



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111716/2021

Reconsideration Hearing held in chambers remotely by CVP on 9 March 2023

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**Employment Judge A Strain
Members J McElwee & R Taggart**

Mr D Duployen

**Claimant
[by Written
Representations]**

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Whyte & Mackay Limited

**Respondent
[by Written
Representations]
Represented by:
Ms K Norval –
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The Judgment of the Employment Tribunal is that:

1. Having considered both parties' written representations on the claimant's opposed application for reconsideration of the Tribunal's Judgment dated 26 September 2022, after private deliberation, at the Reconsideration Hearing held in chambers on 9 March 2023, decided it was in the interests of justice to grant the reconsideration sought by the claimant in part as follows:

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- (a) The Tribunal varies its finding in fact dd by inserting the following prior to the last sentence:

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"ML informed the claimant that morale was low due to his absences and that ML had an issue with the claimant's conduct at the attempted phased return to work."

- (b) The Tribunal varies paragraph 72 of its Judgment to the following:

“72 The tribunal did consider that the references to the Claimant’s conduct and absences at the disciplinary hearing on 27 July 2021 arose in consequence of the Claimant’s disability. The tribunal accepted that the claimant’s conduct at the attempted phased return to work and his absences were due to his disability.”

(c) The Tribunal varies its judgment by amending paragraph 3 on page 1 of its judgment and paragraphs 94-97 and 100 as follows:

3. The tribunal orders the Respondent to pay the Claimant the sum of £16,134.50 (comprising a Basic Award of £1,731.48 and a Compensatory Award of £14,403.02).

94. This equates to 26 weeks x £303.20 = £7,883.20. The Respondent paid an employer pension contribution of £35.97 per week. This equates to 26 x £35.97 = £935.22. The Claimant’s loss of statutory rights is accepted at £500.

95. The Claimant’s total financial loss is £9,318.42.

96. The tribunal deducted the sum of £2,415.40 in respect of earnings and benefits received. The tribunal did not deduct the self isolation grant of £500.

97. The total compensatory award financial loss element is £6,903.02

100. The total compensatory award for discrimination is £14,403.02

2. In all other respects, the Tribunal, on reconsideration, has confirmed the original Judgment, without variation, and amplified its reasons, as set forth in the following Reasons for this Reconsideration Judgment, to address the points arising from both parties’ written representations.

REASONS

Background

1. This case called before the Tribunal again on 9 March 2023, for an in chambers Reconsideration Hearing, held remotely by CVP.
- 5 2. The Respondent had previously agreed that the opposed reconsideration application brought by the claimant could be dealt with by the Tribunal on the papers. The Claimant had requested an oral Hearing. The Tribunal did not consider it necessary to have an oral hearing given the matters raised in the reconsideration application were matters which could be addressed on the
10 papers and did not require any further elaboration.
3. The reconsideration application arose out of the Tribunal's judgment on 26 September 2022 to uphold his claims of Constructive Unfair Dismissal and Disability Discrimination under sections 15 and 20 of the **Equality Act 2010 (EA 2010)**, award a Basic Award, Compensatory Award and damages for
15 injury to feelings.

Claimant's reconsideration application

4. On 13 October 2022, the claimant applied to the Tribunal, further to Rule 70 of the Employment Tribunal Rules of Procedure 2013, for reconsideration of the Tribunal's Judgment. His application was copied to the solicitor for the
20 respondents.
5. The claimant sought reconsideration on the following grounds:
 - a. Miscalculation of loss of earnings and deductions;
 - b. Reinstatement and Re-engagement;
 - c. Limiting loss of earnings to 6 months;
 - 25 d. The injury to feelings award was too low; and
 - e. In the Tribunal's findings incidents of comments about the claimant's conduct had been dismissed.

6. The claimant enclosed various job application responses and documents showing outcomes for disabled people in the workforce.
7. The claimant lodged an additional document by email of 3 November 2022. This document was a letter from the claimant's GP outlining the difficulties he experienced due to his disability in finding employment.

The Respondent's response

8. The respondent responded by email of 9 November 2022. The reconsideration application was opposed on the following grounds:
- a. It was not in the interests of justice to do so;
 - 10 b. The points raised by the claimant in his application had all been considered and determined by the Tribunal;
 - c. The claimant sought to introduce new evidence which he could have presented at the original hearing;
 - d. The Tribunal had correctly calculated the loss of earnings and deductions;
 - 15 e. There was no authority for the proposition that salary sacrifice should have been taken into account;
 - f. The claimant never advanced an argument that re-engagement should be considered. In any event the Tribunal had found that it was not reasonably practicable to reinstate and the same would have applied to re-engagement;
 - 20 g. The claimant has produced new evidence in support of his claim that the loss of earning should not have been limited to 6 months. This new evidence should not be considered by the Tribunal and the claimant had ample opportunity to present this at the hearing;
 - 25 h. The Tribunal had taken into account all relevant factors in assessing the injury to feelings award;

- i. The Tribunal addressed and dealt with the incidents of comments about the claimant's conduct; and
 - j. The claimant had not advanced the incident where he was told his absences were causing low morale in support of his discrimination claim.
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9. The Tribunal wrote to the parties on 16 November 2022 inviting written representations by 30 November 2022.
10. The claimant sent an amended calculation of his loss by email of 5 December 2022.
- 10 11. The Tribunal wrote again to the Parties on 15 December 2022 inviting any final written representations by 22 December 2022.
12. The claimant submitted written representations by email of 15 December 2022. This recast the claimant's application for reconsideration as being on the following grounds:
- 15 a. Failure to address an element of his discrimination claim;
 - b. The injury to feelings award;
 - c. Limiting lost earning to 6 months;
 - d. Miscalculation of lost earnings and deductions;
 - e. Reinstatement and Re-engagement.
- 20 13. The claimant invited the Tribunal to consider supplementary evidence he lodged in support of his reconsideration claim.

Relevant law: reconsideration

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

“70 Principles

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
5 reconsideration, the decision ('the original decision') may be confirmed, varied or revoked. If it is revoked it may be taken again.”

15. When considering such an issue regard must also be had to the Tribunal's overriding objective in Rule 2. The Tribunal's “overriding objective” under Rule 2 is to deal with the case fairly and justly.

10 *Necessary and in the interests of justice*

16. The EAT in **Serco Ltd v Wells [2016] ICR 768** held that a Tribunal should interpret the words 'necessary in the interests of justice' in what is now Rule 70 as limiting reconsideration to where: (a) there has been a material change of circumstances since the order was made; (b) the order was based on a
15 misstatement or omission; or (c) there is some other 'rare' and 'out of the ordinary' circumstance.

New evidence

17. Following the implementation of the 2013 Rules, the EAT held that the **Ladd v Marshall [1954] 3 All ER 745** test (in conjunction with the overriding
20 objective) continues to apply where it is sought to persuade a Tribunal, in the interests of justice, to reconsider its judgment on the basis of new evidence (**Outasight VB Ltd v Brown UKEAT/0253/14**). The **Ladd v Marshall** test has three parts. It must be shown: (a) that the evidence could not have been obtained with reasonable diligence for use at the original hearing; (b) that it is
25 relevant and would probably have had an important influence on the hearing; and (c) that it is apparently credible.

Approach to be taken

18. 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:

5 *The Employment 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;*

10 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*

15 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.”*

Finality of Litigation

19. 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, the Scottish EAT Judge, 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”.

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20. Her Honour Judge Eady QC provided further guidance 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."

Discussion and Deliberation

- 10 21. The Tribunal carefully considered both parties' written submissions and addressed each of the claimant's grounds for reconsideration in turn following ***Liddington v 2Gether NHS Foundation Trust [2016] UKEAT/0002/16/DA.***
- a. *Failure to address an element of his discrimination claim.*
- 15 22. The claimant contends that part of his discrimination claim was for comments made by his manager at a disciplinary hearing relating to his unfitness for work, requesting a phased return and his absences causing a low morale amongst his colleagues.
- 20 23. He asserts that the Tribunal dismissed these claims. The reasons were brief and appeared to refer to his conduct at the disciplinary hearing rather than in general. He specifically refers to paragraph 72 of the Tribunal's judgment.
- 25 24. The Tribunal, having reviewed the claimant's witness statement, accept that the claimant did address these comments in his witness statement (paragraph 95). The Tribunal accepts the claimant's evidence on this point and accordingly considers that it is necessary and in the interests of justice to reconsider this finding.
- 25 25. The comments made were in consequence of his disability. Specifically they were made because of his absence due to his disability and his conduct at the attempted phased return to work which was also due to his disability.

26. The Tribunal accordingly varies its finding in fact dd by inserting the following prior to the last sentence:

5 *“ML informed the claimant that morale was low due to his absences and that ML had an issue with the claimant’s conduct at the attempted phased return to work.”*

27. The Tribunal also varies paragraph 72 of its Judgment to the following:

10 *“72. The tribunal did consider that the references to the Claimant’s conduct and absences at the disciplinary hearing on 27 July 2021 arose in consequence of the Claimant’s disability. The tribunal accepted that the claimant’s conduct at the attempted phased return to work and his absences were due to his disability.”*

28. The Tribunal appreciates and accepts the impact of these comments on the claimant however it does not consider this has any impact on the compensatory award or the injury to feelings award and confirms those awards.

15 *b. The injury to feelings award*

29. The claimant contends that the injury to feelings award was manifestly low and diminished respect for the policy of the anti-discrimination legislation.

30. The claimant cites his disabilities and argues that it should have been obvious that such discriminatory treatment would have had a more substantial effect on him. He argues that the Tribunal failed to properly direct itself to the Vento Guidance and Bands.

31. The Tribunal specifically addressed injury to feelings in paragraph 98-100 of its judgment. The Tribunal considered all of the evidence before it. The claimant raises nothing new and the Tribunal remain satisfied that it properly directed itself and the award made was just.

32. The Tribunal accordingly confirm its judgment.

c. Limiting lost earning to 6 months

33. The claimant contends that in limiting his loss of earnings to 6 months the Tribunal do not appear to have taken into account his disability. Had the Tribunal done so then the Tribunal would have known this would have had a significant effect on his ability and efforts to find suitable work.
- 5 34. The Tribunal took his disability into account in assessing whether or not he had mitigated his loss. The Tribunal were aware of the limitations that the claimant imposed on his job search and took that into account in determining what would be an appropriate period to award loss of earnings for (paragraph 91). The Tribunal considered that the claimant had not made sufficient attempts to secure alternate employment, was unnecessarily restrictive and should have been able to secure alternative employment within the 6 month time frame.
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35. The claimant seeks to lodge new evidence in support of his application for reconsideration. This new evidence is said to support the difficulties he experienced in the past and also responses he received for failed job interviews referred to in his schedule of loss. The claimant also refers to a document from the Office for National Statistics titled "Outcomes for Disabled People in the UK: 2021" which, he says, shows, on Page 15, that individuals suffering from mental illness and Autism are in the top 3 disabilities with the lowest employment rates. He also refers to a letter from his GP which he asserts explains the difficulties he has in finding work as a result of his disability. This documentation (apart from the GP Letter) was clearly available to the claimant but was not provided to the Tribunal at the Hearing. A letter from his GP could have been provided by him for the original hearing.
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- 25 36. The Tribunal considered ***Stephenson v Golden Wonder Limited***. The claimant clearly sought to rehear what already had been argued before the Tribunal with the addition of evidence which could have been available at the original hearing.
- 30 37. The Tribunal are satisfied that the award of 6 months loss of earnings is just and reasonable. Even if the new evidence had been available this would not have altered the Tribunal's decision.

38. The Tribunal confirms its judgment on this matter.

d. Miscalculation of lost earnings and deductions

39. The Claimant contends that the earnings calculations and deductions were incorrect.

5 40. The Tribunal based the calculation for loss of earnings on the claimant working reduced hours of 30 per week.

41. The claimant produced an amended calculation of his schedule of loss based on a 30 hour week and 6 months loss of earnings. The Tribunal accepted that it applied the pension loss calculation based on a 38 hour week in error.

10 42. The claimant contends that the Tribunal have deducted earnings received since termination of employment which were received after the 6 month period awarded by the Tribunal. The Tribunal accepted that it appears to have deducted earnings received after this 6 month period. This was an error on the Tribunal's part.

15 43. The Tribunal considers it to be in the interests of justice to correct its arithmetical mistake in calculating the earnings and deductions.

44. The Tribunal varies its judgment by amending paragraph 3 on page 1 of its judgment and paragraphs 94-97 and 100 as follows:

20 3. *The tribunal orders the Respondent to pay the Claimant the sum of £16,134.50 (comprising a Basic Award of £1,731.48 and a Compensatory Award of £14,403.02).*

25 94. *This equates to 26 weeks x £303.20 = £7,883.20. The Respondent paid an employer pension contribution of £35.97 per week. This equates to 26 x £35.97 = £935.22. The Claimant's loss of statutory rights is accepted at £500.*

95. *The Claimant's total financial loss is £9,318.42.*

96. *The tribunal deducted the sum of £2,415.40 in respect of earnings and benefits received. The tribunal did not deduct the self isolation grant of £500.*

97. *The total compensatory award financial loss element is £6,903.02*

5 100. *The total compensatory award for discrimination is £14,403.02*

e. Reinstatement and Re-engagement.

45. The claimant contends that the Tribunal decided reinstatement was not possible was based on the treatment he had received from the Respondent and not because of anything he had done.

10 46. The claimant accepts that the relationship between himself and the Respondent had broken down. He submits that practicality in terms of section 116 (1) (b) ERA 1996 does not refer to the relationship between the parties. Any breach of trust and confidence was caused by the Respondent. It would be just to order his reinstatement.

15 47. The Tribunal carefully considered whether or not to order reinstatement (paragraph 101). The claimant accepted the relationship had broken down. The Tribunal has to consider whether or not it would be practicable to order reinstatement and that correctly involves consideration as to whether or not the relationship between the parties has broken down.

20 48. The Tribunal's finding that it was not reasonably practicable to order reinstatement was entirely justified on the evidence.

49. The Tribunal confirms its judgment on this matter.

50. The claimant also contended that the Tribunal should have automatically considered re-engagement. He cites the fact he was a party litigant in support
25 of this.

51. The Tribunal do not accept that it should have automatically have considered this alternative remedy when it was not sought by a party (even where the party was a party litigant). In any event, had the remedy been sought the

Tribunal's decision would have been the same. Section 116 (3) (b) ERA 1996 involves the same considerations of practicability for making a re-engagement order.

52. The Tribunal confirms its judgment on this matter.

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Employment Judge: A Strain
Date of Judgment: 06 April 2023
Entered in register: 26 April 2023
and copied to parties

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