

HC



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms S Moreau

**Respondent:** (1) Birkbeck College Students' Union  
(2) Yousuf Joondan

**Heard at:** London Central Employment Tribunal      **On:** 16 September 2019

**Before:** Employment Judge H Clark (sitting alone)

## RECONSIDERATION

**The Claimant's application for a reconsideration of its judgment dated 9 August 2019 is refused.**

## REASONS

1. By an email dated 2 September 2019 the Claimant asked for a reconsideration of part of the Tribunal's judgment of 9 August 2019, sent to the parties on 21 August 2019. The aspect of the judgment about which the application relates concerns the Tribunal's refusal to permit the Claimant to advance claims of indirect sex discrimination. Whilst the refusal of an application to amend is not susceptible to an application for reconsideration (which relates to judgments not orders), as the Tribunal also struck out any of the Claimant's indirect sex discrimination claims in the alternative, the Tribunal has treated this application as one to reconsider that strike out decision.

### The Law

2. 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.

3. 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.
4. 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 in litigation and other aspects of the overriding objective.

#### The Application

5. The Claimant was been permitted to proceed with the following claims as claims of direct sex discrimination:
  - i) *On 17 December 2017, the Claimant's family and childcare arrangements were included in meeting minutes.*
  - ii) *The Claimant's attempts to challenge the minutes (on 14 March, 21 March and early April 2018) received no response from either Respondent.*
  - iii) *At a Student Council meeting on or about 30 March 2018 Mike Best, the Acting Chair raised his voice, disproportionately challenged any policy suggestion the Claimant made and threatened to prevent her motions from being submitted.*
  - iv) *Both the Second Respondent and Mr Baker, Chair of Trustees of the First Respondent failed to respond to the Claimant's complaints dated 1 to 4 April 2017 about the conduct during the 30 March 2017 meeting.*
  - v) *The imposing of recurring obstacles to flexible working, in particular in relation to childcare, which disproportionately affects female employees.*
6. The Claimant wishes to pursue all these allegations as both direct and indirect discrimination claims and has included extracts of the evidence on which she relies in support of the allegations and further explanations as to why she thinks they constitute indirect discrimination, in particular because the context in which they arose related to her need to work flexibly. The Claimant challenges the Tribunal's conclusion that there was insufficient information provided by the Claimant to understand how the allegations (apart from allegation (v)) could constitute indirect discrimination. She also refers to being disadvantaged as a

disabled litigant in person as a result of the way the bundle was prepared and as to the Tribunal hearing environment more generally.

### Conclusions

7. The Tribunal recognises the difficulties experienced by litigants in person generally and disabled litigants in particular, in formulating their claims. The Claimant has now provided additional explanation and evidence concerning her allegations of indirect discrimination outside the pressure of the Tribunal hearing environment. However, it still remains unclear from the Claimant's submissions on which provisions, criteria or practices she relies in relation to each separate allegation of discrimination. This is a necessary element of section 19 of the Equality Act 2010. By way of illustration, in relation to allegation ii), namely "*The Claimant's attempts to challenge the minutes received no response from either Respondent*", is the Claimant relying on a practice of the Respondents "not to respond to challenges about entries in minutes?" If so, in what way does that have a disproportionate impact on women?
8. An indirect discrimination claim relies on a neutral provision, criterion or practice having a disproportionate impact on people with particular protected characteristics. In the absence of any indication from the Claimant as to the neutral provision, criterion or practice relied upon, the Respondent is unable to admit or deny whether such a practice was applied to the Claimant and, if discriminatory, whether it was a proportionate means of achieving a legitimate aim. The Claimant's provision of further evidence does not change that. The evidence would become relevant at the full merits hearing only once the basis of the claim had been clarified.
9. The Claimant suggests that the Respondent will not be prejudiced by permitting her to proceed with these claims of indirect discrimination. The Tribunal disagrees, because the allegations of indirect sex discrimination are not yet in a form to which the Respondents can respond. If a further opportunity were given for the Claimant to try again to formulate her claims of indirect sex discrimination, there would be additional delay and costs incurred. The Respondents would need an opportunity to set out whether they wished to rely on the defence in section 19, to amend their pleading and consider whether further disclosure was needed. It is unlikely that this would be possible before the full merits hearing. For the reasons set out in the Tribunal's judgment, the time has come for those allegations of discrimination which can be identified, to be heard, rather than allow further attempts to be made to formulate claims which remain unclear.
10. Whilst the Tribunal recognises the Claimant's frustration that she cannot pursue all the heads of claims she wishes to, as was set out in the Tribunal's judgment, where it remains impossible to discern the precise nature of an allegation, notwithstanding a number of opportunities to do so, it has no reasonable prospects of success and it is proportionate to strike it out. The Claimant's providing further evidence and submissions about her claims in the course of the reconsideration application have not clarified the legal basis of them as the provision, criteria or practices have not been identified. As such, there are no reasonable prospects of the Tribunal's judgment being varied or revoked and

her application for reconsideration is refused.

Employment Judge Clark

Dated: 16 September 2019

DECISION SENT TO THE PARTIES ON

16/09/2019

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS