EMPLOYMENT TRIBUNALS

Claimant: Mrs F Hassanzadeh

Respondents: City of Bradford MDC

Heard at: Manchester **On:** 19 November 2019 (In Chambers)

Before: Employment Judge Holmes
Ms F Crane
Mr T A Henry

REPRESENTATION:

Claimant: Written Representations
Respondents: Written Representations

RESERVED JUDGMENT ON RECONSIDERATION

It is the judgment of the Tribunal that:

1. The claimant's applications for reconsideration of the judgment sent to the parties on 15 March 2019 are refused by the Employment Judge pursuant to rule 72(1) of the 2013 rules of procedure , save in so far as the applications which relate to the failure of the Tribunal in the judgment to determine the claimant's s.15 claims, which the Tribunal has reconsidered, as set out below.

2. The Tribunal (i.e. the Panel) does reconsider its judgment in relation to the s.15 claims, and the judgment is varied in accordance with attached supplementary judgment.

REASONS

1. By a judgment sent to the parties on 15 March 2019, the Tribunal dismissed the claimant's claims of unfair dismissal, disability discrimination and protected disclosure detriments.

2. By letter of 28 March 2019 from Mr Shojaee, the claimant's husband and representative, the claimant sought reconsideration of the Tribunal's judgment. The application was referred to the Employment Judge pursuant to rule 72(1) of the 2013 rules of procedure. He refused the application under that rule, on the grounds that there was no reasonable prospect of the original judgment being varied or revoked, for reasons which were set out in the Tribunal's letter of 3 April 2019. Having received further submissions, in which the claimant sought again reconsideration of the judgment , the rejection of the application is confirmed by the Employment Judge, who does not reconsider his decision to reject the application under rule 72(1).

3. The Employment Judge, however, accepted that the claimant had identified that the judgment did not address and determine the claimant's s.15 claims. The views of the respondent were sought, and by a document dated 1 May 2019 entitled "Respondent's Response to the Request for comments on the Claimant's application for Reconsideration" , the respondent conceded that there were s.15 claims before the Tribunal, and that these claims had not been determined in the Tribunal's judgment.

4. Accordingly, the respondent set out its response to the s.15 claims identified by the Employment Judge as having been before the Tribunal.

5. The claimant was permitted to respond further to the respondent's submissions on the s.15 claims did, which Mr Shoajee did by further submissions dated 1 July 2019.

6. The parties agreed that the reconsideration could be dealt with without a hearing, and (after an attempt to do so on 19 September 2019, when one of the panel could not attend) on 19 November 2019 the Tribunal convened in Chambers to reconsider its judgment, and determine the s.15 claims.

7. The Tribunal's findings and judgment on these claims are set out in the attached supplemental judgment.

8. The claimant, however, has also made applications in relation to other aspects of the judgment, in letters dated 15 April 2019, 24 May 2019, 4 June 2019, and 10 June 2019, and not merely the omitted s.15 claims, is also made in the Submissions made by the claimant dated 1 July 2019. It is contended that the Tribunal should address these other aspects before determining the s.15 claims, in order to prevent any errors or perversities in the judgment affecting the determination of these claims.

9. Whilst the original application made on 28 March 2019 has been determined, and refused pursuant to rule 72(1) by letter of 3 April 2019, it is appreciated that the claimant has by Mr Shojaee's letters particularly of 24 May 2019 and 4 June 2019 sought to reiterate , and indeed add to the original grounds for reconsideration. Given the size of the judgment, and the limited timescale for submission of a reconsideration application, the Employment Judge extends time for what may technically be regarded as further applications for reconsideration.

10. Having read and considered these further grounds, the Employment Judge refuses the application (save , as previously, in respect of the s.15 claims).

11. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70).

12. Rule 72(1) of the 2013 Rules of Procedure empowers the Employment Judge to refuse the application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked.

13. The importance of finality was confirmed by the Court of Appeal in ***Ministry of Justice v Burton and anor [2016] EWCA Civ 714*** in July 2016 where Elias LJ said that:

> ***"the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Ironsides Ray and Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."***

14. Similarly in ***Liddington v 2Gether NHS Foundation Trust EAT/0002/16*** the EAT chaired by Simler P said in paragraph 34 that:

> ***"a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or by adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered."***

15. In common with all powers under the 2013 Rules, preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay. Achieving finality in litigation is part of a fair and just adjudication.

The Applications

16. The majority of the points raised by the claimant are attempts to re-open issues of fact on which the Tribunal heard evidence from both sides and made a

determination. In that sense they represent a "second bite at the cherry" which undermines the principle of finality. Such attempts have a reasonable prospect of resulting in the decision being varied or revoked only if the Tribunal has missed something important, or if there is new evidence available which could not reasonably have been put forward at the hearing. A Tribunal will not reconsider a finding of fact just because the claimant wishes it had gone in his favour.

17. That broad principle disposes of almost all the points made by the claimant. However, there are some points she makes which should be addressed specifically. The letter of 24 May 2019 contains most of the applications, although others appear elsewhere. The claimant seeks in the first four pages to re-argue the disability discrimination claims. On pages 5 to 6, she seeks to re-open the Tribunal's decision on constructive dismissal. This is no more than an attempt to re-litigate issues which had been decided.

18. The claimant goes on to contend that there have been errors and irregularities, and that the Tribunal been "misled" by the respondent, and that the Tribunal has permitted this. Comment is also made (in several places) that the Tribunal has been perverse in its findings or how it has dealt with the proceedings. The Employment Judge can see no basis for such contentions. Mr Shojaee seems to regard every decision or finding adverse to the claimant as "perverse". Other than to re-argue those matters he had previously unsuccessfully argued, he has done nothing to show any perversity.

19. Much is made of the alleged conduct of the respondent, and in particular Ms Mellor, its counsel, in relation to the omission from the judgment of the s.15 claims. Mr Shoajee contends that this was somehow deliberate , or some form of sharp practice on the part of the respondent , or its counsel. The Tribunal does not agree. It was clearly an error, which had been overlooked. The Tribunal made the same error, compounded (in part) by the absence of any specific reference to the s.15 claims in the claimant's closing submissions. There is no basis for any other conclusion.

20. Mr Shojaee contends that the Tribunal and the respondent had been treating the Scott Schedule as the main document for identifying the claims and the responses. That is correct, and is what its purpose was. Some claims were withdrawn, and Mr Shojaee has explained how he completed the Schedule. The Employment Judge accepts that, and does not criticise him for how he did so. He is right that the respondent did provide responses in the Scott Schedule, but in many instances there are more than one type of claim being made. The respondent had not made any specific closing submissions in relation to the s.15 claims, and neither had the claimant.

21. In short, however the omission of the s.15 claims came about, both parties have now had a chance to agree what s.15 claims were before the Tribunal, and to make specific submissions upon them

22. A further feature of the claimant's applications is reference to the application made, but then withdrawn, during the hearing, to amend the claims to include further claims of victimisation (or other types of disability discrimination claim) arising from the conduct of the respondent's representatives. The claimant appears again to be seeking to be permitted to amend to add claims of this nature.

23. When the application was made, the Employment Judge pointed out to Mr Shoajee that one consequence of it being successful may well be the need for an adjournment, in order for the respondent to respond to it (indeed, for the consideration of further representation as the current representatives would then potentially become parties) , with the inevitable effect of the conclusion of the hearing being seriously delayed. Mr Shojaee then withdrew the application.

24. To be crystal clear, there was no "proviso" expressed at the time that the withdrawal was on the basis that the Tribunal reached a fair decision , and that the respondent stopped (allegedly) bullying the claimant. Even if there had been, a party either makes and pursues an application, or abandons it. It is not open to party to impose "provisos" of this nature. None was expressed at the time, and had it been, the Employment Judge would have made it clear that such a proviso would be of no effect. It is not now open to the claimant to resurrect, post – judgment, this abandoned application.

25. In general terms, Mr Shoajee suggests that his own health was suffering at the end of the hearing. He seeks to link this with the s.44 and protected disclosure claims. It is unclear what he is suggesting, but he went on to make written submissions. Whilst he suggests that at the time he did so he was still suffering from a high state of depression, he did not seek any extension of time, or give any indication that he was been in any way hampered in producing his submissions. In his closing submissions (which were after Ms Mellor's and made in response to them) the claimant dealt with the "claim" (i.e singular) of whistleblowing. Ms Mellor's submissions had identified one disclosure, and one detriment, and Mr Shojaee responded without suggesting there were any more.

26. In summary, save in relation to the s.15 claims, nothing in the applications made provides any reasonable prospect of the Tribunal evoking or varying its judgment, and the applications are refused pursuant to rule 72(1).

Dated 22 November 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
6 December 2019

FOR THE TRIBUNAL OFFICE