EMPLOYMENT TRIBUNALS

Claimant: Mr D Taheri

Respondent: Perry Motor Sales Limited

JUDGMENT

The claimant's application for reconsideration of the judgement sent to the parties on 9 January 2019 is dismissed.

REASONS

The application

1. At a hearing on 19 and 20 December 2018, and in a judgment sent to the parties on 9 January 2019, the tribunal dismissed the claimant's complaints of direct race discrimination and direct age discrimination. The same judgment contained an order that the claimant pay the sum of £1,000.00 towards the respondent's costs. On 25 January 2019, the tribunal sent two sets of written reasons for that judgment, which I shall call the "Liability Reasons" and the "Costs Reasons".
2. By e-mail dated 7 January 2019 the claimant applied for reconsideration of the judgment. His grounds were:

   "

   1. I was ill during the hearing and the case should have been adjourned is my illness impaired my judgement. Medical evidence is attached.
   2. Introduction of Bad Character by Mr Sugarman prejudiced The Panel.
   3. Respondents witnesses lied as "Arnold" does not exist no one at Mr Hallam dealerships have [ever] heard of a Black Arnold.
   4. Arbaz is not of Asian descent he is Albanian.
   5. Panel member was seen talking to Mr Hallam so collusion is suspected.
   6. All people present at the hearing or white so this again violated my Article 6 human rights.
   7. The hearing was procedurally incorrect and the law was not applied correctly.

8. To say I lied about my CV is evidence of the Panel's bias. I was working part-time at the time of my application to the Respondent.
9. As I was Litigant-in-Person and Respondent was represented by Counsel this tip the scales of justice in favour of The Respondent.
10. Cost application was fraudulent as costs have not been properly formatted.
11. Emails from Toni Haynes were "Without Prejudice" as they were CC to ACAS. Counsel failed to give the Tribunal the full picture.
12. Mr Sugarman behaviour was unprofessional and racist."

3. Attached to the email with the following documents:

3.1. a general practitioner fit note addressed to the claimant dated 24 December 2018 stating, "I assessed your case on 24/12/2018 and, because of … Anxiety with depression I advise you that you are not fit for work… from 17/12/2018 to 17/1/2019".

3.2. An NHS specimen label dated 7 January 2019.

3.3. A chain of e-mails between 22 March 2018 and 18 April 2018. Most of the chain already appears at pages 111 to 113 of the hearing bundle. Additionally, the chain contains two e-mails sent by the respondent to the tribunal on 22 March 2018 and 9 April 2018, and an e-mail sent by the claimant at 4.34pm on 9 April 2018 to Mr Haynes, copied to ACAS. That e-mail states "At this late stage I am willing to accept settlement via ACAS".

3.4. An almost identical e-mail chain, but containing a further e-mail sent by Mr Haynes at 12.02pm on 18 April 2018. The e-mail asked for an extension of time to respond to the claimant's latest offer.

4. On reading the application, I thought that it contained insufficient information to demonstrate any reasonable prospect of the judgement being revoked or varied. I bore in mind, however, that the claimant was representing himself and may not have appreciated what information he would need to provide in support of his application. Rather than dismissing the application, therefore, I decided to defer my preliminary consideration and give the claimant an opportunity to provide further information. Accordingly, on 1 February 2019, the tribunal wrote to the claimant in these terms:

> "Employment Judge Horne has read the claimant's reconsideration application dated 7 January 2019. He has decided to defer his preliminary consideration of the application and to seek further information from the claimant in the meantime.
>
> The further information required from the claimant is as follows:
>
> 1. In relation to Ground 1 (adjournment on medical grounds), the claimant is required to state in full what his arguments would have been at an adjourned hearing had an adjournment been granted. These arguments must be set out in writing in as much detail as the claimant would have provided at the adjourned hearing.

2. In relation to Ground 2 ("Bad Character"), the claimant must state whether the claimant is referring here to the documents contained at pages 118 onwards of the bundle.
3. In relation to Ground 3 (Arnold), the claimant must set out his basis for making this assertion. If he has heard it from somebody else, he must say who that person is. If it is based on a document, he must provide a copy of that document.
4. In relation to Ground 5 (collusion with Mr Hallam), the claimant must name, or otherwise identify, the person who allegedly saw a member of the tribunal talking to Mr Hallam and full details of what that person saw.
5. In relation to Ground 7 (incorrect law and procedure), the claimant must identify the relevant legal principles and rules of procedure.
6. In relation to Ground 12 (Mr Sugarman's behaviour), the claimant must set out what behaviour he alleges was unprofessional and racist.

…"

5. The claimant replied by email on 6 February 2019. Adopting the same paragraph numbering as in the tribunal's letter, he provided the following further information:

"

1. Medical adjournment

   I would have cross-examined all witnesses and called them "liars" as Arnold never existed and The Respondents defence was a Tissue of lies.

   If Arnold had existed surely he would have given evidence!

   Arbaz was a male from Albania and he was never employed again why didn't he give evidence?

2. Bad character

   As I dont have the bundle I can only presume you are referring to incident in 2008.

   To say you simply put this out of your minds has violated my Article 6 Human rights.

3. Arnold

   I have made exhaustive enquiries about Arnold that no one of Mr Hallam dealerships has ever heard of him or Arbaz.

   Crucially yesterday I met Eddie who used to work for Perrys at Burnley with Dave Hallam he is a black guy and told me he was the only black Salesperson in this area and there were no Asian Salespeople he further told me that Arnold did not exist and if he had why didn't The Respondent produce him as a witness.

   I asked Eddie if he would make statement on my behalf but he was worried that The Respondent would attack his character as he was sacked due to violent racist incident at the Burnley showroom.

4. David Hallam

   I saw Mr Hallam outside the Tribunal building talking to Panel member and shaking hands I suspect they had made a deal to get my case thrown out

5. The law

   The Judge has been deliberately bias towards me and not used the law correctly to allow a fair and impartial hearing thus violating my Article 6 Human rights.

   The Costs Order is totally illegal and this whole matter is a total travesty of justice.

6. Mr Sugarman

   Mr Sugarman attempts to undermine my defence were illegal and he omitted crucial evidence eg Without Predudice emails via ACAS also his actions were racist and totally illegal.

7. Judge's conduct

   The Judges conduct and subsequent written reasons just show how biased the Tribunal was and in my opinion racist as I was the only non white person at the hearing.

   My case was Prima facie and I have faced substantial discrimination by many potential employees this is just attempt to try and teach me a lesson.

   I did not "Storm out" I left and did not return as I was ill and did not want to hear the findings of the racist file awarding an illegal Costs Order against me."

Relevant law

6. 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".

7. Rule 71 sets out the procedure for reconsideration applications.

8. 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…"

9. 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.

10. Article 6(1) of the European Convention on Human Rights provides:

    "In the determination of his civil rights and obligations… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"

Further enquiries

11. Ground 5 of the application alleged that a member of the panel was seen talking to Mr Hallam. It is vitally important that panel members are not only impartial but also seen to be impartial. I was therefore keen to find out from both lay members of the tribunal whether they had spoken to Mr Hallam and, if so, the full detail of what happened. Accordingly, the assistant to the Regional Employment Judge asked both lay members to provide this information in writing. They separately confirmed very clearly that they had no such conversation.

Conclusions

12. I start by reviewing each of the grounds for reconsideration:

Ground 1 – ill health

13. There is no contemporaneous medical evidence about the claimant's state of health during the hearing. His GP fit note was retrospective. Moreover, it did not comment on the claimant's ability to attend a tribunal hearing. As the Costs Reasons relate at paragraphs 5 to 8, at no stage did the claimant say that he was unwell, although he did say during the costs hearing that the "personal attacks" had "brought out a lot of hurt".

14. The claimant's health did not prevent him from participating fully in the liability hearing. He presented clear and detailed arguments, some of which we accepted (see, for example, our decision at Liability Reasons paragraph 6 to refuse to admit documents into evidence). He asked questions of witnesses and was able to make oral submissions. At no stage did he ask for an adjournment before the respondent applied for costs.

15. The claimant did ask for an adjournment during the costs hearing. But even if the claimant's health had, by that time, prevented him from participating effectively, there is still no reasonable prospect of the Costs Judgment being revoked. This is because I now know what the claimant would have argued if he had been well enough to argue it. His full argument is set out under the heading, "Medical Adjournment". Dealing with the points he now says he would have made:

    15.1. Calling the witnesses "liars" would have been unlikely to make a significant difference to the reliability of their evidence.

    15.2. The claimant's decision not to cross-examine Ms Kentish-Beard was made at the start of the hearing, about 45 minutes before the claimant made his successful submission and the day before he asked for an adjournment. He still has not put forward any basis for arguing that Ms Kentish-Beard's evidence was inaccurate.

    15.3. It is highly unlikely that the claimant's evidence about Arnold (had he given it) would have swayed us. At its very highest, it would be evidence that a former employee of the respondent ("Eddie") had told the claimant that Arnold did not exist. But that evidence (assuming it to be true) would have to be weighed against the oral evidence of Mr Hallam that Arnold did indeed exist. Mr Hallam gave evidence on oath and had his version of events tested by questioning. Eddie's evidence could not have been tested in that way.

    15.4. The existence, and national origin, of Arbaz did not feature significantly in our reasoning, so evidence that he was from Albania would not have altered our findings.

15.5. Had the claimant asked us to draw an adverse inference from the respondent's omission to call Arnold and Arbaz, it is highly unlikely that we would have drawn such an inference. It would only be in a very rare case that an employer would need to call an employee as a witness in order to prove the fact of his existence.

15.6. We had many reasons for concluding that the complaint of race discrimination was vexatious and lacking in prospects. The existence or otherwise of Arnold was relevant to one of those reasons (namely whether the claimant had any basis for believing that it was only the white candidates who had progressed beyond the first stage). But there were many other reasons for our conclusion: see Costs Reasons 26, 27 and 50 to 52.

Ground 2 – "Bad Character"

16. It is now reasonably clear that, by "Bad Character", the claimant is referring to the matters described at pages 118 onwards of the bundle. We did not read them and did not allow Mr Sugarman's summary of them to influence our decision. The claimant consented to this approach (see Liability Reasons, paragraph 6). I do not see how his right to a fair hearing was adversely affected.

Ground 3 - Arnold

17. We accepted Mr Hallam's evidence about Arnold. There was no evidence to contradict it. As I have explained under Ground 1 – it is highly unlikely that new evidence about what Eddie said about Arnold would cause us to alter our findings of fact.

Ground 4 – Arbaz

18. See under Ground 1 – The national origin of Arbaz was not a factor in our decision.

Ground 5 – Collusion with Mr Hallam

19. The lay members of the tribunal have confirmed that they did not speak to Mr Hallam outside the hearing. I can assure the claimant that I did not do so either. In these circumstances there is no prospect that the tribunal will find that any of its members colluded with Mr Hallam. If the claimant wishes to pursue this point, he will have to do so on appeal.

Ground 6 - Demographic of the hearing room

20. The claimant's right to a fair hearing was not violated by the fact that everyone else in the room was white. Article 6 does not require the tribunal, or any member of it, to share the same protected characteristics as the parties to the hearing.

Ground 7 – Incorrect application of law and procedure

21. In the light of the claimant's e-mail of 6 February 2019, this now appears to be an allegation of bias. I was not deliberately biased either "towards" the claimant or against him.

22. I remain open to persuasion that I have "not used the law correctly", but in order to engage with this argument I would need to know which point of law I allegedly misapplied or got wrong. The claimant has had an opportunity to point out any errors of law and has not done so.

23. The costs order was not illegal. The Costs Reasons set out the legal power to award costs.

Ground 8 – The claimant's CV

24. In Liability Reasons paragraph 11.3 we explained our finding that the claimant had submitted a misleading CV. The claimant's reconsideration application states, "I was working part-time at the time of my application to the respondent". That assertion is different from his oral evidence to us. He sent his CV to the respondent on 26 November 2018. He told us, in December 2018, that he had been on Employment Support Allowance for over a year and that he had last been in work "some time last year". There is no reasonable prospect of our now finding that the claimant's CV was accurate.

Ground 9 – Imbalance in legal representation

25. Self-represented parties can be put at a disadvantage compared to a party who is legally represented. The overriding objective requires tribunals, so far as practicable, to ensure that the parties are on an equal footing. This is what we tried to do in the claimant's case. We explained aspects of the procedure to him (such as "re-examination") as we went along. We also reminded the claimant, once he had told us he had finished asking questions in cross-examination, of the need to put his case to the witnesses, so he would not be disadvantaged by a failure to do so.

26. Placing the parties on an equal footing does not mean finding in favour of the unrepresented party. The claimant is not suggesting that he is about to be legally represented and has not explained how, if he were legally represented, the tribunal's conclusions would be any different. I cannot therefore see any prospect of the judgment being varied or revoked.

Ground 10 – costs application "fraudulent"

27. There is no evidence of any fraud at all in the costs application. It was not supported by a costs schedule, but it did not need to be. It was obvious from the documents in the bundle and the presence of counsel at a two-day hearing that the respondent had incurred more than £1,000 in costs.

Ground 11 – "without prejudice" e-mails

28. We explained (Costs Reasons paragraphs 37 to 44) why we admitted the disputed e-mails into evidence.

29. The claimant's point now appears to be that the respondent should also have informed us about further "without prejudice" e-mails. (This is the opposite of the point that the claimant was making at the hearing, which was that we should not consider the e-mails at all.) It would have been open to the claimant at the hearing to draw our attention to the e-mails himself. Other than saying that the further e-mails are "crucial", he has not stated what those further e-mails say, or how they might alter our findings.

Ground 12 – Mr Sugarman's behaviour

30. The claimant's e-mail identifies two ways in which Mr Sugarman is alleged to have behaved inappropriately:

    30.1. His "attempts to undermine my defence were illegal"; and

    30.2. "he omitted crucial evidence eg Without Prejudice e-mails…"

31. Although it is not entirely clear what the claimant's first point means, I take it to be a reference to Mr Sugarman's attempt to rely on page 118 onwards in the bundle. To be clear, Mr Sugarman himself was not breaking the law, but on the respondent's behalf he was inviting the tribunal to take a course which (in our view) would have contravened a statutory provision. That is why we refused to admit the documents. There is no prospect of persuading us to alter the judgment simply by reminding us that the respondent should not tried to rely on those documents.

32. I have dealt with the claimant's point about "without prejudice" e-mails.

33. The remainder of the claimant's points under this heading are simply bare assertions and there is no reasonable prospect of the tribunal agreeing with them.

"Judge's conduct"

34. This ground for reconsideration did not feature in the claimant's original application, but was introduced in his e-mail of 6 February 2019. Although headed, "Judge's conduct", it actually alleges that the entire panel was racist.

35. There is no reasonable prospect of me, or the lay members of the tribunal, agreeing with the claimant that we discriminated against the claimant because of race, or are "racist" in any other way. Nor were we trying to teach the claimant a lesson. It was the respondent, not the tribunal, who applied for costs. We had to decide whether or not his claim was vexatious, or stood no reasonable prospect of success. Otherwise we would not know whether or not we had the power to make the costs order which the respondent sought.

36. If the claimant wishes to pursue these points, his better course would be to raise them on appeal to the Employment Appeal Tribunal.

Disposal

37. Looking at the whole application I cannot see any reasonable prospect of the judgment being varied or revoked. The application is therefore dismissed.

_____

Employment Judge Horne
12 February 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

15 February 2019

FOR THE TRIBUNAL OFFICE