Case Number: 2305183/2021 2305065/2021
2305178/2021 2305180/2021 2305182/2021
2305069/2021 2305067/2021 2305066/2021

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr M Qureshi & Ors	v	**Pakistan International Airlines Corporation Limited**

JUDGMENT upon RECONSIDERATION

1. The Tribunal grants the application for reconsideration of its judgment dated 12 May 2023.

2. The Tribunal varies its judgment by adding:

The application to strike out the claims of race discrimination as having no reasonable prospects of success is refused.

REASONS

1. By way of a letter dated 29 May 2023, the respondent made an application for a reconsideration of the decision and reasons of this Tribunal dated 12 May 2023.

2. Any application for the reconsideration of a judgment must be determined in accordance rules 70 to 74 of the Employment Tribunal Rules of Procedure 2013.

Rules

3. The relevant Employment Tribunal rules for this application read as follows:

RECONSIDERATION OF JUDGMENTS

Principles

70. 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.

Application

71. 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.

Process
72.— (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.

4. In accordance with rule 70, a Tribunal may reconsider any judgment "*where it is necessary in the interests of justice to do so*". On reconsideration, the decision may be confirmed, varied or revoked. If it is revoked, it may be taken again.

5. The case authorities remind Tribunals that there is no automatic entitlement to reconsideration for any unsuccessful party. On the contrary, there is an underlying public policy principle in all proceedings of a judicial nature that there should be finality in litigation. Reconsideration of a judgment should be regarded as very much the exception to the general rule that Tribunal decisions should not be reopened and relitigated. In reference to the antecedent review provisions, in **Stevenson v. Golden Wonder Ltd** [1977] IRLR 474 EAT, Lord McDonald said that the (exceptional) process was '*not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before*'.

6. When dealing with the question of reconsideration, a Tribunal must seek to give effect to the overriding objective to deal with cases 'fairly and justly'. The Tribunal should also be guided by the common law principles of natural justice and fairness. Her Honour Judge Eady QC (as she then was) gave guidance as to the approach to

be taken in **Outasight VB Ltd v. Brown** [2015] ICR D11 EAT. Although a tribunal's discretion can be broad, it must be exercised judicially "*which means having regard not only to the interests of the party seeking the review or 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*".

7. Earlier guidance as to the approach of Tribunals to the matter of reconsideration remains equally pertinent. In **Trimble v. Supertravel Ltd** [1982] ICR 440, the EAT made the following observations:

7.1. it is irrelevant whether a tribunal's alleged error is major or minor;

7.2. what is relevant is whether or not a decision has been reached after a procedural mishap;

7.3. since, in that case, the tribunal had reached its decision on the point in issue without hearing representations, it would have been appropriate for it to hear argument and to grant the review if satisfied that it had gone wrong;

7.4. if a matter has been ventilated and properly argued, then any error of law falls to be corrected on appeal and not by review.

8. This Tribunal decided that it was appropriate to reconsider its judgment as the claims included a claim of nationality discrimination which had not been addressed in the original judgment. Submissions had already been made on this issue by both parties at the hearing, the Tribunal invited any further submissions from the parties and decided a further hearing was not necessary. No further submissions were received from the parties.

9. Having ticked the race discrimination box, the ET1s narrate:

In Pakistan under the Voluntary Separation Scheme proper redundancy package was given to employees who took up voluntary redundancy. The Respondent has also treated me differently as my redundancy package was not on parity with other employees who took redundancy in Pakistan. Employees in Pakistan have received substantial enhanced redundancy packages whereas UK employees have only received statutory rights. I contend that I was treated less favourably on the grounds of nationality by deliberate omission of the Respondent by not offering the same redundancy package (VSS).

10. The further particulars provided by the claimants state:

Each ofthe Claimants pursue claims for race discrimination, relying on nationality within the meaning ofs.9(1)(b) ofthe Equality Act 2010.

Each ofthe Claimants are British nationals.

Each of the Claimants rely on a hypothetical comparator, being someone who is a Pakistani national, but is otherwise in materially the same circumstances as the Claimant, within the meaning of s.23 ofthe Equality Act 2010.

Each of the Claimants also rely on a specific comparator, being Mr. Sikander Zia, a finance manager based in Bradford. Mr. Zia is a Pakistani national who was able to apply for and provided with enhanced redundancy terms, which were not available to the Claimants being British nationals.

11. The respondent argues that the EHRC Code states that nationality is "the specific legal relationship between a person and a state through birth or naturalisation" (paragraph 2.38). The claimants claim that the better conditions of Pakistani citizen PIA employees sent to UK to work for PIA as compared to locally employed British citizen staff such as the claimants constitute race discrimination. However the claimant's claims conflict with the guidance on comparators set out in the EHRC code of practice, Employment Statutory Code of Practice. The Equality Act 2010 states that in comparing people for the purpose of direct discrimination there must be no material difference between the circumstances relating to each case. Though it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator. Further at page 52 of the EHRC guidance, so far as relevant states in relation to direct discrimination:

> "The head office of a Japanese company seconds a limited number of staff from Japan to work for its UK subsidiary, alongside locally recruited UK staff. One of these local workers complains that his salary and benefits are lower than those of a secondee from Japan employed at the same grade. Although the two workers are working for the same company at the same grade, the circumstances of the Japanese secondee are materially different. He has been recruited in Japan, reports at least in part to the Japanese parent company, has a different career path and his salary and benefits reflect the fact that he is working abroad. For these reasons, he would not be a suitable comparator."

12. From the information available to the Tribunal, the claimants are all of Pakistani nationality as well as British citizenship [317]. The claimants position is that they are all British Nationals [313 para. 21]. The submission for the respondent focuses on the legal position of multinational company staff however, this Tribunal does not have the facts to determine that the legal proposition is valid. Comparators are names who it is assumed are of a different nationality, if not a hypothetical comparator is identified who would be of a different nationality [313 Para. 22]. The race discrimination claims have been set out by the Tribunal [302 para. 52.1] and do not require a comparator who is seconded from another country. The claim is directed at the alleged failure to pay enhanced redundancy. The list of issues from the 17 February case management hearing shows that this is brought as a breach of contract claim [305 Para. 56].

13. The Tribunal took the claimant's claims at their highest and considered all the material in the round. The basis for the race discrimination claims is easy to understand and the question of whether or not they can be established is a matter for evidence. The Tribunal is not in a position to know and cannot strike all the claims without knowing that there is no validity in any of the claims. The Tribunal decided not to strike out the race discrimination claims. The Tribunal considered a deposit order but considered that the issue of discrimination in the level of redundancy payment should be addressed by the fact finding Tribunal.

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I D Truscott QC Employment Judge

Date: 6 September 2023