# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Z Saleh

**Respondent:** (1) Viking Consultancy UK Ltd
(2) Mr D Hobson

**Heard at:** Manchester (In Chambers) **On:** 10 September 2020

**Before:** Employment Judge Sharkett
Mr J Ostrowski

## JUDGMENT ON RECONSIDERATION

**Rule 70-73 Employment Tribunal Rules of Procedure 2013**

1 Paragraphs 3 of the original Judgment is varied so that all the claimant's claims of harassment under s26 Equality Act 2010 are well founded and succeed

2 Paragraph 4 of the original Judgment is varied by reason of s212 (1) Equality Act 2010 so that the claimant's claim of direct discrimination under s13 Equality Act 2010 are not well founded and are dismissed.

3 A remedy hearing will now be listed.

## REASONS

4 This is a Hearing for reconsideration of the Judgment of the Tribunal sent to the parties on 3 September 2019 (the Judgment).

**Introduction**

5 By way of brief background of the progress of this application, this claim had originally been listed for a remedy hearing on 12 September 2019. An application for a postponement of the remedy hearing was granted on 11 September 2019, pending settlement between the parties through ACAS. A request for reconsideration of the Judgment was then submitted by the

claimant on 16th September, followed by notification from ACAS to the Tribunal on 4 October 2019 that settlement had been reached by way of a COT3. It was only on 11 February 2020 when the claimant chased the application for reconsideration that it came to light that not all of the claimant's claims had been settled under the COT3 agreement and specific elements of the claim had been excluded The matter was then referred to the Judge who originally heard the claim at the beginning of March 2020 but due to the Covid19 pandemic it was not possible to progress the matter further and in the absence of the availability of the Judge who originally heard the case Regional Employment Judge Parkin determined that the case should be listed for a reconsideration hearing. Because of the impact of the Covid 19 pandemic and member availability it has not been possible to list this hearing until now.

6 The substantive hearing had been heard by a full panel but since that time one of the panel members has retired. The parties agreed that the reconsideration hearing could be held with the Judge and remaining member of the panel in chambers, and written submissions were received on behalf of both Respondents.

**The Hearing today.**

7 The claimant's application is made under Rule 71 of the Employment Tribunals Rules of Procedure 2013 (the ET Rules). The basis of the application relates mainly to the claimant's claims of discrimination that were found to be not well founded by the Tribunal. There is an additional reference to the Tribunal having made no Judgment in relation to the outstanding monies owed to the claimant. This is incorrect and the parties are referred to paragraph 6 of the original Judgment. The Tribunal note that the part of the claim referred to at paragraph 6 of the original Judgment has now been settled within the terms of the COT3 dated 8 October 2019.

8 In respect of the remainder of the application, it is the claimant's submission that the Tribunal was wrong to have viewed a single allegation of discrimination in isolation. The claimant submits that having found the verbal attack on the claimant and use of the word 'paki' amounted to unlawful discrimination under both s26 and s13 Equality Act 2010 (the Act), it is an error of law for the Tribunal to have separated out what was a continuing incident. The claimant further submits that to separate out the acts complained of is perverse and the incident should be considered as a whole. The claimant further submits that there is no evidence on which the Tribunal could reach a finding that the second respondent would have verbally and physically assaulted a hypothetical comparator.

9 It is the respondents' submission that there is an expectation of finality in proceedings and that the claimant should have pressed the Tribunal earlier in relation to the listing of the reconsideration hearing. They submit that the application does not satisfy the circumstances in which an application in the interests of justice is met and that the claimant should not be simply allowed a second bite of the cherry. The findings of the Tribunal, they submit are neither perverse or lacking in common sense and the claimant's submission that the

incidents referred to should be taken as a continuing act is a new argument that was not put forward at the hearing. They submit it amounts to nothing more than a bare assertion on the part of the claimant, which is not supported by the evidence that there were several interactions between the claimant and the second respondent. The events of the 31st August – 1st September were, they say, a one-off incident. The respondent further submits that the Tribunal did correctly apply itself in finding that the claimant's race was not the effective cause of the acts complained of and that the application for reconsideration should be dismissed.

10 Under Rule 70 of the Rules, an Employment Tribunal has a general power to reconsider any judgment where it is necessary in the interests of justice to do so. For the reasons set out above it was not possible for the Judge hearing the case to carry out an initial consideration of the application under Rule 72(1) therefore Regional Employment Judge Parkin appointed himself to do so under Rule 72(3) and determined that this matter should be listed for a reconsideration hearing.

11 On reconsideration of the Judgment, which the Tribunal has read in full, it has had regard to the submissions of the parties and the authorities it was referred to of, Quershi v Victoria University of Manchester 2001 ICR and Anya v University of Oxford [2001] EWCA Civ 405. It has also reminded itself of the relevant law in respect of claims under s13 and s26 of the Equality Act 2010, and the application of s212 in respect of claims brought under both s13 and s26, in that claims which amount to harassment for the purposes of the Act do not amount to acts of detriment. The Tribunal has also had regard to the burden of proof applicable in claims under this Act.

12 In respect of the claimant's claim that he was verbally assaulted and the reference to paragraph 117 of the Judgment; the claimant brought one claim relating to a verbal assault which the Tribunal found amounted to both direct discrimination and harassment under the Act. Whilst it specifically made reference to the finding of the overtly racist term used it did not intend to separate out all the words used to make findings on each word, it merely meant to highlight how it had reached its decision. On reconsideration the claim is upheld in respect of that claim of harassment under s26 of the Act but fails under s13 of the Act by virtue of s212(1). No further reconsideration of this part of the claimant's claim is necessary

13 However, in respect of the remaining claims of discrimination which were unsuccessful the Tribunal accepts that a proper application of the burden of proof under s136 Equality Act 2010 must lead to the conclusion that the burden shifted to the respondents to show that the treatment did not contravene s26 of the Act which they failed to do. S136 so far as is relevant provides:

"(2) if there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provisions concerned, the Court must hold that the contravention occurred

(3) But subsection 2 does not apply if A shows that A did not contravene the provision.

14 The Tribunal find that it has reached its conclusion in the Judgment on the basis that the claimant had not established facts from which the Tribunal could reasonably conclude that there had been a contravention of the Equality Act and therefore in the absence of any evidence to show proof of discrimination the respondents were not required to explain the treatment. The Tribunal made assumptions for the reasons for the treatment based on what it has seen of the manner of the second respondent before the Tribunal.

15 On reconsideration the Tribunal find that it had overlooked its findings of unlawful discrimination in respect of the verbal assault. Whilst separate allegations arise out of the events that took place on the night of 31st August to 1st September, there can be no doubt that they took place within a short window of time, in the same overall premises and were executed by the same protagonist.

16 The Tribunal accepts the claimant's submission that, the claimant was able to show facts from which the Tribunal could infer the treatment complained of was due to his race because the Tribunal should have had regard to its finding that that the claimant had been subjected to a verbal assault by the second respondent amounting to harassment under s26 of the Act. On reconsideration given the application of s212(1) it could not also amount to direct discrimination under s13 of the Act as well

17 Having been able to establish these facts the burden then shifted to the respondents to show that the reason for the remaining treatment was for a reason other than the claimant's race. The respondents offered no reason for the treatment as they denied that the alleged events took place. Consequently they failed to discharge the burden placed on them to show that the treatment found proved was in no way connected to the claimant's race and the claimant's claims under s26 of the Act should have succeeded. By reason of s212(1) of the Act the s13 claims could not also succeed.

18 For these reasons the Tribunal find that it is in the interests of justice to vary paragraphs 3 and 4 of the Judgment and replace them with a decision that all the claimant's claims s26 Equality Act 2010 are well founded and succeed and the claims under s13 are dismissed by reason of s212(1) of the Act.

Employment Judge Sharkett

Date: 22 September 2020

JUDGMENT SENT TO THE PARTIES ON

29 September 2020

FOR THE TRIBUNAL OFFICE

**Note**
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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