



## EMPLOYMENT TRIBUNALS

Claimant

Miss F Mubayiwa

v

Respondent

Cygnnet Health Care Ltd

## RECONSIDERATION DECISION

Heard at: Watford

On: 14 September 2017

Before: Employment Judge Bartlett

## BACKGROUND

1. At a preliminary hearing on 22 July 2017 I made the following deposit order:

*“The Employment Judge considers that the claimant’s allegations or arguments that she has suffered direct race and age discrimination have little reasonable prospect of success. The claimant is ordered to pay a deposit of **£150.00** not later than **31 July 2017** as a condition of being permitted to continue to advance those allegations or arguments. The judge has had regard to any information available as to the claimant’s ability to comply with the Order in determining the amount of the deposit.*

2. The claimant states that this order was sent to her on 15 August 2017.
3. The claimant applied for a reconsideration of this order. The claimant sent correspondence to this effect to the tribunal on 16 August 2017 but she did not include the correct form. The application including the correct form was sent to the Employment Tribunal on 28 August 2017.

## The rules

4. The Employment Tribunal Rules of Procedure 2013 as amended set out the rules governing reconsiderations. The pertinent rules are 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. (3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.”*

**The claimant's application**

5. The claimant's application sets out the following:

5.1 the respondent has destroyed evidence:

In its defence, Cygnet has stated that my application was rejected upon submission at 23:25 hrs, and where an application is rejected automatically/electronically, there should be a record showing the algorithms fed into the system to formulate the rejection criteria. Even if my application was rejected for not being one of the already shortlisted candidates as alleged, a computer-generated record of that automatic decision would have been instantly created, with the data algorithms and that reasoning specified at the time of the rejection.

5.2 the respondent evaluated the claimant's application based on her qualifications and work experience:

The point in paragraph 18, that "No other criteria was applied other than was the claimant on the shortlist" is contradicted by available evidence submitted to the Tribunal. As part of the evidence, I submitted the rejection email sent to me, which shows that my application was evaluated on qualifications and work experience, before being rejected (please see email dated 08/03/17). Cygnet has also admitted that its advertisement did not specify that the role was only for already shortlisted candidates. In the absence of that criteria, Cygnet received my application and evaluated it automatically, reaching the decision to reject it, following an evaluation of my qualifications and work experience. That was the only criteria used, as stated in the rejection email, not the 'already shortlisted' criteria.

5.3 The respondent used video profiles in its recruitment processes:

*However, emails provided as part of disclosure show that the defendant used video profiles as the main selection method in its several, intermittent shortlisting exercises during the recruitment period of 4 January to May 2017, including the time of my application. Thus, although Cygnet might not have directly solicited information about candidate's ages or races, these characteristics were identified using images in the videos (please see emails dated 20/12/16 and 17/02/17). Even though there was no requirement or opportunity provided in the application process to submit videos, Cygnet accepted, used, and preferred candidates who submitted videos because this enabled it to identify and accept candidates based on age and race.*

**Decision**

6. In accordance with the Employment Tribunal Rules of Procedure I must reconsider any judgement where it is in the interest interests of justice to do so. Further, if I considered that there is no reasonable prospect of the original decision being varied or revoked I must refuse the application for reconsideration.

7. The claimant's first point concerning destruction of evidence is a serious allegation. However the claimant's letter sets out little more than an assertion that the claimant believes something exists where there is little basis on which she can make that assertion.
8. Further, the claimant appears to have fundamentally misunderstood the respondent's defence which is not that an algorithm was used to reject applications. Instead the respondent's defence is that any application from a non-shortlisted candidate was automatically rejected. The respondent has not asserted that an automated algorithm based programme was the means by which applications were reviewed and rejected.
9. The claimant's second point is no more than a disagreement with my statement at paragraph 18 of the original directions and orders from the 22 July 2017 hearing. It does not establish that it is in the interests of justice for me to reconsider the original decision.
10. The claimant's third point takes her little further. All it appears to identify is that the respondent used video profiles in some recruitment exercises during a five-month period in 2017. There is no claim that the claimant submitted a video profile and therefore it is of little relevance.
11. For all of the reasons set out above I find that there is no reasonable prospect of the original decision being varied or revoked and neither is it in the interests of justice to revoke the original decision. Therefore I refuse the claimant's application for reconsideration of the deposit order arising out of the 22 July 2017 hearing.
12. I make the following order:

## **ORDER**

1. The Employment Judge considers that there is no reasonable prospect of the original decision being varied or revoked and neither is it in the interests of justice to revoke the original decision. Therefore the claimant's application for reconsideration of the deposit order arising out of the 22 July 2017 hearing is refused in respect of both the claims for direct race and direct age discrimination.

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**Employment Judge Bartlett**

14 September 2017

Sent to the parties on:  
26 September 2017

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For the Tribunal:

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