THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH EMPLOYMENT TRIBUNAL**

BEFORE: **EMPLOYMENT JUDGE WEBSTER**
MS S DENGATE
MS M FOSTER-NORMAN

BETWEEN:

Ms K COULTON **Claimant**

AND

BEWBUSH COMMUNITY NURSERY

Respondent

ON: **20 March 2019**

Appearances:

For the Claimant: **Dr Coulton (Claimant's father)**

For the Respondent: **Ms G Crew (Counsel)**

RECONSIDERATION

JUDGMENT

1. The claimant's Second and Third applications for reconsideration are refused.

REASONS

2. The tribunal was convened on 20 March 2019 for what had been listed as a remedy hearing.

3. By emails dated 9 March and 16 March the claimant made two applications for reconsideration. As the claimant had previously made an unrelated application for reconsideration, these applications area referred to as the Second and Third applications. Both these 'new' applications were made on the basis of the discovery of or creation of new, documentation which was not before the tribunal at the full hearing.

4. The Second application was based on a document that had allegedly appeared in the claimant's emergency contact details file and was not disclosed to the claimant or the tribunal during the full merits hearing. This document had come into the claimant's possession in or around September 2018 when the claimant's representative made a Freedom of Information Act application. The document was a single sided form which, had, in handwriting at the bottom of the page, that the claimant had anxiety and OCD and took citalopram. We were also provided with a covering email between the respondent and ACAS which clarified that this document had been sent by the respondent to ACAS during Early Conciliation.

5. The Third application was made on 16 March 2019, the date that the claimant's representative received the new document which is a report by the local council's ombudsman report. This is an entirely new document and was not available to either party at the time of the full merits hearing in February 2018. The report criticises the way that the local authority and the Local Authority Designated Office ('LADO') dealt with the investigation into a child's disappearance from the respondent and the claimant's alleged role in that incident.

6. The Claimant's representative wanted the matter to be dealt with prior to any decisions about remedy. The respondent felt that the severity of the allegations being made against the respondent's witnesses was so severe that it was necessary for there to be a hearing and that they had not had sufficient time to prepare for that hearing. Two of the respondent's witnesses were present.

7. The tribunal adjourned to consider whether to proceed with the application to reconsider and any subsequent reconsideration today. We decided that it was in the interests of justice and in accordance with the overriding objective for the matter to be dealt with today at a hearing. We agreed that the respondent needed an opportunity to respond to the allegations and that this application for

reconsideration could not be decided on the papers. We concluded that a hearing was possible today following an adjournment. Respondent counsel was given sufficient time to take instructions along with the option of providing written witness evidence if they chose. To re-list this matter for another hearing at a later date was, in our view, disproportionate and not in the interests of the overriding objective. This case has been ongoing for some time now and re-listing it was not necessary given that the information needed from the witnesses and the respondent was regarding a relatively finite point. Although one respondent witness was not available as she was abroad, the two witnesses who were present were able to address the relevant points.

8. In order to decide whether to reconsider our Judgment we considered, under Rule 70 whether reconsidering our judgment was in the interests of justice. We considered the overriding objective which states that parties ought to be on an equal footing, that matters are dealt with proportionately and in accordance with the rules of natural justice. We have to balance the interests of both parties. Under Rule 70 we can confirm, vary or revoke our decision.

9. The leading case where new evidence is produced after the hearing is Ladd v Marshall. The CA held that it is necessary to show:
   (i) That the evidence could not have been obtained with reasonable diligence for use at the original hearing
   (ii) That the evidence is relevant and would probably have had an important influence on the hearing; and
   (iii) That the evidence is apparently credible

10. We found that the evidence for the Second application ought to have been disclosed as part of the original disclosure exercise, was clearly relevant and appeared credible. The evidence for the Third application was not in existence at the time of the original hearing. Whilst the relevance of this document is more debatable, it is clearly credible. We therefore considered that it was in the interests of justice to reconsider our judgment though our final conclusions regarding the applications are set out separately below.

11. The reconsideration hearing therefore proceeded after a one hour adjournment. The tribunal heard from the respondent witnesses Ms Worsfold and Ms Webb. The claimant did not attend the hearing and did not give evidence.

<u>The second application</u>

12. The respondent's first argument was that the application for reconsideration was out of time as it was made more than 14 days since the original judgment was sent to the parties and more than 14 days since the claimant had been sent the new document.

13. The claimant stated that he had not submitted the application earlier because he did not want to make such applications in a piecemeal fashion. He was aware that the Local Authority Ombudsman report was going to be put out soon

and he felt it was more appropriate to wait and put the applications in together. The fact that the ombudsman report did not arrive in good time before the remedy hearing meant that Dr Coulton felt he should put in the application without that report.

14. We accept Dr Coulton's submissions on this point. Whilst the application is outside the relevant time limit we believe that it is in the interests of justice to allow this application for reconsideration to be heard out of time. The respondent ought to have disclosed this document as part of the disclosure exercise in the original hearing and ought not to be allowed to benefit from its failure in that regard. Dr Coulton is a lay representative, representing his daughter, and the prejudice against his daughter of not being able to pursue this application and have the matter considered by the tribunal would far outweigh the respondent's difficulty in defending the application. We have considered the need for the 'finality' of justice and not allowing parties repeated bites at the cherry, however we believe that this is outweighed on this occasion by the need for this apparently important evidence to be considered.

15. Arguably, given that the matter is ongoing and remedy has not yet been decided, the respondent or its representatives ought to have considered drawing its omission to the tribunal's attention at the point at which they realized the document had not been disclosed in accordance with its disclosure obligations. For all these reasons we have agreed to reconsider our judgment in light of this document and the covering email to ACAS.

Reconsideration

16. We have considered whether the document produced and its covering email to ACAS mean that our original decision needs to be either revoked, restated or changed. Rule 70 states that we can do this where it is necessary in the interests of justice to do so.

17. The claimant's application states that the respondent's failure to disclose this document demonstrates that they were untrustworthy and that it undermines their evidence and the tribunal's conclusions particularly in respect of two findings of fact:

18. (i) That Dr Coulton submitted a particular form to the respondent before she commenced employment; and

(ii) That the respondent's investigation into the disappearance of a child was reasonable and that their decision to refer the claimant to the DBS was not related to her disability or an act of harassment or victimisation.

19. The claimant's representative submits that this document was in the claimant's personnel file, that it was not the emergency contact information as stated by the respondent and that the decision not to disclose it appeared deliberate.

20. The respondent states that despite its title this document was the claimant's emergency contact details, that it sat in a separate folder on a shelf in the office that could be accessed by any member of staff should there be an emergency and that the failure to disclose it the first time round was an oversight as opposed to deliberate. The rest of the claimant's personnel file was kept in a draw that could be locked.

21. The tribunal felt that the respondent's explanation was poor. They had sent this document to ACAS and Ms Webb confirmed that she had sent it to them at the request of Ms Godley. She said that she was then in charge of disclosure and did what she was told to do by their legal representatives once the claim was underway - namely send across a copy of the personnel file. She did not think to look in the emergency contacts file as it was normal practice when an employee left for those emergency details to be transferred across to the personnel file. She said that this had not happened in this case.

22. Whilst we are concerned by the lack of thoroughness applied by the respondent to the disclosure exercise, we note however that the respondent did not deliberately seek to hide the document from ACAS and accept that they thought that it was part of the personnel file that they had sent across and/or were so disorganized that they did not keep a proper track of what had been sent to their lawyers and what had not. We therefore accept that the failure to disclose was a mistake and not a deliberate attempt to mislead the tribunal.

23. Nevertheless we do find that the failure to refer to it in witness evidence by either Ms Worsfold or Ms Webb does bring their original evidence on the extent of their knowledge about the claimant's health into significant doubt. Ms Worsfold clearly did, at some point, know that the claimant took medication and we find it hard to believe that she forgot about this despite the extensive questioning and conversation about this in the original hearing. Respondent's counsel is correct to say that witness evidence is not a memory test and that without reference to this document before the original hearing, Ms Worsfold could have forgotten about it. However given the extent of what she did know about the claimant, and her evidence in her witness statement, which is almost identical in wording to what is on this form save for the information about the claimant's taking medication; we find it hard to believe that she had forgotten altogether about the extent of the health matters the claimant had told her about.

24. Further we find that Ms Webb must have read the document when liaising with ACAS as she refers to its content and significance in the covering email to ACAS. At the original hearing she denied knowing about the claimant's medication as well. Whilst we accept that she may not have known about the ill health at the time, the fact that she failed to tell us that she had since become aware of the extent of the claimant's conditions feels misleading by omission. If her evidence to us today is to believed then she had disclosed this document to ACAS and expressly referred to it not that long before she wrote her witness statement. However we do note that her original witness statement deals with

what she knew at the relevant time whilst the claimant was employed and there is nothing to suggest that she knew about this information during the claimant's employment and nothing about the evidence given to the tribunal today or from the new documents, contradicts that.

25. Nonetheless, the claimant's health and the respondent's knowledge of it was a matter of key concern to the respondent and it brings their witness evidence on this matter into question. We have therefore reconsidered our conclusions and the extent to which it was based on the evidence that this document refers to and/or the credibility of the respondent's witnesses.

26. On reconsideration we find that this document would not have changed our original judgment regarding the claimant's health. In our original judgment we found that the respondent ought to have known that the claimant was disabled by reason of OCD and anxiety. We based this conclusion on the evidence available to us at the hearing but we believe this document strengthens our conclusions on this point rather than changes them. They ought to have known that the claimant was disabled for the purposes of the Equality Act 2010.

27. We have then considered whether the doubt over the trustworthiness of these two witnesses' evidence in this regard should cause us to question our conclusions with regard to the other findings of fact that the claimant's representative disagrees with.

28. At the reconsideration hearing the Tribunal asked Dr Coulton which factual conclusions he believed ought to be overturned in light of this document. The first was when or whether Dr Coulton submitted a medical report detailing the claimant's conditions. The second, which is covered most extensively in his written application, is that the tribunal's conclusion that the respondent's investigation was reasonable was perverse and that the referral to DBS was therefore an act of victimisation.

29. Turning to the first issue of whether or when Dr Coulton submitted the medical report to the respondent. We make the following observations:
    (i) Regardless of when or whether the report was given to the respondent we concluded that it ought reasonably to have known about the claimant's OCD and anxiety in any event. This was the main relevance of that document as it went to their knowledge of the claimant's health. Therefore even if this document casts doubt on the respondent's trustworthiness about how they kept and stored documents, or their memory of when the documents were delivered - our conclusion would have remained the same.

    (ii) The claimant's evidence about the timing of when documents were provided to the respondent directly contradicted her father's evidence. This directly informed our conclusion on this point. We concluded

throughout that the claimant's evidence was trustworthy and honest and have no reason to change our mind on this point today.

30. We therefore conclude that the evidence submitted in the Second Application has no bearing on this particular factual conclusion and we confirm our original Judgment in this respect.

31. With regard to the second issue of whether the respondent's investigation was reasonable and whether the respondent's decision to refer the claimant to DBS occurred because of the claimant's father's threat to go to tribunal we note the relevant paragraphs of our factual conclusions in the original Judgment.

'77. The Tribunal heard a huge amount of evidence from Ms Worsfold about the investigation that she did. Dr Coulton cross examined her for some time on this topic and challenged the reasonableness of the investigation.

78. We are not in a position to, nor is it necessary for the purposes of our findings today, to find out whether the claimant was responsible for the child's escape. Our only role is to decide whether the respondent's investigation was reasonable insofar as whether it was reasonable for the respondent to find in their report that the claimant was responsible for the child escaping and therefore whether it was reasonable for the claimant to be reported to the DBS in all the circumstances.

79. Overall we conclude that Ms Worsfold treated the situation with extreme importance and care. The investigation that we were presented with appeared thorough and reasonable. It is correct that there were other possible escape routes for the child as presented by Dr Coulton but they were highly unlikely and CCTV footage clearly showed the escaping child exiting the door behind another family. We accept the respondent witnesses' evidence that him getting to that outside door could only really have happened in one way. We find that on balance the investigation was reasonable in the circumstances and that given the seriousness of the incident we do not believe that the respondent took steps to undermine the security of its other children by deliberately framing the claimant.

80. We accept Ms Worsfold's evidence that she was provided with support and guidance during the investigation and subsequently by the LADO officer from the local authority. We accept that she was told by them that she had to refer her report and its conclusions to the DBS for them to satisfy themselves whether there were any wider child protection issues that needed considering regarding the claimant. We do not consider that she would have referred the matter to DBS without being told to do so. The DBS duly found that there was no further case for the claimant to answer and no further action was taken.

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122. We conclude that the reason a factual only reference was provided to Daisy Chain was the fact that the claimant had been referred to DBS as a result of the child escaping. We do not believe that it was as a result of the threat of legal action in the letter dated 24 May.

123. The respondent was faced with a decision as to whether to disclose that they had made the DBS referral which had not yet been concluded, or give no information at all, otherwise they felt that they could have been misleading to the next employer. They chose the latter. Whilst we accept that this may have been in breach of the industry norm in childcare we do not think that it arose in any way because of the claimant's threat to take possible legal action. The issues surrounding the DBS referral and the concerns raised about the previous reference were more important at that time than the possibility of possible legal action.

124. The DBS referral arose from the very difficult situation of the child escaping. Whilst a huge amount of tribunal time was spent examining photos and maps of the nursery, we conclude that the investigation into the child's escape was reasonable in all the circumstances. Whilst we accept that the claimant and her father will never accept any responsibility, we have no evidence to suggest that the nursery's investigation and conclusions were unreasonable and as per our factual findings above we believe that Ms Worsfold's investigation was reasonable in all the circumstances.

125. We accept Ms Worsfold's evidence that in those circumstances and in accordance with LADO advice they have to refer to DBS. That DBS referral took place before the ET1 and only when they had a vague threat of legal action from the claimant's father. We conclude that it was clear from all the evidence given that this was an incredibly emotional and worrying time for all the staff at the nursery given the significant implications of the child's escape. We do not believe that it was unreasonable for them to make the referral given their conclusions and their conclusions were based on a reasonable investigation. We therefore do not conclude that it occurred as a result of the claimant or her father's threat of legal action in the letter dated 24 May 2017.

32. We have therefore reflected on these findings of fact and conclusions in light of the documents attached to the Second application. We have the following observations:
    (i) We heard and saw extensive evidence about the respondent's investigation into the child's disappearance. This was not an unfair dismissal claim where the reasonableness of the investigation was key to the reasonableness of a subsequent decision to dismiss. We had to determine whether any failure to properly investigate was because of the claimant's threat to go to tribunal. We then had to determine whether the decision to refer the claimant to the DBS was an act of victimisation.

(ii) We did find Ms Worsfold's investigation reasonable and believed her evidence. However in reaching this conclusion we also relied upon the extensive paper evidence that we were taken to by Dr Coulton in his cross examination and the substance of the report itself, not just the evidence given by Ms Worsfold. We accept that Dr Coulton disagrees with the conclusion reached by Ms Worsfold but we were not considering whether the claimant was responsible for the disappearance of the child. We were considering whether the investigation that was carried out was reasonable in all the circumstances. The body of documentary evidence around the investigation convinced us that this was a reasonable investigation. We did not rely solely on Ms Worsfold's evidence in this respect.

(iii) Whilst we accept that the new evidence provided under the Second application does bring some of Ms Worsfold's original evidence into question regarding her knowledge of the claimant's health we do not accept that this means we have to disregard all her evidence – particularly when it was corroborated by documentary evidence. In this instance her evidence about the extent of the investigation was supported by the extent of the documentary evidence produced that supported the investigation methodology and conclusion.

(iv) We found that the decision to carry out the investigation occurred because of the child's disappearance not because of the claimant's threat of litigation. Further we found that the decision to refer the claimant to DBS occurred because the LADO advised the respondent to do so. Dr Coulton has stated in his application that the tribunal found that LADO had said that it 'must' refer rather than 'may' refer the claimant thus leaving out any element of discretion on the part of the respondent. If Ms Worsfold's evidence and trustworthiness is now in question because of this document, can we trust what she said about the advice that LADO gave her? We have again turned to our original decision. We found that the decision to refer the claimant to DBS arose because of the advice from LADO. Whether that advice allowed discretion could now be called into doubt but we believe that given the seriousness of the nature of the incident, the respondent would have referred the claimant to DBS because of LADO's advice even if it was not mandatory advice but merely guidance. Again we conclude that this referral happened because of the child's disappearance and subsequent LADO advice not because of the claimant's apparent threat to go to tribunal. The claimant did not establish a link between the apparent threat of legal action and the subsequent events surrounding the disappearance of the child and how the respondent dealt with it. The claimant had already resigned, she was not going to have an ongoing relationship with the respondent and despite the evidence we have heard today we do not accept that our interpretation of the events surrounding the disappearance of the child would have significantly altered had we had more information that the respondent knew or ought reasonably to have known more about the claimant's health. In our original conclusion we found that the respondent's evidence regarding their knowledge of the claimant's health was inadequate hence our conclusion that they ought reasonably to have known about the extent of the claimant's condition. We had

already doubted the respondents' witnesses' evidence in that regard when we came to our original conclusions about the investigation and do not feel that this new evidence changes our views regarding the body of evidence upon which we based our conclusions regarding the investigation and the respondent's subsequent actions.

(v) We therefore confirm our original conclusion that this was an immensely serious incident and that this coupled with LADO's advice was the cause of the claimant's referral, not the claimant's threat to go to tribunal.

(vi) We note Dr Coulton's submissions about the content of the Ombudsman's report further undermining our conclusions and address that in full below.

(vii) However we have considered the ombudsman report appended to the Third Application with regard to our conclusion on this matter as well. The report states, at paragraph 69, that Dr Coulton *"has provided information showing it was the Nursery's view that the LADO instructed it to make a referral during the contacts in May and June 2017."* Whilst we do not have sight of what information Dr Coulton was relying upon at this meeting, he appears to have relied upon the nursery's view about the advice they received when seeking to raise this matter with the ombudsman. We therefore question his decision to rely upon the respondent's interpretation of the advice from the LADO in one forum and then ask this tribunal to disregard that same interpretation in this forum.

33. We remain of the view that LADO advised the respondent to refer the claimant to the DBS and this was the reason for her referral not the threat of tribunal proceedings. We reached this conclusion for several reasons and it is not undermined by the new documents produced in the Second application. We therefore confirm our original decision and refuse the claimant's application for reconsideration as we do think it is necessary in the interests of justice.

<u>Third application</u>

34. The document relied upon by the claimant for the Third application is the Local Authority Ombudsman's report into the claimant's referral to the DBS and the local authority's role in that process. The report concludes that the local authority did not follow proper procedures and that the LADO ought to have taken steps to satisfy itself that the investigation into the child's disappearance was reasonable and that the claimant ought to have been told about the decision to refer her to DBS and given an opportunity to respond to that decision. This document was only sent to the claimant on 15 March 2019.

35. We do not believe that this document is sufficiently relevant to the tribunal proceedings to allow a reconsideration. Had this document been submitted in isolation we believe that the tribunal would have been able to deal with this matter on the papers. The document does not comment on the respondent's actions nor did the respondent give any evidence to the ombudsman before this report was made. The report looks solely at the local authority's role and is therefore not relevant to the actions of the respondent that the tribunal was considering. It was created a long time after our original decision and the

existence of it is sufficiently tangential so as to mean that allowing a reconsideration on this basis would be to allow the claimant a second bite of the cherry over a year after the original hearing. Further it undermines the 'finality' of justice which parties need to have faith in when decisions are reached.

36. If we are wrong on that we have nonetheless considered whether its content ought to change our factual or legal conclusions in the main judgment. We find that it does not. As stated above it refers solely to the behaviour of a third party namely the local authority. It does not examine or comment on the respondent's behaviour and the respondent was not asked to contribute to the report in any way. If the LADO was wrong to give the advice that he did to the respondent, that does not change the fact that s/he gave that advice and the respondent followed it. It does not change our conclusions as to the reason for the DBS referral namely that this occurred because of LADO advice following the escape of a child - not because the claimant threatened legal action.

37. Dr Coulton's submissions in the Third application state that our original conclusion as to the reasonableness of the investigation must be perverse because the claimant was not informed of the allegation and was not able to defend herself. However the investigation we were considering was an investigation into a safeguarding incident. It was not a disciplinary investigation and no disciplinary action was taken against the claimant by the respondent as her employment had already been terminated by reason of a resignation that had been given prior to this incident. The claimant knew why she was being spoken to as part of the investigation – namely that a child had gone missing. The purpose of the investigation went no further than that. Our consideration of its reasonableness went no further than whether it was a reasonable investigation into the disappearance of a child.

38. Therefore even if the LADO failed to take appropriate steps as per the Ombudsman's report, that does not detract from our conclusion that the respondent referred the claimant to the DBS on the basis of the LADO's advice not because of the threat of litigation.

39. We find that the ombudsman report offers no additional insight or relevance to the other key factual conclusion we reached that the claimant disagrees with namely whether Dr Coulton delivered the medical report or not.

40. We therefore find that it is not in the interests of justice to reconsider our judgment based on this document. If we are wrong we confirm that our reconsideration has resulted in us confirming our original judgment.

Other matters

41. This matter is now ordered to be listed for a remedy hearing. A separate document will be sent to the parties with that listing. The claimant is reminded

that if possible she will need to be in attendance for that hearing in order to give evidence regarding any remedy she is seeking.

Employment Judge Webster

Date: 5 April 2019