EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR S IMAM	**AND**	**TRUDELL MEDICAL UK LTD (R1)** **MATTHEW LENNOX (R2)** **MARWA ABDULHAMID (R3)** **ANDREW VARGHESE (R4)** **SHARMAN CROCKETT (R5)** **CESAR LOPEZ MORENO (R6)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 9TH / 10TH MARCH 2023

EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE) **MEMBERS: MR K GHOTBI-RAVANDI**

APPEARANCES:-

FOR THE CLAIMANT:- **IN PERSON**

FOR THE RESPONDENT:- **MR J WYNNE (COUNSEL)**

RECONSIDERATION AND COSTS JUDGMENT

The unanimous judgment of the tribunal is that:-

1. The claimant's application for reconsideration is dismissed.

2. The claimant is ordered to pay to the respondents costs in the sum of £20,000.

Reasons

1. By a judgment and reasons dated 10th of October 2022 the tribunal dismissed the claimants claims of both ”ordinary“ and automatic unfair dismissal, and claims of suffering detriments for having made public interest disclosures. This hearing has been listed to determine the claimant's reconsideration application, and the respondent's costs application.

Reconsideration

2. The first application before us today is the claimant's application for reconsideration of our judgement.

Legal Principles

3. The principles we have to apply in considering a reconsideration application, are firstly that rule 70 of the Employment Tribunal rules of procedure permits an employment tribunal to exercise a general power to reconsider any judgment where it is necessary in the interests of justice to do so.

4. Whilst this gives a broad discretion it is not unlimited. In *Outasight VB Ltd v Brown 2015 ICR D11, EAT*, Her Honour Judge Eady QC accepted that the wording 'necessary in the interests of justice' allows employment tribunals a broad discretion to determine a reconsideration application. However, this discretion must be exercised judicially, '*which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation*'. In addition, reconsideration is not simply a process by which a disgruntled litigant can have a second bite at the cherry, or simply attempt to re-litigate points already determined (*Liddington v 2Gether NHS Foundation Trust EAT/0002/16*) .

5. One of the grounds for reconsideration may be if there is new evidence that was not available to the tribunal at the time it made its judgment. The underlying principles to be applied by tribunals in such circumstances are the same as those which apply in civil litigation (*Ladd v Marshall 1954 3 All ER 745, CA*). In order to admit fresh evidence, it is necessary to show:

   i) That the evidence could not have been obtained with reasonable diligence for use at the original hearing;

   ii) That the evidence is relevant and would probably have had an important influence on the hearing; and

   iii) That the evidence is apparently credible.

6. This principle is of considerable significance in this case as a large part of the reconsideration application is based on documentary material which was not before the tribunal at the original hearing.

7. The process is a two stage process. Firstly there is a filter stage at which the question of whether there is any reasonable prospect of the original decision being varied or revoked should be considered on the papers by an Employment Judge, who can if appropriate refuse the application on the papers, or subject to further procedural steps, list the case for a reconsideration hearing. In this case the respondent had already indicated that it intended to make a costs application and the EJ took the decision that both applications would be considered at that hearing, to which the parties agreed. In this case therefore the case has been listed for a reconsideration hearing before any assessment of the merits of the application. However, this causes no prejudice to the claimant as he gets the full consideration of his application by the panel which heard the case.

Witness Order – Mr Darush Attar Zadeh

8. Prior to the liability hearing the claimant had made an application for a witness order for Mr Attar Zadeh the circumstances of which are set out in paragraph 3 of the judgement. Mr Attah Zadeh declined to attend the original hearing and in the circumstances described at paragraph 3, the application for him to attend was not pursued by the claimant's counsel Mr. Johns. The claimant has sought a further witness order for him to attend the reconsideration hearing. In his oral submissions this morning the claimant has described wishing to put to Mr Attar Zadeh the contents of a covert recording of a conversation between the two of them. This was in fact already before the tribunal (see paragraph 35) and the tribunal has already been invited to take it into consideration. The only new information is that the claimant contends that in fact, although identified as having taken place on the 21st March 2021 in the original bundle index, that is in fact took place but on the 19th January 2019.

9. In our judgement the issue of the attendance of Mr Attar Zadeh was before the tribunal at the original hearing and an application to secure his attendance was not pursued on the claimant's behalf by Mr. Johns at the time. In addition the claimant still does not have a witness statement from Mr Attar Zadeh so there is no basis upon which we could conclude that any evidence he could give would in any way affect our earlier decision. The attempt to secure his attendance is on the entirely speculative basis that he may say something to assist the claimant.

10. In our judgement this issue was fully ventilated at the original hearing, and we are not persuaded at that it is proportionate or necessary for him to give evidence at a reconsideration hearing and the application is refused.

Grounds for Reconsideration

11. The reconsideration applications are voluminous. The first was made on 9th October 2022 and between then 22nd November 2022 ten supplemental or additional applications were made. The applications and documents supplied by the claimant run to in excess of 230 pages of the reconsideration bundle. In addition on 7th March 2023 the claimant sent seven emails which included further allegations of fraud perpetrated by the respondents or their solicitors with further accompanying documentation.

12. In respect of the documentation relied on by the claimant some has not previously been disclosed, some was disclosed but was not in the trial bundle, and some was already in the trial bundle. As a general point we note that there is no assertion before us that any of the material not in the trial bundle was not already in the claimant's possession or could not have been placed before us at the time. Secondly we bear in mind that the claimant was represented by counsel at the final hearing and that this is not a case in which there was any inequality of arms between the parties. As is set out in greater detail below many of the matters now relied on by the claimant could and should have been raised at the final hearing if the claimant was unhappy with them.

13. Whilst reading and assimilating the documentation and applications has been a time consuming task it is possible to distil the applications into a number of broad areas. The first is that the tribunal should revisit its conclusion that the claimant did not have a genuine or reasonable belief that the information he had disclosed tended to show the breach as alleged by him (paragraph 78 of the judgment). The claimant has set out in his application of the 9th October 2022 factors he suggests should lead us to the alternative conclusion that he did have such a genuine belief. This is in our judgement is simply an attempt to relitigate a decision which has already been made and there is nothing cause us to alter our original conclusion

14. Whilst this part of the application could be dismissed on this ground alone, we note that in the application itself claimant states in support of his application that we have failed to take into account, or give sufficient weight, to the fact that "*The claimant at first did not realise what he had heard was of a bribery, but it had taken in some time to appreciate*...". This is a remarkable assertion given that it presents an entirely different case to that which was put before us at the original hearing, which was that the first disclosure of bribery was made on the 12th January 2018 the same day that the discussion of bribery had taken place. It follows that in addition to having already been litigated, the basis of the current application is wholly new and wholly different from the pleaded claim, and the claim as set out in the claimants witness statement as put before us. We therefore conclude that there is no basis for varying or revoking our decision on this ground.

15. The second broad area is the assertion that the tribunal should revisit its conclusions that it accepted the evidence of Dr Kaul, Mr Moreno and Mr Lennox, as there are grounds for concluding in respect of each of them at that the evidence they have

given to the tribunal that was untruthful. Insofar as the material upon which this assertion is based is a new material which was not contained in the original trial bundle, there is no assertion or information before us that it could not with reasonable diligence have been included in the original trial bundle. Alternatively if it is in the original trial bundle it was open to the claimant to cross examine on the basis of it or to base submissions on it. In our judgement it is not now open to the claimant either to invite us to revisit our conclusions on the basis of material which was already before us, or simply to seek to place new documentary material before us at this stage. In addition, having heard the evidence of the witnesses we do not believe that the new documents would materially alter our view as to the honesty or reliability of their evidence. Similarly, therefore, we conclude that there is no basis for varying or revoking our decision on this ground.

16. The final allegations are the allegations of fraud and the alteration of documents. In his supplemental application dated 12th of November 2022 claimant asserts that:

    i) The hearing bundle was not agreed by the claimant prior to the hearing;

    ii) That upon examination of the bundle documents number 121 / 122 / 123 and 124 have been altered and are fraudulent;

    iii) That the respondents solicitors had removed documents the claimant had understood would be included in the bundle;

    iv) Attached to this e-mail was a document outlining the additional documents which had apparently no not being included. The broad categories to which they relate are they driving offences (items 1 to 9); documents in relation to Dr Kaur (items 10 to 15); and documents in relation to the bribery investigation and first and second disciplinary meetings (items 16 to 20).

17. The alleged significance of these documents is not at all clear, and there has been no attempt to relate them to any of our specific findings. In relation to the bundle, in any event the claimant was represented by counsel at the hearing, and any issues as to the bundle could and should have been raised at that stage.

18. The most serious allegations are set out firstly in the document “List of Fraudulent documents within the hearing bundle”.

19. The first referred to is the Code of Business Ethics. The claimant contends that the cover is missing and asserts that on the 11th of November 2019 the version released to the claimant showed that the document was created on the 23rd May 2019, but the version sent to the claimant on the 23rd May 2019 is dated 11th of January 2018. The claimant contends that it therefore follows that the document sent to him on 11th November 2019 was not created in May 2019 but sometime after the first disciplinary of the 23rd May 2019. The logic of this is extremely difficult to follow, but the claimant appears to be asserting that on the 23rd May 2019 he was sent the version dated the 11th of January 2018, but in fact on that same day an

updated version was created, a copy of which was sent to on the 11th November 2019. Why those facts should lead to the conclusion that that the second version was created after the 23rd May 2019 is not at all clear, and nor is it at all clear what the significance that is alleged to be or what is “fraudulent “ about it. It is not alleged that the contents of either document are significantly different or how that would have affected our decision.

20. The second document is the employee handbook. The claimant asserts that the document doesn't have a cover and that the pages in the bundle are photocopies. He asserts that the employee handbook was also created on the 23rd May 2019, and that he wasn't provided any training on the 16th July 2019. It's impossible to understand from this what the allegation of fraud in relation to this document is or how it could affect our decision.

21. The third document is the Complaint and Investigation policy and procedure. Documents 121 / 122 / 123 and 124 are said to be “fraudulent”. The claimant states that the dates on the documents have been changed (although does not suggest how) and that there was no disciplinary or grievance policy or procedure in place for the UK at the time of the first disciplinary on the 23rd May 2019. The only dates on those pages are “ Last Revised Jan 2018”and “Issued May 2019” which appear on each page. If we have understood it correctly the claimant is alleging that one or both of those dates has been “fraudulently” added to the document. He describes this as the most obvious and deliberate attempt by the respondents and Wiggins solicitors to mislead the ET. We confess we find it impossible to understand this allegation or even if it is true how it is said to fundamentally affect our decision. Why the respondent’s solicitors should have added those dates to one of the respondent’s policies which had no bearing on the outcome of the case is something of a mystery. In any event it was open to the claimant through counsel to challenge the existence of these policies at the original hearing if he chose to. Moreover there is no evidence in support of this allegation. We also note that in our original judgment we found that the claimant was prepared to make the most serious allegations on the basis of little or no evidence, and far from making us to revise that conclusion this allegation reinforces it.

22. The fourth document is the Anti-Bribery and Corruption policy. The claimant asserts that he has never seen this document, and therefore concludes it is highly unlikely that this document that was in existence as of May 2019. Whilst the logic of this is hard to follow, of greater significance is that the claimant’s case relied, at least in part on the existence of the policy to indicate the reasonableness of his belief in his disclosures. His own evidence is that he received anti-bribery training in the first few months of his employment. How it would assist his case to demonstrate now that the policy did not exist is not at all clear.

23. These allegations are extremely difficult to follow as allegations of fraud. In any event if the claimant it was asserting, at a time when he was represented by counsel, that the documents in the bundle were not genuine documents and either had been altered or were not in existence at the relevant date, that was a matter which could

and should have been raised at the original hearing. In any event none of this appears to have any significant bearing on any of the decisions that we took in the original hearing. We therefore conclude that there is no basis for varying or revoking our decision on this ground.

24. The claimant also relies on a document headed “List of Documents suppressed from evidence by the respondent”. This refers to a series of emails, and the claimants appraisal from November 2018. claimant contends that each of them should have been included in the bundle. There is no indication of where these documents have come from, whether they are part of original disclosure which the claimant has only recently looked at, or appreciated the apparent significance of, or whether they are recently acquired. However there is no evidence before us that they could not with reasonable diligence have been obtained prior to the at first hearing. Again, and in any event we can see no basis for concluding that had we seen them they would have altered our decision.

25. Having considered all the material placed before us it is not our judgement that our original decision should be varied or revoked on the basis of the claimants grounds for reconsideration, and the reconsideration application is dismissed.

Respondent’s Costs Application

26. Rule 76(1) provides: "a Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that – (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success.

27. Under Rule 78(1) a costs order may – (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party; (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles …"

28. As is set out in greater detail below the respondent’s costs schedule shows costs incurred of some £268,403 (excluding VAT) and the order it seeks is that the claimant pay 100% of its costs on an indemnity basis subject to detailed assessment.

29. The basis of the application is that the claimant’s conduct was vexatious and/or unreasonable within the meaning of r76(1). It relies on the definition of vexatious as set out by Lord Bingham in *A.G.v Barker 20001 FLR 759*; and correctly points out that in determining whether to make an order on the basis of unreasonable conduct

that the tribunal should take into account the “gravity, nature and effect” of the party’s conduct (*McPherson v BNP Paribas 2004ICR 1398 CA*).

30. The factual basis of the application is that the claimant’s primary case that he had suffered detriment and/or that his dismissal was automatically unfair based on his having made public interest disclosures rested on a ”central deceit”. In summary we concluded that the claimant had not made a disclosure alleging bribery on the 12th January 2018; and that we did not accept that given his own participation in the events which led to the payment of the £2,500 that he either had or could have had any belief that at the time that the payment was in fact a bribe. The first allegation that that payment was a bribe was made in May 2019. Our findings were that nothing new had happened and no new information had emerged as to that payment, and we concluded that the claimant did not have either a genuine or reasonable belief in the allegation that the payment constituted a bribe.

31. The respondent submits that this is the “central deceit” at the heart of the claim, and that we further found that the claimant had given evidence which was untrue and in support of a concocted claim. In particular our findings in respect of the dispute between Dr Kaul and the claimant led us to the conclusion that the claimant could not have been mistaken, and that as we accepted Dr Kaul’s evidence it followed that the evidence of the claimant was straightforwardly untrue.

32. It follows, the respondent submits, that at least in respect of the claims of whistle blowing detriment and automatic unfair dismissal that the claims were not brought by the claimant on the basis of any genuine belief in the allegations he was making; and that he was prepared to give false evidence, and make entirely untrue accusations and allegations against other people including Dr Kaul in order to bolster his claim. The respondent asserts that this is necessarily vexatious or unreasonable conduct; and of very significant nature or gravity as it was central to the claim.

33. The claimant does not accept that he has behaved vexatiously or unreasonably and essentially submits that although we have made findings against him that those findings are wrong. He submits that at all times he had an entirely genuine belief in the allegations that he was making. He accepts that we have made the decision we have on the information before us but insists that is all times he was acting in good faith and that he had both a genuine and reasonable belief in the allegations he was making. He had taken legal advice at different times from two separate firms of solicitors and two different barristers, including Mr Rhys Johns who represented him at the final hearing. He contends that at no point was he ever advised that his claim was weak or had little or no prospect of success. He therefore contends that although he lost the case it was not inevitable that he was bound to, and that in the circumstances despite our conclusions that we should regard this as an ordinary case in which no order for costs should be made.

34. In addition he contends that it is the respondent’s conduct which is vexatious. He re-iterates the points made in his reconsideration application, and asserts that the respondent and its solicitors have forged documents, omitted documents from the

bundle, and have given lying and untruthful evidence to disguise the fact that he had exposed an act of bribery which they have spent considerable time and money attempting to conceal. Moreover he takes great exception to Mr Wynne characterising him as dishonest and as lying. He suggests that this conduct is malicious and requests the employment tribunal institute contempt of court proceedings against Mr Wynne for having made this suggestion. In addition he requests that the tribunal refer the whole case to the police and/or the Attorney General for investigation as he insists that a full investigation would reveal the truth of the allegations of bribery he has made.

35. For completeness sake we record that since the hearing the claimant has sent further emails essentially re-iterating the points summarised above.

36. The central difficulty for the claimant is that the assertion that the claim was fundamentally built on a fabrication, that the claimant had lied in evidence to support or bolster that fabrication, and had made false allegations against a number of the respondents witnesses and employees were ones that we upheld on the evidence before us. As is set out in the original judgement specifically in respect of the evidence in relation to Dr Kaul we could see no conclusion other than that the claimant had deliberately lied, and had made false allegations against Dr Kaul. The claimant may not, and clearly does not, agree with those conclusions but those are the conclusions that we reached.

37. In the light of those conclusions we are satisfied that the claimant has acted vexatiously and/or unreasonably and that threshold for making an order for costs has been crossed. For the sake of completeness that conclusion is reached in relation to the public interest disclosure claims and not the “ordinary” unfair dismissal claim. In our judgment that was an arguable claim, at least in relation to procedural fairness, and had it been the sole claim before us we would not have made any order for costs. However the evidence, submissions and analysis of the ordinary unfair dismissal claim occupied a small part of the tribunal hearing, and as a stand-alone claim it would not have required the volume of documentation, the preparation time or tribunal time eventually necessary.

38. The respondent contends that the claimant’s conduct was particularly egregious, and that there should be an order that he pay 100% of their costs which should be referred for detailed assessment on an indemnity basis. Whilst, on the basis of our conclusions as to the ordinary unfair dismissal claim it would not be appropriate to award the respondent all of its costs, on any analysis the bulk of the respondent’s costs are referrable to the part of the claim in which the threshold for making an order costs has been reached.

39. That leaves the question of whether to exercise our discretion to make any costs order and if so in what amount. We accept that whilst the costs are very substantial this was a long and difficult case and the allegations against the respondent were immensely serious. Whilst it was no part of the tribunal’s function to determine whether the claimants allegations of bribery were correct, had the tribunal concluded

that the claimant had a reasonable and genuine belief in the allegations that he had made, and that the respondent had either subjected him to detriment and/or dismissed him because he had made them they would potentially have suffered significant reputational and perhaps commercial damage. it was therefore entirely reasonable of them to defend this claim very robustly. In our judgement in principle there is no reason why the claimant should not be ordered to pay a substantial proportion of the costs subject to detailed assessment.

40. However in determining the amount of any costs order we are entitled to take into account the means of the claimant. He has given evidence that that since being dismissed by the respondent he was able to obtain a fixed term contract with the DWP between June 2021 and July 2022 in which employment he earned £29,000. He has been out of work since and is currently in receipt of Universal Credit. He lives in a rented property at a rent of £1650 per month and has three children aged between 16 and 19 all of whom are in full time education. His only source of income is Universal Credit and he has disclosed the Universal Credit details for February 2023 which reveals that he was paid £2,713 which is made up of £334.91 as his standard single allowance, £1,650 for his housing costs, and £779.16 in respect of the support for three children. There was deduction of £50.24 for tax credits recovery.

41. His evidence is that he is separated from his wife, has no assets and now owes something between £70,000 and £80,000 in combined loans and credit card repayments. In support of that he has supplied a document which dates from 2021 and shows him having debts at that point on loans and credit cards off just short of £60,000.

42. The respondent contends that we should treat this evidence with extreme scepticism. Firstly, and as we have found, the claimant is perfectly prepared to lie to advance his interests; and secondly as, other than the Universal Credit record, there is no contemporaneous evidence that the claimant is in debt. In addition the document from 2021 shows Google searches in respect of a number of companies share prices. The respondent invites us to draw the conclusion that this was the claimant seeking either to buy or sell shares in these companies. If it was to sell he has shareholdings which he is not disclosed, and if it was to buy he has access to funds he has not disclosed. The claimants' explanation for that is that he was asked to do so by his brother who was living in Dubai to make these inquiries on his behalf. The respondent contends that that is self-evidently absurd and unbelievable. In addition the respondent points to the fact that the claimant has throughout this litigation at various points instructed solicitors and counsel. There is no explanation of how if his evidence is true he funded that. In respect of the instruction of Mr. Johns for the final hearing claimant asserts that until shortly before the final hearing that he was to be presented by Ms Malik of counsel but that she was unable to attend the final hearing. Mr. Johns was instructed at short notice and it was agreed by his legal expense insurers they would pay 75% of the cost of instructing Mr Johns and the claimant would bear 25%. That involved the claimant paying Mr. Johns

£5,000 which he had to raise at very short notice. His evidence is that he borrowed it from his estranged wife.

43. The respondent submits that the appropriate order is for detailed assessment of all of their costs. Once that has happened a proper inquiry can be made at the enforcement stage as to the claimant's means and he can at that point produce appropriate evidence which he has not done thus far despite requests from the respondent to do so.

44. In the light of our findings as to the claimants credibility there is a great deal in our judgement in the respondents submissions. However whatever else is somewhat opaque it is clear that certainly at present claimant is in receipt of Universal Credit, and we accept that he has significant debts and does not own any property against which any order could be secured. In those circumstances it does not appear to us that there is any realistic prospect either now or in the foreseeable future of the claimant being able to pay £268,000 or anything remotely close to it. However he was able to obtain £5,000 to instruct Mr. Johns at short notice, and he does appear to be have access to funds if they are needed. Equally between his dismissal and the hearing he was able to obtain work for a year and there is no obvious reason why he should not obtain further work in the future.

45. In those circumstances the question is whether we refer the case for detailed assessment with either a finding as to the proportion of the assessed costs to be paid and/or a specific monetary limit, or to make an award within the summary assessment limit.

46. After much consideration, and balancing the considerations set out above, we have concluded that although it represents only a small proportion of the respondent's costs that it is appropriate to make a summary assessment of costs and to order the claimant to pay the respondents costs in the sum of £20,000.

Employment Judge Cadney
Date: 24 March 2023

Judgment sent to the Parties: 04 April 2023

FOR THE TRIBUNAL OFFICE