



EMPLOYMENT TRIBUNALS

Claimant: Mrs N Sweeney

Respondent: Merseyside Community Rehabilitation Company Limited

Heard at: Liverpool

On: 7 and 8 February
2019

Before: Employment Judge Horne
Ms F Crane
Mr B Bannon

REPRESENTATION:

Claimant: In person

Respondent: Ms D Grennan, Counsel

Judgment was sent to the parties on 18 February 2019. Written reasons for the judgment (“the reconsideration reasons”) were sent to the parties on 14 March 2019. Those reasons provided for the parties to request additional reasons, which the claimant has since done. The following additional reasons are therefore provided.

ADDITIONAL REASONS FOR RECONSIDERATION JUDGMENT

The disputed decision

1. These reasons relate to a case management decision that we made during the course of the reconsideration hearing. As paragraph 15 of the reconsideration reasons records, we refused to allow the claimant to give oral evidence at the reconsideration hearing.

The claimant’s request

2. The reconsideration reasons set out the background to and the purpose of the reconsideration hearing.

3. On the first day of the reconsideration hearing, the claimant asked to give oral evidence. She told us:
 - 3.1. that she wanted to explain the detail of the individual cases listed in the Caseload Document and tell us how much work was required in relation to each one;
 - 3.2. that, had the tribunal wished to do so, it “could have questioned me about each and every one of these cases”; and
 - 3.3. that she “could tell [the tribunal] about every one case and many others”.
4. The claimant did not have a witness statement setting out the evidence she proposed to give on these matters.
5. The employment judge asked the claimant if she had asked to give oral evidence about these matters at the original hearing. The claimant did not directly answer that question, but said, “I thought that the tribunal had all seen this. I was saying that how can it be that they say I only had 20 cases when I’ve got 34 cases.”
6. We checked our notes of the original hearing to see if the claimant had asked to give oral evidence about the Caseload Document. We could not find any note of the claimant having made such a request.
7. Our notes also showed how the Caseload Document came to light during the original hearing. At numerous points in the hearing the claimant asserted that she had been given a certain number of cases without a support worker, but did not refer to any document supporting that assertion. The first time she referred to the Caseload Document was during her oral closing arguments, shortly before 4pm on Day 9 of the hearing. By this time all witnesses had given their oral evidence, the claimant had already been recalled to give evidence for a second time, and Ms Grennan had made the respondent’s closing submissions. The claimant asserted, in closing, that she had been given 33 cases without a support worker. The employment judge asked the claimant where the evidence was that would enable the tribunal to find that as a fact. The claimant answered by saying that she had raised the matter with Gail Churchill. Once the claimant had concluded her closing arguments, the employment informed the claimant that she had one final chance to identify a document supporting her assertion about the 33 cases. It was at this point that the claimant first mentioned the Caseload Document.

The respondent’s objection

8. The respondent objected to the claimant’s request. On the respondent’s behalf, Ms Grennan argued:
 - 8.1. that it was 5 years since the events about which the claimant proposed to give evidence and 2 years since the original hearing;
 - 8.2. that Ms Grennan would not be in a position to cross-examine the claimant or adduce any oral evidence in rebuttal, as she did not have witnesses with her;
 - 8.3. that the tribunal would not have heard oral evidence on these matters had it considered the Caseload Document at the original hearing; and

8.4. the requirement to put parties on an equal footing works both ways.

Relevant law

9. We reminded ourselves of the overriding objective, which is set out in the reconsideration reasons.
10. Rule 41 of the Employment Tribunal Rules of Procedure 2013 appears under the heading, "*RULES COMMON TO ALL KINDS OF HEARING*". It provides that the tribunal "may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective."

Our decision

11. We decided that the overriding objective would not be served by our hearing the oral evidence that the claimant wanted to give. Our reasons were as follows:
 - 11.1. The claimant did not ask to give oral evidence about the Caseload Document during the original hearing.
 - 11.2. Even if the claimant had made such a request, it is highly unlikely that we would have allowed it. In order to counter the further oral evidence, the respondent would have had to recall witnesses who had already been questioned and whose evidence was complete. We had heard the parties' closing arguments and there was very little time left on the penultimate day of the hearing. To allow oral evidence at that stage would have created a real risk of going part-heard.
 - 11.3. The claimant did not produce a witness statement for the reconsideration hearing. She did not give the respondent advance warning of her intention to give oral evidence, or indicate what that evidence was going to be. This meant that, if the claimant gave oral evidence at the reconsideration hearing, the respondent would be at a disadvantage. Ms Grennan would not be able to test the evidence without taking instructions from witnesses (who were not present at the reconsideration hearing) and, possibly, asking the respondent to search individual case files. In any event, the respondent would not be able to rebut the evidence without witnesses being available to be called. We thought it almost inconceivable that all of this could be done, and the respondent's evidence could be completed, in time for us to begin our deliberations on Day 2 of the reconsideration hearing.
 - 11.4. We could, of course, proceed without giving the respondent the opportunity to test or rebut the claimant's evidence. In our view, that approach would not be putting the parties on an equal footing.
 - 11.5. The quality of any oral evidence would be affected by the fact that it was 5 years since the events that claimant wanted to describe.
 - 11.6. In our view it was very important that the reconsideration hearing should not go part-heard. One of the panel's lay members would have been unavailable to sit on a re-listed case for many months. Delay has to be avoided where practicable. The added urgency in this case comes from the

fact that the claimant's appeal to the Employment Appeal Tribunal is effectively on hold pending our reconsideration decision.

Employment Judge Horne
22 March 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

28 March 2019

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