Case number: 2602341/2018

EMPLOYMENT TRIBUNALS

BETWEEN:

Ms J Williams **Claimant**	and	The Commissioners for Her Majesty's Revenue and Customs **Respondent**

Application for Reconsideration

Held at: In Chambers On: 22 October 2019

Before: **Employment Judge R Clark**

JUDGMENT

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

REASONS

1. The background to this application is this. By an email dated 2 August 2019, the claimant contacted the tribunal herself, not through her solicitors, to complain about her representation at a preliminary hearing held on 29 July 2019. At that hearing I had dismissed claims of disability discrimination on the basis that they were presented out of time and that the claimant had not established it was just and equitable to extend time. The claimant requested that the preliminary hearing be "re-done or some other solution to this be found". I caused a letter to be sent to her on 12 August 2019 asking to confirm by 19

August 2019 (a) whether she was still represented and (b) whether she wished her email to be treated as an application for a reconsideration of the judgment.

2. By email of 19 August 2019 the claimant confirmed her solicitors were still acting and that they would confirm the request for reconsideration. By letter of the same date, the claimant's solicitors confirmed they were still acting. It was implied that the substance of the claimant's original email was not now to be the basis of the application for reconsideration as "Counsel proposed to submit their written submissions" to vary or revoke the judgment. The letter asked the tribunal not to make a decision on the reconsideration for another 14 days. I was content with that.

3. On 2 September 2019, the claimant's solicitors wrote to say the application had been drafted. Rather than submit it, they sought reasons for the judgment out of time. Reasons had been given at the time and in fact were already set out in the written summary of the preliminary hearing sent to the parties on 5 August 2019. This was confirmed in correspondence from the tribunal dated 11 September 2019.

4. In the meantime, the final hearing listed for 4-6 September 2019 had been vacated.

5. About a month later, on 12 October 2019, and in the absence of any written submissions, I asked listing to take steps to relist the final hearing.

6. By letter dated 15 October 2019, the claimant's solicitors then provided their application for reconsideration. There is no explanation given for the delay in it being presented.

7. 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 own email of 2 August was submitted in time but it is clear that the content of that email is irrelevant to the application now before the tribunal. The Claimant's solicitors intimated that further submissions would follow in 14 days. They did not. The tribunal was told the written application was prepared by 2 September yet it has taken a further 6 weeks for it to submitted. The reality is that what is now before the tribunal is a fresh application, unrelated to Ms Williams' original concerns, and presented outside the 14-day time limit. It is well outside the applicant's own proposed timescale. I could vary the time limits under rule 6 but I have no explanation before me why the application has been so delayed and it remains out of time.

8. In any event, it seems to me any preliminary consideration of the application would not lead me to conclude that there was a reasonable prospect of the judgment being varied or revoked. The challenges raised by the claimant no longer concern her dissatisfaction with her representation on the day. It seems clear that, although the author is not identified,

counsel drafting this application is not the same counsel as represented the claimant on the day and is made without the benefit of knowing the submissions and concessions made at the hearing. The three areas of challenge now put are, in summary, that I failed to clarify, or explore of my own motion, whether there was an application to amend (although the claimant says that no amendment was necessary); that I misapplied *Matuszowicz v Kingston-Upon-Hull Council 2009 EWCA 21* on the question of time limits and that I did not hear evidence on whether it was just an equitable to extend time.

9. 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.

10. If I conclude the interests of justice were 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 (I note the respondent has in any event already volunteered outline objections to the application) and whether the matter can be dealt with on paper or at a further hearing. 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.

11. In my judgment I am not satisfied that the interests of justice require the reconsideration and in any event, to the extent that the matters raised can be said to do so, there is no reasonable prospect of the decision being varied or revoked.

12. So far as the amendment is concerned, the issue of amendment arose first at the preliminary hearing before EJ Camp. He raised the issue in the context of limiting the orders to provide further and better particulars of the existing claim. He made clear no permission to amend had been granted and included any amendment application in the list of potential matters to be determined at a future hearing. The orders that followed were purportedly complied with so far as further particulars were provided. It is significant to note that in the further particularisation of all aspects of the discrimination claim, neither dismissal nor any other acts or omissions occurring in time were relied on. Prior to that, the only reference to dismissal as a discriminatory act had been dismissed on withdrawal by the claimant.

13. The claimant did not make any application to amend at that stage. The respondent, however, noted in its response that in two respects, the further particulars advanced factual matters that were not originally pleaded and asserted they would need to be subject to an application to amend. (The matters set out at paragraphs 10iii and 11v of the further particulars relating to matters in early and late 2017 respectively).

14. As a result, the original case management orders cited by the claimant in her application were supplemented by further orders. They have not been referred to but they mean that the claimant was aware in advance of the preliminary hearing that (a) there was an issue of time limits and all discrimination claims appeared to be out of time and (b) directions had been given to file evidence, relevant documentation and any written submission on the points in issue, which necessarily included the time limit point.

15. The claimant made no further application to amend at that stage. She did serve a witness statement on the relevant issues including time limits.

16. At the hearing, it did not become necessary to determine the only live amendment issue before me (i.e. the two points identified in the further and better particulars) as they each arose in 2017 and therefore did not assist the claimant in what became the more fundamental question of time limits.

17. I do not accept the issues were not clarified at the commencement of the hearing. It became clear to the tribunal that Counsel for the claimant had been instructed very late in the day and he had not been provided with all the relevant documentation including documents crucial to his lay client's application. I delayed the start of the hearing to allow copies to be made available to him and for him to have time to consider the information. The hearing started only when he confirmed he was in a position to do so. There was no broader amendment issue raised. In fact, the reconsideration application says none was needed. On that basis there cannot have been any failure on the part of the tribunal to explore one any further.

18. So far as the tribunal's application of time limits is concerned, it became clear to all that this was potentially determinative of all the issues identified for the preliminary hearing. I do not accept the tribunal misapplied the law on time limits. It was confirmed that the only claim relating to dismissal was one of victimisation which had previously been dismissed upon withdrawal. The claimant had had opportunity to particularise her claims in the further and better particulars provided. Having done so, the claims crystallised with acts or omissions all said to have occurred much earlier in the chronology, in some cases by years. All of the allegations arose at a time which meant they were prima facie out of time. EJ Camp had ordered the claimant to identify when she said the reasonable adjustments should have been made. That question had not been answered, clearly or at all, in the further particulars provided and to the extent that it was possible to identify a date, it appeared to be late 2017. In any event, it was common ground that the notice of dismissal had been given to the claimant on 5 March 2018. That was clearly an act inconsistent with the making of any adjustments, the purpose of which were to keep the claimant in employment. Irrespective of whether the adjustments claimed could and should have been made earlier or amount to an ongoing omission to discharge the duty, as argued in the claimant's application, that date was the latest date on which the reasonable adjustment claim

crystallised and time began to run. That date was itself out of time. There were no later dates identified in any other alleged discriminatory acts against which the earlier allegations could, theoretically, form part of a discriminatory act continuing over a period of time. Whilst I remain satisfied that the adjustment claims crystallised much earlier by operation of s.123(4)(b) of the 2010 Act, at its highest, this date of 5 March became the last possible date in any claims said to have extended over a period of time. As a matter of fact and law, if the end date of any continuing act is itself out of time, the tribunal must be satisfied that it is just and equitable to extend time in order to engage jurisdiction.

19. That leads me to the third area of challenge, that the tribunal did not hear evidence from the claimant. For some time prior to the hearing, the issues had been identified as including the question of time limits, the respondent's contention being that all claims were out of time. Orders had been made for the claimant to disclose documents, serve a witness statement and any written submissions on the point. The claimant had prepared a witness statement. That did not advance any basis for a just and equitable extension but was set out, as the reconsideration application is now, on the basis that it formed part of a continuing act. The issue was not that the tribunal failed to hear evidence, but that it was conceded there was no evidence to put before it on the necessary just and equitable extension of time.

20. For those reasons, had this application been accepted, on the substance and merits of it I would have refused it at a preliminary consideration under rule 71(1).

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Employment Judge R Clark

Date: 14 November 2019

JUDGMENT SENT TO THE PARTIES ON