EMPLOYMENT TRIBUNALS

Claimant: **Miss N. Wood**

Respondent: **Liz Earle Beauty Co. Limited**

Heard at: **EXETER** **On:** **Monday, the 10th September 2018**
and Tuesday, the 11th September 2018

Before: **Employment Judge D. Harris**
Ms S.M Christisan
Mr I. Ley

Representation
Claimant: Mr Benzin (Claimant's partner)
Respondent: Mr N. Moore (counsel)

JUDGMENT ON THIRD APPLICATION FOR RECONSIDERATION

The judgment of the Tribunal is that the Claimant's third application for a reconsideration is refused because there is no reasonable prospect of the decision made at the conclusion of the final hearing on the 11th September 2018 or the decisions made in response to the first and second applications for reconsideration being varied or revoked.

REASONS

1. In a written application dated the 3rd January 2019, the Claimant seeks the following relief:

   (1) a third reconsideration of the judgment dated the 16th September 2018 dismissing her claims of direct age discrimination, harassment and victimisation and the order that her deposit of £250 be paid to the Respondent;

   (2) a reconsideration of the judgments made in respect of her first and second applications for reconsideration dated the 12th September 2018 and the 12th December 2018.

2. When dealing with this further application, it is useful to set out the Tribunal's jurisdiction concerning reconsideration of judgments. Rules 70, 71 and 72 of the Employment Tribunal's Rules of Procedure provide as follows:

   70Principles
   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.

   71Application
   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.

   72Process
   (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.

3. It is important to emphasise that the reconsideration procedure is not an alternative to an appeal against a decision made by a Tribunal. If errors of law have been made by the original Tribunal, they fall to be corrected by an appeal and not by a reconsideration. The purpose of this reconsideration is not to correct errors of law that ordinarily would be dealt with by way of an appeal.

4. Before dealing with the basis of this third application for a reconsideration, it is appropriate to deal with a query that has been raised by the Claimant as to whether it was the Employment Judge alone or the full original Tribunal that dealt with her applications dated the 12th September 2018 and the 12th December 2018. Pursuant to Rule 72(1) those applications were considered by the Employment Judge alone and they were refused for the reasons given by the Employment Judge in his Judgments dated the 15th November 2018 and the 27th December 2018.

5. In her third application dated the 3rd January 2019, the Claimant contends that further reconsideration is necessary for the following reasons (as summarised by the Employment Judge):

   (1) the Claimant says that she was misled and wrongly advised by the Tribunal regarding the publication of the judgment made by the Tribunal dismissing her claim;

   (2) the Claimant says that her first and second applications for a reconsideration have not been properly considered;

   (3) the Claimant says that there was inadequate pre-reading of the case papers before the first day of the final hearing;

   (4) the Claimant says that the final hearing was rushed;

   (5) the Claimant says that there had been a failure on the part of the Tribunal to familiarise itself with the case management orders that had been made in the proceedings before the final hearing began;

   (6) the Claimant says that the Tribunal showed bias in favour of the Respondent in respect of the pre-reading of the case papers that was done on the first day of the final hearing before evidence was called;

   (7) the Claimant says that the Tribunal should have contacted Employment Judge Reed at the conclusion of the final hearing on the 11th September 2018 to question him about his conduct of a telephone case management preliminary hearing on the 15th September 2017 when it is alleged, according to the Claimant, that he made oral comments (not recorded in the written Order) to the effect that he disagreed with the Deposit Order that had been made by Employment Judge Harper on the 18th May 2017;

   (8) the Claimant says that it is a matter of concern that the Tribunal's deliberations took longer than the time estimate that had been given for those deliberations by the Employment Judge;

   (9) the Claimant says that the Employment Judge showed bias in favour of the Respondent in his treatment of the chronology that had been prepared by the Respondent for use at the final hearing;

   (10) the Claimant says that the late allocation of the Employment Judge to hear the final hearing resulted in unfairness to the Claimant.

6. Adopting the bracketed sub-paragraph numbering set out in paragraph 5 above when dealing with the Claimant's concerns, the Employment Judge responds as follows:

   (1) The Claimant was informed at the conclusion of the final hearing that full written reasons, if provided, would be published on the Ministry of Justice's website. That information was, and remains, correct.

   (2) The Claimant's first and second applications for a reconsideration were properly considered and reasons for the refusal of those applications were set out in judgments dated the 15th November 2018 and the 27th December 2018.

   (3) The Order made on the 22nd February 2018 directed the Respondent to bring 4 copies of the hearing bundle (to include witness statements, a schedule of loss, any cast list, any statement of facts and a chronology) to the final hearing by 9.30am on the morning of the first day of the final hearing. It follows that the hearing bundle was not available to be read before the first day of the final hearing.

   (4) The contention that the hearing on the 10th and 11th September 2018 was rushed is rejected. Ample time was given to the parties to present their evidence, cross-examine the witnesses of the opposing party and to make their submissions. No time restraints of any sort were imposed during the final hearing.

   (5) Though it is regrettable that neither party had ensured that the earlier case management orders had been placed in the hearing bundle, it is not accepted that any unfairness to the Claimant or the Respondent resulted from the fact that the original Tribunal did not have sight of those case management orders before hearing the claim at the final hearing. That position was made clear when all of the case management orders were reviewed in response to the Claimant's first application for a reconsideration.

   (6) It is not accepted that the original Tribunal showed bias in favour of the Respondent in the pre-reading that was conducted before the final hearing began on the 10th September 2018. The Employment Judge and the members were able to assess for themselves what was required by way of pre-reading before the hearing began.

   (7) The notion that the original Tribunal should have made contact with Employment Judge Reed to question him about a comment or comments that he is alleged to have made at a preliminary hearing on the 15th September 2017 is rejected. To expect Employment Judge Reed to remember the content of a discussion during a telephone

preliminary hearing that took place almost a year before the final hearing is unrealistic in the extreme. In the judgment of the Employment Judge, there was, and continues to be, no reason to seek to go behind the written order made by Employment Judge Reed following the relevant preliminary hearing.

(8) In respect of the issue raised concerning the time taken by the original Tribunal on its deliberations, the position is that the Tribunal took the time that it needed to make the decision that it made.

(9) It is correct to say that the Respondent produced a chronology for the final hearing. It is also correct to say that the original Tribunal read the Respondent's chronology. It is not accepted, however, that the Tribunal showed bias in favour of the Respondent by reading its chronology. Had objection been taken by the Claimant to the Tribunal reading the chronology, the matter could have been ventilated at the final hearing (which is not to say that the outcome would have been that the Tribunal would have refused to read the chronology). No objection was taken by the Claimant to the chronology but, in any event, the chronology was not a document that was a source of unfairness or prejudice to the Claimant's case.

(10) It is not accepted that the late allocation of the Employment Judge to hear the final hearing produced any unfairness to the Claimant. As mentioned above, the pre-reading for the case could not take place until the morning of the first day of the final hearing. An earlier allocation of an Employment Judge would not have had any effect on the pre-reading that was undertaken before the final hearing commenced.

7. For the reasons set out above, the Claimant's third application for a reconsideration is refused. Nothing has been demonstrated by the Claimant to have gone radically wrong with the conduct of the final hearing so as to give rise to a denial of natural justice or something of that order.

8. Though the third application for a reconsideration has been refused, it is clear from her applications that the Claimant has ongoing concerns about the way in which the final hearing was conducted and the outcome of the final hearing, which may not be allayed by this third refusal of an application for a reconsideration. Though the Claimant is out of time in her request for full written reasons of the Tribunal's original decision, it is recognised that the Claimant would be assisted in any further action that she may wish to take in respect of the original Tribunal's conduct of the claim and the final outcome

if she were to be provided with full written reasons for the original decision. The Claimant will therefore be provided with full written reasons. The task of preparing the full written reasons will involve the members who sat with the Employment Judge in Exeter in September 2018. It is the intention of the Employment Judge that the full written reasons be promulgated by the 29th March 2019. In the event that further time is needed, the parties will be notified by the Tribunal.

Employment Judge David Harris

Dated: 21st February 2019