EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Agnes Olawepo

AND

Respondents:
First Respondent (R1): CSP Limited
Second Respondent (R2): The Jockey Club Racecourses Ltd
Third Respondent (R3): CSH Surrey
Fifth Respondent (R5): Mr Peter Barker

RECONSIDERATION JUDGMENT

The Claimant's applications for reconsideration and/or set aside are refused and dismissed because there is no reasonable prospect of the original decisions being varied or revoked.

REASONS

Background

1. I shall for ease refer to the parties as the Claimant and the Respondent. Unless otherwise stated, references below to rule numbers are to the Rules of Procedure set out in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.

2. By her ET 1 Claim Form dated 18 October 2021**,** Ms Olawepo brings claims of race discrimination, harassment, victimisation, and the unlawful deduction of wages against each of the Respondents arising out of her time working as a cleaner at Sandown Park. The Claimant originally also brought claims under the Equality Act 2010, the Human Rights Act 1998, the Data Protection Act 2018, and the Regulation of Investigatory Powers Act 2000; she later accepted that the employment tribunal only had jurisdiction under the 2010 Act and with regard to the unlawful deductions claim. She says that while working at Sandown Park while it was operating as a mass vaccination centre, she was the victim of an intense and sustained campaign of race discrimination on the grounds of her colour, committed by multiple people.

3. The Respondents, in their various ET3 Grounds of Resistance each denied that they discriminated against the Claimant on the grounds of her race and/or were responsible for any unlawful deduction of wages.

4. On 15 May 2024, I heard various applications from both the Respondents and the Claimant, and determined these as set out below.

A. the Respondents' various applications for strike out orders under Rules 37(1)(a) in respect of

(a) the entirety of the Claimant's race discrimination claims of direct discrimination, harassment and victimisation were refused;

(b) the individual particulars of the Claimant's race discrimination claims of direct discrimination, harassment and victimisation, as set out in the document called the Schedule of Acts, were, as identified in detail in the Reasons, partially successful because I considered that the particulars identified in red had no reasonable prospects of success and accordingly those claims were struck out;

(c) the Claimant's unlawful deduction from wages claim, was successful because I considered that claim had no reasonable prosects of success, and accordingly that claim was struck out.

B.1 The Respondents' various applications for deposit orders in respect of the individual particulars of the Claimant's race discrimination claims of direct discrimination, harassment and victimisation, as set out in the document called the Schedule of Acts, were, as identified in detail in the Reasons, partially successful because I considered that the particulars identified in orange had little reasonable prospect of success and I ordered that those claims could only continue subject to the payment by the Claimant of a deposit of £25 per identified particular.

2. The Claimant was accordingly ordered to pay an individual deposit **of £30** in respect of each of the 8 paragraphs identified in orange **(£240 in total),** not later than 14 days from the date the Reasons were sent out to the parties by the tribunal, as a condition of being permitted to continue to advance those particulars.

C. the Respondents' various applications for strike out orders under Rules 37(1)(b) and/or (e) in respect of the entirety and/or the individual particulars of the Claimant's race discrimination claims of direct discrimination, harassment and victimisation were refused.

D. R1 and R2's applications for a costs order against the Claimant in respect of her non-appearance at the 31 January 2023 Preliminary Hearing was refused.

E. the Claimant's various applications for

1. disclosure on non-contractual matters, including whether Peter Barker [R5] worked for any of the Respondents; and

2. a strike out/deposit/unless order against R3;

were refused.

The Application for Reconsideration

5. By her email dated 20 June 2024, the Claimant made several applications, namely:

a. two applications for reconsideration (under Rule 70) of:
    i. some of the decisions I made following the 15 May 2024 CMPH, as set out in my decision dated 28 May 2024, sent to the parties on 6 June 2024 ("the 15 May CMPH"), namely
        i. the decisions to impose 8 deposit orders;
        ii. the decisions to strike out all the claims that were struck out including the unlawful deduction from wages claim,
        iii. the decision to refuse the Claimant's request for disclosure on who R5 worked for
    ii. the Directions/Orders made at a Case Management Hearing on 11th June 2024, as sent to the parties on 20th June 2024 ("the 11 June CMPH").
b. an Application for a set aside of the Case Management Hearing held on 11th June 2024.

6. In regard to the first application for a reconsideration of some decisions I made following the 15th May 2024 OPH, the Claimant submitted that her Article 6 rights to a fair trial had been impaired in respect to matters i, ii and iii. She asked for a reconsideration of my decisions in the interest of justice on the ground of procedural error or cumulative unremedied procedural errors.

7. In regard to the second application for a reconsideration, namely of the Directions/Orders made at the 11 June CMH, the Claimant seeks a reconsideration on the grounds that it would be in the interest of justice because:

a. The directions given relate to matters which are covered by her first applications for reconsideration;

b. The directions concern Deposit Orders which are the subject of her first reconsideration application;

c. She has found new evidence of the Vaccination Hall, floor area size and capacity that could not have been found in time for the 11 May 2024 CMPH (sic) (I have assumed the Claimant meant the 15 May CMPH here).

8. In regard to her third application, for a set aside of the Directions/Orders made at the 11 June CMH, the Claimant relies on the same grounds and matters as set out at paragraph 7 with regard to her second application for a reconsideration.

Relevant law and rules of procedure

9. All Tribunal rules are subject to the overriding objective, which is set out at Rule 2, as follows:

> "2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable— (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense. A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

10. A party may, within 14 days, ask for decisions and judgments of the tribunal to be reconsidered where it is in the interests of justice. The only ground in the 2013 Rules on which a decision can be reconsidered is where it is "necessary in the interests of justice" to do so. It was confirmed by Justice Eady in *Outasight VB Limited v Brown* UKEAT/0253/14/LA that the guidance given by the Employment Appeal Tribunal in respect of previous rules is still relevant guidance in respect of the 2013 Rules. In *Phipps v Priory Education Services Ltd* [2023] EWCA Civ 652, the Court of Appeal said that the "interests of justice test" was broad-textured and should not be "so encrusted with case law" that decisions are made by resort to phrases or labels drawn from the authorities rather than on a careful assessment of what justice requires. It said that the tribunal has a wide discretion in such cases and that dealing with cases justly "requires that they be dealt with in accordance with recognised principles".

11. The relevant rules on reconsideration are set out at Rules 70-73 of the 2013 Rules. These state:

> **70.** 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 reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.
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> **71.** Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.
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> **72.** (1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise, the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.
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> (2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph

> (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.
> (3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

12. There is a public policy principal that there must be finality in litigation and reviews or reconsiderations are a limited exception to that principal. In the case of *Stephenson v Golden Wonder Limited* 1977 IRLR474, 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 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". The EAT went on to say in the case of *Fforde v Black* EAT68/80 that this ground does not mean "that in every case where a litigant is unsuccessful is automatically entitled to have the Tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in even more exceptional cases where something has gone radically wrong with the procedure involving the denial of natural justice or something of that order."

13. The phrase "in the interests of justice" involves the consideration of the interests of justice to *both* sides. The EAT provided further guidance on this in *Reading v EMI Leisure Limited* EAT262/81, a case decided under previous equivalent rules, where it was stated "when you boil down what it said on [the claimant's] behalf it really comes down to this: that she did not do herself justice at the hearing so justice requires that there should be a second hearing so that she may. Now, "justice", means justice to both parties."

14. In *Flint v Eastern Electricity Board* [1975] ICR 395 QBD, a case decided under the 2004 Rules, Phillips J stated with regard to the "the interests of justice":

> "… First of all, they are the interests of the employee. …. One also has to consider the interests of the employers, because it is in their interests that once a hearing which has been fairly conducted is complete, that should be the end of the matter. ….. it has to be remembered that the same principles have to be applied either way because one day a case may arise the other way round. So, plainly, their interests have to be considered.
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> But over and above all that, the interests of the general public have to be considered too. It seems to me that it is very much in the interests of the general public that proceedings of this kind should be as final as possible; that is should only be in unusual cases that the employee, the applicant before the tribunal, is able to have a second bite at the cherry." (404E - 405A)

15. It is also apparent that the overriding object must also be taken into account when reconsidering. This requires Employment Tribunals to deal with cases fairly and justly, which includes, so far as practicable— (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.

16. 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.

17. In the recent EAT decision of *White v TW White and Sons Limited*, UKEAT/0022/21, before his Honour Judge James Tayler, it was held that there is a mandatory requirement, pursuant to rule 72(1), for an employment judge to determine whether there are reasonable prospects of a judgment being varied or revoked *before* seeking the other party's response and the views of the parties as to whether the matter can be determined without a hearing, potentially giving any provisional view, and deciding how the reconsideration application will be determined for the purposes of rule 72(2).

18. Judge Tayler held that the rules set out a structured, and mandatory, process for the consideration of applications for reconsideration: (1) the employment judge must first consider whether there are "no reasonable prospect of the original decision being varied or revoked", in which case the application is to be dismissed ("the rule 72(1) decision"); (2) where practicable, the consideration under paragraph (1) shall be by the employment judge who made the original decision or, as the case may be, chaired the full tribunal which made it; (3) otherwise, the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing; (4) the employment judge may choose to express a provisional view; (5) a hearing will be fixed unless the employment judge considers having regard to any response to the above enquiry that "a hearing is not necessary in the interests of justice"; (6) any reconsideration determination under rule 72(2) ("the rule 72(2) decision") shall be made by the judge or, as the case may be, the full tribunal, which made the original decision.

19. Rule 29 is headed 'Case management orders' and states that an employment tribunal 'may at any stage of the proceedings, on its own initiative or on application, make a case management order':

> "The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. The particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."

20. The term 'case management order' in Rule 29 is defined in Rule 1(3)(a) as '… an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment. Case management powers need to be exercised to ensure that evidence is kept within 'reasonable bounds'. Case management is aimed at achieving this objective. It will aim to identify what the issues are between the parties (see eg *Mensah v East Hertfordshire Trust* [1988] IRLR 531), what the relevant areas of law may be, what orders need to be made in order to ensure the case is properly prepared, with the correct documents and witnesses in place, and any arrangements for the hearing, including the length, location and dates. It will also identify any adjustments that may be needed to make sure a fair hearing takes place and will look at the possibilities for alternative dispute resolution.

Conclusions and discussion

21. As per His Honour Judge James Tayler in *White*, there is a structured and mandatory process for the consideration of applications for reconsideration, of which the first, mandatory, requirement, (rule 72(1)), is for an employment judge to determine whether there are reasonable prospects of a judgment being varied or revoked. If the employment judge decides there are "no reasonable prospect of the original decision being varied or revoked the application is to be dismissed. If the judge decides the application has a reasonable prospect of success, then the application can proceed further and comments are to be invited by the Respondents.

22. I have accordingly considered the arguments advanced by the Claimant without inviting any comments from the Respondents, in accordance with Rule 72(1), as set out above. In doing so, I have taken the Claimant's application at its highest as revealed in the submissions sent in by the Claimant. I also bear in mind when considering the interests of justice, that it is important to look at this not just with reference to the interests of the Claimant, but also to the interests of the Respondents and bearing in mind the overarching provisions of Rule 2 and the overring objective.

23. The overriding objective of the Tribunal Rules is to enable Employment Tribunals to deal with cases fairly and justly, which includes dealing with cases in ways which are proportionate to the complexity and importance of the issues and avoiding delay, so far as compatible with proper consideration of the issues; and saving expense. This claim was started by the Claimant in October 2021. It was originally listed for a 6-day hearing in November, starting on 13 November 2023. That hearing was vacated at a hearing in January 2023. It has now been listed for an 8-day final hearing starting in November this year. There have to date been 5 CMPHs. The 11 June CMPH set out directions to ensure proper and timely preparation to ensure that the November 2024 full hearing goes ahead. I consider these are relevant factors for me to bear in mind against the background of the overriding objective to deal with cases fairly and justly, which includes dealing with cases in ways which are proportionate.

24. On balance, as far as each of the matters raised by the Claimant in her first application for reconsideration is concerned, I did not consider that there was any reasonable prospect of any of the decisions thereby challenged being varied or revoked. As such, there is no need to proceed down the rule 72(2) route such as for

comments to be invited from any of the Respondents. I confirm the decisions made by me at 15 May CMPH and therefore dismiss the Claimant's first application. The Claimant has not identified by reference to any individual or specified particulars that have been struck out or were made the subject of a deposit order, why it is said to be in the interests of justice to vary or revoke that particular decision, rather she has made an overarching challenge to each such individual decision. This applies equally to the decision to strike out the unlawful deduction of wages claim. No specific challenge is raised to this beyond the general submissions.

25. I dismissed each of the matters raised by the Claimant in her first application for reconsideration on the basis that I considered there was "no reasonable prospect of the original decisions being varied or revoked", for the following reasons:

a. As far as the Claimant's general point that her Article 6 rights to a fair trial have been impaired,

   i. there are specific powers in the Rules for tribunals to make orders to impose deposit orders and/or strike out all or part of a claim or response, such powers are therefore clearly compatible with Article 6 of the Schedule to the Human Rights Act;

   ii. If the Claimant disagrees with my specific decisions in regard to the making of any specific deposit orders and/or strike out ruling, that judgment is not in my judgment a matter of procedural error but is one of substantive law, such that the appropriate route of challenge would be by way of appeal;

b. As far as the Claimant suggests that there have been any errors of law, those are not matters that it is appropriate to be dealt with by way of reconsideration; the appropriate route is for an appeal to be brought;

c. In regard to paragraph 3 of the submissions made by the Claimant, namely "Whether a procedural error arose from me not receiving the explanation regarding the "technical IT error" that R3 provided the Tribunal, when R3 requested an ET3 filing time extension. Paragraph 67 of Judge Phillips Order with reasons does not appear to provide clarification. Judge Phillips states *"……. It appears that R3 clarified the position, (in accordance with EJ Wright's direction of 30 September), by email dated 7 October, (which was sent to the tribunal and copied to the other Respondents but does not appear to have been copied to the Claimant as far as I can tell) as regards their use of the term "technical IT error"……"* While discussing the unknown "technical IT error" at the 15th May 2024 OPH, R3's Counsel spoke over me and said, "it's a dead duck":
   i. the extract from the Reasons referred to by the Claimant in paragraph 3 is part of a narrative background to my consideration of a submission from the Claimant that R3 had failed to comply with EJ Wright's instruction dated 30 September 2022, requiring R3 to provide evidence of the "technical IT error", which formed part of the Claimant's wider

application for R3's ET3 response to be struck out under Rule 37(1)(b) and/or 37(1)(e), on the basis that R3's conduct of the proceedings was unreasonable and / or it was not possible to have a fair hearing in respect of the Claim and that R3 has little prospect of success in defending the Claim "if playing by the rules"; in the alternative, the Claimant applied for R3's ET3 response to be struck out under Rule 37(1)(c), on the basis that R3 had failed to comply with orders of the Tribunal, including the 30 September instruction from EJ Wright; further and in the alternative, the Claimant requested that the Tribunal made an unless order against R3 that unless it provided the outstanding information, the ET3 response should be struck out. The extract from the Reasons referred to by the Claimant in paragraph 3 was my explanation to the Claimant that in fact, albeit unbeknownst to her, R3 had complied with EJ Wright's instruction;

ii. I have nonetheless made further inquiries into the circumstances relating to R3's application for an extension of time to serve its ET3 Response; Rule 20 requires that an application for an extension of time for presenting a response shall be presented in writing *and copied to the Claimant.* It does not appear that R3 copied the Claimant into either (a) its 7 September 2022 email in response to the ET's letter of 18 August (which was copied to the Claimant) when it initially requested an extension of time to serve its ET3 Response because of a "technical IT error"; or (b) its further response, by email dated 7 October, to a letter from the ET dated 30 September (copied to the Claimant) asking it to provide evidence of the "technical IT error" by the 07 October 2022.

iii. There was therefore in my judgment a procedural error in R3 not copying those documents to the Claimant as required by Rule 20; however, this does not change or alter my decision that there was no breach of EJ Wright's 30 September direction – it was complied with and accepted by EJ Wright;

iv. as I understand the Claimant has not seen R3's 7 October email, I have asked the Tribunal administration to provide a copy of this to the Claimant;

v. I did not understand the Claimant here to be seeking a reconsideration of the decision of EJ Wright, as reflected in her instructions of 19 October 2023, to allow R3 to submit its ET3 Response out of time; if that is what is sought, that application is outside the relevant time limits for any reconsideration; and/or in any event would appear to be one of substantive law, such that the appropriate route of challenge would have been by way of appeal;

d. As far as paragraph 4 of the submissions made by the Claimant, namely "Whether a procedural error and/or error of law arose in that The Tribunal had not fully dealt with and determined the status of R5, in relation to who R5 worked for, at the 6-7 November 2023 OPH,

during which amongst other issues, evidence was heard on contractual matters. R3 in their ET3 at paragraph 2 of grounds of resistance states "The Third Respondent reserves the right to apply to amend these Grounds once the status of the Fifth Respondent has been clarified." In my ET1, I identified R5 by full name, description of duty, date and approximate time. I provided sufficient detail to enable R5 to be identifiable by a reasonable or proportionate disclosure exercise; irrespective of numbers of people working, through for example a Human Resources records search. Following the Preliminary Hearing sitting before Judge Heath on 2 May 2023, I sent a request for contractual information to Respondents. The matter of identifying who R5 worked for at the Vaccine Centre was outstanding, at the end of the 6-7 November 2023 OPH, as R3 for example was not directed to explain why R5 could not be accounted. The matter of who R5's worked for, was also outstanding at the end of the 15th May 2024 OPH.":

i. as made clear in the 15 May PHCM Order, who Mr Barker is and who, if anyone, he may have worked for, remains a live and relevant issue on disclosure; as such this submission appears premature;
   further and in any event
ii. to the extent that the Claimant is relying here on an error of law, the appropriate route is by way of appeal;

e. As far as paragraph 5 of the Claimant's submissions is concerned, namely "Whether a procedural error and/or error of law arises over the imposition and payment of a Deposit Order on allegations I did not consent to. The tribunal has ordered me to pay a deposit on allegations that were hurriedly submitted during the 2nd May 2023 hearing by R3's counsel and adopted by Judge Heath (I did not draft allegations) and I tried a couple of times to explain at the hearing at the time they were being adopted that not all persons are unknown. (This is because some staff names that I knew were mentioned in my ET1, e.g Peter Barker and Jackie Ellington). Judge Heath states in his record of a preliminary hearing at paragraph 3 under discussions; *"In respect of the issues, the claimant made the point that she did not know the names of the people who she complains about, and she was in difficulty being precise on dates until documents are disclosed….."* I did not know at the time the Judge was adopting them, that some of those allegations could end up being the subject of a deposit order. Judge Phillips Order with reasons gave me 14 days in which to pay, but 'ET rules' give me 21 days to pay and then another 14 days if applying for reconsideration. The deposit payment has exposed me to the risk of costs of preparation from the Respondents and I request a refund should deposit orders be dismissed":

i. no objection appears to have been made by the Claimant about the Schedule of Acts when it was originally compiled;

ii. it appears to have been complied in the spirit of the rule 2 overriding objective;

iii. if and to the extent that this is an attempt to reconsider the Order of EJ Heath of 2 May 2023; the application is out of time;

iv. the Claimant added to and updated the Schedule of Acts on 29 February 2024;

v. in my assessment, in any event, the facts and matters set out in the Schedule of Acts fairly and fully reflect the facts and matters set out by the Claimant in her ET1 and the various further and better particulars that she has provided;

vi. the Claimant's objection to the Schedule of Acts is unspecific and vague; she has not identified any actual paragraph or matter in the Schedule of Acts that she takes objection to, or why she takes objection to it;

vii. in regard to matters pleaded with regard to any named or physically described individuals, those matters have not been struck out;

viii. there is nothing in Rule 39 that says that a party should have 21 days in which to pay for a deposit as the Claimant asserts; the party against whom the deposit order has been made must pay the deposit by the date specified in the order;

ix. to the extent that the Claimant believes there has been an error of law, that is matter for appeal not reconsideration;

f. with regard to paragraph 6 of the Claimant's submissions, namely "whether a procedural error and/or error of law arose due to the close proximity of events affecting adequate preparation for a hearing. The link for Judge Phillips OPH was sent to the parties on the 14 May 2024, the day before the 15/05/24 hearing. R3's representatives also sent chronology and Case Law they wanted to rely on, also on the 14th May 2024, the day before the 15/05/24 hearing. R3's figure of 1,200-1,400 people working and the submitted case law suggested to me that R3 was reluctant for disclosure. It was insufficient time for me to find suitable supporting case law. The judgement of the previous OPH sitting before Judge Jones on 6-7 November 2023 was sent to the parties on 14 May 2024, also a day before Judge Phillips 15/05/24 sitting. I searched and found the email of Judge Jones judgement around the start of the OPH after Judge Phillips informed parties present that R4 had been dismissed from proceedings. I sought clarification from Judge of the procedural correctness of sitting through a hearing when I had not read a judgement in full but got no reply. I asked because Judge Phillips made clear that I only get 10 minutes to read and to read only paragraphs 36 to 39 of Judge Jones' judgement, (This was after R3 Counsel informed the hearing that only paragraphs 36 to 39 were relevant for me to read). This was insufficient time to organise myself at the hearing and be given a fair hearing.":

i. as far as the delay in the sending out of the Judgment of EJ Jones, following the 6-7 November 2023 PHCM hearing is concerned, the Claimant did get a reply to her questions about the delay in the judgment; this was discussed and considered at some length at the 15 May CMPH as reflected in paragraph 18:

> *"The Claimant was understandably disconcerted and taken aback by this development. She asked for time to read the Judgment. I explained that it appeared that most of the Judgment related to EJ Jones KC's findings on the contractual status points and the dismissal of the claim against R4. I pointed out to the Claimant that the only bits of the Judgment which might have any relevance to today's applications and the matters to be determined by me were the final 4 paragraphs of the Judgment, (36-39), which did touch on the Case Management Order made by EJ Jones KC that the Claimant had to provided further particulars of her Claim. I explained that if, once the Claimant had had the opportunity to consider the Judgment in full, she disagreed with it, then the appropriate route of challenge would be by an appeal. I read paragraphs 36 to 39 out to the Claimant, and also permitted a short adjournment so that she could take stock."*

ii. I did not and do not consider that the delay in the Claimant getting EJ Jones KC's ruling caused the Claimant any prejudice or impacted on her right to a fair trial regarding the matters that were under consideration by me on 15 May;

iii. to the extent that the Claimant believes there has been an error of law, that is matter for appeal not reconsideration;

g. With regard to paragraph 7 of the Claimant's submissions, namely "whether a procedural error and/or error of law arose as the Tribunal did not provide me with a fair opportunity to respond to Respondent 1 to 3's applications at the 15 May 2024 OPH, as there was insufficient time to organise myself at the hearing; My schedule of Acts table was sent to parties on 29th February 2024 giving Respondents sufficient time to respond. Respondent's 1 to 4 had not given me a fair opportunity to respond to their renewed applications sent to the Tribunal on 10th May 2024, and correspondence from R4 to the Tribunal on 13th May 2024, two days before the 15 May 2024 OPH":

i. the Claimant has been aware since the 2 May 2023 CMPH before EJ Heath, that the Respondents were looking to strike out her claim and/or make applications for costs orders;

ii. those applications have all been extant and details and grounds available for strike out and deposit orders since May 2023 (see paragraph 15 of my 15 May Order and Reasons);
iii. on 6 July 2023, EJ Heath ordered that they be dealt with at the 6-7 November CMPH; in the event that hearing did not have time to deal with those applications;
iv. EJ Jones KC at the 6-7 November CMPH ordered that a further one day CMPH was listed for 15 May 2024, to consider any outstanding applications which were not determined at that hearing and remained to be determined;
v. As stated at paragraph 19 of my Order and reasons of 15 May, "on 10 May, R1, on behalf of and supported by Rs 2-4 (R4 not knowing at this point that the claim against it had been dismissed), wrote to the tribunal to say that having reviewed the further particulars produced by the Claimant, it remained of the view that the Claimant's case was not sufficiently clear for them to understand and respond to **[291-2, 617-621].** R1 confirmed that all the Respondents intended to pursue all of their applications for strike out and/or deposit orders which were not dealt with at the 6-7 November 2023 CMPH. On 13 May 2024, the Claimant wrote setting out her objections to the Respondents' applications and referring to EJ Heath having said at the 2 May 2023 CMPH, that she could re-present her applications for discovery on non-contractual matters, which she said she wished to do, as well as making her own applications for an unless order and deposit orders [**622-626]";**
vi. In the circumstances, the Claimant had a fair opportunity to understand the Respondents' applications and to respond thereto, which indeed she did both prior to the CMPH as well as by way of making oral submissions on the day;

vii. to the extent that the Claimant believes there has been an error of law, that is matter for appeal not reconsideration;

h. With regard to paragraph 8 of the Claimant's submissions, namely, "whether a procedural error and/or error of law arose regarding the phase of the proceedings at which restrictions of deposit orders and partial strike out orders were imposed when there was an unaddressed central issue of R5's identity. This is because deposit orders and partial strike out restrictions were imposed before the respondents provided some sort of explanation of why R5 could not be accounted for despite being easily identifiable, impairing my right of access to a fair trial on allegations that were struck out and allegations that were subjected to a deposit order":

i. See my reasons for paragraph 4 of the Claimant's submissions above;
ii. As stated at paragraph 68 of my 15 May Order and Reasons, "In any event, the main disclosure stage of these proceedings

has yet to occur – and that is when – by reference to the issues that remain – R3, as well as R1 and R2, will have to provide disclosure of relevant documents. In the particulars that have survived the strike out applications from the Respondents, there are references to Mr Barker and each of these Respondents will therefore have to carry out reasonable searches to see if he can be identified";

iii. As stated in the specific reasons for allowing certain particulars to survive, those particulars that referred to Peter Barker were expressly permitted to survive because "while Peter Barker has not to date been identified, given the serious nature of the allegations against him, it would in my judgment be premature to strike out these particulars at this stage, before the disclosure exercise has taken place, in case Peter Barker can be identified by one of these Respondents";

iv. to the extent that the Claimant believes there has been an error of law, that is matter for appeal not reconsideration;

i. With regard to paragraphs 9 and 10 of the Claimant's submissions, namely "Whether a procedural error (possibly violation of due process) and/or error of law arose as the Tribunal made a judgement on chances of the success of my claim that took into consideration the numbers of people working as a factor, without obtaining evidence of those numbers. The 15th May OPH gave weight to a statement of numbers of in excess of 1,200 people working (referenced 39 times as a factor influencing Judge Phillips decision making in her Order with reasons sent to the parties on 6 June 2024) at any time without evidence. The realistic number of people looked after by just 1-day cleaner was neither evidenced by Judge Heath nor by Judge Phillips at any hearing" and "I support my version of realistic numbers of people working with a reference to R2's website, https://www.thejockeyclub.co.uk/sandown/venue-hire/spaces-suites/esher-hall/ showing the Vaccination Hall (Esher Hall) which has an advertised classroom seating layout, maximum capacity of 300. This evidence could not be found in time for the 15 May 2024 OPH as I did not know that numbers of people working will be considered in Judge Phillip's reasons for judgement. To clarify, as stated on the Sandown Park website, the area of Esher Hall is 1218m^2 which according to R3 Counsel's number of people working, equates to about 1m^2 per member of staff, assuming the hall was empty of furniture and no members of the public were present. R3's Counsel in his version of numbers of people working did not appear to discount capacity, to allow for the following; large areas of spaces for staff and members of the public to walk through, Vaccination booths, beds, waiting areas with seats for the public, general dustbins, hazardous waste bins and other infrastructure. Assuming the figure of people working is 1200 to 1400 and the ratio of staff to members of the public is a ratio 1:1, it means 1 cleaner is looking after in excess of 2,400 people's toilet needs. I consider saving expense versus fairness,

competing factors in the Tribunals "Overriding Objective", can only be fairly weighed, based on realistic numbers of people working.":

i. The context in which staffing numbers of 1200-1400 were discussed - and are relevant – is in regard to the proportionality of the scope of the disclosure exercise that the Respondents - in particular R3 - have to undertake; see paragraphs 41, 43, 46 and 47 of my 15 May Orders and Reasons; this relates to the likelihood of - in particular R3 - being able to identify an unnamed and undescribed individual referenced by the Claimant; while the Claimant makes the point that on any given day, there might only be 300 staff actually on site, that does not affect overall, in my judgment, the reasonableness of what can be expected from a Respondent on disclosure in this case; disclosure is not a fishing expedition for a Claimant; it is not fair or proportionate in my assessment to expect R3 on each and any day identified by the Claimant to search through 300 possible staff to work out if they might be the individual that the Claimant has referenced;
ii. If the Claimant feels that any of the Respondents have not given proper disclosure that is a matter she is entitled to raise with the tribunal at that time;
iii. Further, the Claimant is perfectly entitled to raise her points on numbers in terms of ratios and the numbers she was cleaning for by way of submissions at the full hearing and to cross-examine any of the Respondents' witnesses about them;
iv. In so far as the Claimant says that she considers saving expense versus fairness to be competing factors in the Tribunals "Overriding Objective", Rule 2 makes clear, that dealing with a case fairly and justly includes "(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues"; "(d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense".
v. Moreover, rule 2 also makes clear that "the parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal";

vi. to the extent that the Claimant believes there has been an error of law, that is matter for appeal not reconsideration;

26. Given my finding that none of the matters in the first application for reconsideration have any reasonable prospect of success, the second application for reconsideration falls away, because none of the grounds specified are now made out.

27. As far as the application to set aside the Orders and Directions from the 11 June CMPH, where the appropriate test is whether it is necessary in the interests of justice to set aside those directions, given my findings regarding the first

application, this also fails on the basis that none of the grounds specified are now made out.

28. In my judgment and assessment, none of the matters raised by the Claimant are such as to give rise to the need for any reconsideration of any of my decisions in the interests of justice. I do not believe that there has been any denial of natural justice to the Claimant in this case. Accordingly, I dismiss her three applications. That being the case I confirm the decisions set out in my Order and Reasons arising from the 15 May and 11 June CMPHs, which remain valid and extant. In particular, the Orders and Directions given have been made so as to ensure this case is fairly, properly and proportionately prepared, with the correct documents and witnesses in place, so as to ensure that the final hearing is fairly conducted.

Employment Judge Phillips
28th June 2024
London South
Date and place of Order

Date sent to the parties:
28th June 2024

FOR THE TRIBUNAL OFFICE