EMPLOYMENT TRIBUNALS

Claimant: Ms P Austin

Respondent: Mears Group plc

Tribunal: Employment Judge Quill; Ms J Hancock; Mr D Wharton

Appearances: Decision on the papers without the parties present

JUDGMENT

1. The panel has decided to vary the remedy judgment which was sent to the parties on 10 October 2022.

2. The revised figures will be supplied in a new judgment in due course. Our reasons below explain the revised figures prior to the grossing up exercise.

REASONS

1. Rules 70-72 of the Tribunal Rules provides as follows:

70. Principles
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.

71. Application
Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

72. Process
(1) 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. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to

any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

2. The Tribunal has discretion to reconsider a judgment if it considers it in the interests of justice to do so. Rule 72(1) requires the judge to dismiss the application if the judge decides that there is no reasonable prospect of the original decision being varied or revoked. Otherwise, the application is dealt with under the remainder of Rule 72.

3. In deciding whether or not to reconsider the judgment, the tribunal has a broad discretion, which must be exercised judicially, having regard not only to the interests of the party seeking the 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.

4. Under the current version of the rules, there is a single ground for reconsideration — namely, *"*where it is necessary in the interests of justice*".* This contrasts with the position under the 2004 rules, where there specified grounds upon which a tribunal could review a judgment.

5. When deciding what is "necessary in the interests of justice", it is important to have regard to the overriding objective to deal with cases fairly and justly, which includes: ensuring that the parties are on an equal footing; dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense.

6. In Outasight VB Ltd v Brown 2015 ICR D11, the EAT explained that the revision to the rules had not been intended to make it more easy or more difficult to succeed in a reconsideration application. In the new version of the rules, it had not been necessary to repeat the other specific grounds for an application because an application relying on any of those other arguments can still be made in reliance on the "interests of justice" grounds.

7. Previous appellate decisions, even under the pre-2013 rules, can provide helpful guidance to a judge, but they are not intended as a checklist. The individual circumstances of the particular application have to be considered on their own merits. This is a point which has been made several times at

appellate level, and was re-emphasised recently but the Court of Appeal in Phipps v Priory Education Services Neutral Citation Number: [2023] EWCA Civ 652, where it was said:

> The interests of justice test is broad-textured and should not be so encrusted with case law that decisions are made by resort to phrases or labels drawn from the authorities rather than on a careful assessment of what justice requires. The ET has a wide discretion in such cases. But dealing with cases justly requires that they be dealt with in accordance with recognised principles

8. That being said, there may be some types of application that rely on very commonplace arguments/reasons. For those, it is likely that the interests of justice will be best served by the tribunal considering whether there are well-established guidelines for addressing the argument in question. For example, as discussed in Outasight, where the commonplace argument is made that the applicant thinks that there is "new evidence" which means that the judgment should be revoked or varied, the interests of justice are likely to be best served by the Tribunal asking itself the questions posed by Ladd v Marshall [1954] 3 All ER 745, CA (as a starting point, at least). This is not a straitjacket which prevents the application being decided on its own merits, but a useful tool which helps to ensure a level of consistency of approach, which is part of what the "interests of justice" requires.

9. It is not unheard for a party to argue that some event which has occurred since the judgment shows that the Tribunal was "wrong". Usually (though not always) this will be an assertion that the Tribunal's assessment of the likelihood/probability of particular future events has been proven wrong; for example, where reasons for a remedy decision explained that the Tribunal thought it very unlikely that the claimant would ever work again, and they were actually able to start a new job shortly afterwards.

10. A remedy judgment is never made on the basis that the Tribunal believes that it knows with certainty what the future holds. Thus, for example, where the Tribunal's assessment was that a particular future event was unlikely, but the event did occur, then it does not necessarily follow that the Tribunal got it "wrong". Low probability events do occur some of the time.

11. All reconsideration decisions must take account of the public interest in finality of judgments. However, that is especially important when the application relies on events occurring after judgment. There is no rule that remedy judgments are left open, with the parties having the right to come back to the Tribunal every time (for example) the claimant gets a new job, or loses a job, or gets a pay increase, or dies, etc. For reconsideration to be granted, there has to be something more than just a simple argument that "now we know what did happen, we can do away with the speculation about future events that was part of the judgment/reasons".

12. In Yorkshire Engineering & Welding Co Ltd v Burnham 1974 ICR 77, the appeal court said that a tribunal deciding whether to review its decision (because of events occurring after the remedy judgment) should decide whether the forecasts upon which the remedy decision was based have been falsified sufficiently to invalidate the assessment and whether this was so soon after the decision that a review was necessary in the interests of justice. On the facts, the tribunal had been right to refuse reconsideration since the future events after the decision (the tribunal decided, and the appeal court agreed) were not substantially different from what was forecast. On the facts, the tribunal had made an assessment of what the claimant's future weekly earnings were likely to be. By the time of the reconsideration application, it was known that the claimant had obtained a job in which the earnings were approximately 11% higher. While the size of percentage difference was not the only (or even the main) reason for deciding that there had been no need to grant reconsideration, size of the difference was part of the factual matrix which led the court to decide that "*the sort of errors of prognostication which have been pointed to by both the parties in this case fall well within the range of error which is inherent in any form of forecasting and provide no ground at all for the tribunal to be asked to review its decision*."

13. In Help the Aged Housing Association (Scotland) v Vidler, 1977 IRLR 104, the EAT upheld an argument that the Tribunal should have granted reconsideration, and the EAT granted reconsideration and reassessed remedy. It accepted that the analysis in Burnham was correct, and sought to rely on and apply Burnham. The proper test was (1) whether the forecasts on which the tribunal based their decision had been sufficiently falsified to an extent that invalidated the assessment and (2) whether this occurred soon enough after the decision that a review was necessary in the interests of justice. On the facts, where the Claimant had been considered unlikely to get a job prior to retirement age, but had obtained one shortly after the remedy decision (albeit at a lower salary), reconsideration should have been granted. The EAT held that the tribunal's assessment that they would award two years' loss of earnings, based on the salary of the old job, had been reasonable at the time it was made; even so, the difference between the actual events and the projected events was so stark that reconsideration was appropriate. The award was reduced by about 36%.

14. Future decisions of third parties can potentially be taken into account. For example, in Ladup Ltd v Barnes 1982 ICR 107, the EAT's decision was that the tribunal was wrong to refuse reconsideration where the employer's argument had been that the Crown Court's decision (later than the tribunal's remedy decision) on criminal liability should have been a good enough reason for the tribunal to reassess its decision on contributory fault.

15. The situation remains, as it had been prior to the 2013 rules, that it is not necessary for the applicant to go as far as demonstrating that there were

exceptional circumstances justifying reconsideration. There does, however, have to be a good enough justification to overcome the fact that, when issued, judgments are intended to be final (subject to appeal) and that there is therefore a significant difference between asking for a particular matter to be taken into account before judgment (even very late in the day) and after judgment. 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 application and the documents

16. The respondent submitted an application dated **4 January 2023**, within the relevant time limit, seeking reconsideration.

17. This was considered by the judge (EJ Quill) who did not dismiss it as having no reasonable prospects of success. Both parties were invited to make submissions and to comment on whether a hearing was needed. Both parties were content, as was the Tribunal, that a decision could be made on the papers.

18. As the parties had been told would happen, the panel convened in chambers (by video) on 10 August 2023 to make a decision.

19. As well as the original bundles and statements (from liability hearing and remedy hearing respectively), and the correspondence sent by the Tribunal to the parties, we had:
    19.1. The Respondent's 4 January 2023 application;
    19.2. The Respondent's 3 April 2023 email with attachments
    19.3. The Claimant's 2 May 2023 email with attachments
    19.4. The Respondent's 15 June 2023 email with attachments
    19.5. The Claimant's supplemental bundle and further grounds for resisting the application dated 31 July 2023

Analysis and Conclusions

20. Our remedy reasons mentioned that we had received some information about UNUM, and payments by it to the Respondent and the Claimant, during the liability hearing. We discussed those payments in our liability reasons in paragraphs 42 to 55 and 114, and we took into account those findings/assessments in our calculations.

21. In reaching those conclusions, we had carefully taken into account the

information supplied to us by the parties, including a 24 December 2019 letter sent by UNUM to the Claimant (page 189 of remedy bundle), and a 20 May 2022 email sent by UNUM to the Respondent (page 199 of remedy bundle and the 29th page of the electronic bundle sent for this hearing).

22. A major concern that we had at the time was that those documents created no enforceable rights for the Claimant. In particular, if there ever came a time when the Claimant believed that UNUM had done something which was inconsistent with those documents, that would not give her the right to ask a court, tribunal or other body to order UNUM to make payments to her. Our assessment on that point has not changed.

23. A major concern that we had at the time was that those documents were open to interpretation. We were aware that UNUM were aware that, after her injury, the Claimant had not left the Respondent's employment and that she had, in fact, resumed carrying out duties for the Respondent, albeit on reduced hours and working from home. (She had also changed job title and job description, for the reasons set out in the liability decision, which was not argued to be because of the injury.) We were aware that, while in possession of that information, UNUM had been content that the terms of its policy did require it to make payments to the Respondent.

24. However, we were also aware that, as stated in its correspondence to the Claimant, the fact that she had been eligible while doing part-time work for the Respondent might not be a good enough reason for her to be confident that she would receive payments if she did (part-time) work after cessation of employment with the Respondent. The 24 December 2019 letter said:

> This benefit is being paid to you under the terms of the above group policy with the exception that after a period of 12 months of direct payments, the definition of incapacity changes so that it requires you to be unable to perform the material and substantial duties of your previous occupation and any other occupation for which you are reasonably fitted by training, education or experience.
>
> This means that benefit will only continue after the 12-month period if, and for as long as, we are satisfied that you are totally unable to perform your own occupation and any other occupation for which we consider you reasonably fitted. In the event of benefit ceasing, your cover under the above scheme ceases as well. In that event, the 'linked claim' provisions, where further benefit can be paid in the event of you subsequently becoming incapacitated again from the same cause, will not apply.

25. The 20 May 2022 email reiterated that "*The revised definition of incapacity … which apply are set out in our letter to Ms Austin dated 24 December 2019*".

26. At the time of our liability decision, the Claimant had informed UNUM about a new job and was waiting on their decision. One possible outcome was a

decision to continue benefits, but reduce them pro rata to take account of the income from the part-time job (and the 20 May 2022 email supplied a formula); another possible outcome was to decide that payments would cease completely.

27. As discussed more fully in the remedy reasons, we had to assess the likelihood of UNUM continuing to make payments to the Claimant in circumstances in which it had no legal obligation to do so, and was operating on a purely discretionary basis, and was, in any event, relying on the definition of "incapacity" which it had stated in December 2019 and May 2022.

28. Against that background, we decided to assess the Claimant's losses on the assumption that UNUM would pay her until 31 December 2022, and then cease.

29. In due course, after the remedy decision, UNUM did contact the Claimant. It told her that it was not cancelling the discretionary payments that it was making to her. It told her that it had assessed the income that she would receive from the new job and it would pay her a reduced amount (but not zero). There was some overpayment. It has paid her £1897.99 for the month of January 2023, and £2156.25 per month thereafter. These are the net figures as supplied by the Claimant's legal team. (We have not been supplied with the gross, and do not necessarily need to have them confirmed; as far as we know, as per the 24 December 2019 letter, 20% of the gross is still deducted at source.)

30. Had we been sure that the Claimant would receive £2156.25 net per month from UNUM during 2023 when we reached our remedy decision in September 2022, then we definitely would not have assessed remedy on the basis of there being no UNUM payments after 31 December 2022.

31. The mere fact alone, however, that the actual losses potentially turned out to be lower than the assessed losses does not necessarily mean that the interests of justice require a redetermination. See Burnham.

32. In this case, neither the Claimant nor the Respondent was to blame for the fact that UNUM had not made a decision by September 2022. It is a surprising failure on the part of the Respondent and/or its legal representatives that it had ceased to use UNUM as an insurer in June 2020 but had allowed the litigation to proceed (including liability hearing, remedy hearing, reconsideration application, information supplied by the parties relating to reconsideration application) without revealing this information until 15 June 2023. The strength of the Respondent's arguments in support of the reconsideration application is not bolstered by the fact that it is no longer using UNUM. Nor does the fact that the Respondent is no longer using UNUM make it any easier for the Claimant to obtain information from UNUM.

33. However, the fact is, that UNUM had not made a decision by the time of the remedy hearing, and we, the panel, therefore had to assess what their decision *might* be. We believed that there was a high risk to the Claimant that UNUM might decide it had no obligation to her, especially once it was told about the Tribunal's award.

34. Our decision, taking into account Burnham and Vidler, is that the forecasts on which we based our remedy decision have been falsified to an extent that invalidated the assessment for 2023. This occurred so soon after the decision that a change to our decision is necessary in the interests of justice.

35. Having decided that there should be some change, to reflect that payments have continued during 2023 (at a rate of more than £25,000 net per annum), that requires us to decide what the revised compensation award should be.

36. In our judgment, the fact that, so far, UNUM has continued to make payments to the Claimant is not analogous to a claimant (like Vidler, for example) obtaining a new job. In the normal run of things, when a claimant has a new job before the remedy hearing (assuming it is not a fixed term contract, at least) their losses are likely to be assessed on the basis that they will stay in the new job. This is not so much because the tribunal is blind to the possibility of their losing the new job, but more because the tribunal is likely to decide that it is not just and equitable to expect the respondent to be some kind of insurer against the risks of some new and intervening event causing this new job to come to an end.

37. In this case, however, while the Claimant was employed with Mears, she had a contractual right to benefit from the payments (paid to her by Mears) which were underwritten by UNUM. Whereas, following termination of employment, she has no such right. The cause of this change of circumstances was the Respondent's unfair and discriminatory dismissal. There is a risk of UNUM ceasing to make the payments to her. However, if that happens, and the Claimant therefore suffers a loss, it would not be a loss caused by some new and intervening event. It would still be a direct consequence of the Respondent's unlawful actions as identified in the liability decision; UNUM ceasing the payment is not a risk that she faced while she remained employed. She was paid by the Respondent while employed by them, and a decision that she was no longer eligible for the payment protection clause was a finite risk, but she had a contractual right to be paid while eligible, and the means to enforce such contractual rights if breached (or, at the least, the right to a court/tribunal decision on the merits of her argument). The Respondent's unlawful dismissal changed that. She now merely has the aspiration that UNUM will make discretionary payments to her.

38. The 24 December 2019 letter referred to

> As we assess your claim for ongoing eligibility, we will undertake regular reviews. During these reviews I will contact you by telephone on a regular basis to obtain an update from you of your current condition and to advise you what additional information we require to enable us to make a decision on whether or not we can agree ongoing benefit payments.

39. It stated the first review was to be May 2020 (following the discretionary payments commencing June 2019). Although there is no obligation for UNUM to limit its reassessments to one per year (or at all), we think an appropriate assessment of the current award to the Claimant is that there is a 100% chance that it will continue to May 2024. This is the fourth anniversary of the first assessment, and about a year after the Claimant informed them that she planned to start a new job.

40. We do not consider that there is a 100% chance of the payments continuing after May 2024. UNUM has not provided the Claimant with written reasons for why the payments have continued. It has not offered any guarantee that it will not reach a decision in the future that, even if her medical evidence remains the same, it will not either decide she no longer meets the definition of incapacity or else decide to cease exercising its discretion to pay her. The only information that the Claimant has received is the inference to be drawn from the amended payments. She does know that UNUM plans to keep the situation under review.

41. In the original liability reasons, we said:

> if it was [UNUM's] position that they were going to continue to make payments to the Claimant indefinitely (subject only to reductions to take account of what sums she could earn), then they could have told her that already. That is, if UNUM accepted the principle of paying her, subject only some arithmetic about the specific amount, there would be no reason not to tell her that.

42. That is still the panel's assessment of UNUM's position, albeit modified by the knowledge that the new job did not, in and of itself, cause UNUM to decide that the Claimant was outside the definition of incapacity as of August 2022, and did not cause UNUM to decide that it would cease to exercise its discretion in the Claimant's favour from August 2022.

43. Although the onus falls on the panel, rather than the parties, to assess the likelihood of UNUM's future decisions to cease or to continue to make payments to the Claimant, the Claimant made an open offer prior to the remedy hearing to enter into a binding agreement with the Respondent to repay to them all sums received from UNUM in the future on condition that the Respondent agreed to no deductions from the award arising from UNUM's discretion. Our inference is that the Respondent is not sure that UNUM will continue to pay the Claimant indefinitely.

44. Seeking to do justice to both parties, our assessment is that we should reduce the compensation for future loss by a sum roughly equivalent to a quarter of what the Claimant would receive if UNUM carried on paying her at the current rate until her 70th birthday. There is some finite chance that they might carry on paying that long, but also a finite chance that they might cease during 2024. Alternatively, there is a finite chance that they will carry on paying after 2024 and 2025, but still cease the payments long before the Claimant's 70th birthday. There is no precise formula for assessing what UNUM might do in future, but, in all the circumstances, we think its is significantly more likely than not that UNUM will cease the payments before the Claimant's 70th birthday, and that it is significantly more likely to do that much closer to the present day than to that birthday.

New Calculation

45. The Claimant received £1897.99 for one month, January 2023, and then £2156.25 thereafter. Thus, for the period January 2023 to May 2024 inclusive, she will have received [£1897.99 + (14 x £2156.25) =] £32,085.49.

46. From then until her 70th birthday, if she carried on receiving the same £2156.25 per month, she would receive a further (approximately) [206 x £2156.25 =] £444,185.50.

47. However, we did not consider that there is a 100% chance of that. We assessed the chance as being significantly less than 50%. To reflect the chance of the Claimant continuing to receive, after May 2024, some discretionary payment, to which she has no enforceable entitlement, we think the appropriate figure is around 25% of that, which, in round terms, we will assess at £111,000.

48. In our original remedy decision, as explained in paragraph 136 of the reasons, we came up with a figure for aggregate future loss of £515,893.24 (paragraph 136(d)) and then applied a 20% reduction to it for the reasons mentioned in paragraph 136(e).

49. Taking into account our revised decision that there is a 100% chance of the UNUM payment from January 2023 to May 2024 being £32,085.49 and the fact that we are assessing the chance of some further UNUM payments after that date as being worth £111,000, the revised equivalent figure to replace that in paragraph 136(d) is £515,893.24 - £32,085.49 - £111,000 = £372,807.75.

50. Reducing that by 20%, the equivalent figure to the one we arrived at in paragraph 136(e) of the original remedy reasons is £298,246.20.

51. In turn, that would mean that paragraph 137, had we used those figures in

the first place, would have read: So the total of all of the above, prior to any ACAS uplift is [£25,000 + £6,980.83 + £300 + £47,759.62 + £6,686.35 + £298,246.20]. That comes to £384,973.

52. Applying a 20% uplift to that gives an uplift figure of £76,994.6. We stand by the decision described in paragraph 138 of the original reasons, namely that it would not be proportionate to award as much as that. However, we do think that the uplift figure of £50,000 is proportionate. The fact that the uplift figure (based on 20% of eligible compensation) is now lower than in our original reasons is not a reason to reduce the absolute sum for uplift down from £50,000. Our assessment of the appropriate percentage was, and remains, 20%. The fact that we capped it meant that the Claimant was receiving a smaller amount than the sum that a 20% uplift would otherwise have led to. But we did not decide that the uplift should be cut in half for proportionality reasons; we decided to limit it to £50,000.

53. As per paragraph 139 of the original remedy reasons, the new figure, prior to grossing up, is now £434,973 (instead of £549,441.39).

54. We invite the parties to attempt to agree the grossed up figure. If they cannot, the Tribunal will carry out the grossing up exercise. We will make case management orders for that and send them separately.

Employment Judge Quill

Date: 14 August 2023

JUDGMENT SENT TO THE PARTIES ON

14/9/2023

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FOR THE TRIBUNAL OFFICE