EMPLOYMENT TRIBUNALS

Claimant: Miss C

Respondent: (1) The Governing Body of Warren School
(2) Suffolk County Council

HEARD AT: BURY ST EDMUNDS ET **ON**: 7 August 2017

BEFORE: **Employment Judge M Warren**

MEMBERS: Ms P Breslin
Mrs L Gaywood

REPRESENTATION

For the Claimant: Ms J Phillips, Solicitor.

For the Respondent: Mr A Hodge, Counsel.

APPLICATION FOR A RECONSIDERATION OF THE JUDGMENT OF 7th APRIL 2017

UNDER RULE 71 OF EMPLOYMENT TRIBUNALS OF PROCEDURE REGULATIONS 2013

JUDGMENT

1. The Tribunal reconsiders and confirms its original Judgment.

REASONS

Background

1. Following despatch of Written Reasons to the parties on the 30th June 2017, the Respondents have by letter received at the Tribunal on the 4th July 2017, made application for us to reconsider our decision.

2. The Respondents' application is set out in detail in a carefully put together document from Mr Hodge dated the 3rd July 2017. This morning the Claimant's Solicitor, Miss Phillips, has provided us with a written response. We have heard oral submissions from each of the representatives.

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:

> *"**Principles***
> ***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.*
>
> ***Application***
> ***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.*
>
> ***Process***
> ***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.

(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.

…

4. Mr Hodge has rightly cited cases to support the proposition that Tribunals should decide a parties pleaded case, or put another way, should not decide cases on a basis on which they have not been pleaded: Chapman v Simon [1994] IRLR 124, Ahuja v Inghams [2002] EWCA Civ 1292 and Chandhok v Tirkey UKET/0190/12/KN.

5. Miss Phillips has referred us to a couple of cases on the status of a List of Issues; Parekh v London Borough of Brent [2010] EWCA Civ 1630 and Millin v Capsticks Solicitors LLP and Others UKEAT/0094/14/RN. These are cases where the EAT have reminded us that the List of Issues is a useful tool in case management, but that a tribunal is not required to stick slavishly to it where that would impair our duty to hear and determine the case in accordance with the law, to adjudicate, *"justly on the real dispute between the parties in accordance with the law",* (Langstaff P in Millin). The Judgments in those cases also made it clear that cases should be decided on the basis upon which they are pleaded.

6. Mr Hodge accepts of course that Parek and Millin are correct in principle, but he seeks to distinguish them. He says that in those two cases, the burden of proof was on the Respondents, whereas here, the burden of proof had been on the Claimant; to prove her constructive dismissal and to prove facts from which we could conclude discrimination.

7. However, we would say that fundamentally, these two cases make an important point which applies equally, wherever the burden of proof may lie, which is that cases should be decided on their pleading, the list of issues is but a case management tool.

The Applications – Discussion and Conclusions

8. The application is in two parts, we will consider each in turn. The first is that we should reconsider and revoke our decision in the Claimant's favour that she was indirectly discriminated against by reason of her sex.

9. The Respondent says that we have re-written the provision, criterion or practice relied upon, by adding that the environment in which the Claimant was required to work in which a sexual assault could take place was an environment in which a sexual assault by Child A could take place. Mr Hodge says that this was not pleaded and was not identified in these terms in the list of issues.

10. We turn first of all to the pleading; the Respondent's knowledge about Child A's sexualised behaviour was part of Miss C's pleaded case, thus at paragraph 8:

> *"The Respondent was aware that there had been issues about Pupil A's sexualised behaviour. Prior to the Claimant's employment Pupil A bit a female member of staff on the breast. In November 2015 Pupil A held a female teaching assistant against a wall and thrust his pelvis against her body in a sexualised way."*

And at paragraph 9:

> *"Pupil A was known by the Respondent to have established a habit of masturbating in class and frequently in a bathroom close to his classroom. Pupil A had also masturbated in public, instigating a safeguarding referral which was completed by the Claimant in November 2015. Following the referral, the headteacher Ms Jan Bird confirmed Warren School as a suitable provision for Pupil A."*

11. The Claimant pleaded the Respondent's failure to deal with and foresee the impact of Child A's behaviour, paragraph 23 of the particulars of claim reads:

> *"The Claimant asserts that she was subject to indirect sex discrimination contrary to Section 15 of the Equality Act 2010 in that:*
>
> > *(1) The school failed to deal with and foresee the possible impact of Pupil A's recognised sexualised behaviour towards staff. That failure amounted to a provision, criterion or practice (PCP) that required employees to continue to work with Pupil A without any specific reference being made to his sexualised behaviour.*
> >
> > *That requirement put our member at a particular disadvantage compared to male employees. There was no justification for the requirement.*
> >
> > *(2) The headteacher in response to the complaint that a male colleague had said the Claimant 'brought it on' that he was entitled to his opinion. And by the fact that the headteacher said being hit 'was part of the job'. Those two comments*

amount to a PCP that the Claimant should accept working in an environment where a sexual assault could take place.

12. The Grounds of Resistance at paragraphs 48 and 49, "do not admit" the provision, criterion or practices and deny that they would have put the Claimant at a particular disadvantage.

13. Following a telephone preliminary hearing before me after which an amended agreed List of Issues was drawn up by the representatives, those PCPs became paragraphs 5.1 and 5.2 of the Agreed List of Issues. They read as follows:

> *"5.1 The requirement to continue working with Pupil A without any reference being made to his sexualised behaviour.* [Note that at the hearing we clarified, at Mr Hodge's initiative, that was a reference to a time before the assault on the 16th June 2016.]
>
> *5.2 The requirement to accept working in an environment where a sexual assault could take place."*

14. In closing submissions at the hearing, the Respondents accepted that 5.2 was a PCP that applies to men and to women. However, the Respondents' case was that it does not put women at a disadvantage, in that men are just as much at risk of sexual assault as women.

15. What we found is set out at paragraphs 113 and 114 of our written reasons; we found, by direct reference to Child A's sexualised behaviour, that women were at a disadvantage. We made reference to Child A in terms of his being a heterosexual adolescent, autistic, 15½ stone and male. Mr Hodge says that by adding the reference to Child A in this way, we have gone beyond the pleaded case and the list of issues. He says that he did not make submissions on that PCP because it was not part of the pleaded case nor the list of issues. He says that his focus was on the environment of the school as a whole, in which he says women were not more at risk of sexual assault then men.

16. Our view is that the characteristics, the behaviour, of Child A, was the context of the risk. Child A's behaviour was a pleaded fact; that the Claimant and women were at risk of sexual assault, was a pleaded allegation. The fact of Child A's behaviour, his characteristics, seemed to us very obviously, the context in which the Claimant was saying that she and women were at a greater risk. We therefore reconsider and confirm our original decision in this respect.

17. Had we decided otherwise, we agree with Ms Phillips' submission that had it been simply that the issue was whether the school environment generally meant that women were at greater risk of sexual assault than men, we would have taken judicial notice that as a matter of common sense, women are at greater risk than men of sexual assault, which is not to say that men are at no risk, just less risk. Why would that be?

Because adolescent boys tend to be more overtly sexualised in their behaviour and it is more likely to be the case that men are better able to physically defend themselves. We are not falling into the trap of offensive stereotypes, of course female adolescents may display sexualised behaviour and of course, there are women more capable than men at defending themselves just as there are men incapable of doing so. What we are doing here, is simply talking about averages and likelihoods. Were we to have faced that argument, we would then have had to look at the justification argument of the Respondent and I cannot give you an indication of what our decision on that might have been; the Tribunal may have disagreed.

18. Now to the second aspect to the application, that we should reconsider and revoke our findings in respect of constructive dismissal. The Respondent refers to the List of Issues at paragraph 10, which reads:

> *"Did the Respondents' above actions and responses following the incident on 16th June 2016 individually or cumulatively, breach the Claimant's contract in such a way as to entitle her to terminate it?"*

The word "above" is a reference to the various allegations of discrimination appearing earlier in the List of Issues, allegations which were not upheld as acts of discrimination and also, the allegation of indirect discrimination, which the Respondents have argued we should not have upheld, but we have.

19. Miss Griffiths has said through Mr Hodge, that at the Preliminary Hearing I had double checked with the Claimant's representative that the "above" were the allegations and that there was nothing more. The representative for the Claimant so confirmed. Miss Griffiths is correct in that.

20. Mr Hodge accepts that we were right to make findings of fact regarding the discrimination allegations and he has no issue with our relying on those findings to inform our decision on whether there was a breach of the implied term of mutual trust and confidence.

21. What the Respondents do take issue with us on, is the second referral to Occupational Health and the information that the Occupational Health Physician had before him, i.e. the lack of a reference by the Respondents to the Claimant having been sexually assaulted, which we treated as the final straw and which was relevant to the issue of affirmation. The Respondents say that had they known that this was going to be a key issue, they would have called the Occupational Health Doctor.

22. We have dealt with this in our Reasons at paragraphs 134, 135 and 136. We quoted from page 343 of the bundle, which was the Occupational Health Doctor's letter, in which he explained that he had been told by Miss C that she had suffered a sexual assault. We made the point at

paragraph 134 that it can therefore be seen that one way or the other, the Respondent had failed to make it clear to the Occupational Health Doctor what exactly it was that the Claimant had been through. Then at paragraph 135 we made a finding that all of the various matters taken together, viewed objectively, amounted to conduct likely to undermine mutual trust and confidence. We then we went on at paragraph 136, to find that Ms C had not affirmed the contract.

23. The Respondents say that they would have called the Occupational Health physician had it been known that this was part of the Claimant's case.

24. I refer to the Particulars of Claim and at paragraph 19:

> *"The Respondent exemplified their view that the assault was not a sexual assault by not naming it as such in two Occupational Health referrals that were made following the events of the 16th June 2016. By failing to accurately name the reason for the referral made it difficult for the Claimant to properly access OH support without having to explain what had happened to her."*

We emphasise there, the reference to Ms C having to explain what happened to her.

25. At paragraph 25 of the Particulars of Claim, the Claimant pleaded:

> *"The Claimant asserts that the Respondent's actions and responses following the sexual and physical assault of the 16th June 2016 amounted to a fundamental breach of the implied term of mutual trust and confidence…."*

26. In the List of Issues under the heading direct discrimination, one of the so called, "above" at paragraph 3.1, states:

> *"The Respondents repeated failure to properly record, identify and act upon the sexual assault the Claimant was subjected to."*

27. The Claimant in her witness statement at paragraphs 77 and 78 explained how the Occupational Health Physician had shown her, on his screen, what he had been told, which was that she had merely been touched by a child. Miss Platten, a Human Resources Advisor, in her witness statement at paragraph 24 made reference to these matters, she said:

> *"I received a letter from Occupational Health dated the 13th September 2016… They summarised that [the Claimant] has provided additional information about the reason for her absence. It would not be normal practice for us to provide background information that Occupational Health are already in receipt of as a result of an earlier referral."*

28. We were told that witness statements were exchanged on the 30th March. The case management order was that statements should have been exchanged on the 17th March. (I am forever telling Solicitors that they should not agree extensions of the dates set for the exchange of witness statements by Employment Judges in our case management orders.) The hearing started on the 3rd April. The Occupational Health Physician letter was in the bundle. We quoted his letter at paragraph 103 of our Judgment Reasons. From the letter it was evident that the Doctor was making the point to the Respondent that he had not been provided with all of the information, in particular that the Claimant had been subjected to a sexual assault. He referred to the Claimant adding that information. The Respondent could, on receipt of the Claimant's witness statement, have put in motion efforts to arrange for the Occupational Health Physician to attend the hearing, or to provide some written comment on the allegation. At the outset of the case, the Respondent could have highlighted this issue. The Respondent knew from the pleading that the Claimant complained that the Respondent had failed to properly record and identify the assault as a sexual assault. In her witness statement at paragraphs 78 and 79, she gave this as an example. It is supported by the document in the bundle at page 343, the Occupational Health Report. The Respondent could have made enquiries both then and indeed since, to see if the Occupational Health Physician would dispute what the Claimant had said.

29. We were careful in our Written Reasons at paragraph 134 to make the point that the letter confirms that Occupational Health had not been told it was a sexual assault. We refer to paragraph 45 of our Written Reasons, where we make reference to the case of Omilaju, authority for the proposition that the final straw in constructive dismissal case need not be unreasonable nor blameworthy conduct on the part of the Respondent, it need merely contribute, however slightly, to the breach of mutual trust and confidence.

30. This point of issue was aired between Mr Hodge and I in closing submissions at the end of the main hearing. I had made the above points; that it appeared to be a pleaded point, the list of issues at 3.1 seemed to cover it and anyway, that we are often reminded by the EAT to look to the pleaded case, not the list of issues.

31. Even if we had excluded this last allegation, for the avoidance of doubt, we would have found that any way, the cumulative effect of the other matters we mentioned would have amounted to a breach of the implied term requiring the employer to maintain mutual trust and confidence, the last incident being the defensive reply by Ms Platten to Ms Roe's long and detailed email. Given the Claimant's ill health as a result of what had happened to her, the fact that the school was closed over the summer and that she had begun early conciliation on the 15th September, we would not have found that she had affirmed the

contract; we would not have found that she had waived the breach by the delay in her resignation.

32. As it is, that the Respondent had not told Occupational Health on the second referral, that the Claimant had been subjected to a sexual assault, was part of her pleaded case. The Respondent had opportunity to deal with that and on the evidence before us, we are satisfied that we came to the right decision. For these reasons, we reconsider and we confirm, our original decision in this respect.

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Employment Judge Warren, Bury St Edmunds.
6 September 2017

ORDER SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS