Case number: 2601086/2018

EMPLOYMENT TRIBUNALS

BETWEEN:

Mr L Attwal **Claimant**	and	Legacy Wills & Estate Planning Limited **Respondent**

Application for Reconsideration

Held at: In Chambers On: 15 November 2019

Before: **Employment Judge R Clark**

JUDGMENT

1. The Claimant's application for reconsideration of the judgment dated 1 October 29 July 2019 is refused.

REASONS

1. On 1 October 2019, I gave an oral judgment of the tribunal which unanimously dismissed the claimant's claims of unfair dismissal and disability discrimination. The judgment was sent to the parties on 5 October 2019. By an email dated 15 October 2019, the claimant applied for a reconsideration.

2. Such an application falls to be considered under rules 70-72 of schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. By rule 71, an application for reconsideration must be made in writing within 14 days of the decision being sent setting out why reconsideration of the original decision is necessary. The

claimant's email application was submitted in time. He has subsequently provided copies of new evidence he wishes to be considered. By rule 70, the tribunal may reconsider any judgment where it is necessary in the interests of justice to do so and, if it decides to do so, may vary, revoke or confirm the original decision. There is now a single threshold for making an application. That is that reconsideration is necessary in the interests of justice. There must therefore be something about the nature of how the decision was reached, either substantively or procedurally, from which the interests of justice would be offended if the original decision was allowed to stand.

3. If I conclude the interests of justice are engaged, by rule 72(1) I am then to give initial consideration to the prospects of the application which determines whether it is necessary to seek the views of the respondent (although in this case the respondent has in any event already volunteered its objections in a letter dated 21 October 2019) and whether the matter can be dealt with on paper or at a further hearing before the same tribunal. Where the application can be said to carry no reasonable prospects of being varied or revoked, the rules dictate that I shall refuse the application without being required to consider the matter further.

4. Mr Attwal's application is based on new evidence and seeks to undermine the respondent's evidence adduced at the hearing on the issue of disparity of treatment that was at the heart of his claim. In particular, whether the company had previously not dismissed employee(s) for swearing in circumstances where it was recorded or heard by customers. The points Mr Attwal seeks to raise can be grouped under two broad categories falling within the interest of justice test. They are: -

    a. The fairness of the respondent being able to adduce late documentation on the morning of the second day of the final hearing concerning a Mr Patel's dismissal.

    b. Mr Attwall acquiring new evidence of others apparently showing circumstances where another company, with loose prior connection to the respondent, did not dismiss someone in broadly similar circumstances to his.

5. Having considered Mr Attwal's contentions and his supporting information submitted subsequently, I have concluded neither point is sufficient to raise any reasonable prospect of the judgment being varied or revoked.

6. The issue with the new documentation arose only because the claimant himself identified what was understood to be a disparity comparator, a person by the name of Patel, as someone in similar circumstances to him who was treated differently. The respondent had not disclosed information. It turns out this was because the comparison was around 10 years earlier and did not in fact involve the respondent, but a transferor organisation. It transpired Mr Patel had in fact been dismissed but Mr Attwal was seeking to suggest that

misconduct was worse than his own in order to establish a kind of inverted disparity comparison. Whilst it was not clear how this was likely to assist the claimant, during the first day of the hearing the tribunal asked the respondent to do what it could to revisit the disclosure search. Some paperwork was discovered because an HR officer had herself transferred from that organisation and had retained some documents on her computer. Moreover, and a matter that was significant in the tribunal's reasoning, his misconduct turned out to be one of a number of past examples of similar misconduct that had then been used by the respondent to develop and reinforce its internal training of call handling staff and to stress the crucial importance of how employees conducted themselves in conversation with customers and between colleagues, all of which was potentially capable of being heard by members of the public. In those circumstances, the manner in which the information came to be put before the tribunal late does not engage the interests of justice warranting the case to be reconsidered.

7. In terms of the new evidence, there are two new comparators that the claimant wishes to be considered. Both are said to be individuals committing similar misconduct but who were not dismissed. Both relate to events in 2010. In this situation, my analysis of the interests of justice must include the principals of **Ladd v Marshall [1954] 1 WLR 1459** to the extent they assist any application of the overriding objective. Whilst they are principals, and not rules, they are important measures of what will be sufficient to upset the public policy aim of finality of litigation. The first is that the claimant must show that the evidence could not have been obtained with reasonable diligence for use at the trial. What has been presented has been obtained quickly after the judgment and, on its face, does not appeal to have taken any special effort or been the result of coincidence or unforeseeable good fortune. I can't see how the claimant could establish the first guideline principal is in his favour. Secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive. The fact that these examples date from 2010 is significant. They are not examples of misconduct by employees of this employer, though there is some distance connection through one or more transfers. More significantly, they occur before the training to staff was revised to unambiguously spell out what was expected and equally what would not be tolerated. Thirdly, the evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be incontrovertible. I can imagine this evidence would have been accepted as the training I refer to, and which heavily influenced all tribunal members, was itself based on how things had gone wrong in the past. We already knew Mr Patel's misconduct formed one for the worked examples and would not be surprised to learn that the examples now cited by the claimant formed some of the others. The fundamental reason why none of this will assist the claimant is because even if an employer has, in the past not taken certain disciplinary steps in response to certain misconduct, if it then warns staff that in the future it will, the opportunity to rely on those past comparisons within the principles of fairness established in **Hadjioannou v Coral Casinos Ltd [1981] IRLR 352,**

that the tribunal relied on in its original judgment, disappears. That was the situation in this case and remains so with these new comparators.

8. It follows that I am not persuaded that the principals which inform my discretion to reconsider by admitting new evidence are made out. For those reasons, I refuse the application for reconsideration under rule 71(1).

9. Finally, on 1 November 2019 Mr Attwal made a separate application for written reasons. This was out of time and in such circumstances the rules state I shall refuse the application. In this case, I have nothing before me to justify exercising any discretion to extent time under rule 6. In accordance with rule 62(3), written reasons will only be provided if requested to do so by the Employment Appeal Tribunal or a Court.

.....

Employment Judge R Clark
Date: 15 November 2019

JUDGMENT SENT TO THE PARTIES ON

.....

AND ENTERED IN THE REGISTER

.....

FOR SECRETARY OF THE TRIBUNALS