EMPLOYMENT TRIBUNALS

Claimant: **Ms A Niemanski**

Respondent: **Nethouseprices Limited**

UPON APPLICATION made in a document from the Claimant, attached to an email dated 1 December 2019, to reconsider the Judgment, sent to the parties on 17 November 2019 ("**Judgment**"), under rule 71 of the Employment Tribunals Rules of Procedure 2013 ("**Rules**").

JUDGMENT

The Claimant's application for reconsideration is refused and the Judgment is confirmed.

REASONS

Background

1. The Claimant's document attached to her email of 1 December 2019 set out her application for reconsideration of the Judgment. In that Judgment the Tribunal had concluded that the Claimant's various claims should be dismissed.

Issues and Law

2. Rule 70 provides that reconsideration of a judgment will take place where the Employment Judge considers that it is necessary in the interests of justice to do so. In the case of a decision made by a full tribunal, as in this case, rule 72(3) stipulates that this should be, where practicable, the Employment Judge who chaired the full tribunal which made it.

3. Rule 71 provides that applications for reconsiderations of judgments should be presented in writing within 14 days of the date on which the written record was sent to the parties and should explain why reconsideration is necessary. The Claimant's document satisfied those

requirements and therefore a valid application for reconsideration was made.

4. Rule 72(1) notes that an Employment Judge shall consider any application for reconsideration made under rule 71, and that if the Judge considers that there is no reasonable prospect of the original decision being varied or revoked then the application shall be refused and the Tribunal shall inform the parties of the refusal. Alternatively, rule 72(2) sets out the process that is then to be followed for further consideration of the application.

5. Rule 70 specifies only that one ground for reconsideration. That was a change from the provisions relating to reviews of judgments under the previous Rules issued in 2004, which specified, in Rule 34, certain specific grounds for review. These included, at Rule 34(3)(d), the availability of new evidence, which was one of the grounds included in the Claimant's application. In the circumstances I considered it appropriate to have regard to case authorities which dealt with applications under that ground.

The Application

6. The Claimant's application for reconsideration, which spanned 25 pages, was made on the following bases: (i) that there was new evidence (Ground 1); and (ii) on four issues which she said arose during the hearing: the refusal of a specific disclosure request, insufficient time to address a number of pertinent points, insufficient time to examine her two witnesses (I took this to mean insufficient time to cross-examine the Respondent's two witnesses), and being denied the opportunity to access an Excel file on her laptop (Ground 2). Much of the Claimant's document however, appeared to focus on requests to reconsider some of the factual findings made, and conclusions drawn, by the Tribunal (although not specified by the Claimant as a separate ground, I refer to this as Ground 3).

Conclusions

7. I deal with each of the Claimant's grounds in turn.

Ground 1

8. With regard to the Claimant's contentions that new evidence had become available which justified reconsideration, I considered the guidance provided by the long-established case of Ladd v Marshall [1954] 1 WLR 1489, that the party making the application needs to be able to show that the new evidence could not have been obtained with reasonable diligence for use at the original hearing, would probably have had an important influence on the hearing, and was apparently credible.

9. In that regard, having considered the Claimant's contentions, there was nothing to indicate that the evidence referred to could not have been previously obtained with reasonable diligence. However, even if that had been the case, I did not consider that the matters would have had an important influence on the hearing or the Tribunal's Judgment, and it was

not therefore in the interests of justice to reconsider the decision on this ground.

Ground 2

10. The Claimant had made an extensive application for specific disclosure, which was dealt with by Employment Judge Beard at a telephone preliminary hearing on 11 September 2019. Judge Beard ordered the Respondent to provide an affidavit dealing with the availability of various requested documents, the methods of search undertaken to obtain the documents, and the reasons why any documents were unavailable; and an affidavit covering those matters was produced by Catherine Lamond, the Respondent's Managing Director. Judge Beard made no further order regarding specific disclosure.

11. Whilst not entirely clear from the Claimant's reconsideration application, the request to which she appears to refer in relation to this ground is her request for disclosure of information relating to the sums received by her colleague, made redundant at the same time as her on 18 October 2017. In her application considered by Judge Beard, the Claimant had noted that her colleague, unlike her, had passed her probation on account of the fact that she had not taken maternity leave, and she considered that evidence of her receiving four weeks' notice (the amount due after completion of the probation period) as opposed to one week's notice (the amount due prior to completion of the probation period) would illustrate pregnancy discrimination.

12. This point can be dealt with by noting that any issue taken with the fact that Judge Beard did not order such disclosure should have been dealt with by an application to him to review his decision at that time. Furthermore, the issue could also have been explored by the Claimant in her cross-examination of Mrs Lamond but was not. On that basis, I do not consider that it would be in the interests of justice to reconsider the decision on this ground. However, regardless of that, I do not consider that, even if such information had been disclosed, it would have led to a conclusion of pregnancy discrimination.

13. As the Tribunal noted at paragraph 61 of the Judgment, it considered that the Respondent's assertion, made prior to its identification of any redundancy situation, that the Claimant's probation period should be extended due to the fact that she had not been employed for six months (i.e. because she had not physically been in work for that length of time), was incorrect. That was on the basis that, whilst the Claimant's contract contained a power for the Respondent to extend the probation period, the power needed to be expressly exercised. As it had not been, by virtue of the Claimant having been in employment for six months, her probation period had ended.

14. Ultimately however, whilst the Claimant was, incorrectly, paid one week's notice, she was also paid a three-week ex gratia payment, i.e. without deduction of tax, which, as noted at paragraph 65 of the Judgment, meant that she had not suffered financially in comparison with her, non-pregnant,

colleague, even if that colleague had received, as it is anticipated she did, four weeks' notice, which she would have received on a taxed basis.

15. The second and third of the issues raised by the Claimant under this ground, i.e. that there was insufficient time to address a number of pertinent points and insufficient time for her to cross-examine the Respondent's two witnesses, can be dealt with together.

16. The listing of the hearing for two days had been made by Employment Judge Brace at a telephone preliminary hearing on 10 June 2019, at which the Claimant had been legally represented. As noted by Judge Brace in her summary of that hearing, the allocation of time was made following discussion with the parties. In fact, Judge Brace went further in her summary and indicated, without limiting the ultimate Tribunal's discretion, that evidence and submissions would be dealt with on the first day of the hearing, with the second day being for deliberation by the Tribunal, the delivery of the judgment, and for remedy, if required.

17. Ultimately, the Tribunal did not stick to that timetable and indicated to the parties that evidence, and consequently, submissions, would spread into the second day. In the event, the first day of the hearing concluded at 4.25pm, and the hearing on the second day concluded at 3.00pm. The Claimant's cross-examination of the Respondent's two witnesses took up the whole of the second morning, the Respondent's cross-examination of the Claimant having taken the whole of the first afternoon, and the first morning having been taken up with the Tribunal's reading of the statements (27 pages on the part of the Claimant, and 10 and 5 pages on the part of the Respondent's two witnesses) and documents. There being insufficient time for the Tribunal to deliberate and deliver judgment, the decision was reserved.

18. Whilst there was a need during the hearing to remind the parties of the need to progress their cross-examination, there was adequate time for the parties to explore all relevant issues in cross-examination. Also, whilst it is correct that the Claimant did not canvass all of the many points raised in her statement with the Respondent's witnesses, the Tribunal did not accede to the Respondent's representative's suggestion in submissions that any areas not directly challenged were to be resolved in the Respondent's favour, as noted at paragraph 12 of the Judgment.

19. In conclusion, I was not satisfied that it would be in the interests of justice to reconsider the decision on this ground.

20. With regard to the Claimant's contention that she was denied the opportunity to access an Excel file on her laptop, the Claimant was able to, and indeed did, access the document on her laptop. However, the Tribunal indicated that it would not be necessary for the Tribunal itself to view the laptop, which would have had to have been undertaken by each member of the Tribunal, in turn, looking at the document on the Claimant's laptop, but that the issues could be raised by the Claimant in cross-examination, which is what happened.

21. The Tribunal was satisfied that all issues had been reasonably aired and explored. Again therefore, I was not satisfied that it would be in the interests of justice to reconsider the decision on this ground.

Ground 3

22. With regard to the various parts of the Claimant's application where she has requested reconsideration of findings or conclusions, the Tribunal heard and considered a great deal of evidence, with the Judgment ultimately spanning 76 paragraphs over 19 pages. The Judgment covered all evidence that was relevant to the issues the Tribunal had to decide and drew conclusions from them on the entirety of the Claimant's claims. The fact that a claimant does not agree with findings or conclusions does not provide a basis for reconsidering them.

23. Overall, I did not consider that there was any reasonable prospect of the Tribunal's original Judgment being varied or revoked and I therefore concluded that the Claimant's application for reconsideration should be refused.

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Employment Judge S Jenkins

Date: 7 January 2020

JUDGMENT SENT TO THE PARTIES ON 10 January 2020

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FOR THE TRIBUNAL OFFICE