EMPLOYMENT TRIBUNALS

Claimant: Mr H Singh

Respondent: B & Q PLC

JUDGMENT

The claimant's application for reconsideration of the judgment sent to the parties on 22 August 2019 is dismissed.

REASONS

The judgment

1. By a reserved judgment sent to the parties on 22 August 2019 I dismissed the claimant's complaints of direct discrimination and harassment. The judgment was accompanied by written reasons ("Reasons"). Essentially, I found that no discrimination had taken place after 15 June 2017 and that, in respect of all contraventions of the Equality Act 2010 that were alleged to have occurred prior to that date, the tribunal had no jurisdiction because the claim had been presented too late.
2. The judgment and Reasons were sent to the parties by e-mail to the addresses provided by them. In the claimant's case, the e-mail address was that of his father, Mr Jasbir Singh.

The application

3. The claimant's father chased receipt of the judgment by e-mail on 10 September 2018. It appears that, for whatever reason, Mr Jasbir Singh had not viewed the judgment that had been sent to his e-mail address. The judgment was then re-sent to his alternative e-mail address on 12 September 2018.
4. On 25 September 2018, Mr Jasbir Singh e-mailed the tribunal with an application for reconsideration. His application ran to 19 pages of single-spaced type. It engaged, paragraph-by-paragraph, with the judgment and the first 78 paragraphs of the Reasons. The detailed critique concentrated on those sections of the Reasons that were headed, "Evidence" and "Facts". It did not make any specific

mention of my analysis of the law or of the section headed, “Conclusions” where I had applied the law to the facts.

5. Many of the points made on the claimant’s behalf are repeated a number of times in the application.

6. In my view it would be disproportionate to set out and deal with every point that the claimant’s father made in his application. Rather, I have attempted, as fairly as I can, to identify the essential grounds for reconsideration and the main points the claimant makes in support of those grounds.

7. The claimant appears to be putting forward two grounds for reconsideration. As a convenient shorthand, I have given each a label. The grounds are:

   7.1. “Bias” – At the outset I decided, consciously or subconsciously, to find in favour of the respondent and then found the facts selectively in order to fit that outcome.

   7.2. “Perversity” – my findings of fact, and evaluation of the evidence, were unreasonable.

8. The claimant makes the same points under each ground. He has set out many respects in which he disagrees with my interpretation of the evidence and my findings of fact. Under the Bias ground, he argues that they are indicators of my having sided with the respondent. Alternatively, he argues my findings were in any event wrong. I picked out the following points:

   8.1. That I did not read all the documents.

   8.2. That, in finding the facts, I did not attach sufficient weight to the following events that took place during the hearing:

      8.2.1. The claimant’s preference to take a religious oath, compared with the respondent’s witnesses’ decision to affirm;

      8.2.2. The respondent’s counsel’s frustration at not being able to shake the claimant’s evidence in cross-examination;

      8.2.3. The relative length of re-examination of witnesses;

      8.2.4. Mrs McAnally being “nervous” rather than “upset” whilst giving her evidence;

      8.2.5. An alleged “loud and aggressive” answer from Mrs McAnally in cross-examination;

      8.2.6. Mr Richardson, when asked about aprons, being “shaken” and demonstrating “an attempt to fit in with Mrs McAnally’s evidence and therefore a conspiracy”;

   8.3. That I was swayed by impression that Mrs McAnally had been upset whilst giving her evidence;

   8.4. That, in forming the impression that Mr Owens had not been shaken in cross-examination, I omitted to mention his oral evidence under cross-examination which was suggestive of a “conspiracy” with Mrs Ward;

   8.5. That I concentrated on the wrong witnesses, giving too much weight to the evidence of Mr Richardson, Mrs Woodcock and Mr Owens, and insufficient weight to the evidence of the claimant, Mrs McAnally and Mrs Ward;

8.6. That I took an inconsistent approach to the weight to be attached to assertions made by persons who had not given oral evidence; in particular, the claimant contrasts the weight I gave Ms Ali's message (Reasons paragraph 17) with what he alleges is my implied acceptance of the evidence of employees who were interviewed as part of the grievance process;

8.7. That I accepted the evidence of Mrs McAnally and Mrs Ward "as gospel" and, in particular:

8.7.1. failed to "be alive" to the fact that they would be unlikely to admit wrongdoing;

8.7.2. at various paragraphs of the Reasons (such as paragraphs 46, 48 and 50) preferred their evidence to that of the claimant;

8.8. That I applied double standards on the question of objectivity of evidence, by finding that the claimant's lack of objectivity had affected the reliability of his evidence, but not taking the same view in relation to Mrs McAnally and Mrs Ward;

8.9. That I took a "one-sided approach" to the question of whether the Return to Work Interview form had been forged;

8.10. That, in finding that the document had not been forged, I failed to give sufficient weight to the following:

8.10.1. the failure of Mrs McAnally and Mrs Ward to mention the document during the grievance investigation;

8.10.2. the failure of the respondent to disclose the document during the grievance investigation;

8.11. That I should have found that the contemporaneous notes (Reasons paragraph 59) had also been forged;

8.12. That I inserted facts into the Reasons without explaining their context (for example, Reasons paragraph 42), giving the appearance of having mentioned them only in order to favour the respondent;

8.13. That I drew on my general knowledge of ethnic demographics in the City of Chester, without considering whether the overwhelmingly white population of the city might itself be evidence of discrimination;

8.14. That I "made light" of facts favourable to the claimant, such as his progress at the Doncaster store (Reasons paragraph 21);

8.15. That I made findings unsupported by the evidence, such as:

8.15.1. "The claimant initially got on well with his supervisors" (Reasons paragraph 27)

8.15.2. The claimant was "sent home for the whole weekend" (Reasons paragraph 29)

8.15.3. That Mrs McAnally "immediately" spoke to the claimant (Reasons paragraph 36)

8.16. That I gave too much weight to the claimant's incorrect evidence about the date of various incidents.

8.17. That my findings rested on a mistaken belief about who (Mrs McAnally or Mrs Ward) had spoken to the claimant on a particular occasion;

8.18. That I failed to take the initiative in drawing an inference adverse to the respondent from the respondent's failure to call witnesses to the alleged incident in which the claimant had been locked out (Reasons paragraph 54);

8.19. That, in finding that no act of discrimination took place on 17 June 2017, I failed to take account of the claimant's witness statement.

Response to the application

9. Unusually, the respondent submitted a written response to the reconsideration application. I took the response into account only for its points of law. My approach to the remainder of the respondent's arguments was that they were of limited assistance at this stage. If an argument raised by the claimant had sufficient merit to call for an answer from the respondent, the better course would be to list the case for a reconsideration hearing at which the respondent could oppose the application.

Relevant law

10. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides the tribunal with a general power to reconsider any judgment "where it is necessary in the interests of justice to do so".

11. Rule 71 sets out the procedure for reconsideration applications. So far as is relevant, it provides that "…an application for reconsideration shall be presented in writing … within 14 days of the date on which the written record… of the original decision was sent to the parties…"

12. By rule 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… the application shall be refused…"

13. Rule 5 gives tribunals the power to extend time limits specified in the Rules. In deciding whether or not to grant an extension, the tribunal should take account of the public interest in finality of litigation.

14. The overriding objective of the 2013 Rules is to enable the tribunal to deal with cases fairly and justly. Dealing with cases fairly and justly, to my mind, includes allowing, where possible, parties to rely on all the evidence upon which they wish to rely that is relevant to the issues to be decided. It also, by rule 2, includes putting the parties on an equal footing, avoiding delay, saving expense, and dealing with cases in ways that are proportionate to the complexity and importance of the issues.

15. Section 5(4) of the Oaths Act 1978 provides that a solemn affirmation "shall be of the same force and effect as an oath".

Extension of time

16. The time limit runs from the date when the judgment was *sent,* not when it was received. The last day for presenting a reconsideration application was therefore 5 September 2018.

17. I accept that the claimant was not, for whatever reason, able to access the judgment until 12 September 2018. His father pro-actively chased the judgment

on 10 September 2018 and made the reconsideration application relatively promptly once the judgment had been re-sent to him.

18. The bulk of the delay in considering the claimant's application has stemmed from the pressure of hearing other cases. The application is lengthy and needed tribunal time to be allocated to it. That time could not be made available until now, because of other cases in the list. Had the claimant's application been made within the time limit, that problem would still have occurred.

19. Despite the public interest in finality of litigation, I consider that the overriding objective favours granting the extension of time and viewing the reconsideration application on its merits.

The claimant's detailed points revisited

Point 1 – not reading all the documents

20. I do not think this point has any merit. Both sides were represented by counsel and would have known that I would concentrate on the documents mentioned either in witness statements or during the course of the hearing. The claimant has not identified any document (outside those categories) which he thinks I should have read. Nor has he explained how that document would raise a prospect of the facts being found on a different basis.

Point 2 – Events during the hearing and their impact on reliability of evidence

21. *Oath* - It would be wrong – and contrary to section 5(4) of the Oaths Act 1978 – of me to attach different weight to the evidence of witnesses on the ground that one had chosen a religious oath and the others had not.

22. *Cross-examination of the claimant* - I do not recall the respondent's counsel becoming frustrated by any perceived inability to shake the claimant in cross-examination. The claimant is correct to observe that there were occasions when I intervened. My notes record that I interrupted Mr Pidington on 9 occasions to discuss questions that he was asking the claimant. Sometimes it was because I thought the question needed clarifying. Sometimes I interrupted because I did not think that the claimant would be able to answer. (For example, he was asked to comment on an e-mail chain between Mrs McAnally and a colleague in Doncaster; the claimant had not been a party to the e-mail conversation). I also interrupted Mr Mensah to make a similar observation. Where my opinion of what was a proper question differed with that of counsel, I did not think that the difference of opinion told me anything about the reliability of the witnesses whom they were questioning.

23. *Re-examination* – This point appears to relate to the evidence of the claimant (on the one hand) and Mr Richardson, Mrs Woodcock and Mr Owens (on the other). I interpret it in this way, because its context is the claimant's wider point that I should not have found that these three witnesses had been "unshaken". The claimant argues that "Respondent's counsel felt the need in respect of each of the Respondent's witnesses to carry out unusually lengthy re-examinations of them". I would not describe the re-examination of these three witnesses as "unusually lengthy". Mrs Woodcock was asked 4 questions in re-examination between 10.42 and 10.46am. None of the re-examination was about the alleged forgery of the Return to Work Interview document. There were two questions

about the process of filing appraisal forms. Mr Richardson and Mr Owens were not re-examined.

24. *"Nervous"/ "Upset"* – I noted three observations of Mrs McAnally's demeanour during the course of her oral evidence. These were: "tearful but composed", "smiles" and "witness requests a break - looks tearful". I imagine that it would have been from observations such as these that I gained my overall impression that she was very upset. From my memory, which has admittedly faded, it would not be unfair of the claimant to describe her as also being nervous. Witnesses can be nervous for all sorts of reasons, one of which might be a guilty fear of being exposed as a discriminator. There are many other reasons though. The witness chair is not a comfortable place for honest and dishonest witnesses alike.

25. *Loud and aggressive answer* – I cannot now recall the particular exchange to which the claimant refers. Quite properly, counsel for the claimant put a number of allegations to Mrs McAnally. According to my notes, to many of these allegations she simply answered, "No". It is possible that one of those answers might have caused me to stop typing and look up. I might have had a better memory of the event had it been highlighted in the claimant's closing submissions, but it was not mentioned.

26. *Mr Richardson "shaken" in evidence* – My notes of evidence do not reveal Mr Richardson having been asked particularly searching or challenging questions. It was certainly never put to him that he had conspired with Mrs McAnally or that he was tailoring his evidence to fit hers.

Point 3 – Effect of Mrs McAnally being upset

27. Reasons paragraph 15.3 explains that I took trouble to remind myself not to be swayed by Mrs McAnally's emotional response, which could just as easily be consistent with guilt as with innocence.

Point 4 – Mr Owens' evidence

28. It is right to record that, during cross-examination, Mr Owens was asked questions about a significant difference between his witness statement and the more contemporaneous handwritten statement provided by Mrs Ward. The witness statement mentioned a detail about the *Crimewatch* conversation that might make Mrs Ward's explanation more palatable. That detail was not mentioned in the handwritten statement. I took the discrepancy into account when finding the facts. I deliberately left out any reference to that detail when describing the *Crimewatch* conversation, because I did not think that the evidence on that point was reliable.

29. In my view, the discrepancy was not sufficient to form the basis of a "conspiracy". It was a factor capable of undermining his evidence. My omission to mention that factor was certainly nothing to do with trying to fit the facts to a pre-determined conclusion. I did not scrutinise Mr Owens' evidence to quite the same degree as I looked at the evidence of the other witnesses. This was because counsel for the claimant stated very clearly that he was not alleging any discrimination in the investigation or outcome of the grievance.

Point 5 – focusing on the wrong witnesses

30. This argument engages with Reasons paragraph 18. It does not raise any prospect of the facts being found differently. I explained at paragraph 15 why I

found myself able to attach more weight to some witnesses than to others. It was because of these differences in reliability that I started with the common ground, the contemporaneous documents and the evidence of the more reliable witnesses. Against that background I could then test the evidence of the three main protagonists and find the facts where I could. This task was made much more difficult by the passage of time. It would have been still more difficult if I had started by trying to resolve the clashes of evidence between the claimant and Mrs McAnally and Mrs Ward before taking into account the evidence of the other witnesses.

Point 6 – inconsistency regarding hearsay statements

31. I explained my reasons for being unable to attach significant weight to Ms Ali's assertion (Reasons paragraph 17). Contrary to the claimant's argument, I did not accept everything that was asserted in the statements provided to the grievance investigation. My finding that the grievance was conscientiously investigated does not, as the claimant contends, necessarily imply that I accepted the truth of the statements obtained by the investigator, or, indeed, the accuracy of the conclusions that the investigator reached. The inconsistency alleged by the claimant does not exist.

32. I did indicate preparedness to attach some weight – if forced to make a finding – to the hearsay account of Mr Cleland contained in his grievance investigation statement. I gave a specific reason for being able to rely on what he said (Reasons paragraph 44).

33. Point 7 – Accepting Mrs McAnally's and Mrs Ward's evidence

34. The claimant's argument is based on a misunderstanding of the Reasons. I was careful to state that I did not simply accept the evidence of Mrs McAnally and Mrs Ward. At paragraphs 15.3 and 15.4 the Reasons explain why their reliability might be affected. In relation to both witnesses I specifically warned myself of the powerful incentive that they would have to deny wrongdoing. The claimant's examples of my having "preferred" their evidence to that of the claimant (Reasons paragraphs 46, 48 and 50) are actually instances of my having expressly stated that I could not prefer one version over another.

35. I did note at Reasons paragraph 48 that Mrs Ward's evidence about CCTV monitoring was uncontradicted. It was. The claimant had no way of knowing whether or not Mrs Ward had been watching him on CCTV and there was no evidence from any other source. Even then, I did not take it at face value, although I did state that "if pushed, I would accept [it]". Observing that a witness's evidence is uncontradicted on a particular point is not the same as preferring their evidence when it clashes with the evidence of another witness.

36. Point 8 - Objectivity

37. I did not apply double standards when assessing evidence against the criterion of objectivity. Each of the three main protagonists had a powerful incentive to see events from their own point of view. The claimant's evidence also lacked objectivity in one very particular respect. That was his incorrect allegation of forgery (see below). As a result, I had to be wary about accepting his evidence on matters of impression and subjective opinion. But that does not mean that I took at face value the point of the view of Mrs Ward and Mrs McAnally. The

Reasons include few findings about the subjective thought processes of these two witnesses precisely because of the difficulties in establishing the facts.

38. Point 9 – "One-sided approach" to alleged forgery

39. I did not take a one-sided approach to the issue of whether the Return to Work Interview document had been forged. In fact, I took the initiative in giving the claimant's counsel the opportunity to bring out the evidence necessary to determine that issue. Mrs Woodcock was examined in chief about the form. Her answers made it quite clear that if there had been a forgery, she herself would have had to be a party to it. Mr Mensah's cross-examination of Mrs Woodcock did not include any questions on the forgery issue. Rather than take Mrs Woodcock's evidence as being unchallenged, I specifically invited Mr Mensah to ask questions about the alleged forgery.

40. Point 10 – factors relevant to the forgery issue

41. The claimant relies on the lack of early disclosure and Mrs McAnally and Mrs Ward's failure to mention the Return to Work Interview form during the grievance. It was not put to either of these witnesses that they had failed to mention the form during the grievance. Nor was it put to any of the respondent's witnesses that they had failed to disclose the form during the course of the grievance investigation. These points were not mentioned in the claimant's written closing submissions either.

42. Point 11 - alleged forgery of contemporaneous notes

43. There was no direct evidence that the contemporaneous notes relating to the holiday request had been forged. There was simply a difference between the claimant's recollection of the discussions and the contents of the notes. I had to bear in mind that the claimant had already made one accusation of forgery that I had found to be incorrect.

44. Point 12 - insertion of facts without context

45. At Reasons paragraph 42 I mentioned an entry in the weekly Rota. The significance of that entry ought to be apparent from paragraph 55. Staff were expected to arrive 15 minutes early. It is a fact that supports the respondent's defence of the claim. That does not mean I was only looking for such facts.

46. Point 13 – demographic finding

47. I was not invited to find that the high white population of the city in which the respondent store was based was a fact from which discrimination could be concluded. Rather, the claimant's point was that the workforce in the store itself was predominantly white. Where statistics indicate that a group within a workforce is significantly under-represented, the disparity may be indicative of discriminatory treatment. But in order to measure under-representation, there has to be a baseline figure for the wider population, otherwise the statistics beg the question, "under-representative of what?" I thought it relevant to use my general knowledge to help me establish that baseline.

48. Point 14 – "making light" of facts favourable to the claimant

49. I included facts favourable to the claimant where I was able to find them. These included the claimant's good progress at the Doncaster store (Reasons paragraph 21) and the way in which the allegations of mistreatment came to light

(Reasons paragraph 73) which I then took into account in the claimant's favour when evaluating his reason for delaying (paragraph 101).

50. Point 15 - Findings unsupported by evidence

51. "The claimant initially got on well with his supervisors" (Reasons paragraph 27) – I did not mean to draw any distinction here between supervisors in general (on the one hand) and Mrs McAnally and Mrs Ward on the other. The claimant gave oral evidence about his working relationship with these two supervisors at the start of his time at Chester. He said,

52. "They weren't extra nice, they were normal for the first month. It is normal behaviour when they meet somebody new. It was only after a month they started mistreating me."

53. I took this to mean that he initially got on well with them.

54. The claimant was "sent home for the whole weekend" (Reasons paragraph 29) – I still do not understand that there is any dispute about the claimant being sent home that weekend. The point now made on the claimant's behalf is that it was at the claimant's father's instigation that he was sent home. It ought to be apparent from the paragraph as a whole that it did not especially matter who took the initiative in first making that suggestion. The point was that, despite being willing to work, the claimant had an absence on his record that rendered him liable to an Amber warning. That state of affairs would prevail regardless of whether the claimant's father had been the instigator or not. I did not omit that detail in order to portray Mrs Ward or Mrs McAnally as being more supportive than they were. Where I have drawn conclusions from the supportive actions of those two supervisors, the Reasons make clear which actions I took into account (see Reasons paragraphs 57 and 59).

55. Mrs McAnally "immediately" spoke to the claimant (Reasons paragraph 36) – It is possible that I may have been incorrect to find that Mrs McAnally's conversation with the claimant came immediately after the mystery shopper exercise. It may have been that some time elapsed between the two events. Neither party contended that there was any significant gap in time. I cannot see how my finding (if it was mistaken) benefited the respondent.

56. Point 16 – Significance of the claimant's incorrect evidence about dates

57. Paragraphs 15.1 and 45 of the Reasons explain how I took into account the claimant's demonstrably incorrect evidence about the dates of various incidents. Contrary to the claimant's arguments on reconsideration, I expressly warned myself that mistakes over the dates did not necessarily mean that the claimant was not telling the truth. I was concerned, however, (see Reasons paragraph 45) that the claimant had attempted to reconstruct events in a way that made the best fit with his case.

58. Point 17 – The "business plan" conversation

59. Reasons paragraph 57 records my finding that it was Mrs Ward who used the analogy of the business plan. On this finding, the claimant's challenge is correct: the evidence of both the claimant and Mrs McAnally was that it was Mrs McAnally who brought the business plan into the conversation. Changing the identity of the person who spoke on that occasion would not significantly alter my overall finding, based on the contemporaneous notes and e-mails, that both Mrs

McAnally and Mrs Ward had acted supportively towards the claimant in relation to his holiday request.

60. Point 18 – Adverse inference

61. As paragraph 54 of the Reasons relates, I considered whether or not I should draw an inference adverse to the respondent from its omission to call witnesses. If the claimant's evidence were correct, those witnesses would have observed how the claimant was treated after he had been locked out. The respondent might have had the opportunity to call the witnesses in order to rebut the claimant's evidence on that point. The claimant's closing submissions did not mention the respondent's failure to call those witnesses. Nor was any explanation sought for their absence during the course of the oral evidence. If I held it against the respondent that it had not called the witnesses, the respondent could have legitimately complained that it had had no fair opportunity to resist that inference. For all I knew, the witnesses might no longer be employed or traceable.

62. At its highest, this is an argument that I failed to draw an inference that the claimant had not invited me to draw. That argument does not raise any realistic chance that I will alter my findings of fact.

Point 19 – 17 June 2017

63. I found in Reasons paragraph 66 that no act of discrimination took place on 17 June 2017. My reasons are set out there. On reconsideration, the claimant's argument appears to be that these reasons are inconsistent with the claimant's general assertion in his witness statement about how long the mistreatment of him had lasted. That argument goes nowhere. The claimant did not refer to any particular incident that had happened on his last day of work. Checking back through my notes, I have a record of the claimant's counsel specifically conceding that the only act of discrimination that was "automatically in time" was the refusal to transfer the claimant back to Chester. That would be an odd concession to make if the claimant was contending that there had been an incident of discrimination at work after 15 June 2017.

The grounds for reconsideration

Bias

64. I can assure the claimant that I did not consciously pre-determine my judgment and then try to build the facts around it. There remains the claimant's argument that I may have done so subconsciously. For obvious reasons I am not particularly well placed to evaluate that argument, other than to deal with the detailed points on which the claimant relies in support of it. If the subconscious bias argument has any force, it strikes me more as a ground of appeal than a ground for reconsideration.

Perversity

65. The claimant's detailed points do not, in my view, raise any reasonable prospect of me deciding that my original findings of fact were wrong. I have corrected two points of detail, but they would not change my conclusions in any way.

Disposal

66. Having given preliminary consideration to the claimant's application, my view is that it does not raise any reasonable prospect of the judgment being varied or revoked. I therefore dismiss the application.

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Employment Judge Horne

Date: 21 January 2019

SENT TO THE PARTIES ON

28 January 2019

FOR THE TRIBUNAL OFFICE