Case Number: 2206616/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr M Ithia		(1) MUFG Securities EMEA Plc (2) Michael Conway

Heard at: London Central (in person) **On**: 14 July 2023

Before: Employment Judge H Stout
Tribunal Member S Campbell
Tribunal Member D Clay

Representations
For the claimant: In person
For the respondent: Ms T Barsam (counsel)

JUDGMENT OF FULL TRIBUNAL ON CLAIMANT'S RECONSIDERATION APPLICATION

In the light of the Claimant's reconsideration application received on 17 April 2023, the Liability Judgment in this matter sent to the parties on 3 April 2023 is varied and reissued in the form appended hereto to reflect the facts that: (i) Mr Niforas' did receive an automatic email notification through the online system in respect of the Claimant's request for a new desktop install in January 2020; and (ii) it is only claims in respect of acts that occurred prior to 2 June 2020 that were outwith the Tribunal's jurisdiction as to time limits, not matters occurring prior to 15 July 2020. The outcome of the case is not otherwise affected.

REASONS

Introduction

1. By application received at the Tribunal by post on 17 April 2023, the Claimant applied for reconsideration of the Reserved Liability Judgment in this matter sent to the parties on 3 April 2023.

2. By judgment and preliminary views sent to the parties on 24 April 2023 the judge dismissed most of that application under Rule 72(1) save in relation to two matters in respect of which further directions were given for the parties to provide written submissions: (i) Mr Niforas' failure to respond to the Claimant's request for a new desktop install in January 2020; and (ii) time limits.

3. The Respondent provided written submissions in accordance with the Tribunal's order by letter dated 28 April 2023.

4. The Claimant did not provide written submissions in response to that order, and at a case management hearing on 8 June 2023, further directions were given in respect of the application, including listing it for hearing before the full Tribunal panel today.

5. The Claimant then did provide written submissions by letter of 7 July 2023, and both parties supplemented their written submissions with oral submissions at this hearing.

The law

6. The legal principles applicable to reconsideration applications were set out in the judgment and preliminary views sent to the parties on 24 April 2023 and are not repeated here.

Discussion and conclusions

Error 1

7. At paragraph 132 in the Liability Judgment we wrongly concluded that there was 'no evidence' that the automated system notified Mr Niforas of the Claimant's request for a new desktop install in January 2020. This is wrong as V5/37 and 46 show emails to Mr Niforas from the automated system on 20 and 25 January 2020. As we noted in paragraph 132, the precise sequence of events in relation to this request was not explored by the parties in oral evidence and we had to do our best with the documentation ourselves. We managed to overlook two pages, although we see now they were referred to by the Claimant in his witness statement, and for this we apologise.

8. The Claimant invited us to hear further oral evidence from Mr Niforas, Ms Owen, Mr Syson, Mr Williams and Mr Conway in order to consider the implications of the pages that we missed. However, we do not consider that it is necessary in the interests of justice, or in accordance with the overriding objective, for us to hear further evidence on this point. The allegation in question is one of race discrimination against Mr Niforas for not replying to equipment requests. We do not see how it could assist us at all to hear further evidence from any of the other witnesses that the Claimant mentions on this issue. We did hear evidence at final hearing on this issue from both the Claimant and Mr Niforas and, apart from missing these two pages, we made detailed factual findings about what happened with equipment requests over the three-year period about which the Claimant complained at paragraphs 118 to 135 and 331 to 336 of our Liability Judgment. It was unfortunately the case that, no doubt in part as a result of the passage of time, and in part because equipment requests of this sort are not generally very memorable, Mr Niforas was unable to remember very much about any of the Claimant's requests, although we did find him to be a straightforward and honest witness, as we set out at paragraph 189 of the Judgment. We do not therefore consider that it is necessary for us to hear further evidence on this issue in order to reconsider our judgment as we do not think that Mr Niforas would be able to add anything to what he already told us at the liability hearing.

9. What we have done is to conscientiously consider whether, if we had been aware of these two extra pages when we were considering our judgment on liability, it would have led us to any different conclusion on the question of whether the Claimant's race influenced Mr Niforas's failure to approve many of his equipment requests over a three-year period. Although the addition of these two pages means that this is 'just one more' equipment request that Mr Niforas ignored, this last request was potentially more significant because it was the only one that the Claimant 'chased' with Mr Niforas, and at paragraph 336 we stated that we had found it *"understandable"* that Mr Niforas had not responded to many of the Claimant's equipment requests because the Claimant had failed to chase or speak to him about these requests. (We interpolate here that the Claimant in his reconsideration application, and again at this hearing, has sought to maintain that he did chase Mr Niforas about equipment requests. However, as the judge noted at paragraph 17 of the Judgment and Preliminary Views on the reconsideration application that was definitely not the Claimant's position at the hearing and is not a basis for reconsideration now.)

10. We have therefore focused our reassessment of the evidence on the question of why Mr Niforas did not respond to this equipment request of January 2020, despite being chased by the Claimant about it orally on 23 January 2020 and in his email of 24 January 2020. The picture of what happened around those two dates is actually quite clear from the judgment, although we had not previously focused on it in relation to this equipment request because of our erroneous conclusion that this particular request had not been made through the online system and thus not notified to Mr Niforas. What we find when we look at what was happening around these dates is as follows:-

a. The Claimant's request was first notified to Mr Niforas through the online system on 20 January 2020.

b. We found as a fact at paragraph 135 that Mr Niforas' working practices were such that he was more likely than not to ignore automated emails unless chased.

c. At a meeting on 23 January 2020, Mr Niforas raised with the Claimant the long-standing issue of him not having signed the dual-hatting arrangements. The Claimant alleged that this was harassment, but we found at paragraph 166 that it was reasonable for Mr Niforas to raise this with the Claimant and that the Claimant over-reacted to Mr Niforas raising this issue with him. It was in this meeting that the Claimant raised orally with Mr Niforas the issue of his most recent equipment request.

d. The Claimant sent a follow-up email on 24 January 2020 in which he complained about a number of different things as detailed at paragraph 167 of our judgment, and it was in the middle of this email that he also again mentioned the equipment request.

e. We found at paragraph 168 that Mr Niforas strongly disagreed with the contents of that email and forwarded it on to Mr Syson. He understood at this point for the first time that the Claimant 'had a problem' with him. Mr Syson told Mr Niforas that he would pass the email on to Ms Owen to deal with and at paragraph 132 we found that Mr Niforas did not reply to the Claimant's email of 24 January 2020 because he understood that Ms Owen was dealing with it.

f. On 25 January 2020 the automated system again prompted Mr Niforas about the request.

g. The automated system did not reject this request after 20 days (although neither is there any evidence it sent Mr Niforas any further reminders). Mr Niforas was later contacted about the request by Mr Cullen and dealt with it as we found in paragraphs 133 and 335.

h. From 6 February 2020, the Claimant was on sick leave (see paragraph 176 onwards).

i. Mr Niforas' evidence in his witness statement was that he did not approve this request at the time because the Respondent was no longer issuing new desktops, but we found as a fact at paragraph 132 that this was something he learned only later when Mr Cullen contacted him about it.

11. Reviewing all that evidence, we find that Mr Niforas' non-response to the Claimant's request in January 2020 is explained by a combination of his general practice of ignoring automated emails, and the fact that the Claimant's oral and written 'chasing' of the request was done in the context of conversations and

emails dealing with other matters in respect of which the Claimant had become very agitated and in respect of which Mr Niforas' understood himself to be the subject of a complaint by the Claimant that Ms Owens was dealing with. We infer that Mr Niforas was at this point finding dealing with the Claimant difficult and decided to wait for guidance on all issues from Ms Owens. The Claimant then went on long-term sickness absence and the Covid-19 pandemic began and so no action was taken until Mr Cullen brought it to his attention in April 2020.

12. Although Mr Niforas' handling of the Claimant's equipment requests was far from satisfactory, there is still nothing in any of this from which we could conclude that the Claimant's race had anything to do with it. In this respect, it is important to remember that there were three categories of allegation made by the Claimant against Mr Niforas: the failure to put him up for promotion, equipment requests and harassment. In deciding whether Mr Niforas was influenced in his treatment of the Claimant by his race, we took into account all the evidence that we had heard about Mr Niforas and our conclusions as to why we found there were no facts from which we could draw the inference that race played any part in any of these matters are to be found at paragraphs 325-330, 331-336, 345 and 348. We do not consider that Mr Niforas' failure to approve the Claimant's last equipment request makes any difference to those conclusions, given the circumstances surrounding that last request as we have set out above.

13. We have, however, made amendments to the reissued judgment in paragraphs 132, 133 and 335 to reflect the true facts as we now find them to be.

Error 2

14. The second error is that at paragraph 363 we have mis-stated the relevant date for time limits purposes. 10 July 2022 is obviously wrong and it should be 2 June 2022. Again, we apologise for this error. Tempting though it is to accede to Ms Barsam's submission that as the time point had become academic we should say no more about it, we considered it important to record our views on the time limit issue because we felt that, in particular in relation to equipment requests, but also in relation to other matters, that the historic nature of the claimant's claims had affected the quality of the evidence that we received so that there is in our view a purpose in recording our view on the time limit point even though it is academic in the light of our findings on liability.

15. The consequence of the change in date for the primary three-month time limit is that, in addition to the claims about dismissal, severance pay and the appeal which we already dealt with in the Liability Judgment, the following claims were also brought within the primary three-month time limit. We make observations regarding those claims as follows:-

    a. *Ignoring advice from the Claimant's doctor in relation to a phased return and/or workplace adjustment to duties and workstation in March 2020 and June 2020* – This claim failed for the reasons set out at paragraphs 350 and 351. It could not arguably form the basis for any continuing act linking back to any of the Claimant's other out of time claims as: (i) the

doctor's advice was not received by the Respondent until 19 June 2020; (ii) the workplace adjustments sought were being dealt with by Mr Zemaitis who had no involvement with the Claimant prior to the end of January 2020 and no material connection with any of the individuals against whom the Claimant's earlier allegations were made; and (iii) the recommendation for a phased return related only to the circumstances arising from the Claimant's sickness absence which commenced on 6 February 2020 and had no link to anything that happened previously for the reasons we set out at paragraph 363;

b. *Failing to award the Claimant a pay rise in the annual pay rise occurring in 2019 and 2020* – These claims failed for the reasons set out at paragraph 343. The claim about the 2020 pay was itself out of time, in our judgment, because as a claim about an omission s 123(3)(b) applies and the decision on pay was taken prior to compensation communication day, which Mr Niforas informed the Claimant would be 29 May 2020 (paragraph 209). In any event, even if the 2020 decision was 'in time', decisions on pay were, in our judgment, one-off acts each year, albeit acts with continuing consequences and we do not accept that the 2020 decision could have been regarded as a continuing act with the 2019 decision even though both were taken by Mr Syson. Further, even if there were a continuing act in relation to pay decisions in the 2019 and 2020, these were the only allegations that the Claimant levelled at Mr Syson and we do not consider that there was anything that could arguably link his decisions to the other matters about which the Claimant complained. Although pay decisions were linked to promotion, even if Mr Niforas had been discriminating against the Claimant in relation to promotion, it would not follow that race formed any part of Mr Syson's reasons for not increasing his pay. There is simply no evidence to link Mr Syson's mindset about the Claimant to that of any other employee at the respondent about whom we have heard.

c. *Failure to carry out a health and safety risk assessment of the Claimant's work station for 8 months from April 2019 until 14 January 2020 and recommendations never completed prior to 15 July 2020* – We rejected these claims for the reasons set out at paragraphs 338 to 342. In our judgment, the allegation about failure to complete the workstation assessment (which was in the end completed in January 2020, well outside the primary time limit) was quite separate to the question of what happened thereafter. Ms Owen was responsible for the failure to complete, and she then handed over to Mr Zemaitis. While there could have been a continuing act in relation to the failure to implement the recommendations, that could in our judgment only have extended back to Mr Zemaitis' involvement and as there was no allegation against him personally, and no link between him and any of the other acts, this could provide no link to any of the Claimant's other claims.

d. *The Respondent informing the Claimant that he would be required to return to work on a phased basis from 23 March 2020 at a time when the*

Claimant was awaiting a response to his letter of 9 March 2020 and asking for adjustment to workstation and changes to duties advised by the Claimant's doctor, followed up on 19 June and 4 July 2020 – This allegation was not made out on the facts because the Respondent never did inform the Claimant he would be required to return to work on a phased basis from 23 March 2020 as the Claimant deliberately did not send the GP's note to the Respondent until 19 June, by which time the recommended period of phased return had long past: see paragraphs 190 and 233.

16. We have also considered whether the change in our understanding of the claims that were 'in time' would have affected the views we expressed at paragraph 365 about whether it would have been just and equitable to extend time for out of time acts, but we do not consider that they would as all the factors that we mention there are still valid and applicable. We add only that the claim about Mr Niforas' failure to put the Claimant up for promotion with effect from 1 June 2020 was potentially a 'near miss' in terms of the primary time limit, but we would not have looked any more favourably on extending time for that, not only because it was unmeritorious but because, as an act that was arguably continuous with previous promotion decisions because of Mr Niforas' ongoing involvement, it would not have been a case of extending time by one day but of extending time by five years so that all the factors that we mention in paragraph 365 about justice and equity of extending time over such a long period in this case would have applied. Alternatively, if promotion decisions were one-off acts, then extending time for the 1 June 2020 promotion decision would still not have been just and equitable because the Claimant's claim in relation to that decision was particularly weak.

17. For all these reasons, although we have amended paragraphs 362 to 366 of the re-issued judgment to reflect the correct time limit date and claims as we now accept them to be, this does not change our overall conclusion about how time limits apply to the Claimant's case (if we are wrong in any respect about our conclusions on the merits). We have not, however, incorporated all the above reasoning into the reissued Liability Judgment to avoid adding further to what is already a very long judgment, especially given that the time limits section was, as we made clear originally, academic in the light of our other conclusions.

29 November 2017 equipment request

18. We also record that at this hearing the Judge noticed that there was one additional factual error that the Claimant had identified in his original reconsideration request that the Judge had not recognised as such when preparing the Judgment and Preliminary Views on the Reconsideration Application. The point was more obvious in the Claimant's submissions of 7 July 2023 (page 6 of 9 of those submissions). The Claimant draws attention to GB2/159 which is an email from the Claimant to Mr Niforas of 29 November 2017 at 17.13pm concerning his request for screen protectors that we dealt with at paragraph 120 of the Liability Judgment. In this email, the Claimant forwards to Mr Niforas his communication with CAF – Facilities Helpdesk and asks him whether he can approve the cost of purchase of those screen protectors as CAF – Facilities Helpdesk have asked. The Claimant did not refer to this email in his witness statement, which gave the

impression (as recorded in our paragraph 120) that his assertion was that this request was made through the online system. The email was not referred to at all during the hearing and none of the Tribunal recalled seeing it. In those circumstances, there is no arguable basis for reconsidering the judgment to take it into account. The onus is on the parties to present their cases and this is an instance of the Claimant seeking to re-argue the case on the basis of material that he did have the opportunity to present the first time round. This is contrary to the important principle of finality in litigation and it is not in the interests of justice even to vary the judgment to take it into account as dealing with this point would require further factual evidence about whether Mr Niforas replied to this email and, if not, why not and, if he did not, why the Claimant did not speak to him about it given that CAF – Facilities Helpdesk were evidently willing to purchase the item if the cost was approved. Indeed, we observe that the emergence of this email at this late stage really underscores our general concerns about the evidence that was available to us in relation to the equipment requests given the historic nature of these claims (as we mentioned in paragraph 365).

Final note bene

19. We realised on seeing our Liability Judgment in the form that it was sent to the parties that some of the automatic cross-references we have used developed error messages in the version sent out by the Tribunal administration. We apologise for that, and apologise for the fact that it may happen again as the problem is not apparent on the version of the Judgment that we have prepared and are sending for promulgation.

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Employment Judge Stout

21 July 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

21/07/2023

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FOR THE TRIBUNAL OFFICE