Case No: 1600772/2016

EMPLOYMENT TRIBUNALS

Claimant: Mrs J Climer-Jones

Respondent: Cardiff and Vale University Local Health Board

Heard at: Cardiff **On:** 31 July 2023, 1 and 2 August 2023

Before: Employment Judge S Moore
Mrs K Bishop
Mr P Bradney

Representation
Claimant: Mr Ohringer, Counsel
Respondent: Mr K Bryant, Kings Counsel

UPON a reconsideration of the judgment dated 24 August 2023 the Tribunal's own initiative under rule 73 of the Employment Tribunals Rules of Procedure 2013, and without a hearing the judgment is varied as shown in BLOCK TYPE at paragraphs 50 as follows:

50. Taking into account all of that information, in particular the Welsh medium salary, we find that the claimant **SHOULD BE TREATED AS BEING IN RECEIPT OF THE PEGGED SALARY LEVEL OF £39904.25 FROM 22 JULY 2023 UNTIL 31 AUGUST 2032.** By September 2032 the Claimant would be earning £45,000. We find that that salary would then remain static given the Wales medium until her retirement, subject to inflationary pay rises. The pension loss in respect of the "new job facts" should be assessed on these amounts.

REASONS

1. Oral judgment was given on 2 August 2023. On writing up the decision the Tribunal reached the view of it's own initiative that in the interests of justice paragraph 50 of the judgment needed to be reconsidered.

2. The parties were invited to comment in accordance with Rule 72 (1). The respondent's comments were received on 8 September 2023. The claimant's comments were received on 4 October 2023. On 31 October 2023 Judge Moore informed the parties that she considered it was not in the interests of justice to have a hearing and parties could make further representations within 7 days.

The Law

3. The Tribunal's power to reconsider judgments are contained within Rules 70 to 73 of the Employment Tribunal Rules of Procedure 2013. Rule 70 provides it may confirm, vary or revoke the judgment where it is necessary in the interest of justice. The process is contained with Rule 72. Rule 73 deals with the tribunal's ability to reconsider a decision of their own initiative. Where the tribunal proposes to do so, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72 (2) as if an application had been made and not refused.

4. The Tribunal must follow Rule 72 in the order provided for within that rule (TW White & Sons Ltd v White UKEAT 0022/21). In exercising the power the Tribunal must do so in accordance with the overriding objective.

5. In Ministry of Justice v Burton and another [2016] ICR 1128, Elias LJ approved the comments of Underhill J in Newcastle upon Tyne City Council v Marsden [2010] ICR 743, that 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. Further, that 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.

6. In Liddington v 2Gether NHS Foundation Trust UKEAT/0002/16 Simler P held:

   "..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."

Conclusions

7. The first (corrected) judgment on remedy is dated 15 April ("JR1").

8. The second judgment on remedy is dated 18 October 2021 ("JR2").

9. The third judgment on remedy related to Pension Loss is dated 24 August 2023 ("JR3").

10. In JR1 we concluded that whilst the claimant would never again be able to work in the NHS in a clinical role she would be well suited to a non clinical role in the private sector and would mitigate her loss two years from the conclusion of these proceedings. We awarded the claimant two year's future loss of earnings (see paragraphs 177, 178 and 182 - 184 of JR1).

11. In JR2 at paragraph 33 we found that as of 22 July 2023 the claimant's salary, had she not been unlawfully dismissed, would have been £39904.85.

12. In JR3, at paragraph 50 of the judgment we found that the claimant would have been earning £35,000 by September 2027. This was in the context of finding facts about the claimant's new job prospects after retraining to be an Architectural technologist. The actual position with the claimant was known by the third remedy hearing and it had changed for the predictive findings of fact we had to make in July 2021. These were that the claimant had not returned to a clinical role in the private sector but had instead decided to retrain as an Architectural technologist. This attracted a lower salary than we found (in July 2021) the claimant would have been earning by July 2023.

13. The Tribunal finds it would be an error to make different findings about the claimant's salary in the "new job" findings of fact that contradict the earlier findings and notwithstanding the evidence that was available in August 2023, we are bound by an earlier finding that up as of 22 July 2023 the claimant would have been earning £39904.85, which is more than we consider she will now actually earn given her decision to retrain.

14. In JR3 the Tribunal acknowledged that the salary was "pegged" until 22 July 2023 at paragraph 43 of JR3. However in error we went on to conclude that the pension loss should be calculated based on the claimant earning £35,000 by September 2027.

15. The Tribunal had indicated in the summary oral reasons they had charted salary figures for the new job findings and these were subsequently set out in paragraph 49 of the written reasons.

16. There were already findings made about the salary progression in the new job. We consider it to be in the interests of justice to vary the order as to do otherwise would give rise to an error in law.

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Employment Judge S Moore

Date: 14 November 2023

JUDGMENT SENT TO THE PARTIES ON 24 November 2023

FOR THE TRIBUNAL OFFICE Mr N Roche