EMPLOYMENT TRIBUNALS

Claimant: **Ms T Marshall**

Respondent: **William Hill Organisation Ltd**

Heard on the papers on: 3 October 2018

Before: Employment Judge O'Rourke

RECONSIDERATION APPLICATION DECISION

The Claimant's application for reconsideration of the Judgment of 14 August 2018 is rejected and the Judgment is confirmed.

REASONS

Background and Issues

1. This claim, of maternity discrimination, came to substantive hearing on 14 August 2018, listed for three days. The Claimant did not attend at the Hearing, having emailed the Tribunal at 08:44 that morning to say that she was '*unable to make it because I am in distress. Hopefully, I can make it in for tomorrow …'*. The Claim was struck out that same day, subject to Rule 37(1)(b)(c) and (d) of the Employment Tribunal's Rules of Procedure 2013 ('the Rules'), for not actively pursuing the claim, non-compliance with Tribunal orders and unreasonable conduct.

2. By email of 15 August 2018, the Claimant applied for reconsideration of that Judgment, the details of such application being considered below. In response to a request from the Tribunal, she made further submissions on 11 September. The Respondent was invited to make written submissions in response, which they did, by email of 21 September. Following that the Claimant submitted further submissions, by email of 24 September.

3. The Tribunal considered those submissions and further considered that in light of the Overriding Objective (Rule 2), in particular that cases be dealt with in ways which are proportionate to the complexity and importance of the issues and avoiding delay and expense, that it was in the interests of justice that the application be dealt with without a hearing. Both parties

were invited, by email of 11 September from the Tribunal, to give their views as to whether a hearing was necessary and neither party having responded on that point, their agreement to the matter being dealt on the papers is presumed.

The Law

4. Rule 72 sets out the procedure for reconsideration, on the grounds that the interests of justice are such that reconsideration is appropriate.

5. The case of **Fforde v Black UKEAT 68/80** indicates that the interests of justice ground only applies when something has gone radically wrong with the procedure, involving a denial of natural justice, or something of that order.

6. The case of **Redding v EMI Leisure Ltd UKEAT 262/81** sets out that 'the interests of justice' relate to the interests of justice to both sides.

7. Under the previous 2004 Rules, old rule 34(3)(c) provided a ground for review if the decision was made in the absence of a party. This is a matter that is now encompassed within the single 'interests of justice' ground, but it is not generally within the interests of justice that parties in litigation should be given a second bite of the cherry simply, if it is the case, because they have failed to attend a hearing, without good and genuine reason.

Details of Application

8. A summary of the application, is as follows:

    a. It is in the interests of justice to reconsider the decision to strike out the claim, because the Claimant corresponded with the Respondent '*informing them of my intentions'* and '*provided some medical evidence to reflect my current circumstances'*.

    b. The Claimant is unrepresented and she considers therefore that '*it would be biased and unjust for my claim not to be considered for reconsideration …'*.

    c. She had notified the Respondent and the Tribunal '*well in advance'*, providing NHS documents as to her child's medical condition. She is '*a full-time mum to two young children* (which) *is time-consuming and stressful.'* She had also suffered a recent bereavement. This also contributed to her inability to comply with case management orders.

    d. These circumstances caused her to '*lack confidence in the outcome of the hearing, another reason why my witness statement was incomplete'*.

    e. She was unable to view CCTV footage disclosed by the Respondent and that inability also resulted in a potential representative being unable to act for her.

Details of Response

9. A summary of the Response (with comments by the Claimant) is as follows:

   a. The medical evidence provided in respect of the Claimant's child does not indicate any emergency, necessitating her absence from the Hearing. (The Claimant asserts that her child's test results were a genuine cause for concern and that she was, at the point, unaware of the prognosis.)

   b. The Claimant was given considerable lee-way in complying with orders and had known of them since late March and therefore had ample time to prepare for the Hearing.

   c. In respect of her bereavement, the Claimant had provided documents for inclusion in the hearing bundle, dated 18 May 2018 that indicated that her mother had died at some point between the birth of her child (January 2018) and the date of that letter. In that case, the Respondent considers that the Claimant still had ample time to prepare for the Hearing, or apply, in good time, for a postponement. (The Claimant states that this event has affected her mental wellbeing and her ability to deal with this litigation.)

   d. At no time did the Claimant inform the Respondent of any intention not to attend the Hearing. She had informed them that she had made an application on 6 August to postpone the Hearing and would not be exchanging her witness statement, until she heard from the Tribunal as to that application. When the Tribunal refused that application on 10 August, she still did not exchange her statement until 15.39 on 13 August, the day before the Hearing. (The Claimant accepted that her application for postponement '*was not clear in so many words …* and '*that I had been dishonest about not having completed the witness statement. My overall intentions was to continue corresponding with the Respondent ….* She referred to attempts at settlement between her and the Respondent.)

   e. In June and July, following disclosure by the Respondent of the CCTV footage, there was correspondence from the Claimant stating that she could not view it. A further copy was provided and instructions were given to her as to how to play it. Nothing further was heard from the Claimant, until less than a week before the Hearing (9 August), when she again complained that she could not access the footage and a further copy was sent, with accompanying instructions. In any event, the Claimant had viewed the footage as part of the disciplinary proceedings leading to her dismissal and didn't challenge its contents at the time. Further, the Respondent did not rely on the footage in reaching its decision, instead on documentary evidence as to her wrongly recording a £100 bet, as for £1, which she admitted doing (notes of hearing provided). The Respondent does not therefore consider the footage, regardless of whether the Claimant could view it or not, as relevant evidence and merely provided it to meet the

Claimant's demand for its disclosure. The Claimant did not raise this issue when she applied for a postponement, or when she notified the Tribunal of her non-attendance.

f. The Claimant brought her claim in November 2017 and has had over nine months to prepare her case, which is ample. It is not in the interests of justice to prolong this matter.

Findings

10. Children's Illness. In this respect, the Claimant stated in her email of 9 August, requesting postponement that her son was due to have a blood test in hospital on the first day of the Hearing. She provided no corroborative evidence of that appointment and the refusal of the application stated that it was because of that lack of medical evidence and nor did she provide any such evidence in advance of the Hearing (which she accepts). What she has now provided, in support of this application, firstly, is a 'local record' from her GP, undated, indicating that her son was diagnosed on 27 July 2018 with 'anaemia unspecified' and had a check-up and immunisations on 26 March 2018. Secondly, she provided a consultation record with her GP, dated 8 August 2018, which recorded, under the heading of 'anaemia unspecified' '*spoke to mum, wanted to discuss blood tests … booked for Ferritin on Tuesday … baby well in self.'* Nothing in these documents indicates either a level of illness on her child's part that would preclude her attending the Hearing, or any degree of emergency justifying her non-attendance on 14 August and notification of such at 08:44 that morning. The consultation record of 8 August does indicate that her child had an appointment for a blood test, to determine iron levels in his blood, on the following Tuesday, 14 August, however there is no indication in the GP's note of any urgency in this respect ('*baby well in self'*), or any evidence of any attempt by the Claimant to re-arrange what appears to be a relatively routine blood test, or to arrange for somebody else to take the child for the appointment, or to delay the Hearing slightly to allow her to attend the test, in order that she could consequently attend the Hearing. I don't consider, therefore that these matters justify her non-attendance at the Hearing and her belated notification of doing so.

11. Child-caring Responsibilities. It is a statement of the obvious that caring for two small children can sometimes be onerous. The Claimant has provided no evidence of what, if any, assistance she can call upon in that task. However, to engage in the Hearing, she had two outstanding tasks, for which she had at least six months' notice (more, if taken from the date of presentation of the claim): firstly, preparation of her witness statement and secondly preparation for and attendance at the Hearing. In respect of her witness statement, she needed to set out the chain of events leading to her dismissal and her assertion and/or evidence as to why that dismissal was actually because of her pregnancy (as opposed to her alleged gross misconduct). This was not, I consider, a difficult task, or legally complex. Despite this, however and also despite the Respondent's agreement to delay exchange, she failed to comply, resulting in a strike out warning from the Tribunal and her eventual provision of a statement

(which she said was '*incomplete'*) an hour before office closure the day before the Hearing, comprising of three paragraphs. I don't accept, regardless of her child's health and her child-caring responsibilities that she could not have, in six months, produced a more comprehensive and timely statement. That failure indicates to me that the more likely explanation is that she had little or no evidence to rely on, to support her case, hence her comment in this application that '*these circumstances had caused me to lack confidence in the outcome of the hearing, another reason why my witness statement was incomplete.'* Her second task was to prepare for and attend this Hearing. I accept, as the mother of two small children that that is going to be more difficult for her than others, but she had known since the birth of her second child in January of this year that she was going to need to make some arrangement for the care of her two children during the eventual hearing, details of which she was aware of since March 2018. If, nonetheless, she felt herself unable to make arrangements for the Hearing, then she should have said so at an early date, suggesting alternatives. In any event, in view of her youngest child being only now nine months old, it seems unlikely that this situation she now relies on was going to change substantially for some time to come, at which point, the Overriding Objective as to avoiding delay and also Rule 72's requirement for the interests of justice to be considered, for both parties, would have been triggered. However, none of this was canvassed with the Tribunal at the relevant time.

12. Lack of Representation. It is far from exceptional for Claimants to be unrepresented in such hearings and would certainly not justify, of its own, postponement of a hearing. In any event, the Claimant has given no indication that that situation might change in the future.

13. Her Bereavement. There is no date provided for her mother's death, but it at least seems to pre-date May 2018 and therefore at least three months in advance of the Hearing. While no doubt upsetting, the Claimant has provided no specific rationale, or her own medical evidence (in respect of what she subsequently says about her medical health), as to why this sad event would prevent her from preparing her statement, or attending the Hearing.

14. CCTV Footage. This issue is, it is clear from the Respondent's submission, a complete 'red herring'. The Respondent did not rely on the footage in reaching its decision to dismiss, accepting that all it showed was the Claimant taking sums money out of the till (which of course, during and at the end of the working day, would be her job), but not any undue amount that could prove that the Claimant had defrauded the Respondent. The notes from the appeal hearing show that the Claimant accepted that she had wrongly recorded the bet for a £1, when it was for £100. In any event, the Claimant had been given ample opportunity to access this footage, but for unexplained reasons, asserted that she was unable to.

Conclusion

15. It is clear, therefore that the Claimant had had, for some time, no intention

of attending the Hearing and when she did not, had no good, or genuine reason for failing to do so. It appears to me, from what she says in her submissions of 24 September as to offers of settlement that she simply hoped to reach some settlement with the Respondent, avoiding a hearing, with which ambition the Respondent would not comply. The 'interests of justice' apply to both parties and on the basis that the Claimant has already had nine months in which to prepare for the Hearing and even in this application gives no indication of any future ability, or real desire to do so, it cannot be in the interests of justice for the Respondent to have this matter stretch into another year, with no end in sight, or, for it to be compliant with the Overriding Objective as to avoidance of delay. It is a principle of justice that there be finality in litigation. For these reasons, the Respondent's application for reconsideration is rejected and the Judgment is confirmed.

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Employment Judge C H O'Rourke

Date 3 October 2018

JUDGMENT SENT TO THE PARTIES ON

10 October 2018

FOR THE TRIBUNAL OFFICE