THE EMPLOYMENT TRIBUNALS

Claimant: **Miss S Barker**

Respondent: **Marks & Spencer Plc**

Before: **Employment Judge M Warren**

JUDGMENT ON AN APPLICATION FOR RECONSIDERATION

The claimant's application for a reconsideration is refused on the grounds that there is no reasonable prospects of the original decision being varied or revoked.

REASONS

Background

1. By a Reserved Judgment dated 31 October 2019, sent to the parties on 5 November 2019, Miss Barker's claim of constructive unfair dismissal succeeded, but her complaint of disability discrimination failed. By email dated 18 November 2019, (in time) she applies for a reconsideration in respect of the tribunal's decision on disability discrimination.

The Law

2. Rules 70 to 73 of the Employment Tribunal's Rules of Procedure 2013, make provision for the reconsideration of Tribunal Judgments as follows:

> *"**Principles***
> ***70***
> *A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party,*

reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

Application
71
Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

Process
72
(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. ....

3. In Outasight VB Ltd v Brown UKEAT/0253/14 the EAT held the Rule 70 ground for reconsidering Judgments, (the interests of justice) did not represent a broadening of discretion from the provisions of Rule 34 contained in the replaced 2004 rules, (at paragraphs 46 to 48). HHJ Eady QC explained that the previous specified categories under the old rules were but examples of where it would be in the interests of justice to reconsider. The 2014 rules remove the unnecessary specified grounds leaving only what was in truth always the fundamental consideration, the interests of justice. This means that decisions under the old rules remain pertinent under the new rules.

4. The interests of justice means that there must be something about the case that makes it necessary to go back and reconsider, for example a new piece of evidence that could not have been produced at the original hearing, a mistake as to the law, a decision made in a party's absence. It is not the purpose of the reconsideration provisions to give an unsuccessful party an opportunity to reargue his or her case. If there has been a hearing at which both parties have been in attendance, where all material evidence had been available for consideration, where both parties have had their opportunity to present their evidence and their arguments before a decision was reached and at which no error of law was made, then the interests of justice are that there should be finality in litigation. An unsuccessful litigant in such circumstances, without something more, is not permitted to simply reargue his or her case, to have, "a second bite at the cherry", (per Phillips J in Flint v Eastern Electricity board [1975] IRLR 277).

Discussion

5. The application is written by Miss Barker's mother, Mrs Barker, who represented Miss Barker at the hearing. It runs to 32 pages and includes a detailed critique of our findings of fact. It is an unfortunate feature of rules 70 and 71 that they give the self-representing the impression that they can simply ask the tribunal to have another think about it. That, I am afraid, is not so. In reaching its decision, the tribunal reviews the evidence it has seen and heard, considers the representations that have been made and then proceeds to make its findings of fact on its assessment of what is likely to have been said or done on the balance of probabilities. It is almost inevitable that parties from their perspective, will regard some of those findings as wrong. However, the purpose of the reconsideration provisions in the tribunal's rules is not to afford the unsuccessful party with a further opportunity to reargue the case and try to persuade the tribunal to change its findings; it is in the interests of justice that there be finality in litigation.

6. Mrs Barker has clearly spent a great deal of time on her detailed analysis. I have considered it carefully and reflected on whether I think that any of the points she makes on the facts, would have a reasonable prospect of changing the tribunal's findings of fact that would in turn, have a reasonable prospect of changing the tribunal's conclusions. I am afraid I have concluded that there are no such prospects.

7. I acknowledge that at paragraph 75 of our decision, I have made an error in stating that Miss Barker worked at ASDA in Bury St Edmunds. The tribunal was aware and appreciated that her job with ASDA was in Stowmarket. This is reflected in our remarks at paragraph 114.

8. I have reviewed our decision on each of the discrimination heads of claim in light of Mrs Barker's 32 page document.

Direct discrimination

9. Nothing goes to our conclusion that the failure to refer to occupational health or to require to work beyond 3pm was *because* Miss Barker was disabled. Nothing suggests that the decision makers were motivated, consciously or unconsciously, by the fact that Miss Barker was disabled. We thought the grievance was investigated thoroughly.

Discrimination arising from disability

10. The key point here and with regard to the reasonable adjustments claim discussed further below, is as we explained, that Miss Baker deliberately focused her case on her inability to work beyond 3pm. We set out a summary of the medical evidence; it did not support Miss Barker's contention that she could not work beyond 3pm. I asked Mrs Barker during closing submissions to point us to evidence that this was so; she acknowledged that there was no such evidence.

11. There was no evidence that had an occupational health report been obtained, it would have said Miss Barker could not work beyond 3pm.

12. I have reviewed Miss Barker's witness statement and my notes of her evidence. She does not anywhere say in terms, "after 3pm I am too tired to work" and of course were she to have done so, that would have been belied by the fact that she worked at ASDA until 4pm. At page 26 of her witness statement, (at paragraph 68 e 7th bullet point) that she asked Addenbrookes to write an explanation of why she was low on energy at 3pm when at work and refers us to document 355. If she did ask for such confirmation, it is significant that in the letter referred to, such confirmation was not given. We quoted from the letter at our paragraph 52.4. She did not in her oral evidence say she could not work beyond 3pm.

13. At page 16 of the application, Mrs Barker sets out an explanation of the difference between working at ASDA in Stowmarket and working at M&S in Bury St Edmunds. That explanation was not put to the tribunal in evidence.

14. The one reference to being too tired in the evidence was referred to by us; the hand note of Ms Richards at page 156, which leaves open the question whether the being, "too tired" is due to the length of the shift, rather than to finish time of itself.

15. Absent such evidence, we cannot conclude that Miss Barker was unable to work beyond 3pm because of her disability. She was threatened with investigation and disciplinary action because she would not adopt the new working pattern and that was because, she said, she could not work beyond 3pm. One cannot say therefore, that the threat of investigation and disciplinary action was because of something arising in consequence of her disability.

Failure to make reasonable adjustments

16. As I have mentioned above, Miss Barker again pins her case on a requirement to work beyond 3pm which, she says, should be adjusted so that she does not have to work beyond that time. As I explained in our Judgment, the same problem arises; there was no evidence before us that a requirement to work beyond 3pm placed Miss Barker at a disadvantage

Conclusions

17. As we made clear in our Judgment, Miss Barker has a serious medical condition. We are also critical of the Respondent and she has succeeded in her unfair dismissal claim. However, sympathy and admiration for the claimant and indeed, her mother, does not mean that it must follow that we should find for her. We have to make our findings of fact objectively, based on the evidence before us and then apply the law to the facts, as we find them.

18. I am afraid that the application for a reconsideration is an attempt to have a second bite at the cherry, an attempt to re-argue Miss Barkers case. Nothing arises that makes it in the interests of justice to vary or revoke our

decision, there is no reasonable prospect of such an outcome and the application for a reconsideration must therefore fail.

Dated: 31/10/2019

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Employment Judge M Warren

JUDGMENT SENT TO THE PARTIES ON

.....05/11/2019.....

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FOR THE TRIBUNAL OFFICE