EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Ms H Curtis	v	Ministry of Defence

JUDGMENT ON APPLICATION FOR RECONSIDERATION

In exercise of powers contained in Rule 72 of the Employment Tribunals Rules of Procedure 2013 (**"Rules"**), the claimant's application of 16 May 2023 for reconsideration of the judgment sent to the parties on 5 May 2023 is refused because there is no reasonable prospect of the original decision being varied or revoked.

REASONS

Introduction

1. This application for reconsideration was lodged within 14 days of the sending of my reserved judgment, and so it is lodged in time and I have considered it accordingly. The application reached me on 31 may 2023 marked as urgent, so I have dealt with it urgently whilst also taking some time to consider the basis of the application and my response to it.

2. My judgment extended time for the claimant to bring the balance of her claims because I considered it just and equitable to do so. However, it struck out paragraphs 26(a)(i) and 26(a)(ii) of the claimant's particulars of claim for reasons given in my written judgment. In short, I consider that the matters complained of had not been submitted to the Defence Council, and so they are deemed withdrawn and the Employment Tribunal has no jurisdiction to hear them.

Principles of Reconsideration

3. When approaching any application, and during the course of proceedings, the tribunal must give effect to the overriding objective found at *Rule 2 of the Rules*. This says:

> *"2 - 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."*

4. The power to confirm, vary or revoke a judgment is found at *Rule 70*. That provides that a judgment can be reconsidered *"where it is necessary in the interests of justice to do so"*. Rule 71 of the Rules requires that an application for reconsideration is made within 14 days of the written record being sent to the parties. This application for reconsideration is made in time.

5. *Rule 72 (1)* provides:

> *"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. …"*

6. Where an Employment Judge refuses an application following the application of Rule 72(1), then it is not necessary to hear the application at a hearing. Rule 72(3) provides that the application for reconsideration should be considered in the first instance, where practicable, by the same Employment Judge who made the original decision. I am the judge who made the decision in respect of which the respondent makes his application for reconsideration.

7. The interest of justice in this case should be measured as a balance between both parties; both the applicant and the respondent to a reconsideration application have interests which much be regarded against the interests of justice (*Outasight VB Limited v Brown [2014] UKEAT/0253/14*).

Grounds and reasons of reconsideration application

8. The claimant's solicitors urge me to reconsider my judgment on the basis that, they say, I have not considered the claimant's argument to the effect of *Regulations 5(3) and 5(4) The Armed Forces (Service Complaints) Regulations 2015.* Those regulations provide:-

> *"(3) If the specified officer decides that any part or all of the service complaint is admissible, he must notify the complainant in writing of the decision and refer that part or all of the service complaint to the Defence Council.*
>
> *(4) If the specified officer decides that any part or all of the service complaint is not admissible, he must notify the complainant in writing of the decision, giving the reasons for the decision and informing the complainant of his or her right to apply for a review of the decision by the Ombudsman."*

9. In the words of Leigh Day's application, *"put simply the specified officer must make a positive decision one way or the other and notify the complainant of that decision"*.

10. The application repeats Mr Jupp's submissions to the effect that (1) the specified officer should have notified the claimant that any part of the complaint is inadmissible, (2) that this would allow the claimant to have asked the Ombudsman to review the decision, (3) that the claimant was not told that part of her complaint was inadmissible, and so (4) the claimant had not expressly withdrawn her complaint. The application asserts that *"there is no evidence that any decision was made one way or the other on the complaint related to the cancellation of the Medical Board appointment of 9 August 2017"* and so *"she could not therefore exercise her right of review to the Ombudsman"*.

11. The argument advanced by the claimant's solicitors is that the absence of a decision about this part of the claimant's claim means that the complaint did not form part of an *admissible* complaint and so the deemed withdrawal provisions would not apply. In effect, the claimant's solicitors suggest that the fact it was not put forward as an admissible complaint means that the Employment Tribunal *does* have jurisdiction to hear this part of the claim and so it is not struck out.

12. It is suggested that *Maloudi* is not applicable because the regulations now allow for there to be a decision about whether or not a complaint or part of it is admissible, which was not the case then.

Decision on the reconsideration application

13. First, I observe that there was evidence before me that the issue was considered by the specified officer and that this part of the service complaint was not put forward as part of the admissible claim. As noted at paragraph 12 of the judgment (quoting from page 96 of the bundle), the service complaint outcome letter includes the passage *"you will have noted from the Specified Officer's (SO) letter of admissibility (22 Mar 19) that your complaint regarding the scheduled Medical Board to assess recovery from an operation was not included. Therefore, I have not included it in this DL"*. This letter was not in the bundle, but at no point has the claimant asserted (that

I have seen) that she never received that letter. It did not form part of her appeal, for example.

14. In those circumstances, it was open to me to find, as I did, that this particular part of the complaint was considered and was considered to not be admissible. The claimant did not complain about the decision that it was not admissible even after she had been informed of it in the service complaint outcome (assuming the 22 March 2019 letter had not reached her).

15. Second, in my judgment, *Maloudi* does remain applicable for the reason given in paragraph 16 of my judgment. The Employment Tribunal has jurisdiction only after a service complaint has been sustained through the service complaint process, and is not withdrawn or deemed to have been withdrawn over the course of that process. A complaint is deemed to have been withdrawn if it is not carried through to the Defence Council (either at a point of first instance or at the point of appeal). .Any different principle would, in my view, negate the purpose of the statutory service complaint process which allows the armed forces the space to consider and deal with service complaints before the Employment Tribunal has jurisdiction to determine those same issues.

16. This application for reconsideration does not offer new evidence or new argument which has persuaded me that it is necessary in the interests of justice to alter my decision. I do not consider, on the wording of *s121 Equality Act 2010*, that the Tribunal has jurisdiction where part of the complaint made has not been put forward to the Defence Council (as is the case here) and where that decision is not reviewed or appealed. I do not see how that position is different where the claimant was not told about the decision not to put forward part of her claim.

17. In this case, it appears that there was a letter informing the claimant about which heads of claim were to be taken forward. It also seems that the claimant did not seek for that admissibility decision to be reviewed when she was aware of it following the service complaint outcome.

18. Consequently, the application for reconsideration is refused.

Employment Judge Fredericks-Bowyer

3 June 2023

Sent to the parties on:

5 June 2023

For the Tribunal Office:

GDJ