EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Jankowski	**and**	GKN Aerospace Limited

Heard at:	**Bristol**	**On:**	**29 March 2019**

Before: **Employment Judge Livesey**
Ms SM Pendle
Ms M Luscombe-Watts

Representation
Claimant: Ms Short, friend
Respondent: Mr Steer, counsel

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The Claimant's application for reconsideration is dismissed.

REASONS

1. The Claimant applied for a reconsideration of the Judgment dated 17 August 2018 following a determination of his claim at a hearing which took place between 15 and 17 August 2018. More particularly, he sought reconsideration of the subsequent Reasons dated 2 October 2018 which was sent to the parties on 3 October 2018 ('the Reasons'). The grounds were set out in his application of 5 October 2018.

2. Following receipt of the Respondent's comments upon the Claimant's application, it was listed for hearing before the same panel which determined

the matter at the original hearing (Mrs Moore's name had changed in the interim).

Principles

3. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). Under rule 71, an application for reconsideration under rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The application was therefore received inside the relevant time limit.

4. The grounds for reconsideration are only those set out within rule 70, namely that it is necessary in the interests of justice to do so. The earlier case law suggested that the 'interests of justice' ground should have been construed restrictively. The Employment Appeal Tribunal in *Trimble-v-Supertravel Ltd* [1982] ICR 440 decided that, if a matter had been ventilated and argued at a hearing, any error of law fell to be corrected on appeal and not by review. In addition, in *Fforde-v-Black* EAT 68/80 (where the applicant was seeking a review in the interests of justice under the former rules, which were analogous to the current rules), the EAT stated that it did not mean "*that in every case where a litigant is unsuccessful he is automatically entitled to have the tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in the even more exceptional case where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order*".

5. More recent case law suggested that the test should not have been construed as restrictively as it was prior to the introduction of the overriding objective (now contained within rule 2). As was confirmed in *Williams-v-Ferrosan Ltd* [2004] IRLR 607 EAT, it was no longer the case that the 'interests of justice' ground ought only to have been reserved for cases of exceptional circumstance. In *Newcastle Upon Tyne City Council-v-Marsden* [2010] IRLR 743, however, the EAT stated that the requirement to deal with cases justly included the need for there to have been finality in litigation, which was in the interest of both parties.

Argument

6. The Claimant's challenge to the Judgment concerns the Tribunal's decision in respect of one of the complaints under s. 20 of the Equality Act (the Respondent's alleged failure to make reasonable adjustments).

7. The nature of the complaints under s. 20 had been identified within paragraph 7 of the Case Management Summary of 15 March 2018, which was confirmed at the start of the hearing (see paragraph 3 of the Reasons).

8. When the Claimant commenced work at the Respondent's site on 13 February 2017, he worked double day shifts; 6.00 am to 5.00 pm for 5 days in one week and then 2.00 pm to 10.00 pm in the next week (paragraph 5.4 of the Reasons). The Claimant had osteoarthritis and was unable to work more hours than were required by his shifts. He therefore worked no overtime.

9. In April 2017, the Respondent changed its shift patterns which meant that the Claimant moved to a 7-day fortnight; in the first week, he worked 12 hours each day for 5 days (60 hours), two of which were at the weekend. In the second week, he worked 12 hours per day on the remaining two days (24 hours), Wednesday and Thursday. Another group of workers dovetailed with those shifts (paragraph 5.19 of the Reasons). The consequence was that the Claimant worked 3 consecutive days in the first week (Friday, Saturday and Sunday).

10. In August 2017, the Claimant made a flexible working request; he asked that he should have been excused work on Fridays in the first week of each fortnightly pattern in order to give him a break because of the effects of his osteoarthritis (paragraph 5.22 of the Reasons). Ultimately, that request was refused (paragraphs 5.26 and 5.27).

11. The Tribunal concluded that the Claimant was subjected to a provision criterion or policy (a 'PCP'), "*the requirement for* [him] *to have worked his specified shifts*" (paragraph 7.1.2 of the Case Management Summary of 15 March 2018) which caused him a substantial disadvantage when compared with those who were not disabled because of his osteoarthritis because of the requirement for him to work for 3 consecutive days (paragraph 6.26 of the Reasons). We went on to find, by a majority, that that the adjustment contended for by the Claimant as suggested in his flexible working application was not reasonable (paragraphs 6.27-6.31).

12. A number of discrete arguments were raised by the Claimant in his application of 5 October 2018 which have been expanded upon orally today;

    a. First, Ms Short has alleged that we had misunderstood the nature of the substantial disadvantage that was contended for. It has been suggested that our understanding that the requirement to work for 3 consecutive days was not the sole cause of the substantial disadvantage. Ms Short maintains that the requirement to work 12-hour shifts was also the cause of a substantial disadvantage which was not addressed in our Judgment;

    b. As to the question of adjustments, although paragraph 7.3 of the Case Management Summary correctly identified the fact that the Claimant did not have to prove which adjustments might or might not have been reasonable, he had nevertheless identified the suggested adjustment of "*allowing him to change his shifts in line with his flexible working request*"

(paragraph 7.3.2). The Claimant argues that other adjustments ought to have been considered; the possibility of a job share, of him being transferred to a different site, of him taking rest breaks or having worked shorter shifts. These alternatives, Ms Short contends, might have alleviated the substantial disadvantage caused by the length of the shifts, rather than the pattern of having to work 3 consecutive shifts;

c. It is further argued that the document referred to within paragraph 5.22 of the Reasons was misquoted and therefore the Tribunal failed to account for the potential for the Claimant's condition to have deteriorated.

Conclusions

13. We will consider each of the Claimant's points as they have been set out above;

a. We consider that we determined the case which was put before us. The Case Management Summary which was produced by Employment Judge Mulvaney following the hearing which she conducted on 30 January 2018 did not identify the issues which fell to be determined in the case under s. 20. The Claimant produced further information in relation to the adjustments complaints and in response to that Order (pages 38 to 42 of the hearing bundle, R1). Those documents were then considered by me at the hearing which I conducted on 15 March 2018. The discussions caused the following adjustment to be identified; "*Allowing him to change his shifts in line with his flexible working request*". The Claimant articulated the problem with the new shift pattern in his flexible working application to have been the requirement to work a third 12-hour day, whereas working 2 days and having 2 days off was not then a problem (see paragraph 5.22 of the Reasons). We were satisfied that that constituted a substantial disadvantage but Ms Short argues that we failed to consider the alternative case; the impact of the 12-hour days themselves.

That point was not specifically raised in the flexible working request and the Claimant did not question the accuracy of the Case Management Summary when it was sent out. Further, when the issues were revisited at the start of the final hearing, there was no suggestion then that the issues had been incorrectly recorded in the Summary.

We are therefore satisfied that we dealt with the case that had been put before us but we have nevertheless gone to consider that specific problem and the potential adjustments which have been aired today;

b. At the outset, we should say that the further information which was supplied in accordance with Employment Judge Mulvaney's Order did contain aim broad and rather general indication of the disadvantage suffered by working longer shifts (the top half of page 2, which was page

39 in R1). The evidence contained within paragraphs 15, 17, 26, 27 and 29 of the Claimant's statement was supportive although apparently inconsistent with the flexible working application that was in fact made in August 2017 (see paragraph 5.22 of the Reasons).

Nevertheless, assuming that a substantial disadvantage was demonstrated by the sheer length of each shift, what of the four potential adjustments which Ms Short has now identified today?

As to the possibility of a Job Share, although not expressly put forward as an adjustment by the Claimant, this was a matter which we nevertheless considered and rejected within paragraph 6.33 of the Reasons. We consider the job share arrangement in respect of only part of each working day would have been even more difficult for the Respondent to have found.

As to the issue of a change of site, paragraph 14 of Ms Chapman's witness statement dealt with that point in detail. A possible change to Filton was explored but did not come about due to the Claimant's lack of cooperation. Ms Chapman was not challenged on her evidence, either in cross-examination or by anything which the Claimant himself said.

As to the possibilities of the Claimant either working shorter hours or taking rest breaks, both potential solutions created the same problem; the undermining of the shift in which he worked. During his evidence, the Claimant accepted that most of his work was undertaken in pairs (a strong feature of the Respondent's case). He also accepted that, if he had been absent on a Friday, as he had requested in his flexible working application, his work would have to have been covered by another employee undertaking over time (or by way of job share, which we have dealt with). Although we were only able to achieve a majority decision in respect of the possibility of using overtime to plug the gap created by the Claimant for a whole day, we are unanimously of the view that plugging that gap for short periods during rest breaks and/or for a few hours each day at the start or end of shifts would have been wholly impracticable. These issues were simply not explored during the hearing with the Respondent's witnesses but the evidence that we *did* hear leads us firmly to that conclusion.

c. Finally, we accept that there were typographical errors within the quotation lifted from the Claimant's flexible working request within paragraph 5.22 of the Reasons. The second sentence in fact reads; "*working 2 days and having to* [sic] *days off is not a problem now, but working the 3rd 12-hour day has caused me increased pain from (as my doctor describes), my age related chronic condition.*"

The Claimant alleges that the Respondent did not adequately consider, by his use of the word 'now', the effects of a deterioration in his condition. We are not told what that deterioration might have been but we have addressed the substantial disadvantage which was identified in the flexible working request (the shift pattern involving 3 consecutive days) and that which has been raised today (the requirement to work 12 hour shifts).

14. Accordingly, for these reasons, the application for reconsideration pursuant to rule 72 (1) is refused because there is no reasonable prospect of the Judgment being varied or revoked.

15. We did, however, ask Ms Short what the ramifications of a different decision would have been at the very start of this hearing. The Claimant may flexible working application on 25 August 2017 and his placement came to an end in September. Ms Short said that there was just a two-week window in which he would have claimed injury to feelings as result of the Respondent's alleged failure to make adjustments in respect of the matters set out above.

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Employment Judge Livesey
Dated 1 April 2019