**Case No. 2500489/2021**

# EMPLOYMENT TRIBUNALS

**Claimant:** Ms G D'Adamo

**Respondent:** Angel of Corbridge Ltd t/a The Angel Inn

**UPON APPLICATION** made by letter dated **27 October 2022** to reconsider the judgment dated **8 October 2022** under rule 71 of the Employment Tribunals Rules of Procedure 2013

# JUDGMENT ON RECONSIDERATION

1. The Judgment dated 8 October 2022 is varied as set out below.

2. While the Tribunal has varied the Reasons for its original Judgment, it being in the interests of justice to do so, that Judgment as set out at paragraphs 1 – 8 is confirmed, without variation, they are unaffected, and that Judgment is confirmed.

## REASONS

3. The Respondent applied to the Employment Tribunal seeking a reconsideration on the grounds that the reasons for the Judgment were not meek compliant. The Respondent highlighted three specific issues, set out below, in which it considers the reasons to be inadequate.

4. The Respondent's application for reconsideration was submitted timeously in terms of Rule 71.

5. The application was referred to me and, in terms of Rule 72, I decided that it

should not be refused on the basis that there was no reasonable prospect of the original decision being varied or revoked. I did not express a provisional view on the application.

6. I invited the parties' views on whether the application could be determined without a hearing and confirmed that any response to the application should be copied to the other parties. The parties were advised that should reconsideration take place without a hearing they would be given an opportunity to provide written representations.

7. Both parties confirmed they considered the application could be determined without a hearing and the Claimant submitted written representations to the Respondent's application.

8. I concluded it was proportionate and in the interests of justice for the application to be dealt with on the papers.

**Relevant Law**

9. Rule 70 of the Employment Tribunal Rules of Procedure 2013 (the "Rules") sets out the principles to be applied when dealing with an application for reconsideration:

> "*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*."

10. Rule 62(1) provides that the Tribunal shall give reasons for its decision on any disputed issue, whether substantive or procedural and in the case of a decision in writing, the reasons shall also be given in writing. Under Rule 62(5) in the specific case of a judgment, the reasons shall: "*identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues."*

11. In Simpson v Cantor Fitzgerald Europe [2020] EWCA Civ 1601, the CA reiterated that the purpose of this rule, in relation to Judgments, is to enable the parties to know why they have won or lost. In Meek v City of Birmingham District Council [1987] IRLR 250 the CA states:

> "*It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises….*"

12. The importance of finality was confirmed by the Court of Appeal in Ministry of Justice v Burton and anor [2016] EWCA Civ 714. An application for reconsideration is an exception to the general principle that (subject to an appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70).

**Decision**

13. Taking each of the issues raised in the Respondent's application in turn, I set out below my conclusions on the same in relation to reconsideration.

Issue 1:

14. I found that the Respondent's failure to provide the Claimant with the information in the "accountability matrix" was not reasonable and rendered the consultation unfair.

15. In the Respondent's application the Respondent states:

    15.1. that I had made findings that the consultation was lengthy and detailed

(paragraph 142);

15.2. information was given to the Claimant to enable her to understand how selection was made;

15.3. there is no legal requirement for the documents a business uses to make a business decision regarding restructuring to be shared – just that adequate explanation in the consultation be provided.

16. My conclusions are set out in paragraphs141-143 of the Judgment.

17. At paragraphs 142 - 143 I state that whilst the consultation process was lengthy and detailed, there was a failure to provide the Claimant with the information contained within the "accountability matrix" which underlined the selection of her role personally for redundancy and that this prevented the Claimant from consulting with the Respondent on this issue.

18. At paragraph 143 I state that without this information, the Claimant was prevented from consulting on a fundamental aspect of her selection. I specifically highlight that whilst the consultation was detailed, which enabled the Claimant to challenge the commercial need for redundancy at length in detail during the consultation, it did not adequately provide her with the information she needed to challenge her selection (paragraph 142).

19. Paragraph 141 explains that reasonable consultation includes providing the employee with enough information to understand why their role was selected, and that the Respondent's failure to provide this information, meant the Claimant was denied the opportunity to consider whether Mr Laing had adequately described her role and tasks and prevented her from challenging the basis upon which her role was placed at risk.

20. In the circumstances I found that it fell outside the band of reasonableness to fail to provide this information to the Claimant and this remains my conclusion. The information contained in paragraphs 141-143 provide clear reasons for this conclusion.

21. The Respondent highlights in its application that there is no legal requirement that the Respondent must provide the accountability matrix to the Claimant.

22. I detailed that case law confirms an employer must provide adequate information to the employee to enable them to respond and take part in consultation. I found at paragraph 141 that the Respondent failed to provide the information in the "accountability matrix", and that this meant the information given to the Claimant was not adequate; I set out in paragraph 142 how this effected the process, in that it prevented the Claimant from understanding and challenging the basis for her selection for redundancy.

23. For clarity, my finding is not that the consultation process was inadequate because the Respondent did not provide the specific document (the "accountability matrix") to the Claimant, my finding is set out clearly in paragraph 143: "*I find the consultation was inadequate because without the information in the "accountability Matrix" the Claimant did not have the opportunity to challenge the basis upon which her role was selected for redundancy*". The Respondent was able to provide this information and did so to Mr Hogg (as set out in paragraph 69 of the judgment) but did not provide the information to the Claimant.

24. My conclusion remains the same; paragraphs 141 – 143 explain how I applied the finding of facts to the law and detail my conclusions. I do not believe it is in the interests of justice to vary or revoke the judgment on this issue.

Issue 2

25. The Respondent states that the reasons are inadequate because having found it to be unreasonable for the Respondent not to have provided the Claimant with the details of the supervisor role I did not consider or provide reasoning as to:

    25.1. the fact that the Claimant would have been aware of the details of the supervisor's role because the Respondent had given them to Mr Hogg, and because she was likely (as Operations Manager) to have known them;
    25.2. that the Claimant had declined junior roles, and the supervisor role was a junior role.

26. I set out at paragraph 149 my conclusion that the Respondent's failure to provide the Claimant with the details of the supervisor role further to her request for them was unreasonable, and with respect to the Respondent's duty to consider alternatives to Redundancy, the Respondent did not act within the band of reasonable responses. Upon reconsideration, this remains my conclusion.

27. The Respondent did not argue at the hearing that providing Mr Hogg with the details of this role was adequate in terms of providing that information to the Claimant. This information was available at the date of the hearing, the Respondent was legally represented and had chosen not to make this argument. A reconsideration is not an opportunity to raise further arguments which could have been raised at the hearing.

28. With respect to the argument that the Claimant was "likely to have been aware as to what the job had entailed" given her role as Operations Manager; this point was put to the Claimant in cross examination. The Claimant responded that the role, hours, and rate of pay all could have changed in the circumstances. I considered this to be a reasonable conclusion, and further to her request for the information, the Respondent ought reasonably to have provided the same to the Claimant, as it did for Mr Hogg.

29. Whilst I did not reference this evidence this in my judgment, I did consider it in my deliberations. It did not change my conclusion at paragraph 149. A judgment is the written reasons produced to explain a Tribunal's decision on the issues; it is not intended to be a comprehensive record of the Tribunal's evaluation of every point put before the Tribunal or considered by the Tribunal in deliberations as to do so would be disproportionate.

30. Upon reconsideration, my conclusion is not changed.

31. The Respondent further suggests that in coming to this conclusion I did not consider or provide reasoning to the fact that the Claimant had declined two more junior roles.

32. I dealt with the two junior roles, and the supervisor role separately in my judgment at paragraphs 145 and 146 of the judgment. I did not conflate the

three roles, as the Respondent seeks to do, I treated them differently as I did not consider them to be equivalent.

33. At paragraph 145 I confirm that the bartender and housekeeping roles were "significantly junior", low rate, hourly paid roles (this reflects my finding at paragraph 81 that these roles were zero hour, minimum wage roles with a possibility of around 20 hours and 40 hours per week respectively only, and the Claimant rejected them). I conclude that these roles were not suitable alternative roles.

34. I made findings at paragraph 57 that the Claimant considered the supervisors were likely to receive an equivalent wage to her annual salary as removing the management would increase their hours, a fact acknowledged during the consultation by Mr Laing (paragraph 59).

35. In paragraph 146 I move on to deal with the supervisor role. Whilst the supervisor role was junior, it was not a "significantly junior" role as the other roles were. The Claimant had rejected the other two, however she did not reject the supervisor role, she requested further information about it. In paragraph 149 I conclude that the Respondent ought reasonably to have considered, where the Claimant requested this information, and in the circumstances, she might consider accepting a junior role and should have provided her with the information.

36. I explain in paragraph 149 that the Respondent was tasked with doing what it reasonable could do, and at paragraph 150 I conclude in the circumstances the Respondent's actions fell outside the band of reasonable responses.

37. Whilst the Respondent asserted that the Claimant would have rejected the supervisor role as it was more junior and she had rejected the housekeeping and bartender role already; the supervisor role, although junior, was not an unsuitable alternative position as the bartender and housekeeping roles were unlike those roles, the supervisor's role was offered with guaranteed minimum hours of 49 hours per week (paragraph 89), furthermore, the Claimant had discussed in consultation with Mr Laing that, where managers was made redundant, the supervisor's hours would increase to a level almost equivalent to her annual salary, a point acknowledged by Mr Laing in the consultation

(paragraph 59).

38. Upon reconsideration, my conclusion remains the same. For the sake of clarity however I believe it is in the interests of justice to vary the judgment to ensure it is clear that I distinguish the roles of housekeeping and bartending, from the supervisor role.

39. Paragraph 149 is amended to include the underlined section as follows:

    39.1. Case law indicates that the Respondent was tasked with doing what it could, so far as that was reasonable, to seek alternative work; after having received a request for information concerning the alternative role, it would have been reasonable for the Respondent to provide that information. The Respondent does not suggest it did not receive that request, only that it did not believe the Claimant would ever have accepted the position. I find that it was unreasonable for the Respondent not to respond to the Claimant on the basis that it simply assumed she would not accept the role, especially in circumstances where she requested the job specification. Whilst the Respondent asserted that the Claimant would have rejected the supervisor role as it was more junior and she had previously rejected the significantly more junior housekeeping and bartender role; the supervisor role, although junior, was not an unsuitable alternative position; unlike the bartender and housekeeping roles the supervisor's role was offered with guaranteed minimum hours of 49 hours per week and the Claimant had discussed in consultation with Mr Laing that, where managers was made redundant, the supervisor's hours would increase to a level almost equivalent to her annual salary, a point acknowledged by Mr Laing in the consultation. It ought to have been reasonably apparent to the Respondent, given the dire economic circumstances at the time for the hospitality industry, that there would have been few employment opportunities for someone whose experience came from that industry and the Claimant might therefore consider accepting a more junior role.

Point 3

40. On the issue of Polkey, the Respondent says at paragraph 157 I found that it was 70% likely the Claimant would have accepted the supervisor role had she been given the details of that role however;
    40.1. the Claimant did not state in her oral or witness evidence that she would have taken that role;
    40.2. the finding at paragraph 157 seems contradictory to the finding at paragraph 156.

41. The Claimant's evidence on whether or not she would have accepted this role is set out at paragraph 154, she stated she would have given this consideration at the time however she was not provided with the details of the role further to her request.

42. Paragraphs 155 and 156 represent a balancing exercise carried out to determine the likelihood of whether the Claimant would have accepted the supervisor role. Had I not drawn some adverse findings in paragraph 156 I would have concluded at paragraph 157 that it was 100% likely she would have taken the supervisor role. I did not conclude it was 100% likely because of the issues I considered and set out in paragraph 156.

43. On reconsideration my conclusion remains unchanged. I do however believe it is in the interests of justice to vary the reasons for the sake of clarity to ensure the balancing exercise in paragraphs 155 and 156 is detailed clearly.

44. Paragraph 157 is varied as follows:

    44.1. <u>In determining the issue of Polkey, given my considerations in paragraph 156, I do not consider there was a 100% certainty that the Claimant would have accepted the supervisor role. I considered it may be the case that the Claimant was concerned about the supervisor's hours, and she may have found it difficult to accept a more junior role. However, the considerations raised in paragraph 156 are significantly compelling. Notwithstanding the considerations at paragraph 155, I find it telling that the Claimant did in fact request the information regarding the supervisor role, she did continue to exhaust all avenues</u>

to consult and to appeal the decision with the Respondent, and she believed the supervisor role would result in similar pay to her management annual salary. Given the economic circumstances of 2020 in the hospitality industry, by September 2020 on balance, where the Claimant believed that the supervisor position would be at a comparable wage to her annual salary, this is likely to have been a significantly appealing alternative offer, despite potential drawbacks. Considering the evidence and my findings above, as well as all of the circumstances of the case, I find that it is 70% likely that had the Claimant been provided with the details of the supervisor role she would have accepted it and would have remained employed with the Respondent.

## Conclusion

45. Whilst upon reconsideration I have determined that is in the interests of justice to vary the reasons for the original decision, the Judgment remains unaffected and is not varied.

Employment Judge **Newburn**

10 April 2023