EMPLOYMENT TRIBUNALS

Claimant: **Mr C. Htwe**

Respondent: **Runwood Homes Ltd**

JUDGMENT ON CLAIMANT'S APPLICATION FOR RECONSIDERATION

The Claimant's application for reconsideration of the judgment on liability, sent to the parties on 6 November 2023, is refused.

REASONS

1. The judgment on liability was sent to the parties on 6 November 2023. On 17 November 2023, the Claimant made an application for reconsideration of the Tribunal's judgment on liability, which was in time. That application was not referred to me until 4 July 2024. This appears to have been an administrative error. I immediately wrote to the parties to apologise for the failure and said that I would respond substantively as soon as time could be allocated within the list. Acting REJ Crosfill was able to allocate a day on 10 July 2024, when I considered the application, deliberated and prepared this judgment.

2. I apologise again for the delay in dealing with this application.

The law

3. Rules 70 to 73 of the Employment Tribunal's Rules of Procedure 2013, make provision for the reconsideration of Tribunal Judgments as follows:

> **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 reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.**
>
> **71. Application**
> **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.**
>
> **72. Process**
> **(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.**
>
> **(2) If the application has not been refused under paragraph (1), the original decision shall be considered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that 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.**

4. The Tribunal thus has discretion to reconsider a judgment if it considers it in the interests of justice to do so.

5. Under rule 72(1), I must dismiss the application if I consider that there is no reasonable prospect of the original decision being varied or revoked. It is a mandatory requirement for a 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): *T.W. White & Sons Ltd v White*, UKEAT/0022/21.

6. If I think there are reasonable prospects, I must (under rule 72(2)) consider whether a hearing is necessary in the interests of justice to enable the application to be determined. A hearing would, unless not practicable, be a hearing of the full tribunal that made the original decision (rule 72(3)). If, however, I decide that it is in the interests of justice to determine the application without a hearing under rule 72(2), then I must give the parties a reasonable opportunity to make further written representations.

7. In *Outasight VB Ltd v Brown* UKEAT/0253/14 the EAT held (at [46-48]) that the Rule 70 ground for reconsidering Judgments (the interests of justice) did not represent a broadening of discretion from the provisions of Rule 34 contained in the replaced 2004 rules. HHJ Eady QC explained that the previous specified categories under the old rules were only examples of where it would be in the interests of justice to reconsider. The 2014 rules remove the unnecessary specified grounds, leaving only what was in truth always the fundamental consideration: the interests of justice. This means that decisions under the old rules remain pertinent under the new rules.

8. The key point is that it must be in the interests of justice to reconsider a judgment. That means that there must be something about the case that makes it necessary to go back and reconsider, for example a new piece of evidence that could not have been produced at the original hearing or a

mistake as to the law. It is not the purpose of the reconsideration provisions to give an unsuccessful party an opportunity to reargue his or her case. If there has been a hearing at which both parties have been in attendance, where all material evidence had been available for consideration, where both parties have had their opportunity to present their evidence and their arguments before a decision was reached and at which no error of law was made, then the interests of justice are that there should be finality in litigation. An unsuccessful litigant in such circumstances, without something more, is not permitted to simply reargue his or her case, to have 'a second bite at the cherry' (*per* Phillips J in *Flint v Eastern Electricity Board* [1975] IRLR 277).

9. The expression 'necessary in the interests of justice' does not give rise to an unfettered discretion to reopen matters. The importance of finality was confirmed by the Court of Appeal in *Ministry of Justice v Burton and anor [2016] EWCA Civ 714* in July 2016 where Elias LJ said that:

> **'the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (*Flint v Eastern Electricity Board* [1975] ICR 395) which militates against the discretion being exercised too readily; and in *Lindsay v Ironsides Ray and Vials* [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review.'**

10. In *Liddington v 2Gether NHS Foundation Trust* EAT/0002/16 the EAT, *per* Simler P, held at paragraph 34 that:

> **'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 by 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.'**

11. The test for determining whether fresh evidence is to be admitted is that laid down in *Ladd v Marshall* [1954] 1WLR 1489. The party seeking to adduce the fresh evidence must show: (1) that the evidence could not have been obtained with reasonable diligence for use at the original hearing, (2) that it is relevant and would probably have had an important influence on the hearing, and (3) that it is apparently credible.

Discussion and conclusions

12. In dealing with the Claimant's application, I have grouped together similar points under the sub-headings below.

<u>Criticisms of the conduct of the hearing</u>

13. The Claimant (on page 1) criticises the judgment because it referred to whether matters were/were not put to witnesses by him in cross-examination and suggests that, if he did not do so, this was because he was pressed for time. I explained to the Claimant at the beginning of the hearing the importance of putting the key points his case to the relevant witnesses; for example, if he was suggesting that a witness did something because of his

sexual orientation, he should say so to the witness so that that they could comment. Far from pressing the Claimant for time in relation to this, I took steps to assist him in doing this. I prepared a new version of the list of issues, which grouped together all the causes of action against each factual allegation, partly as a reminder for the Claimant of what type of unlawful conduct he was alleging in relation to each factual allegation (that list was then transposed into the judgment as a series of subheadings). At every stage of the Claimant's cross-examination, I checked with him which of these factual issues he was asking questions about. I frequently prompted him to put to the witness the essential element of each claim. On occasions, he did so. On other occasions, when he did not, I asked the witness myself, by way of an open question. There were also occasions when the Claimant expressly declined to put something to a witness: for example, when I asked him whether he was going to put to Ms Braithwaite that she dismissed him because he was gay, he said that he was not. In the circumstances, I consider that there was nothing improper in the Tribunal having regard to these matters in our conclusions; there was no unfairness to the Claimant.

14. The Claimant suggests (page 2) that the Tribunal 'didn't intervene when the respondent overshot their cross-examination time allotment by several hours leaving the claimant to cross-examine six witnesses in two days'. That is incorrect. The original timetable, agreed with the parties at the beginning of the hearing, allowed for the Claimant to be cross-examined for one and a half days (Day 2 and Day 3 a.m.), and for the Claimant to cross-examine the Respondent's witnesses for two days (Day 3 p.m., Day 4 and Day 5 a.m.), with closing submissions on the afternoon of Day 5. Counsel for the Respondent lost an hour at the beginning of Day 2 while the Tribunal dealt with further housekeeping matters; she completed her cross-examination at the end of Day 3; she exceeded her estimate by around an hour and a half but she did not have two full days. Rather than require the Claimant to reduce the length of his cross-examination, we agreed to list an additional day for submissions, so that he could have two full days to cross-examine, as originally planned; also he would not need to worry about closing submissions while he was doing so.

15. I reminded both Counsel and the Claimant at appropriate points that the evidence had to be completed within the time available and asked them both occasionally to move on when they had covered an issue. For the avoidance of doubt, there was no question of allowing the Claimant to cross-examine the Respondent's witnesses for two days each, as he suggests we should have done; this would have required the Tribunal to list a further 10 days. I do not consider that there was any unfairness in relation to time allocation as between the parties.

16. The Claimant (page 1) then criticises the Tribunal's approach to closing submissions. As set out above, the evidence was concluded on Day 5 of the hearing, 28 July 2023. We then adjourned to 14 August 2023 for closing submissions and deliberations. I asked the parties to provide a written document outlining their submissions and explained that they would also have the opportunity to make oral submissions, but that these would be limited to 30 minutes, so that the Tribunal could spend the rest of the day deliberating.

17. I believe I explained to the Claimant that, if he decided to produce a written document, it did not need to take any particular form; it was essentially an opportunity to explain why his case should succeed; he was not obliged to produce a written document if he did not want to; the Tribunal would have the evidence fresh in its mind. That is my usual practice with litigants in person; because I give that guidance so frequently, I do not usually record it in my note. I do not have a note of the Claimant asking to make oral submissions for four hours; if he had done so, it is likely that I refused the request, not because there is (as the Claimant suggests I said) 'a tribunal rule which does not allow the parties to make lengthy oral submissions' - there is no such rule - but because it would not have been a proportionate use of Tribunal time; it would have required us to list a further day for deliberations.

18. The panel considered that giving the parties two weeks to prepare their closing submissions was fair to them both. At the beginning of Day 6, the Claimant told us that he had not prepared any written submissions. I have a note that he said 'I am here to answer questions'. He did not make any objection to the Tribunal proceeding as we had proposed. I explained that we would hear the Respondent's submissions first and that he would have 30 minutes to make any oral submissions he wished to make. He made some brief submissions, including referring to the case of *Tomlinson v Mencap* in relation to the issue of sleeping at work; as recorded in the judgment (para 13) he then asked us to consider his statement and all the evidence; he did not use the full 30 minutes available to him. I have a note that at the end of the hearing the Claimant thanked the Tribunal for its 'patience and assistance'. I do not consider that the Claimant was treated unfairly in relation to the arrangements for closing submissions.

19. As for the Claimant's difficulties with his speech, because of the information the Claimant gave us about his speech, we were prepared for him to give lengthy answers. Sometimes he gave long answers, but on the whole, he gave relatively concise answers to questions. Occasionally, I had to remind him to focus on the question he had been asked and to try to answer it; I did not instruct him 'to give only short answers', as he now suggests (page 3).

20. I am satisfied that the hearing was fairly conducted, that the Claimant was given every opportunity to advance his case and that the Tribunal considered all the evidence in reaching its conclusions. The fact that the Claimant does not agree with those conclusions is not a good reason for reconsidering the judgment.

<u>Criticisms of specific findings</u>

21. The Tribunal was not incorrect, as the Claimant suggests (page 2), to find at paragraph 17 of the judgment that the Respondent's employee handbook 'does not contain the disciplinary policy, but it directs employees to it.' The handbook expressly refers to the disciplinary policy, stating: 'for further information refer to the Policy (QD-HR-10)'. At para 18 of the judgment, we made the following findings of fact:

> 'The Claimant completed a form on 9 September 2018, confirming that he had read the disciplinary and grievance policies. There was also a procedure to test the understanding of policies, which the Claimant

completed on 15 February 2019. The disciplinary policy was also available to members of staff at all times.'

22. In relation to the date on which the handwritten note referred to at paragraph 70 of the judgment was created, although the document itself does not have a date on it, the Claimant is right (page 4) to say that the metadata of the photograph of the note gave a date of 'Monday, 2 December 2019'. I note that we referred to that date late in the judgment (para 79). The document is relied on by the Claimant as evidence that he did the protected act referred to in Issue 14 and made the public interest disclosures referred to in Issues 15 and 16, even though these occurred over three months later. The date on which the document was created does not alter the fact that it contains no reference to discrimination; nor does the email of 20 April 2020. The Tribunal found as a fact (paragraph 71) that the Claimant did not complain of discrimination orally on 16 April 2020 or in writing on 20 April 2020. By contrast, the Tribunal accepted (para 232) that he raised with Ms King at his meeting with her two of the matters which are referred to in the note; we concluded that one of them (Issue 15) did not amount to a public interest disclosure and one of them (Issue 16) did. Again, the date of the document does not affect those conclusions. I am satisfied that those findings and conclusions were open to us on the evidence before us.

Time limits

23. The Claimant challenges the Tribunal's conclusions on jurisdiction on page 7. Because he had led no evidence on time limits in his statement, I gave him the opportunity to rectify that omission by asking him supplementary questions at the beginning of his oral evidence. He did not mention what he now describes as 'glaringly obvious mitigations like global pandemic, social distancing, and complete or partial national lockdowns' as reasons why he did not issue his claims earlier; on the contrary, he suggested that being at home with Covid in 2021 gave him the time to do some research into Employment Tribunals.

24. The Claimant is wrong to say that the burden falls on the Respondent in relation to time limits. There are statutory time limits, which will shut out an otherwise valid claim unless the Claimant can displace them. Whether a Claimant has succeeded in doing so in any one case is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer it (*Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 per Sedley LJ at [31-32]).

25. In relation to his assertion that there was no nine-month gap 'in the Claimant's suffering', the authorities are clear that a discriminatory act does not extend over a period merely because it has continuing consequences (*Amies v ILEA* [1977] ICR 308).

26. The Tribunal set out its reasons for declining jurisdiction in relation to the discrimination and whistleblowing detriment claims at paragraphs 219-223 of the judgment. Nothing in the Claimant's application persuades me that there are any prospects of our varying or revoking those conclusions.

Other matters

27. The Claimant is correct that it was Ms Friend who gave the evidence about the reasons for Ms King's non-attendance at the hearing, not Ms Lanigan; that was an error. It is a matter for the Tribunal whether to draw an inference from the absence of a witness. In circumstances where we were satisfied that the reasons given for Ms King's absence (para 68 of the judgment) adequately explained it, we declined to draw an adverse inference from it. I consider that this was a conclusion which was open to us in the circumstances.

28. Certain points which the Claimant makes in his application are, in my view misconceived and I do not deal with them here: the suggestion that he should have been permitted to cross-examine Counsel for the Respondent (page 2); that 'the findings in every issue [bar one] should be reconsidered' (page 6); and that witness summonses should be issued for Ms King, Ms Emery, Ms Todd, Mr Aspinall and many others to attend to give evidence, in what would amount to a wholesale re-hearing of the case (page 6).

Conclusions

29. In relation to the other matters, not specifically dealt with in this judgment, I consider that the Claimant is seeking to re-argue points already made at the hearing, or to make new points which he did not make at the hearing without justification (pages 3 to 6). The authorities are clear that this is not a sound basis for a Tribunal to reconsider a judgment.

30. The Tribunal has declined jurisdiction in relation to the whistleblowing detriments at Issues 1-13 and 23-24, and the discrimination and victimisation claims up to and including Issue 20. Even if the Claimant's factual challenges had any merit, the jurisdictional bar would still be fatal to those claims.

31. In light of the Tribunal's conclusion that there was no protected act, any factual challenges in respect of the alleged acts of victimisation would make no difference.

32. In light of our conclusion that the Claimant provided no cogent evidence that his sexual orientation was a factor in the Respondent's treatment of him for the purposes of the direct discrimination and harassment claims (para 224 onwards) – a conclusion which the Claimant does not challenge in his application – any factual challenge in relation to those claims would make no difference.

33. There is nothing in the Claimant's application that persuades me that the Tribunal reached the wrong conclusion as to the fairness of the dismissal.

Conclusion

34. For all these reasons I am satisfied that there is no reasonable prospect of the Tribunal's judgment being varied or revoked. The application for reconsideration is dismissed pursuant to rule 72(1).

35. Because I have dismissed the application at the first stage, I have not invited the Respondent to comment on it.

Employment Judge Massarella

11 July 2024