document to email from the claimant's representative (copied to the respondent's representative) at 00.00 on 11 January 2023, named 'Credible witness Wendy said'.
- Email from the claimant's representative to the Tribunal office (copied to the respondent's representative) at 00.01 on 11 January 2023

3. The attachment to the email from the claimant's representative's email sent to the Tribunal office at 00.00 on 11 January 2023, named 'Credible witness Wendy said', is 20 pages long and sets out a number of criticisms of the Tribunal's judgment. In general, it was the claimant's representative's position that reconsideration would be in the interests of justice.

4. On 19 January 2023, parties' representatives were sent email correspondence from the Employment Tribunal office stating:

"EJ McManus is now reviewing the claimant's representative's correspondence and attachment, under Rule 72 of the Tribunal Procedure Rules. EJ McManus will consider what is stated in that attachment and revert to parties with her initial view on what appears to her to be each separate point made in the reconsideration application. In respect of each such point, EJ McManus will state her initial view on whether that point is suitable for reconsideration, and if so her initial views on the prospects of reconsideration changing the decision. That initial view will be taken under Rule 72(1) of the Tribunal Procedure Rules. If EJ McManus considers that a point made in this application is a point of appeal to the Employment Appeal Tribunal (the 'EAT'), rather than a reconsideration point, then she will state her position on that in her response at this Rule 72(1) initial consideration stage."

5. The parties' representatives were reminded in correspondence to them from the Employment Tribunal office of 19 January, 31 January, 10 February, 28 February and 16 March 2023 that the procedure for appeal to the Employment Appeal Tribunal is separate to the Employment Appeal Tribunal procedure.

Initial Consideration of Reconsideration Application

6. Parties' representatives were informed of the initial view at the Rule 72(1) stage in correspondence sent from the Employment Tribunal office on 10 February 2023. That view was set out in a letter, with 185 numbered points, over 103 pages. In that stage 71(2) response, comment was given on each paragraph in the claimant's representative's reconsideration application. The response at the Rule 72(1) stage:

- Identified points which should be dealt with by appeal to the Employment Appeal Tribunal rather than by reconsideration.
- Identified points which appeared to be comment on the claimant's view on the decision, rather than identification of a point suitable for reconsideration or appeal to the Employment Appeal Tribunal.

- Identified points made which proceed to reconsideration under Rule 72(2).
- Gave no initial view on whether that reconsideration may change (vary or revoke) the decision.
- Confirmed that the procedure and time periods for lodging an appeal to the Employment Appeal Tribunal were separate from the Employment Tribunal procedure.

7. Point 85 of that letter of 10 February 2023, summarised the points which proceed beyond the Rule 72(1) stage, to reconsideration under Rule 72(2). These are: -

(1) Consideration of whether the claimant's surgery was sex specific

(2) Consideration of what should be the full terms of the sentence at line 30 – 31 of paragraph 151 in the Judgment.

(3) Consideration of what should be the full terms of the sentence at lines 7,8 & 9 of paragraph 177 of the Judgment.

(4) Consideration on the extent of any uplift being applied to reflect action taken by the respondent in respect of the claimant's absence for her surgery, as well as to reflect the respondent's failure to deal with the claimant's grievance timeously.

(5) Consideration on any error in the Tribunal's basis of calculation of the unfair dismissal basic award, including in relation to the amount of net pay.

(6) Consideration of any error in the Tribunal's basis of calculation of the breach of contract award in relation to the amount of net pay.

(7) Consideration on the extent of any uplift being applied to reflect non-compliance with the ACAS Code of Conduct re action taken by the respondent in respect of the claimant's absence for her surgery, as

well as to reflect the respondent's failure to deal with the claimant's grievance timeously.

8. In that response, parties' representatives were asked for their view on whether the reconsideration could be dealt with on written submissions, or whether they considered that a hearing was necessary. It was stated that if the reconsideration is dealt with by written submissions, both parties' representatives would be given the opportunity to set out their submissions on why there should be reconsideration on the above grounds, or not, and what should be the effect of any reconsideration on these grounds, and that once exchanged, each representative would then have the opportunity to comment, in writing, on the other's submissions. They were informed that reconsideration under Rule 72(2) would be carried out by the full Tribunal Panel who made the decision, whether dealt with by consideration of parties' representatives' position in writing or at a reconsideration hearing with parties' representatives present. The position of both representatives was that they wished to proceed with written submissions.

Law on Reconsideration

9. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('the Tribunal Rules') provisions on reconsideration of Judgments is set out at Rule 70 – 73.

10. An Employment Tribunal can reconsider its decision if it is in the interests of justice to do so (Rule 70 of the Tribunal Rules). Rule 70 states:

"A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again."

11. Rule 72 of the Tribunal Procedure Rules states:

"72.—(1) An Employment Judge shall consider any application made under Rule 71. If the Judge considers that there is no reasonable prospect of the

original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part."

12. Section 21(1) of the Employment Tribunals Act provides that questions of law should properly be dealt with through appeal to the Employment Appeal Tribunal.

13. The overriding objective is set out in Rule 2 of the Tribunal Rules, as follows:

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

Correspondence on Submissions

14. The representatives were informed in email correspondence from the Employment Tribunal of 27 February 2023 that they should provide their written submissions to the Tribunal and to the other party's representative by 6 March 2023, with any comment on the other's written submissions to then to be submitted in writing to the Tribunal and copied to the other side, by 13 March 2023.

15. The claimant's representative sent an email to the Employment Tribunal Office, copied to the respondent's representative on 6 March 2023. The content of that email is taken to be the claimant's representative's submissions. In that email the claimant's representative general position was *"we wish for the tribunal members in interests of open justice to each take account of all reconsideration points again and for the reconsideration points to be looked over on as there is glaring neglect."*

16. On 15 March 2023, correspondence was sent from the Employment Tribunal office noting that no submissions had been received from the respondent's representative. The respondent's representative replied on the same day.

She set out that she had not provided the submissions because she had been 'distracted by sick children over the past 2 weeks' and that she was at that time in hospital with her child. She requested that an extension until 17 March be given for her to produce written submissions. That email was copied to the claimant's representative. The claimant's representative replied objecting to the request to be allowed to lodge submissions late. The claimant's representative's position was that the respondent had adequate resources to ensure that a response was made within the required timescale. Reliance was placed on there being no 'out of office' reply to email correspondence to indicate that the respondent's representative was not dealing with emails. It was the claimant's representative's position that the respondent had not complied with deadlines set by the Tribunal previously, and that he would not have sufficient time to respond to the respondent's submissions, should they be allowed late. In consideration of all the circumstances, the respondent's representative's application for her submissions to be allowed to be received late was refused, for reason set out in letter to the parties of 15 March 2023.

17. In response to that refusal, the respondent's representative submitted a further request for the submissions to be allowed late, as set out in her email sent at 15.31 on 15 March 2023. One of the points in the respondent's representative's second request for submissions to be allowed late was that if the reconsideration had proceeded at a Hearing, there would have been little time for the claimant's representative to consider the respondent's submissions. It is now noted that in the response at the stage 71(2) stage (letter from ET of 10 February 2023) it was set out at paragraph 182 that if the reconsideration were to be dealt with at a hearing, both parties' representatives would be directed to set out their submissions for the reconsideration hearing in writing and to exchange these and send to the Tribunal 7 days prior to the reconsideration hearing.

18. The claimant's representative was asked for his comments on this. The claimant's representative replied on 16 March 2023, again objecting to the respondent's submissions being allowed late. Submissions from the respondent's representative were received within 10 minutes of the claimant's

representative's response on 16 March 2023. The claimant's representative was asked if he had any further comment, now that the respondent's representative's submissions had been received. The respondent's representative had highlighted that her submissions were not lengthy. Parties were informed in email to them form the Tribunal office on 16 March 2023 that the reconsideration would take place on 20 March 2023 and the Tribunal's decision issued as soon as possible thereafter and that that decision would include a decision on whether or not it would be in the interests of justice to consider the now received respondent's submissions in making their decision on the reconsideration. The claimant's response on 16 March 2023 was that these submissions should not be considered and that to do so would be to the detriment of the claimant. He described that detriment as 'huge' but gave no further details of what the detriment would be. On 17 March 2023, the respondent's representative sent an email setting out that it would be substantially more detrimental to the respondent should the submissions not be considered. The claimant's representative's response was that if the reconsideration was at a hearing, the respondent would not have appeared at that hearing.

19. The respondent's representative did not object to the reconsideration application being made. We reached our decision on this reconsideration without consideration of the respondent's representative's submissions. We then considered the respondent's submissions. The respondent's representative's submissions do not have a substantial effect on the decision at this reconsideration hearing. It is noted that the respondent's representative's conclusion reached in respect of removal of the word 'both' at the end of the paragraph numbered 177, at line 30, is the same as that reached on this reconsideration. The respondent's representative's submissions had no effect on our conclusion.

20. The respondent's representative's submissions on the other matters which proceed to reconsideration are not considered to be relevant to the reconsideration points. Comment on those is set out in the decision below. On balance, given that the respondent's representative's submissions make

no difference to the outcome of the reconsideration, they are allowed, and considered as setting out the respondent's position on the reconsideration application.

Reconsideration Decision

21. The panel members were provided with the claimant's representative's reconsideration application and agreed that the only issues which should proceed to be considered at this Rule 72(3) stage were those summarised above.

(1) Consideration of whether the claimant's surgery was sex specific

22. The Tribunal's position on this point is set out at paragraph 141 of the Judgment, as follows:

"In her claims under the Equality Act 2010, the claimant relied on her protected characteristic of sex (her gender). She relied on being a woman who had had surgery of the specific nature carried out. Although the respondent's representative's position was that the surgery which the claimant had in January 2018 was 'gender specific', we did not accept that position. That surgery could be carried out on males as well as females: the tissue which was removed is present in both genders. Both genders can have surgery to remove this tissue. We did not then accept the claimant's representative's position that there was sex discrimination because of the nature of the surgery itself. There was no evidence of the respondent's treatment of any man who had had that surgery carried out."

23. The claimant's discrimination claim is based on her protected characteristic of sex. Section 11 of the Equality Act 2010 states:

"In relation to the protected characteristic of sex—

(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same sex."

24. It is the claimant's representative's position that it is not appropriate for the Tribunal to consider whether the surgery which the claimant underwent was *'sex specific',* as the respondent did not dispute that. The claimant's representative relies on no questions having been put to the claimant or any witnesses in respect of whether the surgery was sex specific.

25. We have carefully considered whether it is appropriate for us to have taken the view that the nature of the surgery which the claimant had carried out was not sex (gender) specific. We have considered the effect on the decision of that premise. As set out at paragraph 13 of the Judgment dated 19 December 2022, it was agreed at the outset of the Final Hearing that the specific nature of the surgery which the claimant had in January 2018 would not be referred to in the judgment. Similarly, this reconsideration judgment does not state the specific nature of that surgery. In her submissions for this reconsideration the respondent's representative refers to the name of the condition which led the claimant to have the tissue removed. We do not consider it is necessary to name that condition. The material circumstances are in respect of the nature of the surgery i.e. surgery for the particular tissue to be removed.

26. The claimant's representative's position in his submissions is that because of the nature of the surgery, the respondent believed that the surgery was cosmetic surgery. We agree with that. In the section 13 direct discrimination claim, we required to determine whether the claimant's treatment was because of her protected characteristic of sex i.e. whether her treatment by the respondent was because she is a woman. The comparison is the treatment between a man and a woman. Although the claimant's representative maintains that the surgery undergone by the claimant was sex-specific, neither party has at this reconsideration stage sought to refute the Tribunal's position at paragraph 141 that males can also have surgery to remove the type of tissue which was surgically removed from the claimant. Neither party has disputed that surgery to remove the type of tissue which the claimant had removed may be carried out on a male as a cosmetic procedure.

27. In the judgment at paragraph 149 we set out that the respondent believed that the surgery was cosmetic surgery. In this reconsideration, we amend the

decision to include confirmation that we agree that the nature of the claimant's surgery was part of the reason why the respondent believed that the surgery was cosmetic surgery. In reaching our decision in this case, we focussed on establishing what was the reason for the claimant's treatment. We found that that reason for the initial treatment was because the respondent believed, or at least initially suspected that the surgery the claimant was undergoing was cosmetic surgery. We did not accept that their treatment of the respondent was because the claimant is female.

28. The claimant's claim of sex discrimination failed because it was found that the reason for the claimant's treatment was because the respondent initially suspected that the claimant was to undergo cosmetic surgery. The claimant's representative's position in his submissions for this reconsideration is that it was because the claimant is female that the respondent believed that the surgery was a cosmetic procedure. We do not accept that. We concluded that the respondent suspected that the surgery was cosmetic because of the type of tissue being removed. It was the nature of the surgery which caused the respondent to suspect it was cosmetic, i.e. because of the type of tissue which was being surgically removed.

29. It was argued by the claimant's representative that men do not have the particular condition that caused the claimant to have that tissue removed. That does not detract from the fact that both men and women have surgery to remove that type of tissue. The underlying condition which caused the surgery to be necessary for the claimant did not affect the respondent's suspicion that the surgery to remove the tissue was for cosmetic reasons. Surgery to remove that tissue can be carried out on men and women.

30. We considered it likely that if a male employee had required time off for surgery to have that tissue removed, the respondent would also have suspected that that surgery would have been for cosmetic reasons. We have amended the decision to set out the reasons why we reached that conclusion, having drawn inference from the evidence heard. The crucial question is 'why did the claimant receive the treatment she did'. We concluded that the reason why the claimant was initially treated as she was, was because the

respondent suspected that the claimant's surgery was cosmetic, not because she is a woman.

31. In this reconsideration, we considered the possibility of an effect of the respondent having conceded that the claimant's surgery was 'sex specific' being that the respondent's witnesses were not asked questions about how they would have treated a man undergoing surgical removal of the tissue which the claimant had removed, where that surgery was on clinical and not cosmetic grounds. The claimant's representative did not make that particular point in his reconsideration application or submissions. We noted that in *Chief Constable of West Yorkshire v Vento (No.1) 2001 IRLR 124, EAT,* the EAT considered whether it was necessary to hear evidence from witnesses about how such a hypothetical person would have been treated. The EAT in that case warned that tribunals must take great care in assessing the answers to such questions since they will be almost impossible to disprove and a witness would know, by the time of the hearing, what answer might be the most helpful or convenient to the side he or she wished to support. We therefore considered that even if direct questions had been asked of the respondent's witness about how they would have treated a man who required time off for surgery to remove the same type of tissue which the claimant had removed, either on clinical or cosmetic grounds, or a man who required to be absent from work because of any elective surgery which the respondent suspected was not on clinical medical grounds, then it would not have been appropriate for significant weight to be placed on those responses.

32. At the Final Hearing, the claimant's representative had the opportunity to contest the respondent's evidence on their treatment of other employees, as set out in the witness statements. The respondent's acceptance of the nature of the claimant's surgery being sex specific did not detract from the Tribunal's duty to consider whether the reason for the claimant's treatment by the respondent was because of her sex (gender).

33. We noted the guidance from Mr Justice Underhill in Amnesty International v Ahmed 2009 ICR 1450, EAT "*The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the*

sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment". On application of that guidance, the fact that the claimant is a woman is part of the circumstances leading to the claimant requiring the particular surgery, but was not part of the ground, or reason for, her treatment by the respondent. We concluded that it made no difference to the outcome that the case proceeded on the basis of the respondent's acceptance of the surgery being 'sex specific'. We still required to address whether the reason for the alleged discriminatory treatment was because of the claimant's sex.

34. We did not consider it to be appropriate to delete the lines suggested by the respondent's representative in her submissions for this reconsideration. We have instead provided further clarification of our reasoning by inserting additional paragraphs to the decision dated 19 December 2022.

(2) Consideration of what should be the full terms of the sentence at line 30 – 31 of paragraph 151 in the Judgment.

35. In this reconsideration, we have reviewed our notes from the Final Hearing. These record Katherine Wainwright's evidence on this point that she understood elective surgery to have *'an element of choice'.* An amendment has been made to complete the sentence at line 30 – 31 of paragraph 151 in that judgment in line with that evidence.

(3) Consideration of what should be the full terms of the sentence at lines 7,8 & 9 of paragraph 177 of the Judgment.

36. In this reconsideration, we have reviewed the terms of paragraph 177 in the context of paragraphs 175 – 179 in the Judgment dated 19 December 2022. It is clear from that context that a distinction is being made between the two acts being relied upon as protected acts within the meaning of section 27(2) of the Equality Act 2010. It is clear that both of those acts are not accepted as being protected acts. An amendment is made to the Judgement dated 19 December 2022 to confirm the position, with reference to the definition of 'protected acts' in section 27(2) of the Equality Act 2010.

(4) Consideration on the extent of any uplift being applied to reflect action taken by the respondent in respect of the claimant's absence for her surgery, as well as to reflect the respondent's failure to deal with the claimant's grievance timeously.

37. Paragraphs 183 – 191 set out our reasoning in respect of the application of an uplift, on application of the ACAS Code of Conduct. In this reconsideration we have made an amendment to the Judgment dated 19 December 2022 to clarify the circumstances which were taken into account when deciding on the extent of this uplift.

(5) Consideration on any error in the Tribunal's basis of calculation of the unfair dismissal basic award, including in relation to the amount of net pay.

38. Section 119 of the Employment Rights Act 1995 sets out the basis of calculation of an unfair dismissal basic award, as follows: -

"(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—

(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) "the appropriate amount" means—

(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,

(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and

(c) half a week's pay for a year of employment not within paragraph (a) or (b)."

39. In the decision dated 19 December 2022, it was found that the claimant resigned because of the respondent's material breach of contract. In respect of that successful claim, the claimant was awarded the total sum of £2,819.87 being comprised of an unfair dismissal basic award of £1,881.60, a compensatory award of £570.46 and an uplift of £367.81.

40. The claimant's schedule of loss is at JB160 – JB161 of the Joint Bundle of documents relied on at the Final Hearing. In that schedule of loss, the unfair dismissal award is calculated as '5 weeks x £376.32 per week = £1881.60'. In that schedule of loss, the claimant's representative then made a deduction in respect of 'income received' of £75.27. His calculation of the basic award to the claimant was then £1806.33.

41. The respondent's representative has accepted that the claimant's gross weekly pay with the respondent was £376.32. The claimant had 5 years' service with the respondent. In her ET1, she gives her date of birth as 20/09/1990. The ET1 sets out her start date with the respondent as 16/08/2013. In the Judgment dated 19 December 2022, we found that the effective termination date was 30 October 2018. The claimant was aged 28 at the effective date of termination of employment (not 25 as set out by the respondent's representative in her submissions for this reconsideration). Using the (higher) respondent's figure for gross weekly wage of £376.32, on application of section 119, the claimant is entitled to a basic award of: -

(5 x 1 x £376.32) = £1881.60

42. No evidence was heard on the wages received by the claimant from the respondent. The claimant's position in the ET1 was that her monthly gross pay with the respondent was £1429, and monthly net pay was £1236. Those figures equate to a weekly gross pay of (£1429 x 12) £17,148 / 52 = £329.77 and a weekly net pay of (£1236 x 12) £14,832 / 52 = £285.23. The position of both the claimant in their schedule of loss at JB160 – JB161 in the Joint Bundle for the Final Hearing, and in the respondent's representative's counter

schedule, at JB163 – JB164 of that Joint Bundle, is that the claimant's gross weekly wage was £376.32. The higher, agreed gross figure of £376.32 was used in the calculation of the unfair dismissal basic award. The unfair dismissal basic award was correctly calculated as (£376.32 x 5) £1881.60.

43. In his Schedule of Loss at JB160 – JB161, the claimant's representative sought £500 in respect of loss of statutory rights. In the decision dated 19 December 2022, and award of £570.46 was made in respect of loss of statutory rights. No wage loss was claimed. The compensatory award was in respect of loss of statutory rights only. It was calculated based on two weeks' wages, using the net weekly wage figure calculated from the figures in the claimant's ET1 (2 x £285.23 = £570.46). On this reconsideration, amendment has been made to made to the decision dated 19 December 2022 to set out the basis of the calculation. Consideration has been made as to whether it would be just and equitable to calculated the compensatory element of that award on the basis of the agreed gross weekly wage of £376.32, but with provision for deductions to be made for tax and National Insurance, as appropriate. Neither party has given a net weekly wage figure based on the higher gross weekly wage of £376.32. The award includes an uplift. It is not appropriate to calculate that uplift as a percentage of an award where deductions require to be made for tax and national insurance contributions. The award made for loss of statutory rights is more than the amount sought in the claimant's schedule of loss for that element. In all the circumstances the total award made in respect of the claimant's successful unfair dismissal award is considered to be just and equitable.

44. In his Schedule of Loss at JB160 – JB161, the claimant's representative sought a compensatory award of '£8153.60 + £2822.45 = £10976.05'. He stated in that schedule of loss *'This was calculated at 50% of my wage for a ten-month period (when I started being mistreated til EDT of 30/10/18), and the inclusion of redundancy pay, calculated as one week per year of employment plus an extra ½ week as per company policy."*

45. There was no evidence on the amount of redundancy pay which the claimant would have been contractually entitled to on termination of her employment

by reason of redundancy. In her witness statement, the claimant does not set out the amount which she would have been due to be paid in respect of redundancy. At the Final Hearing, we were not directed to any correspondence in respect of any contractual entitlement to redundancy pay in excess of statutory redundancy pay. Statutory redundancy pay is calculated on the same basis as the unfair dismissal award, i.e. with reference to age, length of service and a factor in accordance with age. If the claimant's employment had terminated by reason of redundancy, the claimant would have been entitled to a statutory redundancy payment of (5 x 1 x £376.32) = £1881.60. We did not hear evidence to conclude what the claimant would have been entitled to in respect of any additional, contractual redundancy pay. In any event, the claimant was not dismissed by reason of redundancy. As set out at paragraphs 135 – 136, the claimant resigned. As set out in those paragraphs, the claimant was found to have been entitled to resign and her claim of unfair (constructive) dismissal was successful. The claimant is then entitled to an unfair dismissal award and this has been calculated appropriately, as set out in the decision dated 19 December 2022.

46. The claimant's representative sought a compensatory award to be based on 50% of the claimant's wage in the 10 month period prior to the claimant's resignation. That basis is not well founded. Section 123(1) of the Employment Rights Act 1996 requires that the compensation for unfair dismissal is such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. The compensatory award is intended to reflect the actual losses that the employee suffers as a consequence of being unfairly dismissed. This requires consideration of the net remuneration that the employee would have continued to receive if the dismissal had not occurred. The claimant's position was that she did not suffer any wage loss as a consequence of being dismissed. There is no basis for an unfair dismissal compensatory award to be calculated based on a percentage of past wages for any period of 'mistreatment'.

(4) Consideration of any error in the Tribunal's basis of calculation of the breach of contract award in relation to the amount of net pay.

47. It is set out at paragraph 191 of the decision dated 19 December 2022 that the claimant's claim for breach of contract is successful for the reasons set out in respect of the constructive dismissal claim. Paragraph 135 of the decision dated 19 December 2022 sets out the acts and failures of the respondent, on which it was determined that, without reasonable and proper cause, the respondent conducted themselves in a manner likely to destroy or seriously damage the relationship of trust and confidence between them and the claimant. As stated at paragraph 136 of the decision dated 19 December 2022, it was on the basis of those acts and failures that it was found that the respondent acted in material breach of the implied term of trust and confidence. Part of the acts and failures which constituted that breach of contract was the respondent's failure to properly deal with the claimant's grievance. As set out in that paragraph 135, the act constituting the last straw in the context of the claimant's decision to resign was the respondent's position that the claimant's grievances would not resolve matters prior to 31 October. The issues in that grievance included the issues relied upon by the claimant in respect of alleged failures by the respondent re. their duty of care and in respect of the treatment of her absence.

48. The only remedy which the claimant sought in respect of the breach of contract claim was financial compensation. In the claimant's schedule of loss at JB160 – JB161 of the Joint Bundle for the Final Hearing, the breach of contract award was calculated as *'50% of my wage for the ten-month period (when I started being mistreated til EDT of 30/10/18).* That is not an appropriate basis for calculation of the breach of contract claim. The award in respect of breach of contract is calculated in respect of the contract which was breached. The claimant had no wage loss. As set out in the Judgment dated 19 December 2022, there was no evidence of the claimant having any contractual right to notice in excess of the statutory notice, which is for one week for each complete year of employment. The award for the successful breach of contract claim was then calculated based on 5 weeks net pay.

49. On this reconsideration, it is recognised that the gross pay figure which the respondent has accepted is higher than the gross pay in the ET1, and that neither party has given information on net pay based on that higher gross figure. We have amended the decision to calculate the breach of contract claim based on gross pay, but with appropriate deductions to be made for any tax or national insurance contributions.

Conclusion

50. On reconsideration, and on application of section 124 (1ZA) of the Employment Rights Act 1996 it is considered to be in the interests of justice to vary the Judgment as set out above. It is noted that it is unusual for substantial additional paragraphs to be included on reconsideration. In this reconsideration it is considered to be in the interests of justice for these additional paragraphs to be inserted. This is because the respondent's position at the Final Hearing was that the surgery which the claimant required was 'sex specific', because in the decision dated 19 December 2022 we did not accept that that surgery is 'sex specific, there had been no submissions at the Final Hearing on that point and it was in the interests of justice to ensure that both parties had the opportunity to provide comment on that position, and for our reasoning to then be more fully set out.

51. In addition to the points raised by the claimant in the reconsideration application, we have noticed some typing mistakes / spelling errors. Amendment has been made on our own initiative to correct these, as set out above. These are in the main errors in the dictation of the content of an email included in the Joint Bundle (JB372 – JB375). These errors do not affect the outcome or reasoning in the decision. An amendment has also been made to include the reference to the page number in the Joint Bundle of that email sent by the claimant on 21 October 2018 (JB372 – JB375).

52. It is noted that in making our Findings in Fact at paragraph 58 of the Judgment dated 19 December 2022, that we took into account our record of the evidence of Wendy Spencer, in respect of when she had a discussion with

Manager K. Her evidence was "*…probably quite soon after the event."* And that she could *"… recall I spoke with her quite quickly afterwards."*

53. Throughout this case, we have sought to apply the overriding objective in Rule 2 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Argument that we have erred in law in our determination of the issues is a matter for appeal to the EAT rather than by reconsideration.

Employment Judge: Claire McManus
Date of Judgment: 30 March 2023
Entered in register: 30 March 2023
and copied to parties