EMPLOYMENT TRIBUNALS

Claimant: Ms L Hedger

Respondent: British Deaf Association

JUDGMENT

The claimant's application dated **31 March 2023 (updated on 17 April 2023)** for reconsideration of the judgment, sent to the parties on **8 April 2023** is refused as it has no reasonable prospects of success.

REASONS

1. In that judgment, at paragraphs 5 to 12, the panel set out the applicable rules and principles relating to reconsideration. I will not repeat what was said there, but have taken it into account.

2. In summary, while reconsideration is possible, in appropriate circumstances, there does have to be a good enough justification to overcome the fact that, when issued, judgments are intended to be final (subject to appeal). As was stated in Ebury Partners Uk Limited v Mr M Acton Davis Neutral Citation Number: [2023] EAT 40

> The employment tribunal can therefore only reconsider a decision if it is necessary to do so "in the interests of justice." A central aspect of the interests of justice is that there should be finality in litigation. It is therefore unusual for a litigant to be allowed a "second bite of the cherry" and the jurisdiction to reconsider should be exercised with caution.

The Claimant's application

3. The Claimant (via her husband and representative) submitted emails dated 31 March and 17 April 2023, within the relevant time limit, seeking reconsideration.

4. The first email was written before written reasons were sent to parties. The first time I saw either of them, was on 25 May 2023 when both were referred to me by the tribunal service.

5. I am sorry to read that some parts of what I was saying when giving our judgment and reasons might not have been interpreted accurately at the time. I do think that the parties and the interpreters were all made aware that they could and should let any of the speakers know at any time if they were

speaking too fast, or not speaking loudly or clearly enough.

6. The second email was written after the written reasons have been received and comments on those written reasons.

7. I do not agree that I (or any one else on the tribunal panel) said that we would not hear arguments to support the Claimant's application for costs unless we were given specific cases. We did, in fact, hear all of the submissions (subject to what I say about "without prejudice" material below). We also made clear that if the parties wanted us to refer to a particular case, then they did not necessarily have to supply a paper copy of it to us, as we would look it up if they gave us the name of it. This is what we did in relation to all of the case names which Mr Hedger supplied at the liability hearing, and in his written argument for the reconsideration hearing.

8. The Claimant refers to "the Halsey principles" and quotes them in bullet points. As he says, these relate to the approach a court should take when considering its discretion to award costs as per Rule 44.2 of the Civil Procedure Rules. As stated in Rule 44.2(2) (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order.

9. However, the Civil Procedure Rules do not apply to the employment tribunal's discretion to award costs. In particular, there is no "general rule" that the unsuccessful party will be ordered to pay the costs of the successful party.

10. The case to which Mr Hedger refers is Halsey v Milton Keynes General NHS Trust: Neutral Citation Number: [2004] EWCA Civ 576. I note that

10.1. At paragraph 14, the court of appeal stated:

> We make it clear at the outset that it was common ground before us (and we accept) that parties are entitled in an ADR to adopt whatever position they wish, and if as a result the dispute is not settled, that is not a matter for the court. As is submitted by the Law Society, if the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement.

10.2. Having set out the principles mentioned by Mr Hedger, the court decided that, on the facts, the Defendant in that case (the successful party which was seeking costs) should not be deprived of the full costs despite having refused to engage in ADR. The trial judge had been entitled to decide that the Defendant had made a reasonable decision, taking into account the sums which the Claimant had been seeking.

11. Like Halsey, the other four cases cited in the first email are cases to which the costs provisions in the Civil Procedure Rules apply and the costs provisions in the Employment Tribunals Rules of Procedure do not apply.

12. The Claimant quotes from DSN, which is a passage addressing a different argument than the one relied on by the defendant in Halsey. In DSN, it was suggested that merely thinking a defence to a claim was a strong one is not a good enough reason (in a case to which CPR apply) to refuse to consider ADR.

13. In summary:

13.1. In Halsey, an argument by the successful party that they should get all of their costs, because they had had a good reason for not engaging in mediation – being a reasonable belief that the parties were too far apart, and it would be a waste of time and effort – was accepted.

13.2. In DSN, an argument by the unsuccessful party that they should pay additional costs, despite not having had a good reason for not engaging in mediation – a belief that their case was a strong one not being a reasonable explanation on the facts of that case – was rejected

13.3. In this case, the Respondent was the unsuccessful party. Subject to that, its argument was similar to Halsey. We do not know what the without prejudice material (if any) may have shown, but based on the open material, including the schedule of losses, we were not persuaded that the absence of a settlement showed unreasonable conduct by the Respondent.

14. We told both parties that we did not want either of them to tell us about any without prejudice discussions unless the communication had been "without prejudice save as to costs". Both parties were invited to put such material before us if they had it, and neither side argued that they did.

15. We said we were not willing to take into account communications that had been without prejudice, if they were not "without prejudice save as to costs". There is no reasonable prospect that the EAT decision in Cole v Elders Voice would persuade the panel that we were wrong about that.

16. More generally, the first email is largely addressed at case law precedent which does not govern the employment tribunal, and there is no reasonable prospect that the decision we made (or the reasons we gave in, for example, paragraph 57) would have been different had it been cited to us by either party. [It follows, therefore, that I also reject the argument that the Tribunal should have found these cases for itself, as part of its duty to a litigant in person.]

17. The second email refers to the court of appeal decision in Barnsley MBC v Yerrakalva Neutral Citation Number: [2011] EWCA Civ 1255. Mr Hedger is possibly referring to the last sentence of paragraph 36. If so, that paragraph

was part of a summary of the arguments made by the party seeking costs, rather than a decision of the court.

18. In paragraph 41, the court noted:

> The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the [relevant party] in … conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.

19. I am satisfied the panel's decision did just that.

20. Furthermore, in paragraph 7, the court stated:

> The ET's power to order costs is more sparingly exercised and **is more circumscribed by the ET's rules than that of the ordinary courts**. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the ET costs orders are the exception rather than the rule. In most cases the ET does not make any order for costs. If it does, it must act within rules that expressly confine the ET's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The ET manages, hears and decides the case and is normally the best judge of how to exercise its discretion.

21. The words which I have emphasised confirm the point made above about why cases based on the Civil Procedure Rules are unlikely to be of assistance when making costs decisions in the employment tribunal.

22. The Claimant (via Mr Hedger) also argues that (to paraphrase) the fact that EJ Alliott made an order that the Respondent should write to the Tribunal and the Claimant about judicial mediation means that the Respondent's response (if any) or lack of response (as the case may be) is not covered by "without prejudice" privilege. I do not agree with that argument. However, in any event, EJ Alliott did not order that the parties were obliged to take part in judicial mediation, and, based on the evidence we considered admissible, we were not persuaded that the Respondent's stance in relation to settlement was unreasonable conduct of the proceedings. (See, in particular, paragraphs 57 and 68, of the reasons for rejecting the preparation time order application.)

23. More generally, I am satisfied that there is no reasonable prospect that the comments about Yerrakalva or the further reference to the Respondent's stance in relation to judicial mediation have any reasonable prospects of persuading the Tribunal to change its decision.

24. In relation to the argument that the unreasonable conduct by the Respondent did, in fact, cause extra preparation time, that is an argument we considered and rejected at the hearing. (See, for example, paragraph 64 of our reasons).

25. For the reasons stated above, having considered the Claimant's application, I am satisfied that there is no reasonable prospect of the original decision being varied or revoked, and the application is refused.

Employment Judge Quill

Date: 28 May 2023

JUDGMENT SENT TO THE PARTIES ON

5 June 2023

GDJ
FOR THE TRIBUNAL OFFICE