EMPLOYMENT TRIBUNALS

First Claimant: Mr. Jaspal Dub
Second Claimant: Mr. Bahadur Mann

Respondent: Menzies Aviation (UK) Limited

RECONSIDERATION

Upon the respondent's application for reconsideration of the Tribunal's Judgment dated 10 January 2023, determined without a hearing

The respondent's application for reconsideration of the Tribunal's Judgment dated 10 January 2023 (sent to the parties on the 11 January 2023) is not well founded and is refused. The original Judgment is confirmed.

REASONS

Number in brackets relate to the Judgment and Reasons dated 10 January 2023.

1. The factual background to this case can be found the Tribunal's Judgment and full written Reasons which have been provided to the parties separately. I therefore do not repeat the factual history here.

The Application for Reconsideration

2. The respondent does not seek reconsideration of the Judgment in its entirety and does not challenge the finding that the claimants were unfairly dismissed. The application for reconsideration is made solely in respect of the determination that no reduction should be made to the compensatory award under the principles identified in *Polkey v. AE Dayton Services Limited* 1988 ICR 142 ("Polkey reduction").

3. The respondent makes the following submissions in support of its application for reconsideration:

    i. The Judgment is critical of the respondent's approach to undertaking interviews and the selection criteria applied as part of that. Those criticisms are acknowledged and accepted by the respondent. However, whilst the Judgment is critical of the objectivity and transparency of the scoring exercise, the Judgment is clear that no findings are made on whether or not the scoring was, in fact, correct [*122*].

ii. The Judgment held that the first claimant was not intentionally marked down by Steven Harrison [*144*]. The Judgment is also clear that there was no evidence of collusion between the two managers responsible for the scoring [*86*]. There is no finding in the Judgment of bad faith in either manager's approach to the scoring of either claimant. On that basis, there is nothing to determine that the scoring itself was not conducted in an honest and legitimate manner by managers who had the knowledge and experience of what was required of the role.

iii. As set out as part of the respondent's submissions (*paragraphs 57 and 58*), the majority of the questions which were asked of the claimants and the other candidates were technical questions with a right or wrong answer. The relevance of these questions to the role being undertaken was explained in witness evidence and it is submitted the answers provided to those questions were a clear means of determining the competency of the claimants and other candidates for the role.

iv. The Judgment found that the selection pool was appropriate [*121*]. Thereafter, whilst there is criticism of the transparency of the selection process, it is submitted that the scoring of the claimants remains valid. That scoring exercise resulted in the claimants scoring lowest and second lowest of the ten Allocators being assessed, with average scores of 49 and 48 out of 100 respectively. Six Allocators were retained and the lowest scoring person who was retained scored considerably higher, with an average score of 79.

v. It is submitted that this is not a minor disparity in scoring, which may not have arisen were it not for the flaws identified in the Judgment. Instead, it is submitted that this is a significant gap, which demonstrates a clear difference in respect of the claimants' suitability for the role in comparison with their colleagues.

vi. The Judgment indicates that the claimants were both longstanding employees and suggests that this would be a factor in the likelihood of them being retained [*150*]. However, the very next paragraph of the Judgment notes that the first claimant had previously been subject to performance management during that long period of service, but then relies on the historical nature of that process as a justification for not taking it into account. It is submitted that the length of service cannot simultaneously be a justification for not upholding the Polkey deduction, whilst also discounting relevant evidence on the basis that it occurred too early in the first claimant's time in the role.

vii. Ultimately, whilst the length of their service may show the claimants held a basic level of competency to carry out their role, it does not give an accurate indication of their capabilities in comparison to their colleagues. The scoring exercise did this, albeit in a flawed manner.

viii. The scoring demonstrates a strong likelihood that the claimants would have been dismissed fairly had a fair dismissal process been followed.

ix. As a result, some degree of reduction to the compensatory award should be made for both claimants.

x. Furthermore, the Judgment appears to indicate an all or nothing approach to applying a Polkey deduction to each of the claimants. It has been the respondent's position throughout both claims that a deduction should be made up to 100% of the compensation. If a reduction to compensation of 100% is deemed to be inappropriate, then consideration should be given as to whether any lesser reduction should be made to reflect the likelihood of a fair dismissal.

xi. In light of the above points, it would be in the interest of justice for the Judgment to be reconsidered in respect of the Polkey deductions to reflect the likelihood that the claimants would have been selected for redundancy had a fair procedure been used.

The Law

4. The rules relating to reconsideration applications are set out at 70 to 73 of the Employment Tribunals Rules of Procedure. As per rule 70, the Tribunal may reconsider any judgment where it is in the interests of justice to do so. On reconsideration, the original decision may be confirmed, varied or revoked. If it is revoked it may be taken again. If there is no reasonable prospect of the original decision being varied or revoked the application is to be refused.

5. There is an underlying public interest in the finality of litigation. Reconsideration is therefore not a means by which a disappointed party to litigation can get a "second bite of the cherry" if they do not agree with the original decision. In (1) *Flint v Eastern Electricity Board* [1975] ICR 395 (High Court, Queen's Bench Division) it states at 404:

> *"But over and above all that (the interests of the parties), the interests of the general public have to be considered too. It seems to me that it is very much in the interests of the general public that proceedings of this kind should be as final as possible; that is should only be in unusual cases that the employee, the applicant before the tribunal, is able to have a second bite at the cherry."*

6. In *Newcastle City Council v Marsden* [2010] ICR 743 (EAT) it was said, at paragraph 17:

> *"In particular, the weight attached in many of the previous cases to the importance of finality in litigation—or, as Phillips J put it in Flint (at a time when the phrase was fresher than it is now), the view that it is unjust to give the losing party a second bite of the cherry—seems to me entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final (subject, of course, to appeal)."*

7. In *Ministry of Justice v Burton* [2016] ICR 1128, the Court of Appeal said, at paragraph 21:

> *"… the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily…"*

8. In *Outasight VB Ltd v Brown 2015 ICR D11, EAT*, Her Honour Judge Eady QC stated that the wording 'necessary in the interests of justice' in rule 70 gives Employment Tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. 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"*.

My Conclusions

9. The Tribunal applied its mind as to whether a Polkey reduction was appropriate on the factual matrix before it.

10. The Tribunal found the dismissals to be unfair due to the unfairness of selection criteria and process used and the issues flowing from that selection process. These deficiencies included lack of standard answers/ marking sheet [128], that the scoring required varying degrees of subjectivity [129], that candidates were scored differently when giving similar answers (in some cases similar answers resulted in significantly different scores) [130] and that the answers recorded were summaries of what was said [132].

11. Whilst the Tribunal found that the claimants were not intentionally marked down by the Steven Harrison and that there was no evidence of collusion or bad faith, as the selection criteria was not objective and measurable there was the possibly of unconscious bias occurring [145]. In respect of the second claimant, the Tribunal also found that the difficulties that arose with the Teams connection during his interview was likely to have impaired his performance in interview [146].

12. Further, whilst some of the questions were of a technical nature, the respondent had no model answer or marking sheet in place. On some questions, similar answers attracted different scoring. The reason for those differences were not apparent on the evidence before the Tribunal.

13. The deficiencies which the Tribunal found in the selection process and criteria were not minor issues; they went to the core of the selection process.

14. The respondent relies upon the fact that the claimants were the bottom two scorers in the selection exercise. However, taking in to account the above factors, and the various and significant deficiencies in the selection process, the Tribunal was not satisfied that it could be said that it was likely, if a fair selection criteria and process had taken place, that either of the claimants would have fallen within the group of employees that would have been selected for redundancy.

15. The respondent refers to the Tribunal stating that both claimants were long standing employees and that this suggests that this would be a factor in the likelihood of them being retained. What is stated is that "*Both are longstanding employees who have carried out the Ramp Allocator role for several years*". The Tribunal was not suggesting that length of service would be a factor or criterion in determining whether or not they were retained. However, they were not, for example, recently appointed in to the role. It is not for the Tribunal to lay out what a fair selection criteria would have involved. However, the Tribunal took in to account that the past experience of the claimants was such that it could not be said that they would have been made redundant had a fair selection criteria been used.

16. Consequently, for those reasons, the respondent's application for reconsideration made under rules 70 and 71 of the ET Rules of Procedure is not well-founded and is refused. Acting in accordance with rule 72, I do not consider that the interests of justice require that the Judgment or its Reasons be varied or revoked. There is no reasonable prospect of such variation or revocation. The Judgment and its Reasons are confirmed.

_____

Employment Judge S.L.L. Boyes

_____

Date: 26 April 2023

Judgment and Reasons Sent to The Parties On

5 May 2023

FOR EMPLOYMENT TRIBUNALS

Public access to Employment Tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.