Case No: 2501101/2016

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr S Daly	**AND**	**The Newcastle upon Tyne Hospitals NHS Foundation Trust**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: North Shields **On:** 14 March 2018

Before: Employment Judge A M Buchanan **Members:** Miss E Jennings, Ms M Clayton

Appearances

For the Claimant: Not in attendance
For the Respondent: Not in attendance

JUDGMENT ON RECONSIDERATION

The claimant's application filed 27 October 2017 (erroneously dated 27 September 2017) for a reconsideration of the Judgment on Costs dated 9 October 2017 and sent to the parties on 13 October 2017 is refused.

REASONS

1 In this Judgment the following expressions have the following meanings:

1.1 "the Judgment" means the judgment dated 23 May 2017 which was sent to the parties on 30 May 2017 and in which the claims of unlawful disability discrimination and public interest disclosure detriment were dismissed by the Tribunal after a five day hearing in March 2017 with deliberations on 12 May 2017.

1.2 "the Costs Judgment" is the judgment dated 9 October 2017 sent to the parties on 13 October 2017 after a hearing in chambers on 25 September 2017 in which the claimant was ordered to pay to the respondent £3,000 towards its costs.

1.3 "the Application" means an application filed with the Tribunal by the claimant on 27 October 2017 (although erroneously bearing the date 27 September 2017) in which the claimant asked for the Costs Judgment to be reconsidered.

1.4 "the Submissions of the respondent" means those contained in a letter dated 14 December 2017 from the solicitors acting for the respondent setting out objections to the Application.

1.5 "the Submissions of the claimant" mean the submissions from the claimant set out in a letter sent to the Tribunal dated 21 December 2017 from the claimant making final comments on the Submissions of the respondent together with five pieces of e-mail correspondence attached.

1.6 "the "2013 Rules" mean the rules contained in schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

2 The history of the matter

2.1 An Employment Tribunal comprising Employment Judge Hunter and the abovementioned non legal members sat in Newcastle on 27-31 (inclusive) March 2017 to deal with claims of unlawful disability discrimination and public interest disclosure detriment advanced by the claimant.

2.2 The Tribunal met on 12 May 2017 to deliberate on the evidence and submissions heard during the hearing and as a result issued the Judgment in which all the claims of unlawful disability discrimination and public interest disclosure detriment were dismissed.

2.3 By a letter dated 16 June 2017 the solicitors acting for the respondent applied to the Tribunal for an order for costs against the claimant.

2.4 On 12 September 2017 the claimant filed detailed comments in respect of the application for costs and on 13 September 2017 filed details of his expenditure and income.

2.5 On 25 September 2017 the Tribunal met in Chambers and deliberated on the application for costs. By consent the parties did not attend and were content to rely on written submissions. That hearing resulted in the Costs Judgment in which the claimant was ordered to pay £3,000 to the respondent as a contribution towards the respondent's costs which were stated to exceed £36,000 plus VAT.

2.6 On 27 October 2017 the claimant made the Application on the basis that new information had become available which was not available at the time of the filing of the Submissions of the claimant and thus that it was in the interests of justice for the Costs Judgment to be reconsidered.

2.7 Employment Judge Hunter retired in June 2017 and accordingly was not available to be involved further in this matter. The matter was referred to Regional Employment Judge Robertson who exercised his power pursuant to Rule 72(3) of the 2013 Rules and appointed Employment Judge Buchanan to deal with the matter in place of Employment Judge Hunter on 9 November 2017.

2.8 The matter was then referred to Employment Judge Buchanan who on 30 November 2017, having familiarised himself with the file, wrote to the parties indicating that he had given the matter preliminary consideration pursuant to Rule 72(1) of the 2013 Rules and indicating that it was his provisional view that the Application should be considered and invited the respondent to give its response by 15 December 2017 and invited both parties to say by 15 December 2017 whether or not they were content for the reconsideration to be dealt with on the papers.

2.9 On 14 December 2017 the respondent filed its submissions and agreed for the matter to be dealt with on the papers. The claimant indicated his agreement to a reconsideration by the Tribunal on the papers by letter dated 7 December 2017.

2.10 The claimant was invited to make final submissions arising out of the Submissions of the respondent and he did so on 21 December 2017.

2.11 There was a delay in listing this matter for reconsideration because of the unavailability of one of the non-legal members of the Tribunal due to personal circumstances.

2.12 There is an appeal pending at the Employment Appeal Tribunal ("EAT") under reference UKEATPA/0428/17/DA against the Judgment. A Rule 3(10) hearing is due to take place at the EAT on 2 May 2018. In order for the EAT to have all relevant information before it, a copy of this Judgment is being sent to the EAT at the same time as it is sent to the parties and pursuant to a request from the EAT dated 10 January 2018.

The Application and the response to it

3.1 The Application is based on an outcome letter dated 13 October 2017 of a grievance raised by the claimant with the respondent on 3 July 2017 which outcome the claimant asserts evinces that the respondent behaved unreasonably in the conduct of these proceedings.

3.2 The grievance outcome letter accepts that when the respondent released to the claimant his occupational health ("OH") records as part of these proceedings, those records had included counselling notes which he had been advised would remain confidential and would not be released. The respondent accepted that counselling notes are held separately within its electronic records system but that when the OH records had been printed off in this matter, the counselling records had also been printed due to what was described as a "systems error" which had now been corrected. The respondent apologised and confirmed its remedial action. The respondent made the point to the claimant that on 21 February 2017, after the disclosure had taken place (some four months before the hearing), it had invited the claimant to withdraw his consent to the production of any part of his records but that he had not done so.

3.3 In the Submissions of the respondent the point was made that all parties had had access to the full OH records for several weeks before the hearing and no application was made by the claimant at any time either before or during the hearing for documents to be removed from the trial bundle. It was submitted that the application for costs had been made on the basis of the claimant advancing claims which had no reasonable prospect of success and that the respondent had been put to much unnecessary work in preparation for the hearing which had also been unnecessarily lengthened. It was submitted the new information relied on by the claimant was wholly unrelated to the reasons for the Costs Judgment.

3.4 In the Submissions of the claimant, reference was made to other matters which occurred during the final hearing including the question of the respondent's attempt to have a diary maintained by the claimant disclosed – an application which was refused by the Tribunal. It was only in October 2017 that the respondent accepted that the OH records should not have been produced. Reference was made to the late disclosure by the respondent of an "important email" and the late exchange of a witness statement. The claimant submits that the counselling records should have been removed from the trial bundle without him having to request that given that the respondent was responsible for the error. The claimant asserts that the withdrawal of his claim of failure to make reasonable adjustments at a late stage during the hearing was not his decision but that of his representative.

3.5 Both parties have confirmed this matter can be dealt with on the papers without a hearing.

4 **<u>The law</u>**

4.1 We have reminded ourselves of the relevant provisions of Rules 70 -72 of the 2013 Rules which read:

Rule 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 revoked it may be taken again.
Rule 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.
Rule 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……

4.2 The 2013 Rules came into force on 29 July 2013 and introduced the new concept of reconsideration of judgments rather than a review of judgments as it was entitled

under the previous 2004 Rules of Procedure. In the 2004 Rules there were five grounds on which a review could be sought and the last of the five was the single ground that now exists for a reconsideration under the 2013 Rules namely that the interest of justice render it necessary to reconsider. We consider that any guidance on the meaning of "the interests of justice" issued under the 2004 Rules (and the earlier Rules) is still relevant to reconsiderations under the 2013 Rules.

4.3 We remind ourselves that the phrase "*in the interests of justice*" means the interests of justice to both sides. We have reminded ourselves of the comments made by the Employment Appeal Tribunal in **Fforde v Black EAT 68/80** where it was said that the words in the "interests of justice" do not mean:

"…. that in every case where a litigant is unsuccessful he is automatically entitled to have the Tribunal review it. Every unsuccessful litigant thinks that the interest of justice require a review. This ground of review only applies in the even more exceptional case where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order".

4.4 We have noted the guidance on the 2013 Rules from HH Judge Eady in the decision **Outasight VB Limited –v- Brown UKEAT/0253/14/LA**. We have considered that guidance and in particular have noted what is said in respect of the admission of new evidence:
"More specifically, as to an application to introduce fresh evidence after the determination of a case, the approach laid down in Ladd v Marshall will, in most cases, encapsulate that which is meant by the "interests of justice". It provides a consistent approach across the civil courts and the EAT. Should a different approach be adopted in the ET because the principles of Ladd v Marshall are no longer expressly set out in the Rules? I do not think so. Those principles set down the relevant questions in most cases where judicial discretion has to be exercised upon an application to admit fresh evidence in the interests of justice".

4.5 The principles in **Ladd –v- Marshall** as to the admission of new evidence were given in the Judgment of Denning LJ in the following terms:

"In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible"."

5 **Conclusion**

5.1 We reconsider the Costs Judgment. The Application is made on the basis that the respondent has now formally accepted its error in respect of the OH records and on the basis of the other matters referred to in the Submissions of the claimant. Referring to the guidance in **Outasight VB Limited** we have considered the grounds available for review under the 2004 Rules. The first three grounds were that a decision had been made as a result of an administrative error, that a party did not receive notice

of the proceedings or that the decision was made in the absence of a party,. Clearly those three matters are not relevant to the decision we have to make.

5.2 The other two grounds were that new evidence had become available since the decision was made the existence of which could not have been reasonably known of or foreseen at that time and/or that the interests of justice required a review. Thus by reference to the 2013 Rules we consider the interests of justice and in particular the new evidence on which the claimant relies.

5.3 The letter from the respondent dated 13 October 2017 giving the grievance outcome is clearly new evidence. We have considered whether that evidence could have been reasonably known of or foreseen when the Costs Judgment was made. We conclude that it could. At paragraph 3 of the Costs Judgment, the Tribunal referred to the claimant's submission that the respondent had *"acted unreasonably in accessing counselling records and withheld other documents. The respondent's solicitor harassed him throughout in the attempt to settle".* We conclude that the fact the respondent formally acknowledged its error in respect of the counselling records in October 2017 was not surprising and could have been anticipated when the Costs Judgment was reached given that the claimant had submitted his grievance to the respondent in July 2017. The Tribunal was aware of the questions around the disclosure of the counselling records when deciding on the Costs Judgment and the non-legal members specifically confirm that they knew of the disclosure of the counselling records when the Costs Judgment was reached. Thus we turn to the central question raised by this application, is it in the interests of justice for the Costs Judgment to be reviewed?

5.4 We consider that there are several important factors in relation to the Costs Judgment which lead us to conclude that the Costs Judgment should be confirmed. These factors are:
(1) It is clear that the decision to award costs was reached for reasons unconnected with the matters referred to in the grievance outcome letter. The Costs Judgment was made for the reasons set out in it at paragraphs 6-10 inclusive namely that the claim for public interest detriment had no reasonable prospect of success, that the claimant had conducted the proceedings unreasonably by only withdrawing reliance on a mental health impairment as amounting to a disability at the outset of the hearing and by only withdrawing a claim for failure to make reasonable adjustments as the five day hearing progressed.
(2) The claimant and his representative had had access to the counselling records referred to in the grievance outcome for several weeks prior to the hearing and no formal or informal application had been made for those records to be moved or redacted. We note and accept that the respondent invited the claimant to ask for the counselling records to be removed by letter dated 21 February 2017 but no such application was made prior to the hearing. Furthermore no application was made during the hearing for any of the documents to be removed from the bundle. It therefore sits very uneasily with the claimant now to seek to use the inclusion of those documents as a reason to reconsider and revoke the Costs Judgment.
(3) The award of costs is a modest one when seen in the context of the respondent's claimed costs which exceed £36000 plus VAT.

(4) The public interest detriment claim was considered by the Tribunal as having had no reasonable prospect of success and the counselling records – directed as they were to the disability discrimination claims – had no relevance to that claim.
(5) By withdrawing reliance on a mental impairment as amounting to a disability very late in the day, two witnesses were called by the respondent who need not have been troubled at all namely Ms Carrol and Ms Grant. The Costs Judgment continues at paragraph 10 "*The evidence in respect of the grievance and redeployment was also unnecessary because the public interest disclosure claim had no reasonable prospect of success as was any claim based on the way in which the redeployment exercise was organised".*
(6) The award for costs is calculated on the basis of the extra work to which the respondent was put by reason of the unreasonable conduct of the proceedings by the claimant with regard to the matters we have already referred to. That matter is not affected by the grievance outcome.
(7) The disclosure of the counselling records should not have happened but the disclosure was accidental and could have been corrected before the hearing if the claimant had taken up the respondent's offer to have the documents removed from the trial bundle.
(8) The grievance outcome would not have amounted to new evidence within the terms of the 2004 Rules had such rules still been in force for the reasons set out at paragraph 5.3 above. Further, we apply the guidance in **Ladd –v- Marshall** and we conclude that the grievance outcome letter would not have had an "*important influence on the result"* of the Costs Judgment. The Tribunal was aware of the matters raised by the claimant's grievance and the respondent's acceptance of its error when it reached the decision contained in the Costs Judgment.
(9) We have considered the matter in the context of the interests of justice as referred to in paragraphs 4.3 - 4-5 inclusive above and conclude the basis for the Costs Judgment is not affected by the grievance outcome.
(10) The claimant does not seek to suggest that he has been put to any additional expense by the disclosure of the counselling records.

5.5 For those reasons individually and cumulatively, we conclude that it is not in the interests of justice for the Costs Judgment to be varied in any way and it is confirmed. We are not persuaded that the fact the respondent has formally accepted its error means that the interest of justice require the Costs Judgment to be revoked.

5.6 In the Submissions of the claimant, he asks the Tribunal to consider the costs order as a detriment as a result of making a protected disclosure and that the conduct of the respondent in disclosing counselling records amounted to "*a criminal offence, a breach of a legal duty, a danger to the health and safety of any individual, a deliberate concealment and a miscarriage of justice".* The order for costs in the Costs Judgment was an act of the Tribunal having considered the representations from both parties and was not an act of the respondent. The public interest detriment claim advanced by the claimant was dismissed in the Judgment. These matters raised by the claimant cannot be considered further and have no bearing on this judgment on reconsideration.

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EMPLOYMENT JUDGE A M BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT

JUDGE ON 26 April 2018