# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs K Lovell

**Respondent: (1)** NHS Professionals

**(2)** Doncaster & Bassetlaw NHS Teaching Hospital Foundation Trust

**HELD AT:** Sheffield **ON:** 17 June 2019

**BEFORE:** Employment Judge Brain

**REPRESENTATION:**

**Claimant:** Written representations
**Respondent:** Written representations

## JUDGMENT ON RECONSIDERATION

The Judgment of the Employment Tribunal is that there is no reasonable prospect of the Judgment promulgated on 19 March 2019 being varied or revoked. Accordingly, the claimant's reconsideration application is refused.

## REASONS

1. Following a three-day hearing held on 25, 26 and 27 February 2019 the Tribunal promulgated a Reserved Judgment on 19 March 2019.
2. The Employment Tribunal's Judgment was that:

   *(1) The claimant was not subjected to any detriment by the second respondent upon the grounds that she made protected disclosures contrary to section 47B of the Employment Rights Act 1996.*

   *(2) The second respondent did not indirectly discriminate against the claimant in relation to the protected characteristic of age contrary to the Equality Act 2010.*

*(3) The Tribunal does not have jurisdiction to consider the claimant's complaint against the second respondent of disability discrimination brought under section 20 and under section 39(5) of the 2010 Act (that the respondent failed to comply with the duty upon it to make reasonable adjustments). This is because the claim was brought outside the time limit provided for by section 123 of the 2010 Act and it is not just and equitable to extend time to enable the Tribunal to consider it. Further, the second respondent was not in breach of the duty to make reasonable adjustments in any event.*

*(4) The complaints against the first respondent are dismissed following withdrawal.*

3. On 31 March 2019 the claimant made an application to the Employment Tribunal for reconsideration of the Reserved Judgment (which I shall now call *'the Judgment'*) in so far as it concerned her claim against the second respondent. (I shall refer to the second respondent simply as *'the respondent'* from now on). On 7 May 2019 the Employment Tribunal asked for representations from the respondent's solicitors. These were submitted on 20 May 2019.

4. By Rule 70 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 the Employment Tribunal may, either on its own initiative or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the judgment may be confirmed, varied or revoked.

5. An application for reconsideration shall be presented in writing (and copied to all of the other parties) within 14 days of the date upon which the written record (in this case that being Judgment) was sent to the parties. It follows therefore that the claimant's application for reconsideration of the Judgment was presented in time.

6. Under Rule 70, a judgment will only be reconsidered where it is necessary in the interests of justice to do so. This allows an Employment Tribunal a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. The discretion must be exercised judicially. This means having regard not only to the interests of the party seeking the reconsideration but also the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation.

7. The Tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases fairly and justly. This obligation is provided in Rule 2 of the 2013 Regulations. The obligation includes:

    - *Ensuring that the parties are on an equal footing.*
    - *Dealing with cases in ways which are proportionate to the complexity and importance of the issues.*
    - *Avoiding unnecessary formality and seeking flexibility in the proceedings.*
    - *Avoiding delay, so far as compatible with proper consideration of the issues.*
    - *Saving expense.*

8. The procedure upon a reconsideration application is for the Employment Judge that heard the case to consider the application and determine if there are reasonable prospects of the original decision or judgment being varied or revoked. Essentially, this is a reviewing function in which the Employment Judge must consider whether there is a reasonable prospect of reconsideration in the interest of justice. There must be some basis for reconsideration. It is insufficient for an applicant to apply simply because he or she disagrees with the decision.

9. If the Employment Judge considers that there is no such reasonable prospect then the application shall be refused. Otherwise, the original decision shall be reconsidered at a subsequent reconsideration hearing. The Employment Judge's role therefore upon considering such an application is to act as a filter to determine whether there is a reasonable prospect of the Judgment being varied or revoked were the matter to go back to the full panel.

10. The claimant has applied for reconsideration of those parts of the Judgment that deal with her complaints of disability discrimination and of detriment for having made a public interest disclosure. I shall deal with the applications in turn.

11. The Tribunal determined that it had no jurisdiction to consider the claimant's complaint of disability discrimination. Her complaint was that the respondent had failed to comply with the duty to make reasonable adjustments. Therefore, it was a complaint brought under sections 20 and 39(5) of the 2010 Act. Section 20 provides that it is unlawful to fail to comply with the duty to make reasonable adjustments. Section 39(5) provides that it is unlawful to fail to comply with that duty within the workplace. The Tribunal determined that it had no jurisdiction to consider the complaint because it had been presented outside the time limit provided for by section 123 of the 2010 Act.

12. The claimant's reasonable adjustments complaint concerned a one-off act which occurred on 1 September 2017. The claimant commenced mandatory early conciliation pursuant to the Employment Tribunals Act 1996 on 16 February 2018 and presented her claim to the Employment Tribunal on 7 June 2018. Therefore, the complaint was presented outside of the limitation period provided for by section 123.

13. An out-of-time complaint may be considered by the Tribunal which may be vested with jurisdiction to consider it where it is just and equitable to extend time. The relevant principles are set out at paragraphs 97 to 99 of the reasons that accompanied the Judgment.

14. The Tribunal went on to determine that the complaint of disability discrimination by way of a failure to make reasonable adjustments failed upon the merits in any event. The relevant principles applicable to a consideration of a reasonable adjustments complaint are set out at paragraphs 92 to 96.

15. The Tribunal's conclusions upon the jurisdiction issue is at paragraphs 134 to 137. Our conclusions upon the merits of the complaint are at paragraphs 126 to 133.

16. In the reconsideration application, the claimant seeks to revisit the Tribunal's finding that the claimant only raised the events of 1 September 2017 in her grievance letter of 19 January 2018 because of the actions of the respondent in December 2017 and January 2018 (of wholly and partially restricting her

work). We found the complaint to have been made by her *"tit for tat"* and that this was not a good reason for presentation of the claim out of time and no other basis for extending time had been presented by the claimant.

17. In her reconsideration application the claimant says that the complaint of disability discrimination was not made *"tit for tat".* She goes on to say that she raised a valid response to the continued discrimination in the form of the respondent restricting her practice. It seems therefore that she is now saying that the discrimination claim was presented in time.

18. However, we found that the respondent's restriction upon the claimant's practice was nothing to do with the claimant's disability. The claimant's complaint in the proceedings was that this was a response by the respondent in answer to public interest disclosures raised by the claimant. It was never her case that the restriction was disability-related. There was no continuing act of disability discrimination.

19. Nothing now said by the claimant therefore persuades me that there is a reasonable prospect of the claimant persuading the Tribunal to reconsider the findings in the Judgment that in reality the claimant only raised the complaint of disability discrimination because of the action taken by the respondent against her. It is difficult to see how that can be a good reason to satisfactorily explain the presentation of the disability discrimination complaint out of time.

20. It is for the claimant to demonstrate that time should be extended to vest the Tribunal with jurisdiction to consider the disability discrimination claim. She advanced nothing in support of that contention which constitutes a good reason for the late presentation of the claim. There is no basis upon which I can conclude there to be a reasonable prospect of the claimant persuading the Tribunal that the claim was not presented out of time.

21. Even if I was to be persuaded that there was a reasonable prospect of the claimant being able to persuade me that there is a reasonable prospect of that aspect of the Tribunal's Judgment being overturned then I would still need to be persuaded that there is also a reasonable prospect of the Judgment upon disability discrimination being varied upon the merits. Upon this issue, the claimant says that it would have been an effective and practicable adjustment to re-deploy an experienced midwife from triage and that allowing the claimant to work on triage would have cost nothing and would have been a reasonable adjustment.

22. The claimant does not appear to be seeking to challenge the Tribunal's conclusion that it would not have been an objectively reasonable adjustment to re-deploy the midwifery support worker upon that day. She seems to be seeking now to argue that she and another midwife should have been re-deployed into different departments and their jobs that day swapped.

23. I agree with Miss Larter's representations of 20 May 2019 that this was not an argument raised by the claimant during the course of the hearing. The interests of justice as a ground for reconsideration relate to the interests of justice to both sides. Further, the Tribunal must give effect to the underlying public policy principle in all proceedings of a judicial nature that there should be finality litigation. The reconsideration procedure is not a method by which a disappointed party to proceedings can get a second bite of the cherry by running a new argument not aired at the hearing. It appears that this is precisely what the claimant is seeking to do.

24. Upon the claimant's application for reconsideration in so far as it relates to the disability discrimination claim it is my judgment that there is no reasonable prospect of the Judgment being varied or revoked for the reasons given. In summary, firstly the claimant has said nothing which persuades me that there is a reasonable prospect of a variation or revocation of the Judgment upon time limits. Secondly, upon the merits of the claim, the claimant appears to be seeking to introduce a new argument not aired before us.

25. I now turn to the public interest disclosure complaint. At paragraphs 5 to 20 of the reconsideration application, the claimant raises various points about the issues of record keeping and documentation. The difficulty for the claimant is that, even if the Tribunal were to accept all of the points that she makes, there is nothing to displace the Tribunal's findings that the detriments (being the restrictions upon the claimant's work with the respondent) were caused by genuinely held concerns upon the part of the respondent about the claimant's record keeping and were not influenced by her having made protected disclosures. Our findings upon causation are at paragraphs 115 to 125.

26. Even if at a reconsideration hearing the Tribunal were to accept the claimant's case that all was in order and records were being kept to the requisite professional standard there is in my judgment no reasonable prospect of the claimant then going on to establish that the respondent's treatment of her was caused or materially influenced by the fact of the claimant having made public interest disclosures upon the basis of the findings of fact that were made.

27. The Tribunal determined that it was inherently unlikely and against the probabilities that the respondent would seek to subject the claimant to detriment because of the qualifying disclosures for the reasons at paragraphs 120 and at 121. In addition, there is no evidence that the decision makers who restricted the claimant's practice were aware of the protected disclosures anyway. I refer to paragraphs 116 to 118. The evidence was that the decision maker was Yvonne McGrath. It was not suggested by the claimant that Sharon Dickinson's actions had in any way been materially influenced by the fact of her making public interest disclosures.

28. Finally, the claimant raises some issues about contract worker discrimination. She contends that she had no access to the NHS e-mail system or the Datix system of reporting concerns and issues. The claimant refers to the provisions of section 41 of the 2010 Act seeking to raise issues of contract worker discrimination. This formed no part of the claimant's complaint. There is therefore no basis for a reconsideration of the Judgment by reason of the claimant's status as a contract worker. This is to seek to raise a wholly new case which was not argued at the hearing.

Employment Judge Brain
Date 21st June 2019

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