EMPLOYMENT TRIBUNALS

Claimant: Ms M Emmerson

Respondent: The Council of the City of Newcastle upon Tyne

Employment Judge Shepherd

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The application is refused as there is no reasonable prospect of the original decision being varied or revoked.

REASONS

1. An oral judgment and reasons having been given at the conclusion of the hearing on 24 September 2019. Written reasons having been requested and sent to the parties on 30 September 2019. That judgment followed a hearing on 17,18 July 2019 and 23 and 24 September 2019. The Tribunal unanimously concluded that the claim of unfair dismissal was not well-founded and was dismissed. The claim of disability discrimination was dismissed upon withdrawal.

2. An application for a reconsideration has been made on behalf of the claimant on 11 October 2019

3. The application for a reconsideration refers to the findings of the Tribunal that the respondent carried out a fair and reasonable consultation and that the outcome of the appeal was within the band of reasonable responses available to the respondent.

4. The application refers to the written reasons of the Tribunal and, in particular, paragraph 21 where it is said that reference is made to the respondent's policy on redeployment. It is submitted, on behalf of the claimant, that this was never referred to in consultation and the claimant's submission was later marked on different criteria. The claimant asserts that a fair procedure would have involved her being given a person specification or detailed criteria and, if this had occurred, the outcome was likely to have been very different.

5. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, provides as follows:

> "70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ('the original decision') may be confirmed, varied or revoked. If it is revoked it may be taken again.
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> 71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.
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> 72 (1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.
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> (2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations."

6. The previous Employment Tribunal Rules (2004) provided a number of grounds on which a Judgment could be reviewed The only ground in the 2013 Rules is that a Judgment can be reconsidered where it is necessary in the interests of justice to do so. I consider that the guidance given by the Employment Appeal Tribunal in respect of the previous Rules is still relevant guidance in respect of the 2013 Rules. It was

confirmed by Eady J **in Outasight VB Ltd v Brown UKEAT/0253/14/LA** that the basic principles still apply.

7. There is a public policy principle that there must be finality in litigation and reviews are a limited exception to that principle. In the case of **Stevenson v Golden Wonder Limited [1977] IRLR 474** makes it clear that a review (now a reconsideration) is not a method by which a disappointed litigant gets a "second bite of the cherry". Lord McDonald said that the review (now reconsideration) provisions were

> "Not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before".

In the case of **Fforde v Black EAT68/80** where it was said that this ground does not mean:

> "That in every case where a litigant is unsuccessful 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 even more exceptional cases where something has gone radically wrong with the procedure involving the denial of natural justice or something of that order".

8. In the interest of justice means the interest of justice to both sides. The Employment Appeal Tribunal provided guidance in **Reading v EMI Leisure Limited EAT262/81** where it was stated:

> "When you boil down what is said on (the claimant's) behalf it really comes down to this: that she did not do herself justice at the hearing, so justice requires that there should be a second hearing so that she may. Now, 'justice' means justice to both parties".

9. In this case, the application for a reconsideration appears to be a request to reconsider the evidence given at the hearing. It refers to paragraph 21 as the respondent's policy on redeployment. This was a short, one sentence policy, that provided an indication of the circumstances in which 'Lift and Drop'arrangements could be applied.

10. There was a draft job description for the new role of ICT Business Improvement Manager. The claimant was told that, if she wished to assert Lift and Drop in respect of the new role, she had to be able to set out in writing how work of a particular kind had not ceased or diminished and would continue on in the new structure. The respondent concluded that the new role was substantially different from the claimant's role at the time. The email from Tony Kirkham on 22 December 2017 was considered by the Tribunal. This was with regard to the application of the lift and drop policy and how it been concluded that the ICT Business Improvement Manager job description was sufficiently different from the claimant's ICT Team Manager role.

11. The Tribunal gave careful consideration to the application of the Lift and Drop policy and the total process including providing the claimant with the opportunity to

apply for the new role. The Tribunal was satisfied that the consultation was within the band of reasonable responses available to the respondent.

12. The application for reconsideration referred to the cases of **The Council of the City of Newcastle upon Tyne v Ford and others UKEAT/0358/13/MC** and **Mugford v Midland Bank plc 1997 ICR 399.** These were not cases referred to in submissions.

13. The **Ford** case was in respect of candidates who had not been entitled to slot in to a new post and the procedure that was then followed in respect of the applications for new posts. It was asserted that the claimant in this case failed in her submission because she was given the incorrect criteria. That assertion was in respect of the criteria applied in the present case for asserting slotting in or the 'Lift and drop' procedure and not, as it was in the **Ford** case, the procedure in respect of subsequent appications for the new role and the subsequent interviews. The claimant in this case did not get to that stage as she did not apply for the new role of ICT Business Improvement Manager.

14. The **Mugford** case is referred to in the application for reconsideration on the grounds that the EAT confirmed that collective consultation with the union does not mean that employers can avoid individual consultation. That was not an issue in this case.

15. Consideration of the judgments in those cases was not likely to lead to the Tribunal to reach a different conclusion.

16. The issues set out in the application for a reconsideration of the judgment do not raise any matters that are likely to lead to the Tribunal reaching any different conclusion.

17. I have considered this application carefully. I have reached the view that a hearing is not necessary in the interests of justice. There is no reasonable prospect of the judgment being varied or revoked and the application for a reconsideration is refused.

Employment Judge Shepherd
28 October 2019.