EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4114755/2019

Reconsideration hearing by written submissions in Edinburgh remotely on 26 May 2023

Employment Judge R McPherson

Members: L Grime and A Matheson

Mr Grant Timothy	**Claimant** **By Written Submissions**
Dell Corporation Ltd	**Respondent** **By Written Submissions** **Mrs D Reynolds - Solicitor**

JUDGMENT FOLLOWING RECONSIDERATION

The unanimous decision of the Employment Tribunal in respect of the respondent's application for reconsideration is as follows -

(i) Paragraph (1) of Judgment dated **28 March 2023** (the Judgment), which set out that (1) the claimant's claim in respect s15 of the Equality Act 2010 (discrimination arising) in respect of the event complained of on 22 July 2019 (expectation of agreeing meeting schedule) succeeds and the claimant is awarded £1,000 for injury to feelings in relation to that claim only together

with interest in the sum of £295.01; and; is revoked and is taken again with unanimous Judgment (1) now being

(1) The claimant's claim in respect of s15 of the Equality Act 2010 (discrimination arising) in respect of the event complained of on 22 July 2019 (expectation of agreeing to meeting schedule) does not succeeds and is dismissed; and

(ii) Reasons section of the Judgment is varied as follows -

1. **Paragraph 278 (a)** and **(b)** are both varied by substitution with

    a. threat to stop sick pay unless the claimant sign consent forms and agree to a meeting schedule with Mr Bowen. The Tribunal concludes there was no threat to stop sick pay as set out in paragraph 117 above. The respondent's letter of 22 July 2022, so far as it related to the completion of forms, was in any event a proportionate means of achieving a legitimate aim, namely continuing company sick pay and insurance thereafter. This claim is dismissed.

2. **Paragraphs 334, 335** and **336** are varied by substitution with *"The claimant's claim in terms of s15 EA 2010 in relation to the respondent's letter of **22 July 2019** does not succeed, as there was no threat to stop sick pay."*

(iii) While we have varied the Reasons for our original Judgment, it being in the interests of justice to do so, that Judgment is otherwise confirmed, without being further revoked or variation, and the claimant's remaining claims in respect of s15 EA (discrimination arising) because of disability, s19 EA 2010 (indirect discrimination), ss20, 21 EA 2010 (reasonable adjustments) and unfair dismissal, are unaffected those claims did not succeed.

REASONS

1. Following a hearing which took place on **9, 10, 11, 12, 16, 17 and 18 May 2022; 28 and 29 November 2022 &** Members Meetings **on 3** and **23 February 2023** (with members meeting on **3 and 23 February 2023)** we handed down the Judgment dated **28 March 2023** issued to the parties on **29 March 2023,** in terms of which we unanimously dismissed the complaints brought by the claimant except what was identified as claimant's claim in respect s15 of the Equality Act 2010 (discrimination arising) in respect of the event complained of on 22 July 2019 (expectation of agreeing meeting schedule).

2. On **11 April 2023,** the respondent's representative applied for reconsideration of the Judgment.

3. The respondent's application for reconsideration was submitted timeously in terms of Rule 71 of the Employment Tribunal Rules of Procedure 2013 (the 2013 Rules).

4. The application was referred to the Employment Judge, who decided it should not be refused because there was no reasonable prospect of the original decision being varied or revoked. No provisional view was expressed on the application.

5. The Tribunal invited 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. Parties were advised that should reconsideration take place without a hearing, they would be given an opportunity to provide written representations. Neither party requested a hearing.

6. Having considered the parties respective positions, the Tribunal concluded that it would not be necessary, in the interests of justice, to appoint a party

Hearing, and the panel was reconvened for a member meeting scheduled for Friday 26 May 2023, to consider the respondent's application and parties were directed to provide Written submissions and, thereafter, if they wished, Further Written Submissions in response, all in advance of this notified reconsideration hearing.

7. The respondent and claimant provided Written Submissions, and the respondent provided Further Written Submissions.

8. This judgment sets out the Tribunal's conclusions in relation to reconsideration.

The application

9. The respondent seeks reconsideration, referring to the event, as set out in the claimant's March 2022 consolidated pleadings and identified in paragraph 22 of the Judgment, pled and insisted upon as a claim, being *"Monday 22 July 2019 (p 549 bundle)* ***HR threaten to stop sick pay*** *unless sign consent forms and agree to a meeting schedule with Mr Bowen",* (emphasis added).

10. The respondent contends that the claimant complains that he has been treated unfavourably by the respondent in **one way only,** that is, the threat to stop sick pay.

11. The respondent argues that the claimant did **not** complain that setting an expectation that he agrees to a meeting schedule with Mr Bowen was unfavourable treatment.

12. The respondent argues, the Judgment appears to identify two forms or types of unfavourable treatment:

A. HR threatening to stop sick pay unless the claimant signs consent forms; and

B. setting an expectation that the claimant agrees a meeting schedule with Mr Bowen

and has treated each as two different section 15 EA 2010 claims.

13. The respondent argues the Tribunal cannot find that the claimant's claim in respect of section 15 of the Equality Act 2010 in respect of the event complained of on 22 July 2019 (expectation of agreeing to a meeting schedule) succeeds on the ground that it was not pled as a section 15 claim in its own right.

14. The respondent argues that the claimant's pleadings set out the only unfavourable treatment complained of as the threat to stop sick pay.

15. In summary respondent argues that the claimant's pleadings (the consolidated pleadings) set out the only unfavourable treatment complained of as the threat to stop sick pay (such threat being made to require him to sign consent forms and agree to a meeting schedule). The claimant did not assert that an expectation to agree a meeting schedule was ***also*** unfavourable treatment.

16. The respondent argues the Employment Tribunal *cannot find* that the claimant's claim in respect of section 15 of the Equality Act 2010 in respect of the event complained of on 22 July 2019 (expectation of agreeing to meeting schedule) succeeds on the grounds that it was **not pled** as a section 15 claim in its own right.

Procedural History

17. The claimant, in his Written Submission, referenced the preliminary hearings, it being argued that the respondent had not previously raised this matter. The respondent in their Further Written Submission, referenced the ET1, Further and Better Particulars and Consolidated Pleadings.

18. In these circumstances, it is considered appropriate, unusually, to set out some of the procedural history so far as it is relevant to this application.

19. The paper apart to the claimant's **2019 ET1,** gave notice, in relation to sick pay and leave at (para 15), that the claimant argued that he had suffered discrimination in relation to the management of his sick pay and leave and (at para 16) referenced respondent letter of 22 July 2019 *"advising that the company could withdraw sick pay if he failed to engage with the support provided and advising that he must return the consent form by 31 July in order to continue benefitting from sick pay. This was entirely inappropriate and discriminatory in the circumstances..."*

20. At Preliminary Hearing on **27 March 2020,** after discussion, it was determined that Further and Better Particulars would be provided by the claimant.

21. On **17 April 2020,** Further and Better Particulars were provided. So far as material, those gave notice, in respect of s15 Equality Act 2010 Discrimination Arising from Disability, at para 46, that the claimant asserts he was treated unfavourably in the way the respondent's HR department managed his sick pay and absence, giving notice at para 47 that the claimant was then arguing that he was treated unfavourably listing 5 acts:

    47.1 In the letter of 22 July 2019, the Respondent threatened to withdraw the Claimant's company sick pay if he did not return the consent forms when he had raised reasonable concerns about the service interfering with his medical treatment;

    47.2 the Respondent insisted that the Claimant set up regular contact with Mr Bowen when the Claimant had made the Respondent well aware that Mr Bowen's actions contributed to his illness;

    47.3...

    47.4..

    47.5...

It being argued that those 5 notified acts, were because of something arising in consequence of the claimant's mental health.

22. At Preliminary Hearing on **11 November 2020,** it was noted that the parties agreed that the then two sets of proceedings should be conjoined and (at para 5 of the Note issued 16 November 2020) parties undertook to consolidate their pleadings.

23. At Preliminary Hearing on **15 January 2021,** at which the claimant represented himself, the Tribunal identified the need for clarity of pleadings.

24. The Tribunal noted that while the claimant had, by that date, provided a two-page summary of his claims, it was identified that the claimant must set out the allegation in chronological order with dates, identifying the essential matters in respect of each allegation were (a) what was the unfavourable treatment? (b) what was the reason 'arising from disability' forthat treatment? (c) how did that reason arise from the disability? Further, it was determined that parties would lodge consolidated pleadings being a consolidation of all claims and an Order was issued accordingly.

25. The claimant provided consolidated pleadings dated 21 February 2022. At para 28 of those February 2022 Consolidated Pleadings (dealing with s15 EA 2010 Discrimination Arising from Disability), the claimant gave notice of the relevant matter here relied upon for the final hearing as

> *28. What was the unfavourable treatment?*
> *22/07/2019 HR threaten to stop sick pay unless I sign consent forms and agree to a meeting schedule with Mr Bowen (manager I formally complained about).*

The claimant further gave notice what he said was the reason *"arising from disability'* for that treatment and the way in which that reason arose the disability.

26. As set out in the Judgment, the claimant provided Consolidated Pleadings in March 2022 (as they are referred to in the Judgment, the **Claimant Consolidated Pleadings March 2022).** The March 2022 Consolidated Pleadings was a 23-page document organised primarily in order of claims (rather than dates) with what the claimant asserted were relevant (dated) events as subheadings set out in chronological order. At para 28 of the Claimant Consolidated Pleadings (which dealt with s15 EA 2010 Discrimination Arising from Disability), again claimant gives notice of the relevant matter relied upon for the final hearing as:

    28. What was the unfavourable treatment?

    22/07/2019 HR threaten to stop sick pay unless I sign consent forms and agree to a meeting schedule with Mr Bowen (manager I formally complained about).

    The claimant further stated what he said was the reason *'arising from disability'* for that treatment, and the way in which it is said that reason arose from the disability.

27. The respondent in their Respondent's Consolidated Pleadings addressing s15 EA 2010 discrimination arising, denies treating the claimant unfavourably because of something arising in consequence of the claimant's disability (so far as relevant) at 9.g:

    g. In the way the Respondent managed his sick pay and absence- The decision how to manage sick pay in relation to the Claimant was not because of something arising from his disability. The Respondent's Sickness Absence Policy explains how sick pay and absence are to be dealt with and the Respondent did or did not do certain things in response to what the Claimant did or did not do. In relation to the sick pay, the Claimant received a greater number of weeks company sick pay to that which he was entitled to under the policy.

28. The agreed List of Issues does not specify the matters complained of.

29. Following the Final Hearing, in written submissions, the claimant sets out his position at **para 53** of his submissions *"HR threaten to stop sick pay unless I sign consent forms and agree to a meeting schedule with Mr Bowen (manager I formally complained about)."*

30. In written submission following the final hearing, the respondent addresses its position at **para 307,** describing (what is listed as event 28) *"that HR threatened to stop sick pay unless the claimant signed the consent forms and agreed a meeting schedule with Mr Bowen… we submit that Claimant's treatment was not unfavourable".*

Written Submissions for this Reconsideration.

31. The respondent set out their Written Submission over 16 primary paragraphs. The claimant set out his Written Submission over 12 paragraphs. The respondent's Further Written Submission is set out over 5 paragraphs. It is not considered necessary, in the interests of brevity, to set out the respondent or the claimant's written submissions, nor the respondent's submissions, although reference is made to those below where it is considered relevant to do so.

32. **Reconsideration of Judgments Rules of Procedure.** The Tribunal has reminded itself of the terms of Rules 70 to 72 of the 2013 Rules of Procedure. It is not considered necessary to set those out at length. Rule 70 however 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."

33. **Case Law.** The approach to be taken to applications for reconsideration was set out in **Liddington v 2gether NHS Foundation Trust** [2016] UKEAT/0002/16 **(Liddington)** in the judgment of Simler P: The Tribunal is required to:

(a) *identify the Rules relating to reconsideration and in particular to the provision in the Rules enabling a Judge who considers that there is no reasonable prospect of the original decision being varied or revoked refusing the application without a hearing at a preliminary stage;*
(b) *address each ground in turn and consider whether is anything in each of the particular grounds relied on that might lead ET to vary or revoke the decision; and*
(c) *give reasons for concluding that there is nothing in the grounds advanced by the Claimant that could lead him to vary or revoke his decision.*

34. In paragraphs 34 and 35 of **Liddington,** Simler P included the following guidance:

"A request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered. Tribunals have a wide discretion whether or not to order reconsideration. Where . . . a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application."

35. The EAT has issued guidance including decisions that the interests of justice include the public interest in the finality of litigation in **Flint v Eastern Electricity Board** [1975] ICR 395 **(Flint)** per Phillips J at 404G-405B: *"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."*

36. Further, Underhill J in **Council of the City of Newcastle upon Tyne v Marsden** [2010] ICR 743 **(Marsden),** having reviewed the relevant case law, said at [17]: " *… 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 bit 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 …"*

37. Judge Hand QC, considering the then new reconsideration jurisdiction under the 2013 ET Rules in the light of the previous case law, said in **Serco Ltd v Wells** [2016] ICR 768 **(Wells)** at [43(a)]: "*The draftsmen of both sets of Rules must be taken to have drafted them with the same universal principle in mind, namely what I have described as finality and certainty of decision and orders and the integrity of judicial decisions and orders; this principle, as the authorities in both jurisdictions illustrate, usually directs any challenge to an order towards an appeal to a tribunal of superior jurisdiction and discourages seeking the same judge or another judge of equivalent jurisdiction to look again at an order or decision, save in carefully defined circumstances.";*

38. The Court of Appeal considered Rule 70 in **Ministry of Justice v Burton** [2016] ICR 1128 **(Burton).** Elias LJ said at [21]: *"An employment tribunal has a power to review a decision 'where it is necessary in the interests of justice': see rule 70 of the Employment Tribunals Rules of Procedure 2013. This was*

one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, as Underhill J pointed out in Newcastle upon Tyne City Council v Marsden *[2010] ICR 743, para 17 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; and in Lindsay v Ironsides Ray & Vials* [1994] ICR 384 *Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally Justify granting a review."*

Discussion and Decision

39. The notes the respondent's position set out in their Further Witten Submissions (para 1), in response to the claimant's Written Submission, that the respondent *"does not submit that the consolidated pleadings were not agreed upon".* The Tribunal, however, concludes that the March Consolidated Pleadings set out the claim for which notice was given and which was insisted upon for the Final Hearing.

40. The Tribunal notes but does not accept the respondent's position set out in Further Written Submissions that the pleadings throughout the ET1, Further and Better Particulars and Consolidated Pleadings on this issue, were consistent. The relevant unfavourable treatment for which notice was given in the ET1 is set out above. That was further clarified as two distinct unfavourable treatments in the Further Particulars again as set out above. However, the claimant elected to consolidate those two separately listed unfavourable treatments into one in his February and thereafter his March 2022 Consolidated Pleadings.

41. The Tribunal recognises that the claimant is unrepresented. The Tribunal notes the claimant's position as set out in his Written Submissions that (his)

consolidated pleadings were agreed upon well before the hearing. The Tribunal notes that the claimant argues that the respondents did not raise this pleading issue at any preliminary hearing before the Final Hearing nor during the hearing. The Tribunal further notes that the claimant argues that Tribunal exercised common sense and dealt with both matters separately.

42. While the argument as set out in the Consolidated Pleadings is articulated differently from that which preceded it, there was no requirement here for the respondent to raise what was a change in the claimant's pled claim for which notice is given, before or during the Final Hearing. Changes in the pled case are not uncommon and indeed, in the course of the Final Hearing, aspects of the claim were withdrawn by the claimant as described at paragraph 22 (14) (2) and (3) of the judgment.

43. Importantly, the claim for which notice is given for the Final Hearing was set out in the consolidated pleadings. It was not as previously set out in the Further Particulars as set out above as two unreasonable treatments. The natural reading of the Consolidated Pleadings describes one event occurring consequential unless two specific actions were taken. In seeking reconsideration, the respondent is not here seeking to relitigate matters, nor can it be said that this is a matter which had been fully ventilated.

44. After anxious consideration, including reflecting on the presentation of the claim at the hearing, the Tribunal is satisfied it requires to vary its Judgment and Reasons in the interests of justice to reflect the s15 EA 2010 unreasonable treatment for which notice was given for the Final Hearing. In doing so the Tribunal requires to revoke Paragraph (1) of Judgment dated **28 March 2023** (the Judgment), which set out that

    (1) the claimant's claim in respect s15 of the Equality Act 2010 (discrimination arising) in respect of the event complained of on 22 July 2019 (expectation of agreeing meeting schedule) succeeds and the

claimant is awarded £1,000 for injury to feelings in relation to that claim only together with interest in the sum of £295.01;

and for that element of the decision to be taken again with unanimous Judgment now being

(1) The claimant's claim in respect of s15 of the Equality Act 2010 (discrimination arising) in respect of the event complained of on 22 July 2019 does not succeed and is dismissed.

45. The following variations of the Judgment also follow:

1. **Paragraph 278 (a)** and **(b)** are both varied by substitution with
   a. threat to stop sick pay unless the claimant sign consent forms and agree to a meeting schedule with Mr Bowen. The Tribunal concludes there was no threat to stop sick pay as set out in paragraph 117 above. The respondent's letter of 22 July 2022, so far as it related to the completion of forms, was in any event a proportionate means of achieving a legitimate aim, namely continuing company sick pay and insurance thereafter. This claim is dismissed.

2. **Paragraphs 334, 335** and **336** are varied by substitution with "The *claimant's claim in terms of s15 EA 2010 in relation to the respondent's letter of* ***22 July 2019*** *does not succeed, as there was no threat to stop sick pay."*

Conclusions

46. While we have revoked paragraph (1) of the Judgment with that element of the judgment being again and varied as above Reasons for our original Judgment, it being in the interests of justice to do so, the Judgment is otherwise confirmed, without variation, and the claimant's remaining claims in respect of s15 EA (discrimination arising) because of disability, s19 EA 2010

(indirect discrimination), ss20, 21 EA 2010 (reasonable adjustments) and unfair dismissal, are unaffected those claims did not succeed.

Employment Judge: **R McPherson**
Date of Judgment: **15 June 2023**
Entered in register: **15 June 2023**
and copied to parties