Case Number: 3311578/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Ian Bye	**v**	Amey Services Ltd

UPON THE CLAIMANT'S APPLICATION dated 20 December 2023, made pursuant to rule 71 of the Employment Tribunals Rules of Procedure 2013, for reconsideration of the Judgment dated 26 October 2023 (sent to the parties on 8 December 2023).

JUDGMENT on RECONSIDERATION APPLICATION

1. The Tribunal determines that a hearing is not necessary in the interests of justice.

2. Employment Judge Tynan declines to recuse himself from considering the Claimant's reconsideration application.

3. The Claimant's reconsideration application is refused.

REASONS

1. The Tribunal gave a Reserved Judgment on 26 October 2023 following a hearing on 5 and 6 October 2023 and struck out the claim ("the Judgment"). The Claimant has applied for reconsideration of the Judgment. His application, which is dated 20 December 2023, runs to some 93 pages, inclusive of the Appendix to it. Many of the points raised in paragraphs 172 to 477 of the application, under the heading "Detailed Assessment Of Reserved Judgment", go to the question of whether my findings and conclusions were contrary to the weight of evidence; they essentially repeat points already made by the Claimant earlier in the application and, in many respects, rehearse the arguments he put forward on 5 and 6 October 2023, including in his written submissions. Nevertheless, I confirm that I have read the application, including its Appendix, in its entirety and that I have given careful consideration to all of the points made by the Claimant.

2. I am satisfied that the interests of justice do not require that there is a hearing to determine the Claimant's application for reconsideration, including his allegations of bias, and that I can deal with these matters fairly and justly on the strength of what is a detailed written application.

3. Rule 70 of the Employment Tribunal Rules of Procedure 2013 empowers the Tribunal, either on its own initiative or on the application of a party, to reconsider any Judgment where it is necessary in the interests of justice to do so. Rule 71 requires that any application for reconsideration must be presented in writing within 14 days of the date on which the written record, or other written communication, of the original decision is sent to the parties. The Judgement was sent to the parties on 8 December 2023 and accordingly the Claimant's application has been made in time

Bias

4. The Claimant asserts bias. Although he specifically addresses the issue in paragraphs 60 to 99 of his application in a section headed, "The Employment Tribunal's Bias", bias is a recurring and central theme of much of the application.

5. If the assertion of bias is well-founded, I would have to recuse myself from any further involvement in the case, meaning that the application for reconsideration would need to be determined by another Judge. For that reason, I shall address the bias allegations first. I am concerned in this regard with my alleged bias in the matter. Although the Claimant alleges that he was denied a fair hearing by Employment Judge Feeney on 1 March 2023 and also criticises the Employment Appeal Tribunal, these are not matters with which I am directly concerned since they do not touch upon the questions of whether I am biased or have given the appearance of bias such that I should recuse myself.

6. The leading case on the test for bias is the House of Lords judgment in Porter v Magill 2002 2 AC 357, HL. Impartiality requires not only that the Tribunal is independent and free from actual bias but that it must also be free from apparent bias. In that regard, the Tribunal must consider whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the Tribunal was biased. An informed hypothetical observer is someone in possession of the relevant facts and circumstances. In this regard, case law is clear that I must decide for myself whether the allegations warrant recusal rather than pass the decision on to another Judge who is unfamiliar with the hearings, decisions or other matters that have given rise to allegations of bias.

7. As I noted in the Judgment, the Claimant asserted on 5 October 2023 that I was biased, alleging that I had rounded on him on 5 September 2023. As I further noted in the Judgment, no such complaint was made at the time or, it seems, following that hearing through any of the normal channels available to the Claimant. He had arranged for a stenographer

to attend the hearing on 5 September 2023 and I suggested therefore on 5 October 2023 that he identify with reference to the stenographer's notes or transcript any issues of concern, including any comments of mine that might have led him to perceive that I had rounded on him or otherwise was biased or had given the appearance of bias. Following an adjournment, the Claimant informed me that he was no longer asserting bias or the appearance of bias and, as I noted in the Judgment, went on to say that he 'liked' me and admired my judgments in other cases. He did not make any further assertions of bias during the hearing or, to my knowledge, following it. As far as I am aware, his application is the first time since the October 2023 hearing that he has raised the issue of bias. I am slightly concerned therefore to read the Claimant's comments at paragraphs 100 and 108 of his application that, "the ruling was entirely predictable" and that I "clearly did not like the Claimant at hearing". If my conduct of the hearings caused him to question whether I was unfairly disposed towards him, it was incumbent upon him to raise the matter at the time, particularly in circumstances where he had made and then withdrawn an allegation of bias, stating that he liked me and respected my judgements in other cases. The clear inference was that he was confident that I would consider and determine the strike out application in an impartial and judicial manner. The comments I have just referred to could lend an impression that the Claimant took his chances on how the strike out application would turn out, only to suggest that I had given an appearance of bias once it did not go in his favour. Be that as it may, if I proceed on the basis that those comments were intended by the Claimant to be expressed with the benefit of hindsight rather than because of any actual comments or conduct of mine during the hearings themselves, then it would seem that the assertions of bias are rooted solely in the Judgment itself, including whether it may be inferred from the Judgment that I was unfairly disposed towards the Claimant or, as he suggests, that I took a personal dislike to him.

8. I do not consider that I am biased against the Claimant. I have certainly not taken against him personally. I believe the Judgment evidences that I have sought to understand his mental health issues and their effects. In the Judgment I noted that the Claimant's conduct during the hearing on 5 and 6 October 2023 was challenging and explained why. I also described his conduct as disruptive and said that whether or not this was intended, it had served to undermine my authority. I am satisfied that these observations were both well-founded and relevant observations for me to make in the context of the issues I was required to determine. Indeed, it would be surprising if a Judge failed to document in a Judgment or other the record of a hearing that a party's conduct was challenging or disruptive. Judges are expected to keep a reasonable record of the proceedings, that is not limited to the decision itself. My observations and comments do not evidence any personal animus towards the Claimant. I believe that a fair-minded and informed observer would be of the same view.

9. In the absence of actual bias, I cannot discern from the Claimant's application or otherwise identify any facts or matters from which a fair-minded and informed observer would conclude that there was a real possibility that I was biased in arriving at my Judgment. I consider that the application for reconsideration reflects, and would be perceived by a fair-minded and informed observer to reflect, the Claimant's significant disappointment and frustration that his claim was struck out, particularly in circumstances where he considers that various of my findings and conclusions were contrary to the weight of evidence and that I erred in Law, rather than because of an objectively well-founded belief on his part that I was unfairly disposed towards him.

10. As I say, the Claimant considers my decision to be perverse. I consider that a fair-minded and informed observer would view the Reasons as sufficiently detailed and reasoned for the Claimant to understand why I came to the conclusions and made the decision that I did, so as to enable him to pursue his appeal rights as appropriate.

11. I further consider that a fair-minded and informed observer would also take the view that I expressed myself in the Judgment in measured terms, that it is a balanced Judgment notwithstanding the decision ultimately went against the Claimant and, in particular, that I dealt with the Claimant's mental health issues in a sensitive and respectful way. In that latter regard, I believe that a fair-minded and informed observer would not consider that the Judgment evidences I was "entirely intolerant of the Claimant's conduct the product of disability" (paragraph 137 of the application), or that I called into question his deafness, PTSD, bipolar disorder or autism (paragraph 112 of the application); in this further regard, whilst I noted in the course of the Reasons that Dr Fernandez-Egea had questioned the Claimant's bipolar disorder diagnosis and, further, that his report makes no reference to the Claimant's PTSD or autism, I specifically acknowledged at paragraph 56 of the Reasons that the Claimant's disability might explain much of his conduct. Accordingly, I believe that a fair-minded and informed observer would conclude that the Claimant is misconceived when he asserts in paragraph 87 of his application (essentially reiterating the point in paragraphs 116 and 159), that "the ET has entirely denied any link between the Claimant's conduct and his disability"; likewise, when he further asserts that I "cherry-picked authorities to cover [my] biased tracks" in that regard. In my judgment, a fair-minded and informed observer would not consider that I had taken the Claimant's case at its lowest, as he now asserts (paragraph 33 of the application), but instead, and as I said I had done, at its highest.

12. Certain of the Claimant's allegations of bias are presented in terms that fail to reflect the careful and balanced way in which I addressed various issues in the Reasons and dealt with them in the course of the hearing. For example, whereas, at paragraph 37 of the Reasons, I noted that I had "suggested" to the Claimant on 5 October 2023 that he identify with reference to his stenographer's notes, or any transcript, any issues of concern, the Claimant now asserts that I "insisted" he provide a transcript

from the earlier hearing, on the basis that I would not believe his recollection "on a contested point" (paragraph 66 of his application). I did not insist upon anything. That is borne out by the fact that the notes and/or any transcript were not in fact produced to the Tribunal or otherwise relied upon by the Claimant. The Claimant's assertion that I was insistent in the matter is wholly at odds with how I interacted with him on the matter on 5 October 2023. It was a low-key discussion during which, as I have previously said, I suggested that he might want to take me to any relevant exchange in the notes or any transcript, so that I could better understand his comments and any concerns he may have. He chose not to pursue the matter further; that was his decision, even if he now infers that I showed irritation or brought pressure to bear upon him. It is notable in this regard that, away from any perceived pressure in the hearing, the Claimant has not thought fit to repeat his allegation that I rounded on him on 5 September 2023. Having had over 3 months in which to reflect on the 5 September 2023 hearing and to consider any available notes or transcript of the hearing, it may reasonably be assumed that there is nothing in terms of my conduct of that hearing that would support an allegation or inference of bias or require that I recuse myself from the case, since otherwise the Claimant might be expected to have raised it within his reconsideration application, if not sooner.

13. Paragraph 84 of the reconsideration application similarly does not reflect the way in which I dealt with comments by the Claimant to the effect that he did not care whether he won or lost. Whilst I noted the Claimant's alleged comments in paragraph 41 of the Reasons, I did not, as he now asserts, "allow" the Respondent to take them out of context. A judge can be expected to set out the parties' respective submissions in the course of their judgment; which is what I did at paragraph 41. To do is not evidence of bias or of "allowing" one party a platform at the expense of the other. At paragraph 63 of the Reasons I concluded that the Respondent had failed to satisfy me that, in making the comments in question, the Claimant had embarked upon the proceedings with the sole or primary aim of vilifying it or giving gratuitous offence to the Tribunal. In short therefore, I did not accede to the Respondent's application to have the claim struck out under Rule 37(1)(a). I noted in this regard that the Claimant had a plainly arguable case and, indeed that he had been advised by a solicitor specialising in employment law that his claim had reasonable prospects. In the circumstances, I do not accept the Claimant's criticism that I "abjectly failed to counter-evidence to allegations he acted vexatiously" (paragraph 237 of his application). I believe that a fair-minded and informed observer, namely one who read paragraph 63 of the Reasons, would conclude that I had weighed the parties' respective submissions and that I considered the Claimant's comments in context, but that I had ultimately concluded they did not evidence that the claim was scandalous or vexatious as the Respondent had contended. Putting aside that the issue was in fact determined in favour of the Claimant, I believe a fair-minded and informed observer would regard my reasoning and conclusion on this issue as further evidence that I was acting in an impartial and judicial way rather than exhibiting bias.

14. As regards the Claimant's complaint that I believed the Respondent but not him (paragraph 61 of his application), at paragraphs 47 and 61 of the Reasons, I set out why I accepted Mr Coulthard's evidence as to the impact which the Claimant's email of 2 March 2023 had upon him and his wife, and why I could not accept the Claimant's characterisation of the email as "polite". The issue is not whether I believed Mr Coulthard over the Claimant, but why I came to the conclusions that I did. As I did in respect of each of the issues in dispute, I set out my reasons for coming to my decision; a fair-minded and informed observer would regard that as an essential feature of a fair and reasoned judgement, rather than it providing evidence of bias.

15. As regards the point raised in paragraph 64 of the reconsideration application, developed further by the Claimant in paragraphs 488 to 495, I set out in paragraphs 66 to 72 of the Reasons why I considered that it would be proportionate to strike out the claim rather than impose less draconic measures. The Claimant may disagree with my conclusions, but a fair-minded and informed observer, including I suggest one who might not agree with the decision itself, would not conclude that my reasons in that regard evidence bias on my part or lend an appearance of bias.

16. The Claimant complains that I did not look at his bundle (paragraph 70 of his application). I retained his bundle from the 5 September 2023 hearing and had it with me throughout the hearing on 5 and 6 October 2023. As I noted at paragraph 35 of my Reasons, neither party referred to the bundle in the course of the hearing. I did not, as the Respondent alleges, refuse to look at the Respondent ET3 documents or consider the Respondent's findings on his grievance. The ET1, ET3 and any other pleadings are essential reading in every case; this case was no exception. Far from refusing to look at the Respondent's ET3, paragraph 11 of the Reasons evidence that during the hearing I specifically engaged with the Claimant regarding the Respondent's Grounds of Response and that I had a clear grasp of the issues that arose from the pleadings. Likewise, we discussed and I made specific reference in the Reasons to Ms Anderson's findings on the Claimant's grievance, specifically her description of the conversation on 8 April 2022 as having descended into an emotional and heated discussion about personal issues. In the circumstances, I believe that a fair-minded and informed observer would regard as misconceived the Claimant's complaint that I failed to have regard to the pleadings or other relevant documents or evidence, as well as his related assertion that this was in order "to suit [my] biased ruling, cherry-picking evidence to create an entirely unreasonable imbalance in any weighting, so as to be beneficial to the Respondent and very harmful to the Claimant" (paragraph 122 of his application). He returns to the issue at paragraph 162(a) of his application, where he complaints that I treated him and the Respondent "very, very differently". He alleges that I failed to take account of medical evidence and refused to look at evidence that he asked me to consider, albeit he fails to identify the evidence in question. The fact that I listened to his recording of his conversation with Mr Coulthard on 8 April 2022,

engaged with him regarding the Respondent's ET3 and considered Ms Anderson's grievance findings, confirm that I looked at the evidence he wished me to consider. As regards my alleged failure to take account of medical evidence, at the outset of the hearing on 5 October 2023 I asked the Claimant to identify the medical evidence he was relying upon and to which I should have regard, and I kept a careful note of this; I also documented that matter at paragraph 13 of the Reasons. Notwithstanding the relatively limited medical evidence upon which reliance was placed, I took it upon myself to re-familiarise myself with the relevant provisions of the ETBB and, although I was not referred to it by either party, identified for myself that Mr Holborn's report contained relevant information that would assist significantly in an understanding of the Claimant's mental health issues, including why the Claimant's ADHD and acute grief reaction might lead others to perceive him as both defensive and reactive. Again, I do not consider that a fair-minded and informed observer would regard this as evidence of bias on my part, on the contrary they would conclude that I was reasonably seeking to inform myself on the issue of the Claimant's disability and its likely effects.

17. The Claimant complains that I have labelled him as "boastful". In paragraph 70 of the Reasons I said that the Claimant had "boasted" that he was a man of some means. I did so because that is how his comments were perceived by me. The context is that the Respondent was seeking a costs order against the Claimant. I therefore drew the provisions of Rule 84 to the Claimant's attention and afforded him an opportunity to provide the Tribunal with details of his ability or otherwise to meet a costs order. He described himself and his wife as high net worth individuals, stating that they were at the other end of the spectrum to the Claimants I would normally encounter. I thought it unnecessary for him to draw that comparison, indeed that he was potentially stereotyping other Tribunal users. It was not a comparison I had invited given that I was focused on his ability to pay rather than his financial situation relative to others. For these reasons the impression was given that the Claimant was boasting of his wealth. Even if it might have been more judicious for me to simply note that the Claimant had informed me during the hearing that he was a high net worth individual who could meet any order for costs, I do not consider that a fair-minded and informed observer would conclude that the use of the word "boasted" evidences that I regarded him more generally as a boastful individual, that I was poorly disposed towards him or that my comment otherwise lent an appearance of bias, not least in the overall context of a judgment that is, as I have already said, balanced and expressed in measured terms.

18. In all the circumstances, I consider that the allegation of bias are not well-founded and accordingly I decline to recuse myself from further consideration of the Claimant's reconsideration application.

<u>The reconsideration application</u>

19. Turning then to the application for reconsideration, should the Judgment be examined on appeal, it will be for the Employment Appeal Tribunal or

other appellate court to say whether my findings, analysis and conclusions ("the Reasons") and the resulting Judgment can stand. Any suggestion that my findings or conclusions were perverse (for example, in paragraphs 10(c), 41, 50(b), 55 to 58, 66 to 68, 78 to 79, 83, 91 to 99, 101 to 102, 123 to 153, and extensively in paragraphs 172 to 477 of the application) or that I erred in Law (for example, in paragraphs 10(a), 63, 70, 72 to 78, 81, 87, 116, 146 to 147, 149, 155 to 161, 162 and 500 of the application) is generally a matter for appeal rather than reconsideration.

20. In Outasight VB Ltd. v Brown UK EAT/0253/14, the Employment Appeal Tribunal considered the Tribunals' powers under Rule 70 of the Employment Tribunal Rules of Procedure 2013. At paragraphs 27 – 38 of her Judgment Her Honour Judge Eady QC, as she then was, set out the legal principles which govern reconsideration applications, and observed,

> *"The interests of justice have thus long allowed for 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."*

21. The overall impression given by the application is that the Claimant is dissatisfied with my decision and is seeking a 'second bite of the cherry'. In my judgment, it is not necessary in the interests of justice that he should be afforded that opportunity.

22. I shall address two specific points raised by the Claimant at pages 3 to 6 of his application under the heading, 'Unfair application of the 'strike out' process'.

23. Firstly, the Tribunal has not ignored the Claimant's strike out application. Employment Judge Feeney considered his application at the preliminary hearing for case management on 1 March 2023 and, for the reasons in paragraph 17 of the case management summary, declined to list the application for a hearing. It is not necessary in the interests of justice that I re-visit that decision.

24. Secondly, the Claimant has misunderstood my observations at paragraph 12 of my Reasons, with the result that quite a number of his submissions proceed on a misunderstanding. Mr Coulthard described his conversation with the Claimant on 8 April 2022 as "fairly disjointed and erratic". In so doing, he was unaware that the conversation had been covertly recorded by the Claimant. The Claimant believes that the recording provides conclusive evidence that Mr Coulthard is lying in describing the conversation in the terms he does. At paragraph 20 of my Judgment, I noted Mr Holborn's observation that the Claimant's ADHD means he may struggle to accommodate other people's perceptions. Having listened, at the Claimant's request, to the recording he kept of his conversation with Mr Coulthard on 8 April 2022, and having made clear to the Claimant that I would not be making any definitive findings in the matter, I considered that

it was certainly not untenable for Mr Coulthard to say that his impression and recollection of the conversation on 8 April 2022 was that it had been "fairly disjointed and erratic". I did not imply, as the Claimant has come to believe (paragraphs 161(d) and (g) of his application), that Mr Coulthard's description of the conversation was inaccurate or that, in spite of such inaccuracy, I nevertheless entirely believed his evidence. I emphasise, once again, that I made no findings regarding the events of 8 April 2022. On reflection, particularly given the Claimant's evident confusion in the matter, I might have avoided the use of a double negative and simply referred to the Respondent's (and indeed, the Claimant's) position as arguable, namely that there was a legitimate, triable issue between them as to the tenor of the conversation on 8 April 2022, including whether it was unreasonable, or even dishonest, for Mr Coulthard to describe the conversation in the terms he has.

25. For these reasons, the application for reconsideration is refused. It is not necessary in the interests of justice for me to reconsider the Judgment, and there is no reasonable prospect of the original decision being varied or revoked.

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Employment Judge Tynan

Date: 5 January 2024

Sent to the parties on:
22 January 2024.....

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For the Tribunal Office