Case No: 2416884/18

EMPLOYMENT TRIBUNALS

Claimant: **Mr P Allen**

Respondents: **(1) Paradigm Precision Burnley Limited**
(2) Carl Wheeler

Before: **Employment Judge Leach**
Mr I Frame
Mr C S Williams

In Chambers on 22 July 2020.

JUDGMENT ON RECONSIDERATION

The outcome of the reconsideration of the judgment on the initiative of the Tribunal is to confirm the judgment dated 19 March 2020 and 11 May 2020.

REASONS

Introduction

1. The Tribunal in this case proposed on its own initiative to reconsider a part of its decision. In accordance with rule 73 of the Employment Tribunal Rules of Procedure the parties were informed of this by letter of 14 May 2020 and the reasons for it.

2. Set out below are the Tribunal's reasons for reconsideration as explained to the parties by letter of 14 May 2020:-

> "*In the course of preparing the enclosed written reasons it became apparent that no decision was made in relation to the application of s48(2) Employment Rights Act 1996 ("ERA") to the allegations under s47C ERA and the Paternity and Adoption Leave Regulations 2002. Section*

48(2) provides that on a complaint under these provisions … "it is for the employer to show the ground on which any act or deliberate failure to act was done."

Both Counsel addressed us on the issue of burden of proof under s136 Equality Act 2010 which was applied in relation to issue (j). Whilst there appear to be close similarities between s48(2) and s136 Equality Act 2010, they are not the same and it is in the interests of justice to reach and record a decision on the application of s48(2) ERA where relevant.

This affects issue (j) only. This will not impact on the findings made on other complaints and issues. No new findings of fact are required.

I propose therefore (applying rule 73 of the Employment Tribunal Rules of Procedure 2013) that the Tribunal will reconsider our findings on issue j, ensuring when doing so that we consider and apply section 48(2) ERA. We invite both parties to make written submissions on this point for the consideration of the Tribunal. Those submissions may include a request for a hearing on this point although we may decide (applying Rule 72(2)) that a hearing is not necessary in the interests of justice.

3. To be clear therefore, this reconsideration only impacted on item j in the list of issues in this case. Item j is:- "*The rejection of the claimant as Operations Manager and then as a candidate for managing director at the general management meeting of 5 June 2018."*

4. The claimant claimed the reason for his rejection was because of:-

    a. His sexual orientation and/or
    b. Because he sought to take adoption leave and/or the respondents believed he was likely to take adoption leave.

5. The representatives of both parties confirmed that the reconsideration should be dealt with in writing and provided written submissions for our consideration, which we summarise below. We are grateful to the representatives of both parties for these.

Claimant's submissions dated 19 May 2020.

6. The claimant's solicitors referred us to the case of **Kuzel v. Roche Products 2008 ICR 799** ("Kuzel v. Roche**")** The judgment in this case made clear that, where a Tribunal cannot identify the grounds on which a respondent subjected a claimant to a detriment, it does not automatically follow that the claimant's claim – by which he or she asserts an unlawful reason for the detriment – is successful.

7. Having referred to this case, the claimant's solicitors noted that we (the Tribunal) had already disbelieved the respondents' version of events on this matter and, further, that we had made positive findings of fact as to the reason for the claimant's rejection. The claimant's solicitors specifically referred us to paragraph 157 of our judgment where we state as follows:-

> *"we are satisfied on a balance of probabilities that the effective cause for the rejection of the claimant as Operations Director and then as a candidate for General manager was the fact that he had informed the respondents of his intention to take adoption leave."*

Respondent's submissions dated 11 June 2020.

8. The submissions from the respondents' solicitors noted that we had already made findings of fact and that we were simply required to apply those facts to the claim made under s47(C) ERA. We agree.

9. The submissions made by the respondent however, then put forward a different version of events to the findings of fact made by us.

10. However, the respondents' submissions conclude as follows:- *"We further submit that as this allegation has already been considered and a decision made, albeit in respect of a claim under the Equality Act 2010, the outcome of the Tribunal's decision in relation to s48(2) ERA1996, would not have any impact on the judgment already provided by the Tribunal."*

The Law - reconsiderations

11. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70).

12. The importance of finality was confirmed by the Court of Appeal in **Ministry of Justice v Burton and anor [2016] EWCA Civ 714** where Elias LJ said that:

> **"the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Ironsides Ray and Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."**

13. In common with all powers under the 2013 Rules, preliminary

consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay. Achieving finality in litigation is part of a fair and just adjudication.

The Law – s47(C) and s48(2) ERA.

14. We have noted the requirements of s48(2) – that on a complaint that an employee has been subjected to a detriment contrary to s47(C) ERA, it is for the employer to show the ground on which any act or deliberate failure to act, was done.

15. We have been referred to Kuzel v. Roche, a case which makes clear that the application of s48 is not directly analogous to the statutory reversal of burden of proof at s136 Equality Act 2010. In short, where a Tribunal rejects the employers purported reason for the act or omission in question it may (but is not obliged to) find for the employee. The following extract from the judgment of Simler J. in Kuzel v. Roche (at paragraph 53) is relevant:

"The identification of the reason will depend on the findings of fact and inferences drawn from those facts. Depending on those findings it remains open to it to conclude that the real reason was not one advanced by either side."

Conclusion

16. As noted in the letter to the parties dated 14 May 2020, it became apparent that the burden of proof provisions at s136 Equality Act 2010 had been applied, not just to the claims made under the Equality Act 2010 but also to the detriment claims, whereas the test that needs to be applied to the detriment claims is that set out at s48(2) Employment Rights Act 1996.

17. It is in the interests of justice to ensure that the correct legal tests are applied to claims made in Employment Tribunals.

18. We do not believe (having regard to the final sentence of their submissions) that the respondents' solicitors have invited us to reconsider and make different findings of fact. However, in the event that (by putting to us a different version of events) they are inviting us to do that, then we will not do so. Clear findings of fact have been made by us, the Tribunal. Finality in litigation is important and the judgment sets out our carefully considered findings of fact which we will not reopen. Justice requires that we apply the facts as we have found them to the correct legal test at s48(2) ERA.

19. It is important that we have due regard to s48(2) ERA.

20. We have now done this and our conclusions are as follows:-

    a. The claimant's solicitors are right to refer to paragraph 157 of our judgment. It is that part of the decision that we have reconsidered, having regard to our findings of fact and the application of s48(2) ERA.
    b. Our findings of fact make clear that we do not accept the employer's explanation as to why the claimant was rejected as operations director and a candidate for the general manager position.
    c. Having rejected the employer's explanation, it does not automatically follow that we find in favour of the claimant, that the reason the claimant was rejected was one which was contrary to s47(C) ERA.
    d. However and consistent with the extract of the judgment of Simler J in the Kuzel v. Roche case (see paragraph 15 above) we have considered and identified the reason/explanation for the rejection of the claimant as Operations Director and candidate for General Manager, having had regard to our findings of fact and the inferences drawn from these; see particularly paragraph 154 of our judgment.
    e. In the circumstances, having now had due regard to the terms of s48(2) ERA, we confirm our finding noted at paragraph 157 of the judgment, that the cause of the claimant's rejection as Operations Director and as a candidate for General Manager was the fact that he had informed the respondents of his intention to take adoption leave.

Employment Judge Leach

DATE 22 July 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

31 July 2020

FOR THE TRIBUNAL OFFICE