mf

EMPLOYMENT TRIBUNALS

Claimant: **Miss M Williams**

Respondent: **Emerson Park Academy**

Before: **Employment Judge Moor**

JUDGMENT ON RECONSIDERATION

The Claimant's application dated 2 February 2017 for reconsideration of the judgment sent to the parties on 25 January 2017 is refused.

REASONS

1. On 25 January 2017 the Tribunal's Judgment and Reasons were sent to the parties.

2. On 2 February 2017 the Claimant wrote to the Tribunal stating 'I wish to have my case reconsidered in accordance with the rules as a reconsideration of all the facts as well as new ones'. She also asked for confirmation that the judgment sent on 25 January included the reasons. She stated that 'I shall be submitting my reasons as to why I believe your decision was so wrong and must be looked at again.'

3. On 6 February 2017 the Claimant wrote a 13 page letter to the Tribunal setting out the reasons she requests a reconsideration.

4. On 8 February 2017 the Claimant sent the Tribunal an email with attachments described as 'research not previously available. The EPA planner is included.' She requested a reconsideration 'as I don't believe it was heard its full capacity as a complaint. I am asking that you look at it as a whole and not in part.'

5. The documents attached were as follows:

5.1. A 'fit note' dated 3 November 2016 stating that she was not fit for work for 2 months.

5.2. A further fit note dated 9 January 2017 i.e. after the hearing was over.

5.3. A Mail Online report that teenagers are less likely to smell sweat than fast food. The report is dated 22 January.

5.4. The letter from the Claimant of 21 March 2016 setting out her claim, which the Tribunal had before it at the hearing.

5.5. An ambulance call-out sheet dated 30 September 2015.

5.6. A patient report form for the same date concerning the Claimant after her fall of that date.

5.7. The ambulance call details for that date.

6. The Claimant sent a further email to the Tribunal on 8 February 2017 enclosing a chain of email correspondence dated in 2014 between her and her TU representative, Anne White, that she states, with no explanation, was 'unavailable'.

7. The Claimant's request for reconsideration was sent to me and I decided it on 6 March 2017. The Tribunal apologises to the Claimant for the administrative delay in sending the decision to her.

Tribunal Rules

8. By Rule 70 of the Employment Tribunal Rules ('the Rules') provides '*a Tribunal may … 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.'*

9. So far as is relevant, Rule 71 provides that *'… an application for reconsideration shall be presented in writing (**and copied to all the other parties**) … within 14 days of the date that the written reasons were sent … and shall set out why reconsideration of the original decision is necessary.*' (My emphasis).

10. The Claimant has made her application within the time required by the Rules and in writing but she has not complied with Rule 71 by copying her application to the other party, the Respondent.

11. Rule 6(a) allows the Tribunal, in the case of non-compliance with the rules, to take such action as it considers just, which may include to vary or waive any requirement of the rules. I have considered whether to do so here:

11.1. The interests of justice normally require that each party inform the other of correspondence it has with the Tribunal. The principle is of open justice: each side should know what the other side is saying to the Tribunal.

11.2. In relation to reconsideration applications, the rule that the other party should be copied into the application is set out clearly in the Tribunal rules and emphasised in bold in the Guidance on reconsideration (T426) available at the gov.uk website (https://formfinder.hmctsformfinder.justice.gov.uk/t426-eng.pdf).

11.3. It is arguable that, in principle, there should be no need to inform the Respondent of the application until the Tribunal decides it has reasonable prospects. But this is not what the Rules require.

11.4. Nevertheless, the Claimant who is unrepresented, has plainly spent a time drafting her reasons for a reconsideration and it would seem unfair to have no regard to them.

12. On balance, it seems to me just to waive the requirement of copying the application to the Respondent. I will therefore consider the application.

13. Rule 72(1) provides so far as is relevant: '*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 … the application shall be refused and the Tribunal shall inform the parties of the refusal.*'

Interests of Justice/New Evidence

14. The Tribunal will only reconsider a decision if the interests of justice require it, see Rule 72.

15. Where a party relies on new evidence after judgment is given, it must be shown: (a) that the evidence could not have been obtained with reasonable diligence for use at the original hearing; (b) that it is relevant and would probably have had an important influence on the hearing; and (c) that it is apparently credible.

16. The Claimant has relied on 'new evidence' but has given no explanation why it could not, with reasonable diligence, have been made available for use at the original

hearing. The Claimant therefore has no reasonable prospect of persuading the Tribunal to consider this evidence and I have not done so.

17. In any event: the second fit note is dated after the hearing of the issues in the claim. It could not have had any influence on the outcome. Likewise the Mail Online report was not written at the time of the hearing. The evidence we heard from the Claimant was that teenagers sprayed deodorants and perfumes in class. It was this evidence and the triggering of asthma attacks because of it that was relevant to the issues in the case. It was common ground that teenagers were overly sensitive about their body odour and therefore sprayed indiscriminately during the day. That they might not smell sweat is not relevant to what a reasonable adjustment is: the facts before us were that pupils wanted to wear scents and deodorants and sprayed them.

18. The interests of justice include the interests of both parties, the public interest requirement that there should, as far as possible, be finality of litigation and the overriding objective. The courts have emphasised the importance of the principle of the finality of litigation. The reconsideration application is therefore not a 'second bite at the cherry'. In other words, it is not usually in the interests of justice to allow a litigant to re-argue the case. This also accords with the Tribunal's overriding objective to deal with cases efficiently and proportionately.

19. I have considered carefully the arguments raised in the letter of 6 February by the Claimant. In my view, the vast majority of them amount to a re-arguing of the claim. The Claimant sets out, at length, why she disagrees with the decision. It is unsurprising that she does so: she brought her claim in good faith, believing that she had been discriminated against. However, the Claimant had every opportunity to give the evidence and make the arguments she wished at the original hearing. Applying the important principle of the finality of litigation, it is not in the interests of justice here to allow the Claimant to re-argue her case. Nor is it proportionate to do so.

20. Those points that the Claimant makes in her application that do not amount to a re-arguing of the issues, I deal with as follows. (I have numbered the paragraphs of the letter consecutively for ease of reference):

20.1. (page 1, para 3) The time given to the hearing was proportionate to the issues in the case and sufficient to cover the relevant facts. Both parties had a reasonable opportunity to give evidence and ask questions. At no point was the evidence guillotined. Nor did the Claimant request additional time. The Tribunal spent a further full day in chambers considering the evidence and reaching its decision.

20.2. (page 1, para 7) The Claimant suggests that the Tribunal's approach was discriminatory because she suggests its approach was 'subjective'. She has not given any reason for this assertion. The Tribunal addressed the issues by reference to the facts it found and the relevant legal principles. The Tribunal did not accept the totality of the Respondent's case and

found some sub-issues in the Claimant's favour, which does not support the contention that it was not objective. This argument has no reasonable prospect of success.

20.3. (page 2, para 8) The Claimant argues that there are points in her original complaint that were not dealt with. She has not identified them. The amended complaint was distilled into a set of issues by Russell EJ, which the Claimant agreed and which the Tribunal identified at the outset of the hearing as being the questions it was to address.

20.4. (page 8, para 43) In relation to the harassment allegation the Tribunal reached a decision based on all the facts: the perception of the Claimant is part of the test and the Tribunal heard evidence from the Claimant that she was embarrassed and annoyed by the comment made by Ms Bass. It found as a fact that this was the effect upon her. The Claimant now seeks to give different evidence as to the effect upon her by analogy with words comprising racist abuse. It is not in the interests of justice to reopen the evidence on this comment. The Claimant had a proper chance to give her evidence and be cross-examined about it at the hearing. To re-open this aspect of the case would be contrary to the principle of the finality of litigation.

20.5. In her application the Claimant states that she feels insulted by the Tribunal's decision. While I am disappointed to read this, there is nothing personally insulting towards her in the Tribunal's reasons. This argument does not provide any grounds for a reconsideration.

21. For the reasons set out above, in my view there is no reasonable prospect of the original decision being varied or revoked and the application for reconsideration is therefore refused.

Employment Judge Moor

4 July 2017