EMPLOYMENT TRIBUNALS

Claimant: Mr G McFarlane

Respondents: 1. Assist-Mi Ltd
2. Neil Herron

JUDGMENT

The claimant's application for reconsideration of the judgment sent to the parties on 31 October 2018 is refused.

REASONS

The claim

1. The claimant's claim included a complaint that the respondents had directly discriminated against him because of disability. One of the allegations was that the respondents had made a deliberate omission from the minutes of a Board meeting on 8 March 2018. For convenience, I refer to this allegation as the "Board minutes allegation".

The hearing

2. The claimant represented himself throughout the hearing with the assistance of Mr Milton. He did not ask for the hearing to be adjourned so that he could obtain legal representation.

3. On 10 July 2018 (the final day of the hearing attended by the parties), Mr Milton e-mailed a document to the tribunal and asked for it to be copied. The attachment was an e-mail chain between the claimant and Mr Herron beginning on 20 March 2016. I will refer to the document as "the late March e-mail chain" and describe its contents in due course. Copies were provided to the tribunal at the start of that day's proceedings. Mr Milton explained that the late March e-mail chain related to the Board minutes allegation. We read the document and took it into account.

The Judgment

4. By a reserved judgment sent to the parties on 31 October 2018 ("the Judgment"), the tribunal dismissed all the claimant's complaints against the respondents, including the Board minutes allegation.

The Reasons

5. The Judgment was accompanied by written reasons (“Reasons”).

6. Paragraphs 31 to 32 of the Reasons told the story, as we found it, of what happened at the Board meeting. The context of the Board meeting was the difficult financial situation of the company and the fractious working relationship between the claimant and Mr Herron, as described in paragraphs 25 to 30. The Reasons went on, at paragraphs 36 to 38, to set out our findings about how the parties went about trying to agree the Board meeting minutes. Paragraph 38 stated:

   > “In a subsequent e-mail, Mr Milton pointed out that he had made comments about the claimant's dyslexia and need for adjustments and that these should be incorporated in the minutes. Mr Herron replied that he would discuss them in a telephone call.”

7. At paragraph 39, the Reasons recorded a finding of fact which (at paragraph 160), we concluded was fatal to the Board minutes allegation. That paragraph read:

   > “We now consider the reason why the Board members omitted reference to the claimant's need for adjustments from the minutes of the Board meeting. The phrase “Board members” might mean just the statutory directors or it might also include Miss Wingate. The only statutory director present at the meeting beside the claimant was Mr Herron. We are quite satisfied that neither Mr Herron nor Miss Wingate was influenced in any way by the claimant's dyslexia in deciding whether or not to include references to adjustments in the minutes. This consideration did not affect them either consciously or subconsciously. The reason why Mr Milton’s comments were left out of the minutes was because nobody (including the claimant) thought at the time that there was a significant contribution to the meeting.”

The application for reconsideration

8. Since the judgement was sent to the parties, the claimant has emailed the tribunal on 27 November 2018, 6 December 2018, 28 December 2018, 21 January 2019, 28 January 2019 (twice), 10 February 2019 and 19 February 2019. Initially it was not clear whether the claimant was applying for reconsideration or merely asking for an extension of time in which to apply. From the later correspondence it is fairly clear that the claimant is applying for reconsideration, although he would prefer not to have to make such an application until he managed to obtain legal representation.

Grounds for reconsideration

9. I understand the claimant to be making essentially two points:

   9.1. The tribunal should reconsider the Judgment on the ground that the claimant was not on an equal footing with the respondents, because of his dyslexia and the fact that he had no legal representation as a result of being wrongly denied Legal Aid funding.

   9.2. The tribunal should take account of the late March e-mail chain and vary the Judgment, in particular, by finding that the claimant succeeds on the Board minutes allegation.

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.

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. The overriding objective of the 2013 Rules is to enable the tribunal to deal with cases fairly and justly. By rule 2, dealing with cases fairly and justly 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.

14. There is an important principle of finality in litigation. Parties to litigation need certainty. Once the tribunal has delivered its judgment, it should not lightly be changed.

15. I have reminded myself of the relevant passages of the *Equal Treatment Bench Book* in relation to dyslexia and paragraphs 1-75 on the disadvantages faced by self-represented parties.

Ground 1 – legal representation

16. According to the claimant's e-mails:

    16.1. The claimant applied for Legal Aid to the Exceptional Funding Team. "Legal Aid was initially offered but refused". It has since transpired that his file had been "lost/forgotten".

    16.2. The Ministry of Justice has since "admitted they made a grave error" and acknowledged that the claimant "should have in fact in back in 2017 not [been] left [to] struggle without legal representation because I was not on an equal footing".

    16.3. The matter is currently being investigated by the "Minister for Justice" and "Head of Ministry for Justice".

17. The tribunal must seek to place the parties on an equal footing where practicable. There can be no doubt that the claimant's ability to present his claim effectively was hindered by the fact that he had no legal representation. He also had to overcome the additional challenges raised by his dyslexia. We were aware of these difficulties during the hearing and made considerable efforts to reduce any imbalance.

18. The new piece of information available to me, that was not known during the hearing, is that the claimant might have been legally represented had it not been for an administrative error by the Ministry of Justice. (I say, "might", because, so far, I have only read the claimant's version of events.) What I have to decide is whether or not there is any reasonable prospect of the tribunal varying or revoking the Judgment in the light of this new information.

19. On the information available to me, there is currently no such prospect. The claimant has not provided anything in writing from the Ministry of Justice. There is nothing to confirm that the claimant will actually be granted public funding in the future in connection with this case or, if so, when the claimant will be in a position to instruct solicitors. Assuming the claimant's version to be accurate, it is

possible that the claimant may just be given an apology. Unless he obtains legal representation he will be in the same position as he was before.

20. In my view it is possible, if the claimant actually did obtain legal representation within a reasonable time, that the tribunal might be prepared to re-open at least parts of the Judgment. If the tribunal had the benefit of focused argument from a skilled lawyer on the claimant's behalf it is possible that aspects of the Judgment might be varied. I should make clear that the claimant should not assume that he would be successful in having any part of the judgment changed, even with legal representation. The respondents would be entitled to be heard, and would no doubt emphasise the need for finality in this already very long-running case. But that would be a factor for the full tribunal to weigh against the need to put the parties on an equal footing.

21. If the claimant were to instruct solicitors and make a further application for reconsideration, he would need an extension of time. I would take into account the history of the claimant's application for Legal Aid in deciding whether to extend time for a further reconsideration application. I would also take into account how promptly the claimant acts once funding is available. The claimant would need to provide documentary evidence to support the assertions he has made in his e-mails to explain the delay to date.

22. On a related topic, the claimant is anxious to be legally represented at the hearing of the respondent's costs application. I agree that it would be in everyone's interests if the claimant could obtain legal representation for this purpose. If, in advance of the costs hearing, the claimant obtains written confirmation of Legal Aid, and makes a prompt application to postpone the costs hearing, I will be sympathetic to such an application. I will, of course, have to take into account the respondents' views.

Ground 2 – the late March e-mail chain

23. The late March e-mail chain begins with an e-mail from Mr Herron to various stakeholders on 20 March 2016. The e-mail states that Mr Herron has "tidied up" various suggested comments in the Board meeting minutes and asks for any further comments as soon as possible.

24. The thread resumes on 30 March 2016 with an e-mail from the claimant to Mr Herron at 2.37pm. It is headed, "FW: assist-Mi Board Minutes 080316 v1.1(2)". The body of the e-mail contains passages in different shades (presumably different colours when viewed on screen). It appears to incorporate changes made in a later e-mail by Mr Herron at 3.24pm and then a further set of comments inserted by the claimant in his subsequent e-mail at 5.52pm. Further e-mails in the chain may or may not have inserted further comments. It appears from the e-mail that, at different times, both the claimant and Mr Herron used the same coloured font to edit the original e-mail. It is therefore virtually impossible to be sure of the order in which the comments were made.

25. From the composite document, it looks as if the claimant's original 2.37pm e-mail began, "Think ready to be signed off but one little point. [Mr Milton] spoke twice at board once to rectify the assist-Mi IP was being used by OMNIA on intuition" It is possible, though not certain, that, in the same e-mail, he stated, "The point no one makes any reasonable adjustment with regards dyslexia?"

26. Mr Herron's subsequent comments included, in relation to OMNIA, "If there is an omission please advise as to where it needs to be in red…" Underneath the

claimant's comments about reasonable adjustment, Mr Herron stated, "My understanding was that [Mr Milton] was attending to assist in this regard but quite happy to work with you to determine what reasonable adjustments are required. As a Director it would be useful if you could assist in helping determining a Company Policy Document."

27. Someone – it is not clear who - inserted a link to the British Dyslexia Association website. It looks as if the claimant revisited the text in order to provide an explanation of where the relevant disability policy could be found in the Sunderland office. There was a detailed discussion of branding ownership and domain ownership in the same font colour.

28. It appears that claimant subsequently added, in a different colour, "…did you not want to comment or shall we as you did remove it ever was said? A further comment appears in the same colour, stating, "We will discuss on the call."

29. On re-reading this thread in detail, it appears that the claimant raised the subject of incorporating the reference to reasonable adjustments in the minutes. (Paragraph 38 of the Reasons is not necessarily wrong: Mr Milton may also have raised the subject. When asking questions of Mr Herron, Mr Milton said that he himself had been the one to ask for the reference to reasonable adjustments to appear in the minutes.) Whether it was just the claimant, or also Mr Milton, who raised the issue, the tribunal's essential conclusion would be the same. The question of whether the minutes should reflect a discussion about adjustments was "a little point" (in the claimant's words) that was raised at a late stage once the claimant had already made extensive proposed amendments to the Board minutes. He had already indicated 5 days previously that he was happy to sign off the minutes without any reference to reasonable adjustments. The rest of the late May e-mail chain shows that the reference to adjustments was one detail amongst many, in the context of a meeting that was about the survival of the company. I cannot see that there is any prospect of the tribunal altering its finding at paragraph 39 of the Reasons about Mr Herron's motivation for leaving that detail out. The Board minutes allegation would still fail and there would be no reason to vary the Judgment.

Disposal

30. I therefore dismiss the claimant's reconsideration application.

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Employment Judge Horne

Date: 7 March 2019

SENT TO THE PARTIES ON

14 March 2019

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