



THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr T Butt

v Instyle Direct Limited

RECONSIDERATION

- 1 By a letter dated 5 June 2019, the Claimant applied for a reconsideration of the Tribunal's judgment dated 10 May 2019, sent to the parties on the 29 May 2019. In that judgment, the Tribunal unanimously concluded that the Claimant's claims of unfair dismissal and disability discrimination were not well-founded.
- 2 In addition to the reconsideration submissions made, the Claimant included the following additional documentation: an email to the Claimant's local Mental Health Team dated January 2019, warnings he received from Uber concerning customer complaints, 10 emails sent to the Tribunal concerning his claimed memory loss (both before and after the full merits hearing), two Employment Tribunal decisions: case number 2410817/2018 dated 4 March 2019 and case number 2206904/2017 dated 15 January 2019, an email dated 14 January 2019 concerning the Claimant's referral by his GP to the IAPT on 8 March 2018, a letter from Brent Talking Therapies dated 31 October 2018 confirming the Claimant's discharge from their service in light of his move to Slough and an email dated 8 May 2018 informing the Respondent that he has reported their actions to the police.
- 3 Subsequent to the application for reconsideration, the Claimant wrote to the Tribunal on 21 and 26 June 2019 adding his further thoughts to the application. He re-iterated to the Tribunal that he suffered from memory loss as a result of his mental health difficulties and asked that this be taken into account in the Tribunal's decision making. He has provided a number of

examples of where this has happened, including the fact that at the case management hearing before Employment Judge Grewal he had indicated that he did not want to claim disability discrimination in relation to his dismissal. He attributes this to memory loss. This claim was clarified after he sought advice from ELIPS. The Claimant highlighted the Respondent's body language during evidence, his disagreement with the inference drawn by the Tribunal that an increase in his salary signalled a desire on the part of the Respondent to retain his services, he gave examples of adverse life event and the Respondent's failure to respond to his request for permanent employment confirmation on 8 December 2017. The Claimant considers that the Tribunal has focused too closely on what he terms the "insane messages" he sent to his colleague and has made generalised conclusions based on those messages. He is also concerned that the Tribunal has been influenced by his ethnicity and religion and suggests that the Tribunal might have to "pay a terrible price" if it if it "favour(s) a uncivilized billionaire who took advantage of a insane person for years." He urges the Tribunal to consider his application carefully.

- 4 At the centre of the Claimant's application is his contention that his inappropriate behaviour towards a junior, female colleague was a manifestation of a mental health condition (possibly a manic episode) and that the Respondent had tricked him into persisting in his inappropriate contact with his colleague. He challenges the Tribunal's conclusion that he was not disabled at the time this contact took place. He also considers that his interactions with his colleague should not be considered sexual advances. He characterises them as a child's message to an adult, not a harasser to a younger female and that they should have been construed as such by the Tribunal.
- 5 At the full merits hearing the Claimant submitted some medical evidence concerning his claimed disabled status at the time of the incidents which resulted in his dismissal. There was no medical evidence which suggested that, if he had been suffering from an undiagnosed mental health condition at the time, that such a condition would have caused him to act in the way he did towards the complainant. The Claimant has suggested in the course of his reconsideration application that he might now wish submit medical evidence following possible medical appointments he has in June or July 2019 or an NHS appointment he has on 11 September 2019. There is, however, some uncertainty about the latter as the Claimant suggests this may not take place as he declined the last appointment due to the (unspecified) ethnicity of the Psychiatrist he was due to see. The Claimant explained in his application for reconsideration that he had been overthinking the question of adducing medical evidence. He had not wanted to submit a

medical report which might risk giving the appearance of his having said things to a medical profession to produce a desired outcome in the proceedings. He has now changed his view on this and asks the Tribunal to take account of medical evidence which he might produce in future.

- 6 Dealing in summary with the additional documents submitted by the Claimant: A number of emails he has provided to the Tribunal demonstrate that he has consistently invited the Tribunal to take account of his memory loss, which is not simply a consequence of poor sleep, but is a symptom of his mental health condition. He has given a variety of examples of circumstances in which he has suffered memory loss ranging from the conduct of the proceedings, issues he forgot to mention in evidence and to going out to the shops to buy milk and then forgetting to buy it. There is no medical evidence concerning the Claimant's memory loss, although the Tribunal accepts that such a symptom can be associated with poor mental health.
- 7 The Claimant has adduced evidence from Uber concerning his high cancellation rate and complaints about him ranging in dates from September 2018 to April 2019. He says these demonstrate that his work as a driver is becoming untenable due to his mental health, in particular due to his intolerance of smoke. He refuses to take passengers who have recently been smoking and this has been the cause of complaints by potential passengers. The complaints do not expressly set out that they relate to the passengers having smoked.
- 8 The Claimant relies on a judgment in case number 2410817/2018 which has alerted him to the fact that the Tribunal has the power to extend the time limit for a disability discrimination claim.
- 9 The Claimant has produced a Tribunal decision in case number 2206904/2017 which refers to an employee who was found to have sexually harassed a colleague, but who conducted that harassment secretly. In contrast, the Claimant's conduct towards his colleague was open, using the Respondent's email account. In the Claimant's view, this proves that he must have been experiencing a manic episode in March 2018. A person acting rationally would seek to hide their harassing behaviour, as was demonstrated in the Tribunal decision he has produced.
- 10 The Claimant repeats a number of the submissions he made to the Tribunal at the full merits hearing, including the fact that the Respondent fabricated minutes of a disciplinary meeting, that his dismissal was the culmination of a calculated attempt to manipulate the Claimant and exploit his fragile mental

health (about which he claims the Respondent was well aware, even though the Claimant had not admitted it to himself), and that his expressed wish to marry his colleague can only have been the product of a disabled mind, because the Claimant knew that she had a boyfriend. The Claimant has set out his disagreement with a number of the Tribunal's findings and conclusions with reference to the paragraphs in its Reasons and refers the Tribunal to aspects of the evidence which he claims to support his version of events.

The Law

10. The Tribunal has the power to reconsider its Judgments under rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 where it is "*necessary in the interests of justice to do so.*" Examples from case law of circumstances where the interests of justice might require a reconsideration are: where relevant evidence subsequently comes to light which was not available at the time of the hearing, where a material error in the procedure at a hearing leads to an injustice, where a party did not have notice of a hearing or where the parties and Tribunal proceed on the basis of a mistaken understanding of the law. The Rules themselves do not define such circumstances (although used to do so), so the Tribunal has a wide discretion, although the "interests of justice" refers to the interests of both parties, not just the disappointed party.
11. Pursuant to rule 72 of the 2013 Rules, if an Employment Judge considers that there is no reasonable prospect of the original decision being varied or revoked, there is no need to invite the parties' views as to whether the application can be determined on paper or whether a further hearing is needed.
12. The reconsideration procedure should not be used simply as an opportunity for an unsuccessful litigant to re-argue his or her case. There is a public interest in the finality of litigation, which is not furthered if parties are permitted to make more detailed or different submissions to those which they made at the first hearing, to put their claim on a different basis in light of the Tribunal's findings or to adduce evidence which was reasonably available to them at that hearing. Any power under the 2013 Rules should be exercised in accordance with the overriding objective, which includes ensuring that parties are on an equal footing. It is conceivable, therefore, that an unrepresented party's mistake or misunderstanding about how to prepare for and conduct a hearing could form grounds for a successful reconsideration application, subject to the public interest in the finality of litigation and other aspects of the overriding objective.

Conclusions

13. As the Tribunal set out in its Reasons dated 10 May 2019, the Claimant has undoubtedly been subject to a number of stressful events since March 2018, such as his colleague's rejection of his advances, the termination of

his employment and the preparation and conduct of Tribunal proceedings. It may well be that these stressful life events have affected the Claimant's mental health to such an extent that he now qualifies as a disabled person. However, it is the Claimant's disabled status in March 2018 on which the Tribunal had to focus for the purposes of determining his claim.

14. The Claimant suggests that the Tribunal has engaged in generalisations. It is right that the Tribunal has not addressed in its judgment each and every submission and assertion that the Claimant (or the Respondent) has made. In reaching its conclusions, the Tribunal is obliged to explain to both parties why it has reached the conclusion it has. The Tribunal is guided by the overriding objective in the Tribunal Rules to deal with cases justly, which includes dealing with cases in a proportionate manner. It would be wrong for the Tribunal to elaborate on its Reasons in the context of a reconsideration application. If the Tribunal's reasons are considered inadequate, the party asserting this can appeal on this basis.
15. The Claimant seeks to rely on documents and information which were not provided to the Tribunal at the final hearing. In some circumstances a Tribunal might take account relevant documents which have come to light following the conclusion of a hearing in the course of a reconsideration. The Tribunal would have to be satisfied that those documents were relevant to an issue in the case, might affect its findings on a relevant issue and generally, that there was a good reason why they were not produced at an earlier stage. The full merits hearing and the preparations leading up to it are designed to ensure that both parties have an opportunity to adduce all relevant evidence at a time when both parties can deal with them in their evidence. With the exception of the Claimant's correspondence with the Tribunal, even taking account of the fact that the Claimant is a litigant in person, it is not clear why the additional documents supplied with the reconsideration application were not included in the Tribunal bundle if the Claimant considers them relevant. The Claimant's correspondence with the Tribunal was available to the Tribunal on the file and the Claimant did refer to this in his submissions, so this is not new evidence. In relation to the other documentation, the Tribunal is not satisfied that there are grounds to admit this evidence after the case has concluded. Notwithstanding this, to assist the Claimant, the Tribunal would make the following observations as to the additional evidence.
16. The evidence adduced by the Claimant of his aversion to smoke in the form of Uber complaints (even if admissible and probative) has no reasonable prospect of altering the Tribunal's findings, as the Tribunal accepted that the Claimant has a particular sensitivity to smoke.
17. As to the two Employment Tribunal decisions produced by the Claimant, if the Claimant is requesting that the Tribunal revisits the list of issues which followed decisions made in the case management hearing as to the scope of the Claimant's claim, the Tribunal is not prepared to do that some 9 months after the decision in question and after the hearing has concluded, particularly in circumstances where the Tribunal is aware that the Claimant

had advice from ELIPS as to the list of issues and he was permitted to restore his claim related to his dismissal.

18. As to the example of another employee in case number 2206904/2017 who had harassed a colleague covertly rather than overtly on which the Claimant relies to prove that he must have been mentally ill because his contacts with his colleague were open, the Tribunal is unable to draw this inference. In the Tribunal's experience, harassment takes a number of forms with varying degrees of secrecy and it does not logically follow that perpetrators who are more open in their conduct must be suffering from a mental impairment.
19. The Tribunal was well aware of the Claimant's contention that he suffered from memory loss to an extent which might be considered more pronounced than is naturally occurring. His production of further examples of this does not assist the Tribunal in drawing conclusions about the Claimant's mental health. The Tribunal is not medically qualified and cannot draw firm diagnostic conclusions from the Claimant's stated symptoms, whether in relation to memory loss, his aversion to cigarette smoke or his behaviour towards his colleague. The Respondent conceded that the Claimant's conduct in March 2018 was out of character for him and the Respondent's Directors were undoubtedly concerned about the Claimant's mental health at that time. The contemporaneous medical evidence from the Claimant's GP confirms that he was struggling with his mental health in the immediate aftermath of the conduct for which he was dismissed and his GP's diagnosis in April and May 2018 of stress related illness and low mood is a matter of record and was not challenged. The Tribunal accepted that the Claimant's mental health was fragile at the time of his dismissal by the Respondent, but did not consider the statutory test of disability had been met at the relevant time. The additional submissions and evidence adduced by the Claimant has no reasonable prospects of displacing that conclusion.
20. The Claimant has asked for permission to be able to provide further medical evidence as to his mental health for consideration by the Tribunal at some unspecified date in the future. In the interests of certainty and finality in litigation, the Tribunal is not prepared to consider medical evidence which could have been adduced prior to the full merits hearing. The evidence thus far provided by the Claimant (even if admissible) does not suggest that his failure to provide medical evidence was itself a manifestation of a potential disability.
21. The Tribunal appreciates that the Claimant does not agree with the Tribunal's findings of fact or conclusions, however, the lengthy submissions made by the Claimant in his reconsideration application are a repetition or re-working of the submissions he made to the Tribunal at the full merits hearing cross-referenced to the Tribunal's decision and reasons. As such, the Tribunal is not persuaded that a reconsideration is necessary in the interests of justice. The Tribunal is confident that it understood the Claimant's case when it was reaching its conclusions and the submissions

made by the Claimant in the course of his reconsideration application are consistent with that understanding. The Tribunal can reassure the Claimant that his ethnicity or religion played no part in its decision making on his claim.

22. As set out clearly in the Tribunal's judgment, even if the Tribunal were to accept that the Claimant was suffering from bi-polar disorder or another mental impairment which had a substantial and long term effect on his day to day activities in March 2018 and that one of the manifestations of his condition was a tendency to harass colleagues, there remains no reasonable prospect of the Tribunal's reaching a conclusion that the Claimant's dismissal was unlawful. Taking the Claimant's case at its highest, if he does suffer from recurring manic episodes which could potentially cause him to act inappropriately towards colleagues and ignore express management instructions and, (as he explained to the Tribunal), for which he was not willing to take medication prescribed by a physician in Pakistan to control his symptoms, there is no reasonable prospect of the Claimant persuading the Tribunal it would have been reasonable for adjustments to have been made to the Respondent's disciplinary process which resulted in his remaining in his employment. This conclusion is stated in paragraph 77 of the Tribunal's reasons to which the Claimant is referred. In these circumstances, there is no reasonable prospect of the Tribunal's original decision being varied or revoked and the Claimant's application for reconsideration is refused.

Employment Judge Clark

Dated: 10 July 2019

Sent to parties – 31 July 2019