EMPLOYMENT TRIBUNALS

Claimant: Ms R Martin

Respondents: (1) Beauty Tonic 64 Beech Rd Limited

(2) Mr Gregory William May

HELD AT: Manchester **ON:** 11 December 2018

BEFORE: Employment Judge Porter
Mr M Firkin
Mr P C Northam

REPRESENTATION:

Claimant: Mr G Chambers, solicitor

Respondent: Mr M Cameron, consultant

JUDGMENT ON RECONSIDERATION

The application for review is refused and the Reserved Judgment made on 16 October 2018 and sent to the parties on 13 November 2018 is confirmed.

REASONS

1. Written reasons are provided pursuant to the oral request of the claimant's representative at the conclusion of the Hearing

Issues to be determined

2. At the outset it was confirmed that the claimant made application for reconsideration as set out in the claimant's solicitor's letter dated 22 November 2018. That application was opposed by the respondents for the reasons stated in their representative's email dated 29 November 2018.

Submissions

3. Solicitor for the claimant made a number of detailed oral submissions, relying, for the large part on the matters raised in the letter of application. In essence, it was asserted that:

3.1. it is unusual to request a reconsideration of the judgment because of an error by a representative but this is an exceptional case;

3.2. no further evidence or arguments are needed to give effect to the required amendment to the judgment. The tribunal has already made the necessary findings;

3.3. Counsel for the claimant (Mr F), made an error at the hearing. He has admitted that he did not make any submissions in support of the claim that the dismissal was a discriminatory act. Instructing solicitors did not become aware of that error until the reserved judgement was sent to the parties;

3.4. The ET1 makes it clear that the claimant was asserting that the dismissal was a discriminatory act;

3.5. The preliminary hearing before REJ Parkin was originally a remedy hearing because the respondent had not entered a response. The respondent was allowed to defend the claim. When identifying the issues, REJ Parkin listed dismissal as an alleged act of discrimination;

3.6. At the commencement of the hearing before this tribunal the parties confirmed that the issues identified in the order of REJ Parkin were the issues to be determined by this tribunal;

3.7. By the date of that preliminary hearing the claimant had already served a Schedule of Loss, which clearly identified a claim for compensation for unlawful discrimination (dismissal and loss of income);

3.8. The tribunal has made a finding that dismissal was because of pregnancy. That amounts to an act of discrimination under the Equality Act and the judgment should be amended accordingly;

3.9. The claimant named Mr May as a party to the proceedings because she was concerned that the first respondent, a small company, would go bust. The claimant still wants a finding of discrimination in relation to the act of dismissal against both the first respondent and Mr May;

3.10. Counsel for the claimant has admitted his mistake. He did not ask the instructing solicitor if the claimant was pursuing a claim under section 18 Equality Act. If he had then the instructing solicitor would have said “yes”.

4. Consultant for the respondent made a number of detailed oral submissions, relying, for the large part on the matters raised in the email dated 29 November 2018. In essence it was asserted that:

   4.1. this is a very unusual and unacceptable application for reconsideration, because a representative has not put forward the case properly;

   4.2. if Counsel is instructed then clear instructions should be given. Mr F had to stop and take instructions from the claimant and instructing solicitor more than once during the hearing;

   4.3. the claimant is bound by what counsel chose to pursue at the hearing itself;

   4.4. at the conclusion of the hearing, after the date of a provisional remedy hearing had been fixed, EJ Porter sought clarification as to whether there was a claim of discrimination in relation to the act of dismissal. Mr F gave a clear answer that no such claim was being pursued and that the only claims before the tribunal were under section 99 Employment Rights Act 1996 and the claim in relation to the failure to provide a pregnancy risk assessment. The tribunal allowed a short break to allow Mr F to take instructions. On his return to the tribunal Mr F confirmed that no claim of discrimination was being pursued in relation to the dismissal;

   4.5. the claimant now has second thoughts and wants to claim something new;

   4.6. it is not in the interests of justice to allow the amendment. The fact that the claimant wants a judgment against Mr May in case the first respondent cannot pay is not a relevant consideration.

Evidence and Factual Background

5. No evidence was heard at this hearing. Mr F did not attend the hearing to explain the reason for his clear statement to the tribunal that the claimant did not pursue a claim of discrimination in relation to the act of dismissal.

6. The tribunal has considered the Reserved Judgment with Reasons and consulted its notes of evidence relating to the conduct of the hearing.

7. As indicated at paragraph 1 of the reasons for the Reserved judgement, at the outset of the final hearing on 26 September 2018, it was confirmed by both representatives that the issues had been clearly identified by REJ Parkin in the Case Management Order sent to the parties on 23 June 2018. The relevant paragraph of that CMO reads as follows:

   The claimant's claims are therefore automatic unfair dismissal on grounds of pregnancy or for asserting their statutory rights, which are effectively the same

claims as claims of pregnancy/maternity discrimination or sex discrimination based upon the dismissal, but together with a discrimination claim for failure to conduct a pregnancy risk assessment.

8. As indicated at paragraph 5 of the Reserved judgment, after oral submissions on the second day it was noted that neither representative had addressed the tribunal in relation to the claim of discrimination.

9. The tribunal retired for a short period to enable counsel for the claimant, Mr F, to telephone his instructing solicitors to confirm the basis upon which the claimant pursued a claim of discrimination. He returned to the tribunal room to confirm that the only claim of discrimination related to the failure to provide a pregnancy risk assessment. Mr F, in response to a question from EJ Porter clearly stated that the claimant was not pursuing a claim under section 18 of the Equality Act in relation to the act of dismissal. The claimant was in attendance when that statement was made. She did not seek to intervene to correct Mr F's statement.

10. Mr F was not in a position to make detailed submissions on the claim under the Equality Act and orders were made for the exchange of written submissions in advance of the tribunal reconvening in chambers to reach its decision.

11. Written submissions were received from Mr F in accordance with the Order. He did not in his written submissions make any reference to a claim that the dismissal itself was a discriminatory act.

The Law

12. Rule 70 of the Employment Tribunals Rules of Procedure 2013 states:

13. 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.

14. In **Outasight VB Ltd v Brown 2015 ICR D11, EAT,** Her Honour Judge Eady QC accepted that the wording 'necessary in the interests of justice' in rule 70 allows employment tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially, 'which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation'.

15. Ordinarily, it will not be in the interests of justice to reconsider a judgment because of an error made by a party's representative. In **Lindsay v Ironsides Ray and Vials 1994 ICR 384, EAT,** the EAT ruled that failings

of a party's representative — professional or otherwise — would not usually constitute a ground for review. If it were otherwise, there would be the risk that disappointed claimants would be encouraged to re-argue their cases by blaming their representatives. This would mean that tribunals would have to investigate the competence of representatives who would not be given the opportunity of defending themselves. Complaints about the conduct and competence of representatives should not be dealt with by way of tribunal proceedings.

16. A reconsideration might be justified, however, if a 'procedural mishap' occurs due to the conduct of the other party's representative. **Shortall t/a Auction Centres v Carey EAT 351/93.**

17. Neither party relied on any case law in support of their submissions.

Determination of the application

18. The tribunal accepts and finds that the claimant did intend, at the commencement of proceedings, to pursue a claim of discrimination in relation to the act of dismissal. The claim form includes a claim of pregnancy discrimination and the grounds of complaint include the phrase "the real reason for dismissing me was because of my pregnancy."

19. The tribunal accepts and notes that at the preliminary hearing REJ Parkin identified one of the issues to be determined as discrimination in relation to the act of dismissal.

20. The tribunal accepts that at the outset of the hearing before this tribunal both parties confirmed that the issues to be determined were as set out in REJ Parkin's Order. Therefore, both parties and the tribunal understood that the key issue for determination was what was the reason for dismissal – was the real reason pregnancy – and that was the fundamental question, both in the claims of unfair dismissal and discrimination under the Equality Act.

21. The tribunal did find that the real reason for dismissal was the claimant's pregnancy. The tribunal found that the complaint under section 99 Employment Rights Act 1996 was successful.

22. The tribunal accepts that, but for counsel for the claimant's clear statement at the hearing, that the claimant was not pursuing a claim of discrimination in relation to the act of dismissal, the tribunal would have made a finding that the dismissal was a discriminatory act under s18 Equality Act. It is simply a question of law. Dismissal because of pregnancy does amount to discrimination under the Equality Act. The respondent was legally represented and knew that point of law.

23. The tribunal itself was surprised when counsel for the claimant made his clear statement, and Mr F was given more than one opportunity to confirm the point. Mr F was given a further opportunity to clarify the grounds upon

which the claimant pursued a claim of discrimination when he complied with the order to serve written submissions in relation to that part of the claim. Again, the written submissions identified only one alleged discriminatory act: the failure to provide a pregnancy risk assessment.

24. The question is whether the claimant is bound by her counsel's mistake at the hearing, when he gave a clear indication, in her presence, that she did not pursue a claim of discrimination in relation to the act of dismissal. We have every sympathy for the claimant and we have considered with great care the prejudice suffered by her. However, with great reluctance, the tribunal has to agree with the respondent that this is an important matter of principle. It is not in the interests of justice to allow the requested amendment to the judgment because of the admitted mistake by a legal representative. This is not a procedural mishap. Counsel for the claimant, in the presence of the claimant, repeatedly made his clear statement that no claim of discrimination in relation to the act of dismissal was pursued. That limitation to the claimant's case was confirmed in written submissions.

25. In all the circumstances it is not in the interests of justice to amend the claim. The claimant is bound by the submissions made on her behalf by her counsel, is bound by the expressed limitation to her genuine claim. There must be finality in litigation. The claimant's remedy lies elsewhere.

Employment Judge Porter

Date: 12 December 2018

JUDGMENT SENT TO THE PARTIES ON

14 December 2018

FOR THE TRIBUNAL OFFICE