



EMPLOYMENT TRIBUNALS

Claimant: Miss. J Limer

Respondent: Tracey Baker t/a Bakewell Gift and Bear Shop

JUDGMENT

The Claimant's application dated 1st June 2017 for Reconsideration of the judgment sent to the parties on 3rd May 2017 is refused.

REASONS

Background

1. The Claimant has made an application for Reconsideration ("The Application") of the Reserved Judgment ("The Judgment") sent to the parties on 3rd May 2017. I granted an extension of time until 31st May 2017 to the Claimant under Rule 5 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("The Regulations") for that Application to be presented.
2. The Claimant submitted the Application on 30th May 2017. On 1st June 2017 she also presented an amended version to include reference to a further point within the Judgment (relating to paragraph 129). Although that amended Application was received outside the extension of time that I had granted to the Claimant, I have considered the amended version on the basis that no prejudice arises to the Respondent in doing so and therefore I have retrospectively granted a further extension of time to 1st June 2017 under Rule 5 of the Regulations.
3. I have considered the Application under Rule 72(1) of the Regulations. There is no reasonable prospect of the original decision being varied or revoked for the reasons set out below and therefore the Application is refused.

The Application

4. The Application presented by the Claimant is a lengthy one which runs to some 24 pages. There is also an extant appeal to the Employment

Appeal Tribunal although I have concentrated my Rule 72(1) consideration on the Application and not the appeal documentation.

5. The Application raises a number of issues which may be conveniently distilled into the following headings:
 - a. The hearing and the way in which it was conducted/proceeded;
 - b. The Claimant's health;
 - c. Limitations on questions to be put in cross examination;
 - d. Findings of fact made and conclusions reached;
6. I shall deal with consideration of each of those below.

The hearing and the way in which it was conducted/proceeded

7. The Application sets out the following matters in this particular section and each is dealt with separately below:
 - a. **That the Claimant was not advised that the order in which the Respondent called her witnesses would be detrimental to her case.**

The order in which a party calls its witnesses is a matter for them and not one in which the Tribunal would invite comment or objections from the other party.

Any deviation from an account previously given is a matter which the Tribunal considered when assessing credibility. Our findings in that regard are set out at paragraphs 18 to 24 of the Judgment.

The burden of proof in relation to the whole of the claim was on the Claimant. She had not, by the time of the Respondent giving evidence, shown any facts which could have shifted the burden to the Respondent in all events.

The order of witnesses therefore had no bearing on the facts as found or the conclusions reached by the Tribunal nor would it have been a matter upon which the Claimant would have been entitled to object.

- b. **That she had been distracted by foot tapping by the Respondent's representative**

Had the Tribunal observed any behaviour that suggested an attempt to distract the Claimant, those matters would have been dealt with at the time.

The only record in the Judge's notes relating to such matters appears to be an entry at 10.25 a.m. on the second day of the hearing where the Claimant asked Mr. Famutimi to stop moving his leg as it was distracting her. There is nothing to suggest that he did not comply with that request nor that he had been moving his leg in an attempt to distract the Claimant.

8. The matters raised in this head of the Application therefore have no reasonable prospect of seeing the original decision being varied or revoked.

The Claimant's health

9. The Application sets out that the Claimant had informed the Tribunal on the first day of the hearing that she was not well enough to proceed and had attended under duress. That is not the recollection of the Employment Judge nor is it reflected in her notes of the hearing and the evidence taken. At the outset of the hearing, the Tribunal observed to the Claimant that we were aware of her requests for adjustments to be made (namely the provision of regular breaks and for a large jug of water to be provided). Those matters were attended to by the Tribunal and it was agreed that the Claimant would request a break whenever she needed one and these would be granted. The only issue raised by the Claimant as recorded within the Judge's notes were when she was asked if matters relating to a delay in the exchange of witness statements had been resolved. The Claimant confirmed that they had and that although she felt that she could "do with more time" she was in a position to continue. No reference as to attending the hearing under duress or not being well enough to proceed was made at that or any other time.
10. The Tribunal was alert to the fact that the Claimant had informed them that she was taking medication. Adequate breaks were provided when requested. This included an extended lunch break on the third day of the hearing (from 1.22 p.m. to 3.00 p.m.) as the Claimant had informed the Tribunal clerk at 2.20 p.m. when the hearing was due to reconvene after lunch that she was feeling dizzy as a result of the diazepam and caffeine tablets that she had been taking. The Claimant requested an additional half hour break. The Tribunal provided the Claimant with an additional forty minutes and for the clerk to see how she was feeling thereafter. At 2.55 p.m. the Claimant informed the clerk that she felt ready to proceed. The Tribunal enquired at the commencement of the hearing at 3.00 p.m. whether the Claimant was well enough to proceed. The Claimant confirmed that she was "not one hundred percent" but that she was able to continue the hearing. It was confirmed that if the Claimant needed additional breaks, then she should inform the Tribunal. Breaks were provided whenever they were requested.
11. No reference was made to the Claimant being too unwell to continue and having attended under duress. Had such reference been made, the Tribunal would have invited the Claimant to consider making an application for an adjournment.
12. The Claimant's health was noted by the Tribunal and adjustments were made to assist her during the process. These included the water and breaks referred to above and also assistance in focusing her evidence and her questioning of witnesses to the issues that the Tribunal were required to determine and putting questions to the Respondent's witnesses on her behalf where necessary.

- 13.** The assessment of the Claimant's credibility was not on account of her health but on account of the issues set out in the Judgment and, particularly, paragraphs 19 to 21 of the same.
- 14.** The matters raised in this head of the Application therefore have no reasonable prospect of seeing the original decision being varied or revoked.

Limitations on questions to be put in cross examination

- 15.** The Judge's notes demonstrate that there were interactions with the Claimant during the course of her cross examination. However, those were necessary interjections to deal with issues such as:
 - a. Giving evidence or long speeches rather than asking a question which rendered it impossible for a witness to understand what, if anything, they were being asked;
 - b. Misquoting what a witness had said when asking further questions in cross examination;
 - c. Repeating the same question on a number of occasions when the same answer had already been given;
 - d. Asking questions that had no relevance to the facts that the Tribunal needed to find and the issues that we were required to determine;
 - e. Putting questions to a witness that they were clearly not able to answer and which were relevant instead to other witnesses.
- 16.** The Claimant was not prevented from asking relevant questions in cross examination, and the Application does not set out what relevant questions she contends that she was prevented from asking, but interjections were made where necessary in order to focus questions on the issues that the Tribunal would need to determine.
- 17.** The hearing had to be extended for a further three days from the original listing, despite the Tribunal having sat late during the hearing itself. It was not proportionate or in accordance with the overriding objective to allow the Claimant to cross examine on issues which were not of relevance to the claim – for example that dealt with whether she had been unfairly dismissed when that was not a complaint before the Tribunal. It is the function of the Tribunal to manage the proceedings and to limit where necessary questions which have no relevance and to require the parties to focus on the issues.
- 18.** The Judge's notes also record that the Tribunal asked questions of our own volition, but again those were by necessity limited to the matters of relevance to the claim before us.
- 19.** The matters raised in this head of the Application therefore have no reasonable prospect of seeing the original decision being varied or revoked.

Findings of fact made and conclusions reached

- 20.** It should be observed that as recorded at paragraph 9 of the Judgment, a List of Issues was prepared by the Tribunal and which was agreed by both the Claimant and the Respondent. Areas, therefore, where the Claimant contends that the conclusions reached by the Tribunal do not reflect what her case was (for example her responses to paragraphs 165 and 167 of the Judgment) have no reasonable prospect of succeeding on the basis that the conclusions were derived from the List of Issues which was agreed by the Claimant as reflecting the case as it was put. It should also be noted that there was no claim of indirect age discrimination before the Tribunal as referred to at the final page of the Application and that was not a complaint, therefore, that the Tribunal were required to determine.
- 21.** It is not necessary to deal with each of the matters raised by the Claimant given the volume of the disputed findings and the fact that many can be dealt with by virtue of the following general position. In this regard, as a Tribunal we heard evidence over a number of days and read extensively into the documents before us. We deliberated in Chambers in detail and dealt with all of the relevant and necessary points raised by and on behalf of the Claimant. In doing so, we also reviewed our notes of evidence, the relevant documents and the witness evidence that we had heard. Our findings of fact were unanimous and reflected the evidence that had been presented to us and our evaluation of the same. Where we preferred certain evidence, for example witness evidence, we gave reasons why that evidence had been preferred. We did not find the Claimant to be a particularly credible witness for the reasons that we set out in the Judgment and, unless we have said otherwise, where her evidence conflicted with witnesses whom we did consider to be credible and where there was no contrary documentation, we preferred the evidence from the Respondent.
- 22.** It is acknowledged that the Claimant will undoubtedly find it difficult to accept that there were facts that we had found which were adverse to her but those were made after a full evaluation of the evidence before us and then applying the law as we had set it out at paragraphs 26 to 34 of the Judgment to those facts. That was the function of the Tribunal and the reasons why we found the facts that we did is explained fully within the body of the Judgment.
- 23.** Moreover, there is nothing within the Application which deals with the overarching issue that the Claimant failed to show any facts from which an inference of discrimination (on grounds of age or disability) could be shown. Her evidence was not such as to reverse the burden of proof.
- 24.** This section of the Application also deals with the issue of late introduction of documentation. This was an issue that arose on both sides with new documents being adduced, either of a party's own motion or on request, on an almost daily basis. The Tribunal dealt with these issues as and when they arose and determined whether the documentation should be admitted into evidence based on the representations of the parties and the issue of relevance and prejudice.

25.The matters raised in this head of the Application therefore have no reasonable prospect of seeing the original decision being varied or revoked.

Employment Judge Heap

Date 12th July 2017

JUDGMENT SENT TO THE PARTIES ON

.....17 July 2017.....

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FOR THE TRIBUNAL OFFICE