EMPLOYMENT TRIBUNALS

Claimant: **ABC**

Respondent: **XYZ**

RECONSIDERATION JUDGMENT

Upon the Claimant's application and without a hearing:-

1. In the interests of justice, paragraph 3.a.2 of the reasons for the Deposit Order of 2 November 2023 are amended to the following:

The Claimant relies on section 64(2)d) that he was deprived of a benefit (funded legal support for employment claims) which would otherwise be provided or made available to him by virtue of his membership of the Respondent trade union had he not made an assertion pursuant to section 65(2)(c). However, whether or not an assertion was made, there is little reasonable prospect of a finding that such a benefit is "otherwise *available" (or was believed to be available) for external funding* by the Respondent for *independent legal support to bring an employment claim against the Respondent. Accordingly, there is little prospects of a finding that the Claimant would have "otherwise" been entitled to the benefit sought.*

2. The application to reconsider is otherwise refused.

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REASONS

1. This decision has been made by the Employment Judge without a hearing, in accordance with rule 72(1).

Background

2. There was a video (CVP) preliminary hearing on 5 and 6 October 2023 in the London Central Employment Tribunal (the "PH"), at which I made a deposit order (the "Deposit Order"). Full reasons were given orally at the hearing, with summary reasons for the purpose of the Deposit Order issued on 2 November 2023.
3. At the start of the PH, prior to hearing the submissions, I explained to the parties that I had read the documents (or parts of the documents) referred to in their submissions, along with the pleadings, case management orders and statements, but that I had not read the whole Bundle or full copy documents annexed to the Claimant's statement. It was agreed that I need not do so and I would be taken to such documentation as considered necessary by the parties. I acknowledged that I was helpfully assisted by Counsel for each party, both by their written submissions and in oral submissions.

4. A deposit order was issued in respect of the Claimant's claim for unjustified discipline pursuant to section 64 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"). This related to the refusal by the Respondent to provide funded legal support for the Claimant's claims against the Respondent. The summary reasons, as set out in the Judgment in respect of the Deposit Order, were as follows:

There is little prospect of the Claimant's claim for unjustified discipline succeeding:

1) in circumstances where on the face of the documentation:

i) the refusal was because decision maker believed that the Respondent would not fund employment litigation against itself;

ii) The Claimant had also adopted the same position in respect of employment claims against the union in his tenure as a senior employee of the union; and/or

2) The Claimant relies on section 64(2)d) that he was deprived of a benefit (funded legal support for employment claims) which would otherwise be provided or made available to him by virtue of his membership of the Respondent trade union had he not made an assertion pursuant to section 65(2)(c). However, whether or not an assertion was made, no benefit is available (or was believed to be available) for external funding for independent legal support to bring an employment claim against the Respondent. Accordingly, there is little prospects of a finding that the Claimant would have "otherwise" been entitled to the benefit sought.

5. A deposit order was issued in respect of the Claimant's claim for victimisation pursuant to section 146 TULRCA. This also related to the refusal by the Respondent to provide funded legal support for the Claimant's claims against the Respondent.

The summary reasons, as set out in the Judgment in respect of the Deposit Order, were as follows:

There is little prospect of the Claimant's claim … pursuant to section 146 [succeeding] where, on the face of the documentation;

i) Whether or not decision makers in the Claimant's case were correct that the Respondent would not fund employment claims against itself, the refusal was because the decision maker believed that the Respondent would not fund employment litigation against itself;

ii) The Claimant had also adopted the same position in respect of employment claims against the union in his tenure as a senior employee of the union; those decision makers considered this to be the case, and the Claimant himself had previously adopted the same position in relation to funding for employment claims against the Respondent.

6. The Claimant had opportunity to make submissions on his ability to pay, agreed that he was able to pay the deposit and that the issuing of a deposit order would not be a bar to proceedings continuing.

7. Written reasons were not requested, but the Claimant, through his solicitors, has applied for reconsideration of the decision to make the Deposit Order by emails of 17 November 2023 and 25 January 2023.

8. The parties have both had further opportunity to comment, and they have agreed that this matter can be dealt with without a hearing. The interests of justice do not require a hearing.

9. Legal experts hold different views about whether a decision to make or not to make a deposit order is, technically, a judgment or an order; and therefore about whether it is possible to apply for reconsideration of such a decision (because only judgments can be reconsidered). I take the view that such a decision is a judgment. It is, anyway, possible to apply to set aside or vary a Tribunal order under rule 29. If a deposit order decision is in fact an order and not a judgment, this should be treated as my decision on an application to set aside or vary under that rule.

Application for reconsideration

10. The Claimant asserts that the "interests of justice would only be properly served by the Tribunal hearing evidence … and thereafter making full findings of fact". In considering the Claimant's application and the further representations of the parties, I am mindful that no findings of fact have been made on the disputed evidence in this case. That is a matter for the final hearing, and it remains so notwithstanding the Deposit Order. Whether or not the Deposit Order is amended, set aside or not, the Claimant is able to put forward evidence for the Tribunal to consider at final hearing.

11. The Claimant's application for reconsideration focuses on the following (by way of very brief summary for the purposes of ease of reference):

    a. The evidence that the benefit sought by the Claimant (his "Paid Legal Costs") would never be paid by the Respondent was based on one piece of litigation some years prior, which the Claimant says is only one relevant consideration.

    b. The Respondent's (and indeed the Claimant's) approach in the previous "Reuby" litigation may have been different to their approach some years later. The Claimant further submitted an email from an individual who says that the Respondent authorised payment of her legal fees in litigation against the Respondent.

    c. There may be more than one reason for the refusal of the Paid Legal Costs, which is accounted for in TULRCA.

    d. A determination that "the decision-maker 'believed that the Respondent would not fund employment litigation against itself'" was made without witness evidence having been tested.

    e. The Tribunal had been "drawn into a finding of fact on matters which were not subject to any direct evidence".

Law

12. By Rule 70 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 the Employment Tribunal may, either on its own initiative or on the application of a party, reconsider a Judgment where it is necessary in the interests of justice to do so. On reconsideration, the Judgment may be confirmed, varied or revoked.

13. An application for reconsideration shall be presented in writing (and copied to all of the other parties) within 14 days of the date upon which the written record (in this case the written record being the Judgment promulgated on 2 November 2023) was sent to the parties.

14. Under Rule 70, a Judgment will only be reconsidered where it is necessary in the interests of justice to do so. This allows an Employment Tribunal a broad discretion to determine whether reconsideration of a Judgment is appropriate in the circumstances. The discretion must be exercised judicially having regard to the interests of both parties, the public interest and the interests of justice.

15. When deciding what is "necessary in the interests of justice", it is important to have regard to the overriding objective to deal with cases fairly and justly, which includes: ensuring that the parties are on an equal footing; dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense.

16. There must be some basis for reconsideration. It is insufficient for an applicant to apply simply because the party applying disagrees with the decision. For example, new evidence that was not previously available may form a basis for reconsideration.

17. 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* KEAT/0002/16/DA. Paragraphs 34 and 35 provide as follows:

"34. […] a request for reconsideration is not an opportunity for a party to seek to relitigate 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.

35. Where […] 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."

18. This principle was further discussed in the case of *Ebury Partners UK Ltd v Acton Davis* [2023] EAT 40. HHJ Shanks held at para 24 that "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".

Discussion and conclusions

19. By reference to the brief summary of the Claimant's application above (but having considered the Claimant's and the Respondent's correspondence in its entirety):

20. In relation to points a and b, the Claimant has not raised new evidence that changes the summary assessment previously made. Submissions were made at the PH in relation to the ARAG Legal Expenses Insurance policy and its relevance (or otherwise) to this Claim. It was expressly acknowledged at the PH and in the full reasons given for making the Deposit Order that the *Reuby* litigation did not involve a claim for unjustified discipline. It was also acknowledged that the Claimant does not now agree with the position adopted in the Reuby litigation, but that his position in that case was that he had "never authorised legal assistance for a member to pursue an employment tribunal claim against" the union. The Claimant's senior position in the union was not disputed. This was not a case about legal expenses insurance (LEI). The new evidence (email of 16 December 2023) refers to legal cases and fees being underwritten by LEI. The issue as put to the Tribunal at the PH was that LEI is available (subject to the terms of the specific policy) for *employees*, an unjustified discipline claim is based on the Claimant's status as a *member* of the union. The Tribunal was taken to various email correspondence relevant to the matter, and the evidence and submissions considered was not limited to evidence and submissions in respect of the *Reuby* case.

21. However, no finding of fact was made that the Paid Legal Costs sought by the Claimant *would* never be paid. On review of the summary reasons set out in the Judgment dated 2 November 2023, to ensure that it is clear that no findings of fact were made on this issue, such that would bind a future Tribunal in making its findings of fact, paragraph 3.a.2 of the summary reasons in the Judgment are hereby amended in the interests of justice to the following:

> 2) *The Claimant relies on section 64(2)d) that he was deprived of a benefit (funded legal support for employment claims) which would otherwise be provided or made available to him by virtue of his membership of the Respondent trade union had he not made an assertion pursuant to section 65(2)(c). However, whether or not an assertion was made, there is little reasonable prospect of a finding that such a benefit is "otherwise available" (or was believed to be available) for external funding by the Respondent for independent legal support to bring an employment claim against the Respondent. Accordingly, there is little prospects of a finding that the Claimant would have "otherwise" been entitled to the benefit sought.*

22. In relation to point c, the tests under sections 64 and 65 TULRCA were considered at the PH.

23. In relation to points d and e above, and as previously noted, no findings of fact were made as to the motives of the decision makers. No live witness evidence was heard,

as agreed with the parties, and a summary assessment of the documentary evidence was made, including a summary assessment of potential credibility findings. No binding findings of fact were made. The parties will recall that credibility was expressly referred to in the full reasons given at the PH, acknowledging that credibility issues will be a matter for the final hearing, but that on the face of the papers the Claimant had previously adopted the same position as the Respondent (in respect of Paid Legal Costs) in circumstances where, on his own evidence and on the face of the papers, the Claimant was familiar with the Rules of the trade union and indeed the legal framework within which trade unions operate.

24. For the avoidance of doubt, and as the parties will be aware, the emails and letters from the Respondent to the Claimant refusing the Paid Legal Costs were expressly drawn to the attention of the Tribunal. They were considered. As set out above, the Tribunal set out for the parties what documents had been read prior to the commencement of the hearing. The parties agreed that they would take me to such documentation as they each considered necessary. This was also made clear in giving the full reasons at the PH.

25. The effect of the Deposit Order is that (i) the Claimant has to pay a deposit to continue with the claim that is subject to the Deposit Order and (ii) if the Claimant loses for reasons as set out in the Deposit Order, he will lose the deposit and there may be costs consequences (subject to Rule 39(5) of the Employment Tribunals Rules). For the avoidance of doubt, the reasons set out in respect of the Deposit Order do not bind the Employment Tribunal at final hearing, save insofar as Rule 39(5) comes into play on conclusion of the final hearing.

26. The parties had a fair and proper opportunity to present their cases at the PH. The application attempts to re-argue that which I have already considered and decided. The Deposit Order did not prevent the Claimant from pursuing his Claims – it was agreed that it was set at a level that enabled him to do so.

27. Save to the extent referred to at paragraph 21 above, the Claimant's application is therefore refused.

Employment Judge Youngs
8 May 2024

Sent to the parties on:

24 May 2024