



EMPLOYMENT TRIBUNALS

Claimant: Miss S. Tyrwhitt-Williams

Respondent: Marina Developments Limited

Heard at: SOUTHAMPTON

On: Monday, the 10th February 2020

Before: Employment Judge D. Harris (sitting alone)

Representation

Claimant: In person

Respondent: Mr Marc Long (Solicitor)

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The Judgment of the Tribunal is that the Claimant's application for reconsideration of the Tribunal's Judgment on the Preliminary Issues tried on the 10th February 2020 is refused because there is no reasonable prospect of the original decision being varied or revoked.

REASONS

1. By an application received by the Tribunal on the 13th March 2020, the Claimant has applied for a reconsideration of the Tribunal's judgment given in writing following the hearing of a preliminary issue concerning disability on the 10th February 2020.

2. The grounds of the application for a reconsideration of the judgment are set out in a statement by the Claimant dated the 13th March 2020. The statement was filed with the Tribunal on the 13th March 2020.

3. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). Under Rule 71 an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The Claimant's application was received within the relevant time limit.

4. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.

5. The Claimant applies for a reconsideration of the judgment on the preliminary issue concern disability on the ground that not all of the necessary and relevant evidence was before the Tribunal at the hearing on the 10th February 2020. The evidence that the Claimant now seeks to rely upon, which was not before the Tribunal at the hearing on the 10th February 2020, consists of:
 - 5.1 a witness statement by Roely Janson dated the 10th December 2018;
 - 5.2 3 emails passing between the Claimant and Fenella Watts between the 7th July 2018 and the 18th July 2018;
 - 5.3 a witness statement by Fenella Watts dated the 14th December 2018;
 - 5.4 8 pages of counselling notes over a period from the 7th January 2019 to the 21st May 2019.

6. When considering the law that applies to the admission of fresh evidence, whether on an appeal or a reconsideration, the starting point is the Court of Appeal's decision in the case of *Ladd v. Marshall* [1954] 1 W.L.R. 1489. It was held in that case that an appeal court could admit fresh evidence but only on the following "special grounds":
 - 6.1 The fresh evidence could not have been obtained with reasonable diligence for use at the original hearing;
 - 6.2 The fresh evidence must be such that, if admitted, it would probably have an important influence on the result at the original hearing though it need not be decisive; and
 - 6.3 The evidence must be apparently credible though it need not be incontrovertible.

7. These "special grounds" by which fresh evidence may be admitted at an appeal have become known as the *Ladd v. Marshall* test and they have been repeatedly approved by the Court of Appeal (see *Hertfordshire Investments Ltd v. Bubb* [2000] 1 W.L.R. 2318, *Hamilton v. Al-Fayed (Joined Party)* [2001] E.M.L.R. 15 and *Terluk v. Berezovsky* [2011] EWCA Civ 1534).

8. In the cases of *Outasight VB Limited v. Brown* (UKEAT/0253/14, 21st November 2014, unreported) and *Dundee City Council v. Malcolm* (UKEAT/0019/15, 9th February 2016, unreported), the Employment Appeal Tribunal held that the *Ladd v. Marshall* test (in conjunction with the overriding objective set out in Rule 2 of the Rules) continues to apply where it is sought to persuade a Tribunal, in the interests of justice, to reconsider its judgment on the basis of new evidence.

9. Having read and considered the fresh evidence that the Claimant now seeks to rely upon, the Tribunal reached the following conclusions (in the context of the *Ladd v. Marshall* test and the overriding objective):
 - 9.1 The evidence that the Claimant now seeks to rely upon was available to the Claimant prior to the hearing on the 10th February 2020. The Claimant concedes, in her application for a reconsideration, that that was the case but argues that there had been objection by the Respondent to the documents going into the agreed hearing bundle and that she was unsure if she would be allowed to rely upon them if she produced them at the hearing on the 10th February 2020. The difficulty that the Claimant faces, in relation to that submission, is that she did produce additional documents on the morning of the hearing on the 10th February 2020, which were admitted into evidence without any objection by the

Respondent. In the judgment of the Tribunal, it was open for the Claimant to produce the 14 pages of documents, that she now seeks to rely upon, on the morning of the 10th February 2020 and make representations to the effect that the documents should be admitted into evidence along with the other documents that she produced on the morning of the preliminary hearing (which were listed in paragraph 11 of the written Judgment dated the 24th February 2020). It was not raised by the Claimant on the morning of the preliminary hearing that there were further documents that she wished to rely upon. In the circumstances, the Tribunal is not persuaded that it has been demonstrated by the Claimant that she could not reasonably have produced these additional documents on the morning of the preliminary hearing and have argued at that stage that they should be admitted into evidence. The documents were available to the Claimant at the time of the preliminary hearing and it was open for her at that stage to argue that they were relevant and should be admitted into evidence. The fact that she did not do so cannot reasonably be attributable to the Respondent's objection to the documents going into the agreed hearing bundle.

- 9.2 Having read and considered the documents that the Claimant now seeks to rely upon, together with the explanatory background given by the Claimant in her witness statement dated the 13th March 2020, the Tribunal is satisfied that the content of the documents would not have had an important influence on the outcome of the preliminary hearing. The Tribunal is satisfied that its findings on disability would not have differed if the additional documents that the Claimant now seeks to rely upon had been before the Tribunal on the 10th February 2020. In the judgment of the Tribunal, the documents do not contain information that would have caused the Tribunal to reach a different decision on the issues set out in paragraph 26 of the written Judgment dated the 24th February 2020. The Tribunal's critical finding on the issue of disability was its finding that the mental impairment that was present on the 5th February 2018 did not have, nor was it likely to have, a long-term adverse effect (that is to say, lasting 12 months or likely to last 12 months) on the Claimant's ability to carry out normal day-to-day activities. The fresh evidence that the Claimant now seeks to rely upon would not have had an important influence on that critical finding.
10. For the reasons set out above, it is the Tribunal's decision, applying the *Marshall v. Ladd* test and having regard to the overriding objective, that the additional documents that the Claimant now seeks to rely upon should not be received into evidence.

11. Having decided that the fresh evidence that the Claimant now seeks to rely upon should not be admitted into evidence, the Tribunal is satisfied that there is no reasonable prospect of its original decision on the disability issue being varied or revoked and so the Claimant's application for reconsideration of that decision is refused.

Employment Judge David Harris

Dated: 14 June 2020

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