EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: Open GI Ltd

Heard at: Cambridge by video

On: 7 December 2023 (and 23 January 2024, panel only)

Before: EJ Dobbie, sitting with members Mrs Goding and Mr Allan

Representation
Claimant: In person
Respondent: Miss J Bradbury (Counsel)

These proceedings are the subject of a Restricted Reporting Order and an Anonymisation Order.

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the Respondent's application for reconsideration fails and the original decision is confirmed.

REASONS

Background

1. Judgment on liability was sent to the parties on 19 September 2023 upholding one act of disability discrimination detriment (not dismissal) and the claim for unfair dismissal, with a 100% reduction under both the rule in Polkey and for contribution. All other claims failed. On 2 October 2023, the Respondent applied to reconsider the decision on both claims that were upheld. The remedy hearing proceeded on 7 December 2023 and the parties were invited to make submissions on the reconsideration application at that hearing.

The Law

5. Under Rule 70 of the Employment Tribunal Rules of Procedure 2013 ("the Rules") a judgment will only be reconsidered where it is "necessary in the

interests of justice to do so". A tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases "fairly and justly".

2. The tribunal may exercise its power to reconsider a judgment either on its own initiative or on the application of a party. On reconsideration, the decision may be confirmed, varied or revoked, as set out under Rule 70.

6. Rule 71 provides that an application for reconsideration under Rule 70 must be made in writing (and copied to all other parties) within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties.

7. The process by which the Tribunal considers an application for reconsideration is set out in Rule 72. Rule 72(1) provides that where an Employment Judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application shall be refused and the tribunal shall inform the parties of the refusal.

8. In Outasight VB Ltd v Brown 2015 ICR D11, EAT, Her Honour Judge Eady QC stated at paragraph 33 that:

   "The interests of justice have thus long allowed 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."

9. Guidance for Tribunals on how to approach applications for reconsideration was given by Simler P in the case of Liddington v 2Gether NHS Foundation Trust UKEAT/0002/16/DA. Paragraphs 34 and 35 provide as follows:

   "… 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.

   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."

10. In Ebury Partners UK Ltd v Acton Davis 2023 IRLR 486, EAT, the EAT stated at paragraph 24 that:

    "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. In general, while it may be appropriate to reconsider a decision where there has been some procedural mishap such that a party had been denied a fair and proper opportunity to present his case, the jurisdiction should not be invoked to correct a supposed error made by the ET after the parties have had a fair opportunity to present their cases on the relevant issue. This is particularly the case where the error alleged is one of law which is more appropriately corrected by the EAT."

Conclusions

11. We address the Respondent's submissions in the order set out in the written application.

Unfair dismissal reconsideration

12. The Respondent argues that based on the findings of fact, the tribunal cannot have reached any other conclusion that that dismissal was reasonable. We find that this is an example of the Respondent seeking to have a "second bite at the cherry" rather than identifying some procedural mishap or defect. The Respondent disagrees with the tribunal's conclusion and seeks to persuade the tribunal to change its decision. The Respondent was not denied the opportunity to be heard on these matters. Full submissions were made on the relevant cases and legal principles. We therefore hold that this is not the sort of matter that it is susceptible to reconsideration; that it offends the principle of finality of litigation; and it is not in the interests of justice to reconsider the unfair dismissal finding.

13. In the event that we are wrong on this, we have nonetheless engaged with the Respondent's points as set out in its application and stand by the original decision and confirm it for the following reasons:

14. The tribunal held that Bernie Pelster (BP) genuinely believed X to have behaved in the ways reported. Further, that she reasonably believed the same. However, this only addresses two stages of the test set out in BHS v Burchell 1978 IRLR 379. (Further, as discussed more fully below, the tribunal's finding as to the reasonableness of her belief was as judged at the time she held it. However, this was based on a one-sided account and it cannot be reasonable for her to have moved forward to *dismiss* him at that time in reliance on that one-sided belief having done no investigation as to what X's answer to the allegations might be).

15. In Burchell, the EAT stated that the third element of the test for misconduct dismissals requires the tribunal to consider whether the employer's belief is reasonably formed and reasonably maintained after carrying out as much investigation into the matter as was reasonable in all the circumstances of the case. The fact that BP reasonably believed in X's guilt on 22 August 2022 is not sufficient for a finding of fair dismissal. The belief must be reasonably *maintained* after a reasonable process. Fair processes are not mere formalities. They are procedural safeguards.

16. We held that the process was outside the range of reasonable responses for several reasons, the most serious of which were that X was not given the full charges before being dismissed for them and X had no opportunity to comment on them. BP did not have X's side to the story for each of the

charges when she decided to dismiss X for them and therefore, having failed to conduct any sort of process which would elucidate X's account, her decision was based on a one-sided account. It cannot be said to have been reasonably maintained following a fair process. The procedural failings were extreme and significant, not incidental and minor.

17. In short, whilst it was reasonable for BP to have strongly *suspected* X was guilty of the matters alleged, any such belief would have to have been reviewed and revisited following a reasonable investigation process which invited X's account. It could be said that her belief was premature. A Respondent cannot take a decision at a premature stage, turning a blind eye to the employee's potential explanation and say that because its belief was reasonable at *that* stage (on the one-sided evidence) it was thus reasonable to dismiss the individual for it. That would run a coach and horses through the principles of natural justice and the procedural safeguards inherent within a fair dismissal process.

18. The Respondent reached an unreasonable conclusion not to hold a process at all due to the inability to identify someone to hold the investigation. It cannot be fair and just that a Respondent is permitted in law to forego a fair process merely because its employees are scared or because the charges against the employee are serious. Indeed, the more serious the charges, the more important procedural safeguards are.

19. Turning to the exceptional cases where a process is not necessary because an employer could reasonably conclude that it is futile in the circumstances (the narrow exception to the need to conduct a fair process as set out in Polkey) we do not find that this is such a case. The cases in which that rule have been applied are confined to cases where there are no disputable facts such that it is *reasonable* to conclude that a process could make no difference. We find that logically, the rule must be so confined. Otherwise in any case where the employer has good evidential grounds for suspecting wrongdoing, it could rely on the exception to the rule to argue a process was unnecessary and could not have made a difference. Such an approach almost encourages employers to predetermine an outcome on only half the evidence, rather than hearing the employee out and making a decision on the full evidence.

20. As Browne-Wilkinson J commented in Sillifant v Powell Duffryn Timber Ltd [1983] IRLR 91, giving judgment for the EAT, it will be a very rare case where an employer can reasonably take the view that there could be no explanation or mitigation which would cause him to alter his decision to dismiss. These words were expressly approved by the House of Lords in Polkey. Even in the clearest of cases it is difficult to be confident that a hearing will make no difference. As Megarry J said in John v Rees [1970] Ch 345, [1969] 2 All ER 274:

> "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious", they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not;

of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determination that, by discussion, suffered a change".

21. We reminded ourselves of the facts of Polkey and Duffy v Yeomans and Partners Ltd 1995 ICR 1, CA. Both concerned redundancy situations and failure to fully consult. That was the context within which the exception to the requirement to hold a fair process originated. According to Harvey's on Industrial relations and Employment Law:

"in Spink v Express Foods Group Ltd [1990] IRLR 320 (concerning lack of consultation), the EAT (Wood J presiding) considered that the only circumstances where Lord Bridge was envisaging that consultation would not be necessary would be in circumstances of dismissal by reason of redundancy where, for example, there might be a sudden and immediate financial crisis. However, a more general approach was subsequently taken by Choudhury P in Gallacher v Abellio Scotrail Ltd UKEATS/0027/19 (4 February 2020, unreported), citing this qualification. The claimant was a senior manager who over a considerable period had a deteriorating relationship with her manager, at a time of economic difficulty for the employer. Attempts to rectify this were to little avail and eventually the decision was taken that she had to go. On the advice of HR this was done by due notice but without invoking the employer's normal disciplinary procedure (including no appeal). On her claim for unfair dismissal, the ET held that this was an SOSR case based on breakdown of trust and confidence in the employee and, on the facts, was fair. The claimant appealed but the EAT dismissed the appeal. The President's judgment emphasises that any case where the employer argues that to have gone through procedures would have been futile must be examined carefully by an ET but, citing Polkey, rare cases can occur when such an argument can succeed. Here, the claimant herself had recognised the breakdown, she had done little to remedy it, the organisation was in a difficult position where it was important for the claimant and her manager to work together, and to have invoked the formal procedures would not just have been futile but might actually have worsened the situation. Given these facts found by the ET and accepting that it had set out the law accurately, the EAT held that it was open to the ET to have found that the employer had acted within the range of reasonable responses."

22. Gallacher is an example of a case where the facts were not disputed by the Claimant (she agreed there was an irretrievable breakdown in the working relationship) and the facts found by the tribunal were that a process would in fact have worsened the situation. This is very different from the present case.

23. Whilst we held that the Respondent had lost trust and confidence in X by 22 August 2022, this too was based on its one-sided belief that had not investigated. X had been denied the opportunity to advance any explanation which might have exonerated X or mitigated any allegations. The feelings of lost trust and confidence might have altered had such a process been undertaken.

24. We note that when deciding whether the decision to proceed without a process was reasonable, the decision has to be judged based on the facts known at the time. It is seductively easy to let knowledge of hindsight cloud that judgment, but it is important that we do not. Accordingly, at the time of the decision to dispense with a process, BP did not know what X's answer

might be to the charges if X had been informed of them fully and given an opportunity to comment on them. All she knew was that X denied making the calls and all the evidence she had was listed in the liability judgment at paragraph 103.

25. We also reviewed other cases in which the narrow exception to the rule in Polkey was applied or considered:

    (a) In Heron v Citylink Nottingham [1993] IRLR 372 the EAT held that a tribunal was wrong to conclude that an employer acted fairly in deciding to dismiss an employee for redundancy without consultation, even though he was the only person who could be made redundant. Consultation could not be dispensed with just because the employer reasonably believed that the employee's redundancy was inevitable. The employee may know matters that would affect the outcome such as a willingness to accept a lesser post.

    (b) In the IDS Employment Law Handbook, it reports MacLeod v Murray Quality Foods Ltd EAT 290/90 (unreported) as follows:

    > "M worked in MQF Ltd's factory, which was struggling financially. The factory received a large order from a new customer and it was a matter of some urgency that the order be executed on time. Tea breaks were cancelled until the order was completed. M ignored this instruction and, after being warned that he would be dismissed if he did not return to work, was dismissed. The tribunal found that the circumstances were sufficiently urgent to justify the employer issuing the instruction, even though tea breaks were provided for in M's contract. It found the dismissal fair. The EAT accepted that the procedure was flawed in that no investigation had been carried out. Nonetheless, it agreed with the tribunal's finding on the basis that M knew why he was being dismissed and he had the opportunity to make representations to the managing director. Referring to Polkey, the EAT said that the circumstances of the case were 'exceptional'"

    (c) In Ellis v Hammond and anor t/a Hammond and Sons EAT 1257/95 (unreported save for on Bailii [1996] UKEAT 1257_95_2006), the employee had been progressed through a disciplinary process for her conduct up to a stage-three warning for abusive behaviour to supervisors, including swearing and throwing / damaging the products (vegetables), harassment of and snide remarks to fellow workers (culminating in the resignation of an employee with over 25 years' service). Matters came to a head when she was asked to work harder and, in response, swore at her supervisor and started throwing parsnips at the supervisor's legs. The employee lost her temper and walked off the parsnip line alleging she had been threatened by the manager. When she was warned about her conduct by another manager, she *"became enraged. She swore at everybody saying that they had "got a down" on her… [and] left saying [] that she would see him in the Tribunal and hoped that he had got £25,000".* The EAT upheld a tribunal's decision that she had been fairly dismissed, even though the employer had decided to dispense with a *final* disciplinary hearing. The EAT stressed that

the correct question for the tribunal to ask was whether the decision not to hold a final disciplinary hearing was justified at the time of the dismissal, not after the event with the benefit of hindsight.

26. Considering these further cases where the principle was deemed to have been correctly applied, we noted that they too were cases where the facts could not have been disputed in the sense that they were admitted, agreed, or indisputable (i.e. the employee was caught "red-handed" or admitted to the matters), such as Gallacher and Ellis, or where the individual had had an opportunity to out their side of the matter (MacLeod).

27. In the present case, X was not caught "red-handed" or on CCTV for example. There was no irrefutable evidence X had sent the parcels, made the calls or attended MA's home, nor was there indisputable proof as to what X had done at MA's home or what X had intended to do once there. None of that was known because X had not been involved in the investigation. The Respondent did not know for example if X might have had a compelling alibi for X's whereabouts on 20 August 2022, because it never sought it from X.

28. Therefore, we concluded (and continue to conclude) that no reasonable employer could have concluded on 22 August 2022 (on the evidence available on that date) that an investigation process would be futile.

29. Taking a step back and considering the statutory test more broadly, we continue to find that the overall decision to dismiss in the circumstances was outside the range of reasonable responses.

30. We have great sympathy for the predicament the Respondent was in and the distress that BP and MA suffered. However, just because the allegations were serious and the Respondent's employees were fearful, does not mean that serious and important procedural safeguards which are a key feature of natural justice can be conveniently dispensed with. To find otherwise would set a dangerous precedent. As a bare minimum requirement of natural justice and fairness, X should have been invited to comment on the charges before the Respondent reached its decision. This is not the sort of case where the evidence against X was so clear that a process can reasonably be said to be futile.

Discrimination reconsideration

31. In the opening (unnumbered) paragraphs of the Respondent's application for reconsideration under the heading "Discrimination", the Respondent has misstated the basis for the tribunal's conclusions. The judgment sets the conclusions out.

32. The Respondent then makes three main points:
    (a) That the list of issues was "amended by stealth" by the panel;
    (b) That there is no evidence to support the finding that the PIP was not justified; and
    (c) That the Claimant had not yet been subjected to the stage three objectives under the PIP and had a right of appeal against the final written warning.

33. Only the first of these could be said to be a procedural mishap which is susceptible to reconsideration. We have therefore gone on to reconsider it below.

34. The other two matters are essentially the Respondent seeking to re-open the case. The Respondent had the chance to address the tribunal on these matters. There must be finality in litigation. Therefore it is not in the interests of justice to reconsider these matters. However, we will deal with each point nonetheless, in case we are wrong in that conclusion.

"New Issues"

35. The Respondent argues that X clarified X's claim at a case management hearing and that the record of the issues at that hearing should have been strictly adhered to. In the case management order, the specific claim in question (the only discrimination claim ultimately upheld) was framed as being:

> "that by reason of [X's] disability [X] took longer to do work than [X] would otherwise have done, and that as a result [X] was put on a performance improvement plan (PIP) in about March 2022, by Marvyn Amphlett. Putting [X] on a PIP was, [X] says unfavourable treatment (S15 EqA)".

36. The Respondent contends that the tribunal at the full merits hearing went beyond the scope of the claim (amounting to "amendment by stealth") when it considered the entire PIP process, rather than merely the fact of it having been instigated in March 2022, and that it should have confined itself to the mere instigation, as the list of issues did.

37. We have reminded ourselves that a list of issues is a useful case management tool to bring order, structure and clarity to proceedings. However, in Moustache v Chelsea and Westminster NHS Foundation Trust 2023 ICR 1231, the EAT said this about lists of issues:

> "It is important to stress that a List of Issues is not a pleading. Nor is it a Claim Form, or Response. It is a document which can be an exceptionally useful Case Management tool. It can provide clarity and structure when that is otherwise woefully absent. Lists of Issues should be used. They are helpful, as a case management tool, no less, and certainly no more than that. Their use is subject to the rigours of the Overriding Objective, the underlying principles of which Employment Tribunals must closely guard. Employment Tribunals and Employment Judges must be careful to ensure that that which is a useful case management tool does not, through slavish adherence to it, or elevation of it to a formal and rigid pleading, preclude a fair and just trial of the real issues in the case, the principle at the core of the Overriding Objective. Equally, they should be astute to ensure that advantage is not unfairly afforded to any one party through their use"

38. It is fair to say that whilst lists of issues are useful, pleadings are paramount. There are cases where a tightly agreed list of issues, agreed by professionally represented parties, might be more strictly adhered to, but those principles do not apply to cases such as this with an unrepresented litigant in a case for which there was a single case management discussion and the claims were loosely framed by the judge in the Order. It is apparent from the Order that X took some time to articulate X's claims and that X needed breaks.

39. We consider it apt to focus on the pleadings rather than strictly adhere to a list of issues in cases such as these. X's pleaded claim does cover the entire PIP process (not just the *instigation* of it) and further, the Respondent appeared to have understood that when it replied:

    (a) At page 13 of the particulars of claim, X stated: *"There were two stages to this PIP to resolve this dispute, I tried to tell my manager that the blame game needs to stop. We work as a team, anything goes wrong we learn fast and fix it going forward. At this stage I think this was unfair use of a PIP"* and *"It was stage two of the PIP, and now we are looking at two points raised, which are attendance, timely delivery of the work and the standard of the work."* At the top of page 14, X refers to the PIP as a single process, not delineating between the instigation of it and subsequent stages. On page 15, X states *"This whole process had made working at Open GI nearly impossible".*

    (b) At pages 28, 31 and 34 of the liability bundle in the Respondent's grounds of resistance (in unnumbered paragraphs with no internal pagination), the Respondent details each stage of the PIP and concludes *"We believe we have acted fairly and reasonably at each stage of the performance management process".*

40. Both sets of pleadings plainly covered the full PIP process. We consider that slavish adherence to the way the claim was framed in the case management order would have precluded a fair and just trial of the real issues in the case and afforded an unfair advantage to the Respondent contrary to the overriding objective.

41. In any event, we consider the Respondent's interpretation of the Employment Judge's Case Management Order to be too literal and restrictive. It is not reasonable to read it in such a way that the claim was confined to the mere *instigation* of the PIP in March 2022 but not to its continuation thereafter.

42. Further, the matter was not addressed or argued before us as being limited to the instigation of the PIP. MA's evidence and the documents in the bundle evidenced the entire performance management process up to and including the final written warning. X was cross examined at length on the entire process, not just on the issue of its instigation.

43. Further still, we recall that in the case of Hale v Brighton and Sussex University Hospitals NHS Trust [2017] 12 WLUK 215 the EAT held that the tribunal below had erred in treating the decision to instigate disciplinary procedures as a one-off act when that decision created an ongoing state of affairs to which the Claimant was subject. The disciplinary process was an ongoing act. Hale was commented on with approval by the EAT in Chaudhry v Cerberus Service Security and Monitoring Services Ltd [2022] EAT 172. We therefore consider that it must or should have been obvious to the Respondent (professionally represented by counsel and solicitors) that the instigation of the PIP could not be seen in isolation and that the PIP had to be reviewed as an ongoing continuing act.

44. Furthermore, when the list of issues was reformulated by the bench during the trial, counsel for the Respondent did not propose amendments to the wording of the specific claim now in issue. The Respondent did however make other edits to the reformulated version to include the Respondent's justification defences. Indeed, the draft that was used as the final version was returned to the tribunal on 26 July 2023 at 09:43 by the Respondent's instructing solicitor as an amended version. No dispute was raised at that time or at any time thereafter (until the reconsideration application) about the way the specific claim had been formulated. If the Respondent was displeased with the way the list of issues was formulated during the hearing, it was legally represented by both solicitors and counsel and had the opportunity to raise the matter but it did not. Indeed, it appeared to approve (and edit) the list of issues provided by the bench.

45. The only reason that the list of issues had been reformulated by the tribunal at the full merits hearing was to tease out the legal issues and factual issues in such a way that each discrete element and fact was set out so that each party knew what the claims entailed. This would enable each party to make appropriate submissions addressing each such element. The Employment Judge's case management order was written in a more holistic way that had not teased out the specific elements into their constituent parts.

46. In all the circumstances, we find that the claim was accurately framed in the reformulated list of issues. The claim form plainly pleads to the entire PIP process, not just its instigation. There was no need for the claim to be amended in any way because it was already within the claim form that the entire PIP process was in issue. The Respondent not only appeared to understand this (as is apparent from its formal reply) but it also came to the final hearing ready to defend such a claim and led evidence in respect of the entire PIP process at the hearing. The Respondent knew or should have known that a PIP process, like a disciplinary process, was to be viewed as an ongoing matter and it had ample opportunity to argue otherwise if it wanted to seek to persuade the tribunal otherwise.

47. Accordingly, it is not in the interests of justice to allow the application to reconsider the claim on this basis. The Respondent had every opportunity to raise the matter. Even if the Respondent had made such arguments at the final hearing, we would have rejected them as being not sound in law, either in respect of how pleadings are read, and the status of lists of issues, or the well-known authorities which specify that disciplinary processes (such as a PIP process for which warnings were given) are ongoing acts. Accordingly, the original decision is confirmed and the application to reconsider is rejected.

"No evidence to support finding"

48. The Respondent asserts that there was no evidence from which the tribunal could have concluded the continuation of the PIP was not justified.

49. The tribunal held that it was justified for X to be placed on the PIP until around 10 August 2022. It was around 11 August 2022 when the Respondent had knowledge of the substantial disadvantage caused by the timescales imposed on X, such that the duty to make reasonable adjustments was triggered. At this stage, some adjustment was made going

forward (i.e. X was given a 10% buffer to deadlines) but there was no retrospective reflection on the fact that he had already been progressed to a stage-two meeting based on past performance, at least part of which included *past* failures to meet deadlines at a time when there was no adjustment made.

50. Due to the overlap between the reasonable adjustments claim and the claim under s.15 EqA in respect of delivery to deadlines and the PIP, the tribunal concluded it was not justified (i.e. not reasonable and proportionate) to impose the final written warning or to have continued the PIP process (which the Respondent did) at the time it knew that the past failures to adhere to deadlines were impacted by the Claimant's disability and the Respondent itself had agreed a 10% buffer on deadlines was legitimate going forward. In short, the Respondent acknowledged X's right to reasonable adjustments *going forward*, but X was still subject to unfavourable treatment (by being required to attend a stage-two capability hearing and receiving a final written warning) for *past* failures to adhere to deadlines. Those past deadlines were imposed (and some missed) at a time when X was not given any additional time but X was still facing the same substantial disadvantage. Accordingly the tribunal held (and continues to hold) that the stage-two meeting, the imposition of the final written warning and the continuation of the PIP generally (from 11-22 August 2022) were not justified.

51. It is not correct to state (as the Respondent does) at paragraph (ii) of its application that the tribunal had assumed the *third* PIP (after the stage two final written warning) would include a requirement in respect of timelines. The basis of the liability decision was that the Respondent continued to performance manage X after 11 August 2022 by way of the meeting on 17 August 2022 and a final written warning imposed on 17 August 2022 partially due to X's past overrun on timelines and this was the part of the PIP process that was held to be unlawful and not justified. The tribunal was not speculating forward as to what the Respondent would so, but rather looking at what it had done from 11-22 August 2022.

52. As the Respondent records in its own application, MA had stated to X in the PIP interview on 17 August 2022 that the specific objective (objective two) "It's not *just* about the time…" such that it was accepted that stage two was partly about this. Further, the invite letter which called X to a stage-two PIP meeting stated that Objective two was to: *"Complete work within agreed timescales and to an appropriate standard…"* [page 355 liability bundle].

53. Accordingly, X was called to the meeting partly due to having missed past timescales and was required to defend this matter at the meeting on 17 August 2022. X was then given a final written warning partly in reliance on X's past failures to have met timescales. The tribunal held and continues to hold that the process after 11 August 2022 was not justified and that this was therefore discriminatory, contrary to s.15 EqA.

54. It is not in the interests of justice to allow the application to reconsider the claim on this basis. The original decision is confirmed.

"No appeal"

55. The fact that X might have successfully appealed the final written warning

would not undo the discriminatory effect of the PIP process from 11-22 August 2022, even if the appeal had been successful at some later date. Unlike unfair dismissal claims, discrimination claims are not viewed at the end of the entire process (i.e. such that an appeal can sometimes rectify errors made prior). Discrimination cannot be 'undone'.

56. Once the PIP process was no longer justified (as we have found was the case after 11 August 2022) the act of discrimination crystallised and whilst it could have been brought to an end by an appeal (such that its duration would have been shorter) it could not have been erased by a later successful appeal. Further, the onus ought not to be on claimants to take steps (i.e. appeal) to undo unlawful discriminatory acts by Respondents.

57. For all these reasons, the application to reconsider is misconceived and amounts to the Respondent seeking to have a second bite at the cherry, often with arguments not advanced below. It is not in the interests of justice to allow the application and it is refused. The original decisions are confirmed.

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Employment Judge Dobbie

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Date 20 February 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

26 February 2024

FOR EMPLOYMENT TRIBUNALS

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