EMPLOYMENT TRIBUNALS

Claimant: **Ms A Tann**

Respondent: **Katie Hillier Limited**

Heard at: **East London Hearing Centre**

On: **02 November 2023**
(Claimant's Reconsideration Application dated 21 June 2023 considered per written representations only)

Before: **Employment Judge B Beyzade**
Members: **Ms J Clark**
Mr S Woodhouse

Representation
Claimant: (per written representations)

Respondent: (per written representations)

JUDGMENT ON RECONSIDERATION APPLICATION

The unanimous Judgment of the Tribunal is that:

1) Having considered both parties' written representations on the claimant's unopposed application for reconsideration of the Tribunal's Judgment dated 05 June 2023, and sent to parties on 07 June 2023, in terms that the claimant's claim for unfair dismissal is well founded and it succeeds and the claimant is awarded £0.00 basic award and £1196.17 compensatory award), the claimant's complaint of maternity discrimination pursuant to section 18 of the Equality Act 2010 in relation to the respondent not providing the claimant with 2 months' contractual notice succeeds and the claimant is awarded £4460.00 (gross) in respect of financial loss (subject to deductions in respect of tax and national insurance), and dismissing the claimant's remaining complaints, the Tribunal, after private deliberation, following the Reconsideration Hearing held on 02 November 2023, decided it was in the interests of justice to grant the reconsideration sought by the claimant, and so the Tribunal has granted that reconsideration application (to the extent set out in paragraph 2 of this Judgment below).

2) Paragraph 3 of the Tribunal Judgment dated 07 June 2023 awarding the claimant £4460.00 (gross) in terms of her successful complaint of maternity discrimination pursuant to section 18 of the Equality Act 2010 in relation to not providing the

claimant with two months' contractual notice be varied as follows (the Tribunal has underlined the new text that has been added in terms of its original Judgment below):

"3)The claimant's complaint of maternity discrimination pursuant to section 18 of the Equality Act 2010 in relation to not providing the claimant with 2 months' contractual notice is well founded and it succeeds, and the claimant is awarded £5,666.67 (gross) in respect of financial loss subject to any required deductions for tax and national insurance provided that the respondent remits any such amount to His Majesty's Revenue and Customs and accounts to the claimant for any such payment, £1000.00 injury to feelings and £563.01 interest (the daily rate of interest is £1.47 and the number of days of interest awarded is 383 days). The remainder of the claimant's complaint of maternity discrimination pursuant to section 18 of the Equality Act 2010 is not well founded and it is hereby dismissed."

REASONS

Introduction

1. By a Claim Form dated 21 May 2021 the claimant presented complaints of unfair dismissal (sections 94 and 98 of the Employment Rights Act 1996), unfair dismissal (pursuant to Regulation (10 or 20)(1)(a), and Regulation 20(2) MAPLE and section 99 of the Employment Rights Act 1996), unfavourable treatment because of maternity leave contrary to section 18 of the Equality Act 2010, victimisation (section 27 of the Equality Act 2010), and notice pay – wrongful dismissal, which the respondent denied.

2. A Final Hearing was held on 30 May 2023 – 05 June 2023 by Cloud Video Platform ("CVP"). Following oral Judgment and reasons given to the parties at the end of the hearing on 05 June 2023, a written Judgment was sent to parties on 07 June 2023.

3. This case called before the Tribunal again on 02 November 2023, for a Reconsideration Hearing (in chambers), held at the London East Employment Tribunal. Parties were not required to attend, as the Tribunal directed that a decision will be made without a hearing on the basis of written representations only.

4. The reconsideration application arose out of the Tribunal's Judgment issued to parties on 07 June 2023.

Tribunal's original Judgment

5. On 05 June 2023, following what was a Final Hearing by CVP at the London East Employment Tribunal between 30 May 2023 – 05 June 2023, the Tribunal determined, in terms that the claimant's claim for unfair dismissal is well founded and it succeeds and the claimant is awarded £0.00 basic award and £1196.17 compensatory award), the claimant's complaint of maternity discrimination pursuant to section 18 of the Equality Act 2010 in relation to the respondent not providing the claimant with 2 months' contractual notice succeeds and the claimant is awarded £4460.00 (gross) in respect of financial loss (subject to deductions in respect of tax

and national insurance), and it dismissed the claimant's remaining complaints, and the Tribunal did so for the reasons given at the time in the oral Judgment and Reasons on 05 June 2023.

6. For present purposes, it will suffice to note here the specific terms of the Tribunal's Judgment only, issued in writing on 07 June 2023 (please see below):

"The unanimous Judgment of the Tribunal is that:

1) The claimant's complaint of unfair dismissal is well founded, and it succeeds, and the claimant is awarded £0.00 basic award and £1196.17 compensatory award.

2) The claimant's complaint of automatic unfair dismissal pursuant to section 99 of the Employment Rights Act 1996 and the Maternity and Parental Leave etc. Regulations 1999 is not well founded, and it is hereby dismissed.

3) The claimant's complaint of maternity discrimination pursuant to section 18 of the Equality Act 2010 in relation to not providing the claimant with 2 months' contractual notice is well founded and it succeeds, and the claimant is awarded £4,460.00 (gross) in respect of financial loss subject to any required deductions for tax and national insurance provided that the respondent remits any such amount to His Majesty's Revenue and Customs and accounts to the claimant for any such payment, £1000.00 injury to feelings and £459.60 interest (the daily rate of interest is £1.20 and the number of days of interest awarded is 383 days). The remainder of the claimant's complaint of maternity discrimination pursuant to section 18 of the Equality Act 2010 is not well founded and it is hereby dismissed.

4) The claimant's complaint of victimisation pursuant to section 27 of the Equality Act 2010 is not well founded and it is hereby dismissed.

5) The claimant's complaint in respect of notice pay – wrongful dismissal is not well founded and it is hereby dismissed."

Claimant's reconsideration application

7. On 21 June 2023, the claimant's representative, applied to the Tribunal, on behalf of the claimant, further to Rule 70 of Schedule 1 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* ("the ET Rules"), for reconsideration of the Tribunal's Judgment dated 05 June 2023 and issued on 07 June 2023. Her application was copied to the solicitor for the respondent.

8. Directions were issued to parties on 19 July 2023 in the following terms:

"The Employment Judge's provisional view is that the application to reconsider the judgment should be granted because paragraph 3 of the Tribunal's judgment in which the claimant was "…awarded £4460.00 (gross) in respect of financial loss subject to any required deductions for tax and national insurance provided that the respondent remits any such amount to His Majesty's Revenue and Customs and accounts to the claimant for any such payment…" appears to contain the incorrect gross amount. The claimant's representative explains that the claimant's Schedule of Loss dated 18 August 2021 at pages 42-45 of the agreed Hearing Bundle confirms that the claimant's gross annual basic pay was £34,000 and net monthly basic pay was £2,230.00 (and that the claimant should therefore have been awarded £5666.67 (gross) in respect of financial loss for two months' contractual notice). The claimant's representative points out that those figures were not challenged by the respondent. If the claimant's reconsideration application is granted and paragraph 3 of the Judgment is varied, it is proposed that paragraph 3 be varied as follows (the proposed amendments are identified in bold):

"3)*The claimant's complaint of maternity discrimination pursuant to section 18 of the Equality Act 2010 in relation to not providing the claimant with 2 months' contractual notice is well founded and it succeeds, and the claimant is awarded £**5,666.67** (gross) in respect of financial loss subject to any required deductions for tax and national insurance provided that the respondent remits any such amount to His Majesty's Revenue and Customs and accounts to the claimant for any such payment, £1000.00 injury to feelings and £**563.01** interest (the daily rate of interest is £1.**47** and the number of days of interest awarded is 383 days). The remainder of the claimant's complaint of maternity discrimination pursuant to section 18 of the Equality Act 2010 is not well founded and it is hereby dismissed*."
If the respondent thinks that the judgment should not be reconsidered, the respondent must write to us, giving reasons, by ***25 July 2023.***

The Tribunal's provisional view is that the claimant's reconsideration application could be determined without a hearing. Both parties are asked to write to us by ***25 July 2023*** setting out their views on whether the application can be determined without a hearing."

Respondent's response to reconsideration

9. By email to the London East Employment Tribunal on 12 September 2022, the respondents' solicitor, provided their response (with copy sent to the claimant's solicitor).

10. The respondents' response, prepared by their solicitor, advised that the respondent did not object and indicated that the application can be considered without a hearing.

11. The Tribunal issued further directions to parties on 14 August 2023 advising that the Tribunal considers that the interests of justice do not require a hearing, and further, that the Judgment dated 07 June 2023 should be reconsidered without a hearing. The Tribunal directed that any further representations from the claimant or the respondent (if they wish to make further representations before the Judgment is reconsidered) must be sent to the Tribunal copied to the other party by not later than 4pm on 29 August 2023.

12. No further written representations were made by the claimant's or the respondent's representative.

Relevant law

13. To those submissions, the Tribunal applied the law –

Reconsideration

14. The *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* ("ET Rules") set out the Rules of Procedure in Schedule 1,and those in relation to the reconsideration of judgments at Rules 70 – 73:
"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."

15. When considering such an issue regard must also be had to the Tribunal's overriding objective in Rule 2 of the ET Rules. The Tribunal's "overriding objective" under Rule 2 is to deal with the case fairly and justly. The precise terms of Rule 2 of the ET Rules are as follows:

"Overriding objective

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a)ensuring that the parties are on an equal footing;

(b)dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c)avoiding unnecessary formality and seeking flexibility in the proceedings;

(d)avoiding delay, so far as compatible with proper consideration of the issues; and

(e)saving expense."

16. The approach to be taken to applications for reconsideration was also set out more recently in the case of *Liddington v 2Gether NHS Foundation Trust [2016] UKEAT/0002/16/DA* in the Judgment of Mrs Justice Simler, then President of the EAT, and thereafter Lady Justice Simler (now a Justice of the Supreme Court). The Tribunal is required to:

"1. 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;
2. 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
3. give reasons for concluding that there is nothing in the grounds advanced by the (applicant) that could lead him to vary or revoke his decision."

17. In paragraph 34 and 35 of her Judgment, the then learned EAT President, stated as follows:

"34. In his Reconsideration Judgment the Judge identified 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. In this case, the Judge addressed each ground in turn. He considered whether was anything in each of the particular grounds relied on that might lead him to vary or revoke his decision. For the reasons he gave, he concluded that there was nothing in the grounds advanced by the Claimant that could lead him to vary or revoke his decision, and accordingly he refused the application at the preliminary stage. As he made clear, 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, and the opportunity for appellate intervention in relation to a refusal to order reconsideration is accordingly limited.

35. Where, as here, 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. It seems to me that the Judge was entitled to conclude that reconsideration would not result in a variation or revocation of the decision in this case and that the Judge did not make any error of law in refusing reconsideration accordingly."

18. There is a public policy principle that there must be finality in litigation and reviews or reconsiderations are a limited exception to that principle. In the case of *Stephenson v Golden Wonder Limited [1977] IRLR 474* it was made clear that a review (now a reconsideration) is not a method by which a disappointed litigant gets a "second bite of the cherry". Lord Macdonald said that the review provisions were "*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 produced which was available before*".

19. The Employment Appeal Tribunal went on to say in the case of *Fforde v Black EAT68/80* that this ground does not mean "*that in every case where a litigant is unsuccessful is automatically entitled to have the Tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in even more exceptional cases where something has gone*

radically wrong with the procedure involving the denial of natural justice or something of that order."

20. "In the interests of justice" means the interests of justice to both sides. The Employment Appeal Tribunal provided further guidance in *Reading v EMI Leisure Limited EAT262/81* where it was stated "*when you boil down what it said on [the claimant's] behalf it really comes down to this: that she did not do herself justice at the hearing so justice requires that there should be a second hearing so that she may. Now, "justice", means justice to both parties. It is not said, and, as we see it, cannot be said that any conduct of the case by the employers here caused [the claimant] not to do herself justice. It was, we are afraid, her own inexperience in the situation*."

21. Further, the Tribunal are also reminded of the guidance in *Newcastle upon Tyne City Council – v- Marsden [2010] ICR 743* and in particular the words of Mr Justice Underhill when commenting on the introduction of the overriding objective (now found in Rule 2 of the ET Rules) and the necessity to review previous decisions and on the subject of a review:

"*But it is important not to throw the baby out with the bath-water. As Rimer LJ observed in Jurkowska v Hlmad Ltd. [2008] ICR 841, at para. 19 of his judgment (p. 849), it is "basic" "… that dealing with cases justly requires that they be dealt with in accordance with recognised principles. Those principles may have to be adapted on a case by case basis to meet what are perceived to be the special or exceptional circumstances of a particular case. But they at least provide the structure on the basis of which a just decision can be made*."
"The principles that underlie such decisions as Flint and Lindsay remain valid, and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles. In particular, 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 5 is now), the view that it is unjust to give the losing party a second bite 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 (subject, of course, to appeal")."

22. Further, the Tribunal have also considered the further guidance on the ET Rules from Her Honour Judge Eady QC (now Mrs Justice Eady, EAT President) in her Judgment in *Outasight VB Limited –v- Brown [2014] UKEAT/0253/14*. The Tribunal have considered that guidance and in particular the Tribunal have noted what is said about the grounds for a reconsideration under the ET Rules:

"In my judgment, the 2013 Rules removed the unnecessary (arguably redundant) specific grounds that had been expressly listed in the earlier Rules. Any consideration of an application under one of the specified grounds would have taken the interests of justice into account. The specified grounds can be seen as having provided examples of circumstances in which the interests of justice might allow a review. The previous listing of such examples in the old Rules - and their absence from new - does not provide any reason for treating the application in this case differently simply because it fell to be considered under the "interests of justice" provision of the 2013 Rules. Even if it did not meet the requirements laid down in Rule 34(3)(d) of the 2004 Rules, the ET could have considered whether it should be allowed as in the interests of justice under Rule 34(3)(e). There is no reason why it should then have adopted a more restrictive approach than it was bound to apply under the 2013 Rules".

23. Further, in considering this reconsideration application, the Tribunal have also taken into account the helpful judicial guidance provided by Her Honour Judge Eady QC, in her judgment in *Scranage v Rochdale Metropolitan Borough Council [2018] UKEAT/0032/*17, at paragraph 22, when considering the relevant legal principles, where she stated as follows: -

> "The test for reconsideration under the ET Rules is thus straightforwardly whether such reconsideration is in the interests of justice (see Outasight VB Ltd v Brown UKEAT/0253/14 (21 November 2014, unreported). The "interests of justice" allow for a broad discretion, albeit one that 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."

24. *Outasight VB Ltd v Brown* is, of course, an earlier EAT authority [2014] UKEAT/0253/14, now reported at [2015] ICR D11, also by Her Honour Judge Eady QC, where at paragraphs 27 to 38, the learned EAT Judge (now Mrs Justice Eady, EAT President) reviewed the legal principles. The EAT President, then Mr Justice Langstaff, in *Dundee City Council v Malcolm [2016] UKEATS/0019-21/15*, at paragraph 20, states that the ET Rules effected no change of substance to the previous Rules, and that they do not permit a claimant to have a second bite of the cherry, and the broader interests of justice, in particular an interest in the finality of litigation, remained just as important after the change as it had been before.

25. Further, the Tribunal have also taken into account the Court of Appeal's Judgment, in *Ministry of Justice v Burton & Another [2016] EWCA Civ.714*, also reported at *[2016] ICR 1128*, where Lord Justice Elias, a former EAT President, at paragraph 25, refers, without demur, to the principles "recently affirmed by HH Judge Eady in the EAT in Outasight VB Ltd v Brown UKEAT/0253/14."

26. Specifically, at paragraph 21 in Burton, Lord Justice Elias had stated that:
> "An employment tribunal has a power to review a decision "where it is necessary in the interests of justice": see Rule 70 of the Tribunal Rules. This was one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, as Underhill J, as he was, pointed out in Newcastle on 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…"

Discussion and decision

27. On the basis of parties' submissions (and relevant documents) the Tribunal disposes of the issues identified at the outset of the hearing as follows –

Claimant's reconsideration application

28. The Tribunal have now carefully considered both parties' written submissions, the Tribunal's own notes of the evidence, and also, in terms of submissions made by respondent and by the claimant's representatives at the Final Hearing on 30 May 2023 – 05 June 2023, at the Reconsideration Hearing (in chambers) on 02 November 2023, and also the Tribunal's own obligations under Rule 2 of the ET Rules (the Tribunal's overriding objective to deal with the case fairly and justly).

29. We consider that both parties have been given a reasonable opportunity, in advance of this Reconsideration Hearing, to make their own written representations pursuing, and opposing, as the case may be, the claimant's application for reconsideration of the Tribunal's original Judgment of 07 June 2023.

30. On the test of "*in the interests of justice*", under Rule 70 of the ET Rules, which is what gives this Tribunal jurisdiction in this matter, there is now only one ground for "*reconsideration*", being that reconsideration "*is necessary in the interests of justice*." That phrase is not defined in the ET Rules, but it is generally accepted that it encompasses the five separate grounds upon which a Tribunal could "review" a Judgment under the former 2004 Rules.

31. While there are many similarities between the former and current Rules, there are some differences between the current Rules 70 to 73 and the former Rules 33 to 36. Reconsideration of a Judgment is one of the two possible ways that a party can challenge a Tribunal's Judgment. The other way, of course, is by appeal to the Employment Appeal Tribunal ("EAT").

32. Rule 70 confers a general power on the Tribunal, and it stands in contrast to the appellate jurisdiction of the EAT. In most cases, a reconsideration will deal with matters more quickly and at less expense than an appeal.

33. Having assessed the submissions and representations made to the Tribunal by both the respondent's representative and the claimant's representative, the Tribunal is of the view that this reconsideration application should be granted because it is in the interests of justice to grant the claimant's application (to the extent referred to below):

> "3)The claimant's complaint of maternity discrimination pursuant to section 18 of the Equality Act 2010 in relation to not providing the claimant with 2 months' contractual notice is well founded and it succeeds, and the claimant is awarded £5,666.67 (gross) in respect of financial loss subject to any required deductions for tax and national insurance provided that the respondent remits any such amount to His Majesty's Revenue and Customs and accounts to the claimant for any such payment, £1000.00 injury to feelings and £563.01 interest (the daily rate of interest is £1.47 and the number of days of interest awarded is 383 days). The remainder of the claimant's complaint of maternity discrimination pursuant to section 18 of the Equality Act 2010 is not well founded and it is hereby dismissed."

34. The Tribunal has determined that the application to reconsider the Judgment dated 07 June 2023 should be granted because paragraph 3 of the Tribunal's Judgment in which the claimant was "…awarded £4460.00 (gross) in respect of financial loss subject to any required deductions for tax and national insurance provided that the respondent remits any such amount to His Majesty's Revenue and Customs and accounts to the claimant for any such payment…" contains the incorrect gross amount.

35. The claimant's representative explains that the claimant's Schedule of Loss dated 18 August 2021 at pages 42-45 of the agreed Hearing Bundle confirms that the claimant's gross annual basic pay was £34,000 and net monthly basic pay was £2,230.00 (and that the claimant should therefore have been awarded £5666.67 (gross) in respect of financial loss for two months' contractual notice).

36. The claimant's representative points out that those figures were not challenged by the respondent's representative. The respondent did not lodge any objections in response to the claimant's reconsideration application.

37. In light of the forgoing, we have set out the variation to paragraph 3 of the Judgment dated 07 June 2023 above (the amendments are underlined for ease of reference).

Employment Judge Beyzade
Date: 02 November 2023