Case Number: 1602030/2019

EMPLOYMENT TRIBUNALS

Claimant: **Ms H Lancey**

Respondent: **Seaview Hotel Swansea Limited**

RECONSIDERATION DECISION

The claimant's application dated 17 July 2020 for reconsideration of my Reserved Judgment on liability issues dated 23 June 2020 is refused.

REASONS

The reconsideration applications

1. I have undertaken a preliminary consideration of the claimant's application for reconsideration of the liability judgment.

The law

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. 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."

8. In Lindsay, Mummery J said:

"Failings of a party's representatives, professional or otherwise, will not generally constitute a ground for review. That is a dangerous path to follow. It involves the risk of encouraging a disappointed applicant to seek to reargue his case by blaming his representative for the failure of his claim. That may involve the tribunal in inappropriate investigations into the competence of the representative who is not present at or represented at the review. If there is a justified complaint against the representative, that may be the subject of other proceedings and procedure. It is this our view that the industrial tribunal erred in law in granting a review under rule 10(1)e of the Rules of Procedure of 1985."

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."

10. I turn now to the grounds for the reconsideration application.

"KB was incorrectly advised not to attend a hearing and the representative has mislead the Tribunal"

11. The respondent asserts that KB, a director of the respondent and the person whom I found dismissed the claimant did not attend the Tribunal as he had

been incorrectly advised "on numerous occasions" by the respondent's former solicitors that he did not need to attend. I am told that if he had been advised correctly he would have giving evidence to support the respondent's version of events (that the claimant resigned and was not dismissed by KB). I have been given an email from the former solicitors firm dated 28 January 2020 to Mrs Balian seemingly responding to an email query that I do not have in which it is said:

"Apologies if we weren't clear on the phone. If Kumar did not speak with the claimant after she left then I don't think we will need a statement – I will check with this Nia today and get back to you. As mentioned on the phone it is good practice for an employer to check that the resignation wasn't "in the heat of the moment" which is why I thought maybe Kumar had spoken with the claimant after she had left. Look forward to receiving your statement."

12. What that exchange does not cover is what information the respondent had given their solicitors about the circumstances of the alleged resignation and the resulting advice. It does not cover what happened after the exchange of witness statements when the claimant's position on who she said dismissed her became clear (which was central to the postponement application). There is also an email dated 28 April 2020 from the senior partner to the respondent which is after the hearing before me but before delivery of the reserved judgment in response to concerns raised by the respondent in an email of 8 April 2020 (which also refers to an email of 6 April which I have not seen). In the email of 8 April 2020 KB states that:

"*None of the information was provided without asking. The counsel genuinely was not prepared for the hearing. Leena gave Counsel the brief about the whole case before the hearing and even then he did not ask Leena why Kumar did not come. Why he only realised this when the Judge pointed it out during the hearing? Why Dominic and Nia never compelled Kumar to make sure to join the hearing? Why only now that the issue is raised is that Dominic starting pointing fingers on us to claim that Kumar did not wanted to join?"*

The senior partner responded to say:

"*I can see that there was an issue as to whether it would be prudent from an evidential view, for you to give evidence (even though you were away from the area) but it was decided that as other witnesses could deal with the issues within your witness statement, that it would not be necessary for you to give evidence and disrupt your business trip. I realise that comments were made by the Judge but this is not uncommon at the preliminary stages of the hearing."*

13. The reconsideration application states that when I asked the respondent's counsel why KB was not present at the hearing and whether the respondent understood the potential implications of not calling KB as a witness that counsel confirmed that the respondent did. It is said that this was not correct and that counsel, whether intentionally or not, mislead the Tribunal. It is said the respondent's understanding at that time, following their solicitor's advice, was that KB's attendance was not needed.

14. The respondent asserts that KB's evidence was crucial in assisting the tribunal to reach a fair and just decision on whether the claimant was dismissed or she resigned and without his evidence the Tribunal was left with the evidence of the claimant, with great prejudice to the respondent's position.

15. I am asked to reconsider my decision and allow KB to give evidence and it is asserted that thereafter there is a reasonable prospect that the original decision will be varied or revoked. A summary of the evidence I am told that KB would have been able to give is set out in the reconsideration application.

16. I am also referred to the cases of Council of the City of Newcastle upon Tyne v Marsden UKEAT/0303/09 and Radford v Teeside University UKEAT/0304/11.

17. Marsden concerned a decision at the preliminary hearing to strike out the claimant's disability discrimination claim on the basis that the claimant had not established he was a disabled person where there was limited medical evidence available and the claimant did not attend or provide a written witness statement (such a statement not having been ordered). Efforts to secure the claimant's attendance that day were unsuccessful and the Judge recorded that no application to postpone to allow the claimant to give evidence was made. An application for reconsideration was made on the basis that the claimant had not attended because counsel had told him in conference that he did not need to attend. The Judge had recorded that counsel had said to the contrary at the preliminary hearing.

18. At the reconsideration hearing the Judge revoked his original decision and directed a further hearing should take place where the claimant could give evidence. The Judge said that the claimant's counsel had failed to tell the Judge that he had advised the claimant not to attend, that he should have told the Judge and made an application for a postponement. The Judge recorded that probably would have allowed the postponement subject to an order for costs. The Judge noted that having had sight of the claimant's

witness statement it was highly likely the claimant would have succeeded in establishing disability, that the non attendance was not the claimant's fault and that if the review was refused it was likely the claimant's claim in its entirety would fail. The Judge was not satisfied that the claimant would be likely to be adequately compensated by a claim against the counsel's insurers and that any injustice to the respondent could be adequately cured by an order for costs. Overall he said that the respondent otherwise received an unmerited windfall as they would benefit from an error by the claimant's counsel which led to them succeeding in a submission on disability which would probably had failed if the error had not occurred.

19. At the time that Marsden was decided the rules relating to reconsideration applications where in a different form but one of the grounds was that the "interests of justice require such a review." On appeal to the Employment Appeal Tribunal ("EAT") Mr Justice Underhill stated that the principles that underlie decision such as Flint and Lindsay (referred to above) remain valid. He endorsed in particular the weight attached in many previous cases to the importance of finality in litigation and endorsed Mummery J's note of caution in Lindsay about entertaining a review on the basis of alleged errors on the part of a representative. Mr Justice Underhill, however, accepted that the fact that the claimant's counsel had misled the Tribunal and in doing so had deprived him of an adjournment which would otherwise have been granted was an exceptional circumstance. Underhill J noted the concern identified in Lindsay about a Tribunal having to conduct an "inappropriate investigation" into counsel's advice but accepted that on the facts of the specific case it was confined to a narrow factual question of whether counsel had advised the claimant he need not attend. Thereafter it was within the Judge's own knowledge that he had been misled.

20. In Radford the claimant was abroad and her representative, she said, promised he would get the date moved. The postponement application was refused and the representative came off the record whilst the claimant was abroad and unaware of the situation. No one attended for the claimant and there was no fresh postponement application. The claimant's case was dismissed on the basis she should not have gone abroad without knowing that the postponement application had been granted. The claimant unsuccessfully sought a review of the dismissal judgment arguing that the circumstances were exceptional as her representative had misled the tribunal. The judge had commented it appeared the representative had deliberately failed to provide the Tribunal with details of the claimant's holiday booking until she had already left the country. The appeal was allowed, applying Marsden, albeit the review application itself was remitted to be decided afresh.

21. I do not consider the respondent has a reasonable prospect of my original decision being varied or revoked in the interests of justice based on the above arguments. What the reconsideration application fails to mention is that after my exchange with the respondent's counsel about the absence of KB he immediately asked for a break to take some instructions. That was perfectly proper and readily granted by me. Counsel then returned and made an application to postpone the hearing to a future date so that KB could give evidence. The application was considered by me and ultimately rejected with full oral reasons given at the time (in respect of which there was no application by the respondent for full written reasons).

22. In reality this reconsideration application is therefore an application for me to reconsider my oral decision at the full hearing to refuse the postponement application. During that postponement application the relevant factors were put before me; I was told there had been an oversight or misunderstanding as to what evidence the other witnesses for the respondent could give. It is not the case, as in Marsden that the Tribunal was wholesale misled as to what legal advice had been given. I took that into account together with the prejudice to the respondent and the other relevant factors before providing my reasoned decision. What the respondent is now seeking to do is to revisit that decision to refuse the postponement on essentially the same ground traversed before at the hearing. That is contrary to the principle of finality in litigation. This is not a situation, as in Marsden, of a legal representative misleading the Tribunal and depriving the party of an adjournment. The postponement application was made, the grounds put forward and considered and then was refused.

23. Further, the situation is likely to firmly fall (as it did when the postponement application was refused) within the Lindsay line of authorities that a failure of a party's representative will not generally justify granting a review. It would involve this Tribunal in inappropriate investigations into what legal advice was or was not being given to the respondents and why, far beyond the email extracts I have been sent. If there is a justified complaint against the respondent's former solicitors then that is their remedy to pursue elsewhere.

24. In relation to the respondent's counsel, I also do not consider that the Tribunal was misled. Counsel was there representing the respondent. When asked if the respondent (which includes him as representative) understood the implications of KB not being there he said they did (ie answering as the representative). Counsel clearly did understand that as he asked for an adjournment to take instructions and then made the postponement application, citing amongst other things the likely prejudice.

Finding of fact that the claimant was not aware that her 20 days of holiday was in addition to the compulsory holiday to be taken over the hotel's closure over Christmas

Finding of fact that the respondent's statement that claimant is entitled to 20 days of holiday means 20 days of holiday for the whole year rather than in addition to the 8 days of holiday to be taken during the Christmas shutdown.

Finding of fact that when the respondent stated that the holiday year ran from January to December and that the claimant must take 20 days of holiday during that time, that this meant it automatically includes Christmas

25. Much of what the respondent says here is either new information (including their attached document) that would have previously been available to them to put before the Tribunal whether in witness statement or documentary form or is the same evidence and arguments with a renewed emphasis. It is submitted with the power of hindsight having received the Judgment. I do not consider it to be likely to be in the interests of justice to admit so now, as it would offend against the principle of finality in litigation.

26. Furthermore, I would observe that my findings of fact as to the claimant's understanding were based on a variety of evidence including (but not limited to) her testimony, and the holiday schedule sheets themselves as well as what the respondent had to say. To the extent the respondent considers I balanced the evidence before me incorrectly/perversely it is again an attempt to relitigate a decided point and not a matter suitable for a reconsideration application.

27. In summary, 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.

____

Employment Judge Harfield
Dated: 18 September 2020

JUDGMENT SENT TO THE PARTIES ON 22 September 2020

....

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS