Case Number: 1600075/2019

EMPLOYMENT TRIBUNALS

Claimant: **Ms Zoe Davies**

Respondent: **Argos Limited**

RECONSIDERATION DECISION

The claimant's application dated 24 February 2020 for reconsideration of my Judgment of 13 November 2019 and written reasons of 10 February 2020 is refused.

REASONS

The reconsideration applications

1. I have undertaken a preliminary consideration of the claimant's application for reconsideration of remedy judgment and written reasons.

2. On 24 February 2020 the claimant emailed the Tribunal saying:

(a) That the remedy judgment should have been determined on all the relevant facts that would have been available had the case been considered at a full merits hearing rather than a remedy hearing (following liability judgment being entered for the claimant).

(b) That in not doing so detrimentally affected the claimant's presentation of her case as disclosure of relevant documents did not take place/ was not ordered by the Tribunal. In particular, since the remedy hearing the claimant has obtained a document via a subject access request that says:

> *"Complete failure to deal with this situation starting in Oct 2016*
>
> - *Numerous errors and inconsistencies in the process and failures to implement agreed actions*
> - *Lack of ownership from Regional Management to engage in rectifying the situation informally*

- *I am struggling to see after reading the case file and talking to Zoe that the grievance was not upheld and a recommendation of disciplinary action against the Store Manager*
- *I genuinely feel we have let Zoe down. She is a young woman who started her career at 16 and over 10 years obtained a management role.*
- *She has been forced to demote herself over the last 18 months to only working 1 day a week.*
- *Zoe has suffered physically, mentally, emotionally and financially due to the behaviour of her manager and the failure of this business to act."*

(c) I am not told the author or the date of the document. The claimant says that this evidence confirms "*physical, mental, emotional and financial suffering due to the behaviour of her manager and the failure of the business to act."* In essence she says that the respondent was seeking to hide its content during the proceedings.

(d) The claimant asks that the reconsideration be undertaken by a different Employment Judge to "*review the comprehensive material already provided to the Tribunal and additional documentation attached. Bullying harassment and victimisation is a serious matter and is unacceptable behaviour which is the reason that this matter was brought before the employment tribunal."*

(e) Also attached to the reconsideration application is a letter from the respondent's solicitors dated 1 August 2019, a list of documents that the claimant requested from the respondent prior to liability judgment being entered and an email exchange between about that. In particular, the claimant sought to make a subject access request and the respondent's solicitors gave the claimant the option of avoiding the time taken in a subject access request and providing the documents requested on condition that the claimant agree not to make a subject access request and that the documents would only be used for the purposes of the Tribunal proceedings. There is also a further email dated 16 January 2020 in which the respondent's solicitor states that "*I can confirm that I had sight of all relevant documents from the outset of dealing with the case, The documents had nothing to do with the decision to concede liability, this was taken on a purely commercial basis, as explained in our correspondence at the time."*

<u>The law</u>

5. An application for reconsideration is an exception to the general principle that (subject to an 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).

6. Under Rule 72(1) I may refuse an application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked.

7. Rule 72(3) says:

"Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision. and any reconsideration under paragraph (2) shall be made by the Judge who made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application…"

8. 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:

> *"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."*

9. Similarly in Liddington v 2Gether NHS Foundation Trust EAT/0002/16 the EAT chaired by Simler P said that:

> *"a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or reargue matters in a different way or by adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered."*

Decision

10. I can see no reason why it is not practicable for me to deal with the reconsideration application and the claimant's application in that regard is refused.

11. Turning to the substance of the claimant's reconsideration application I should point out that any application for reconsideration of the decision to enter a liability judgment in favour of the claimant would have had to have been made with 14 days of the date on which the written record of that original decision was sent to the parties (4 October 2019) and not the written record/ written reasons for the remedy judgment.

12. In relation to the remedy judgment, I set out at some length in my written reasons the law that I understood I had to apply when assessing the basic award and the compensatory award and the wrongful dismissal (breach of contract) claim.

13. The claimant's application for reconsideration does not set out how the documents that she now seeks to rely upon (some but clearly not all of which she would have been able to put before me at the remedy hearing) would make a difference, bearing in mind the legal framework set out, to how I could go about calculating the financial compensation in her case. Or alternatively does not set out how she considers I have misapplied the law.

14. The consequence of the liability judgment was that the claimant's constructive unfair dismissal claim stood proved against the respondent as she had set out within her claim form. To succeed in a constructive unfair dismissal claim the claimant's resignation has to be in response, in part at least, to the breach of contract relied upon. To resign in response to a breach the claimant has to have knowledge of the conduct said to be the breach. She cannot have resigned in response to a document that she did not know about at the time. Disclosure of these types of document may well still be relevant at the liability stage because they may show, for example, that conduct that is in dispute, or the context of that conduct, happened. However, as I have said, once the liability judgment was entered the claimant's complaints about what she said led to her decision to resign stood as established and the liability disclosure of documents was no longer needed. It is difficult to see how the new material the claimant has (which I only have an extract of) would have made a difference to the remedy decision for the reasons set out in my written reasons.

15. On my understanding of the law and as applied by me I had to assess the financial losses that flowed from the point of dismissal and, as I have already stated, the claimant has not set out how the new documents (or at least those she did not have access to at the time of the remedy hearing)

would have made a difference to that assessment and analysis. I also explained in my written reasons how the law does not allow me to make awards for matters such as physical, mental or emotional suffering or financial losses suffered before the claimant resigned. As I tried to set out in my written reasons, the law relating to constructive unfair dismissal (as I understood I had to apply it) may not offer a complete remedy to the claimant's situation. But I am bound to apply the law as I understand it to be.

15. I am satisfied on the basis of what is before me that there is no reasonable prospect of the Tribunal's original decision being varied or revoked. The application for reconsideration is therefore refused.

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Employment Judge Harfield
Dated: 31 July 2020

JUDGMENT SENT TO THE PARTIES ON

…………1 August 2020…………….

……… ………….
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS