



EMPLOYMENT TRIBUNALS

Claimant: Mr R Atkinson

Respondents: 1. Cape Industrial Services Limited
2. Mr Mark McCoag

JUDGMENT

The Claimant's application dated 27 February 2018 for reconsideration of the Judgment sent to the parties on 13 February 2018 is refused.

REASONS

1. Under Rule 71 of the Tribunal's Rules of Procedure, a party may apply for a Judgment to be reconsidered on the ground that it is necessary in the interests of justice to do so. Employment Judge Cox has conducted a preliminary consideration of Mr Atkinson's application under Rule 72(1).
2. The application relates to the Tribunal's finding at paragraph 27 of its Reasons that by the time Mr McCoag's appeal was heard the First Respondent ("the Company") had work to offer Mr McCoag but "he did not find that offer acceptable" and preferred to enter into a settlement agreement. Mr Atkinson says that he wishes to produce new evidence, the existence of which could not have been reasonably known or foreseen at the time of the Hearing, from Mr Irving and his union representative that no such offer was made to Mr Irving.
3. The circumstances of Mr Irving's case were relevant to Mr Atkinson's complaint because he argued that the fact that the Company had dismissed Mr Irving for abusive language when it did not dismiss Mr McCoag for racially abusive language supported his allegation that the Company had treated racially abusive language as less serious than non-racially abusive language.
4. The documentary evidence relating to Mr McCoag's dismissal was not disclosed until the first day of the Hearing, after the Tribunal ordered its disclosure on the application of the Company to prevent there being a breach of the confidentiality terms in the settlement agreement the Company had reached with Mr McCoag. The Company had assumed that the circumstances of Mr McCoag's case could be established by reference

to this documentation alone, but during the course of the Hearing it emerged that some of the documentation relating to Mr McCoag's case had still not been disclosed and that further witness evidence was necessary from Mr Noakes, who made the decision to dismiss Mr McCoag, and Mr Beardsell, who dealt with his appeal, to explain how his case was dealt with. The Tribunal required the Company to produce supplementary witness statements for both individuals so that there was an account of their actions and Mr Atkinson could be given an opportunity to cross-examine them upon it. Mr Beardsell's supplementary witness statement was provided to Mr Atkinson on the third day of the Hearing and Mr Atkinson exchanged text messages with Mr Irving about it that evening.

5. The Tribunal accepts that Mr Atkinson did not have an opportunity in advance of the Hearing to adduce evidence from Mr Irving and his union representative to refute the evidence of Mr Beardsell that alternative employment was on offer and was discussed with Mr Irving at the appeal meeting. Mr Atkinson did not, however, apply for an adjournment to enable him to produce that evidence, even though by the fourth day of the Hearing he knew that Mr Irving did not accept that an offer was made.
6. More fundamentally, however, even if the Tribunal's finding that Mr Irving had been made an offer of alternative work before he entered into the settlement agreement were disregarded as unsafe, that would not affect the Tribunal's decision. The Tribunal found that there were so many differences between the circumstances of Mr Irving's case and that of Mr McCoag that it was inappropriate to draw any inferences from the different steps the Company took to deal with them. It also found that, in any event, Mr Noakes's initial decision was to impose a final written warning on Mr Irving, the same disciplinary sanction as was imposed on Mr McCoag. Mr Irving was dismissed not for his abusive language but because the client whose employee he had sworn at would not have him back and no other work was available.
7. For these reasons, Employment Judge Cox does not consider that Mr Atkinson has any reasonable prospect of establishing that it would be in the interests of justice for the Tribunal to reconsider its decision. His application is therefore refused on an initial consideration under Rule 72(1).

Employment Judge Cox
Date 9 March 2018