



EMPLOYMENT TRIBUNALS

Claimant: Mr R Tomos

Respondent: Reed Specialist Recruitment Limited

JUDGMENT

The claimant's application dated 9 March 2020 for reconsideration of the case management decision sent to the parties on 28 February 2020 is refused.

The claimant's second application, dated 24 March 2020, for reconsideration of the decision not to order witnesses to appear at the final hearing of his claims, sent to the claimant on 23 March 2020 is refused.

REASONS

1. There is no reasonable prospect of the original decisions being varied or revoked.
2. The claimant has referred to three grounds for the reconsideration application made on 9 March 2020 as follows:
 - 2.1. There was inadequate reasoning for the decision made;
 - 2.2. The decision was perverse; and
 - 2.3. Premature findings of fact were made.
3. The claimant seeks a reconsideration of the refusal to order witnesses to attend the final hearing on the basis that there was inadequate reasoning for the decision made.
4. The reasons for the refusal of both reconsideration applications are set out below, in the order in which the applications were made. In refusing the applications, due regard has been given to comments provided by the respondent on 6 April 2020, and further comments from the claimant, by way of response, on the same date.
5. **9 March 2020 reconsideration application**
 - 5.1. Inadequate Reasoning Ground of Application
 - 5.1.1. The claimant argues in his application that the wording of an advert placed by the respondent is sufficient to shift the burden of proof such that the unnamed client of the respondent would be liable for unlawful

discrimination. This would only be the case if the evidence did not enable that client to discharge the burden of proof.

- 5.1.2. The preliminary hearing was an open hearing, where evidence was heard. This evidence was presented on behalf of the respondent, from the individual who had taken the instructions from the client. The evidence given was clear; the client had not directed the respondent to express an interest in actuaries from Portugal, which the claimant argues was discriminatory.
- 5.1.3. The claimant cross examined this witness. At no point in that cross examination did the claimant make any suggestion that the evidence given regarding the nature of the instructions given was inaccurate. The cross examination focused on the claimant's belief that there would be a written record of the instructions which should be disclosed.
- 5.1.4. The witness was clear that there was no written record. The respondent will, in due course, have to disclose all documents relevant to the claimant's claim, which would include any such record.
- 5.1.5. Given the undisputed evidence that the client did not give the discriminatory instruction, the respondent was not ordered to disclose the name of the client. Nothing set out in the claimant's reconsideration application amounts to new evidence or argument that was not, or could not have been, made at the preliminary hearing. Accordingly, this ground for the claimant's first reconsideration application is refused.

5.2. The decision was perverse

- 5.2.1. The claimant argues that the decision that the client was not necessary to present evidence regarding the claimants' suitability for the post was perverse. The claimant is correct that the client would be well placed to give such evidence. However, the same could be said of any witness with knowledge of the UK actuaries market. The claimant has not provided any explanation of why only an employee of the client could present that evidence.
- 5.2.2. Accordingly, the original decision remains for the reasons set out with that decision and the claimant's application on this ground is refused.
- 5.2.3. The claimant also argued that the decision was perverse because it involved a finding based on evidence that was accepted without question. This evidence was not challenged or questioned by the claimant at the hearing when cross examining the witness who gave that evidence. The evidence was to the effect that recruitment instructions were based on a pre-existing and long standing generic job specification. This is not intrinsically lacking in credibility. Given the oral evidence was not challenged by the claimant, it would be inappropriate for that evidence to be disregarded. In any event, the claimant has not presented any argument against that evidence which was not, and could not reasonably, have been before the first preliminary hearing.

5.2.4. Accordingly, given the purpose of a reconsideration application is not to facilitate the chance to have a second hearing, the claimant's application on this ground is refused.

5.3. Premature Findings of Fact Ground of Application

5.3.1. The claimant argues that there was no need to make findings of fact to determine whether the respondent should be ordered to disclose the name of their client.

5.3.2. The name of the client was specifically identified by the respondent as something that was commercially sensitive, which they argued should not be ordered to be disclosed because it was not relevant to the claimant's claims against them. Given the nature of the dispute, the potential relevance of the identity of the client needed to be determined. This included an examination of the potential evidence which the client, or their employees and/or agents, could potentially give if called as a witness by the claimant.

5.3.3. The Tribunal heard evidence about the interaction between the respondent and the client. This evidence did not support any potential claim against the client. This evidence directly contradicted any suggestion that the client had instructed the respondent to discriminate. This evidence was not challenged by the claimant during his cross examination of the witness.

5.3.4. The claimant's claim against the respondent is one of discrimination. Regardless of whether the client of the respondent was complicit in that discrimination the claimant can pursue his claim against the respondent. The complicity of the client, or otherwise, will not influence the claimant's claim against the respondent for discrimination. That evidence clearly showed that, to the extent that the advertisement placed was discriminatory, that discrimination was the act of the respondent.

5.3.5. Nothing set out in the claimant's reconsideration application amounts to new evidence or argument that was not, or could not have been, made at the preliminary hearing. Accordingly, this ground for the claimant's first reconsideration application is refused.

6. 24 March Reconsideration Application

6.1. This reconsideration application relates to the refusal of the claimant's application that an unidentified employee of the respondent's client be ordered to appear at the final hearing of the claimant's claims.

6.2. It is clear that making such an order would involve the identification of the client, something which had already been refused. The application bears the hallmarks of being an attempt to circumvent a case management decision made, namely that the respondent is not required to reveal the identity of their client. This case management decision was made at a hearing at which the parties were permitted to present any relevant evidence and argument which they wanted to.

- 6.3. An application aimed at circumventing the purpose and effect of a case management decision is not appropriate. The claimant has indicated his intent to appeal against the refusal to order the client to be named. The appropriate course is to pursue that appeal, not to seek to circumvent that decision.
- 6.4. The claimant suggests that the witness may have documents which should be disclosed as a ground for requiring them to appear as a witness. As they are not a party to proceedings they are not covered by the usual requirement to disclose documents. It is not clear what documents any employee of a third party may have which would be of significance to the claimant's claim against the respondent.
- 6.5. The claimant has made no claim against the client. The claimant's claim is against the respondent only. The claims against the respondent can be fairly considered based on the evidence of the respondent. The respondent does not seek to argue that they were discriminating as a result of following instructions from the client or anyone else. Such an argument could not be a valid defence to discrimination claims in any event. Accordingly, insofar as the claimant's claim against the respondent is concerned there is no benefit in the presence of a witness from their client.
- 6.6. Whilst the claimant may wish to raise a claim against the client, that is not a claim against the respondent and as such is not a reason to issue a witness order.
- 6.7. Accordingly, the claimant's application for reconsideration of the refusal to grant a witness order is refused.

Employment Judge Buzzard
29 April 2020

JUDGMENT SENT TO THE PARTIES ON

7 May 2020

FOR THE TRIBUNAL OFFICE