Case No: 2401731/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mrs R Hofmanova**

Respondent: **TS (UK) Limited**

JUDGMENT

The claimant's application dated 4 May 2020 for reconsideration of the judgment sent to the parties on 3 April 2020 is refused.

REASONS

Background

1. I have undertaken preliminary consideration of the claimant's application for reconsideration of the judgment dismissing her claims. That application is contained in a 7 page document attached to an email dated 4 May 2020. I have also considered comments from the respondent dated 11 August 2020.

The Law

2. 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).

3. Rule 72(1) of the 2013 Rules of Procedure empowers me to refuse the application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked.

4. The importance of finality was confirmed by the Court of Appeal in **Ministry of Justice v Burton and anor [2016] EWCA Civ 714** in July 2016 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."

5. Similarly, in **Liddington v 2Gether NHS Foundation Trust EAT/0002/16** the EAT chaired by Simler P said in paragraph 34 that:

"a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to 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."

6. 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 application

7. I have gone through the application in detail and considered the points made by the claimant and the respondent's response.

8. At **paragraphs 1 to 4** of her claimant's application she argues that the hearing was "prematurely closed" or in abbreviated. That is not correct. The hearing was a full hearing and both parties were given as much time as required to present their case, ask relevant questions of the witnesses and make their final submissions.

9. Counsel for the Respondent made an application to postpone proceedings on day 2 in light of the public health crisis and the perceived health issues pertaining to the Claimant. The Tribunal heard both parties on this application. The claimant wished to progress matters and confirmed that she had no relevant health concerns and as such there was no reason for the proceedings to be delayed. The Tribunal retired to consider the respondent's application, the claimant's position and in particular the Government guidance at the time and agreed with the claimant that there was no reason to delay given what she had said.

10. The hearing proceeded without any issues and in the normal manner with each witness being asked relevant questions. The claimant was given a full opportunity to present her case and ask relevant questions.

11. Both the claimant and respondent were asked at the end of cross examination of each witness whether they had any further questions and the Tribunal asked relevant questions.

12. Following conclusion of the evidence and having heard both parties' submissions, the Tribunal retired to deliberate and subsequently a 26 page written judgment was issued. The parties had sufficient time to present their case. It is not correct to state that there was an "abbreviated trial" or that "not many questions were answered" or that the "judge kept drawing my attention to their redundancy". The case that was before the Tribunal was carefully presented by both parties and a reasoned judgment issued in light of the evidence that was presented and the applicable law.

13. While the claimant refers to "new evidence" at **paragraph 5** of her application, none is provided nor is it described and no explanation is given why any such evidence was not raised at the time. The Tribunal emphasised to the parties the need to ensure all relevant evidence was put before the Tribunal in the course of the hearing.

14. At **paragraphs 6 to 8** of her application, the claimant seeks to raise new allegations of discrimination that were not before the Tribunal. Matters had been discussed and agreed at the case management preliminary hearing in relation to this case on 20 May 2019 where it was agreed by all parties that the issues relating to discrimination were limited to the toilet facilities. This is set out at paragraphs 6 and 9 of the judgment and recorded what the claimant stated at the hearing having considered matters.

15. The Tribunal began the final hearing by carefully checking what the issues to be determined were and the list of issues that had been agreed at the preliminary hearing was confirmed to be accurate. The claimant confirmed that the only live issue with regard to her claim for sex discrimination was the condition of the female toilets (paragraph 9 of the Judgment). It was therefore clear to both parties and the Tribunal what the issues to be determined by the Tribunal were and these were fully addressed by the Tribunal at the hearing. it is not appropriate to raise new issues now.

16. In **paragraphs 9, 11, 12, 13 and 14** the claimant refers to facts which were matters considered by the Tribunal. Relevant findings were made on the basis of the evidence before the Tribunal. The change to the claimant's role in August 2016 was considered and addressed. The Tribunal found that the claimant agreed to such change through her conduct when she carried out the cleaning function from August 2016 until her dismissal in November 2018. At no point during this period did the Claimant raise any complaints about the change to her role. Paragraph 21 of the judgment considers this issue.

17. At **paragraph 10** of her application, the claimant raises issues as to the role of other cleaners. That was not relevant to the issues to be determined. The issues before the Tribunal related to the claimant's dismissal and the issues around the toilets, all of which were carefully considered by the Tribunal.

18. In **paragraphs 15 to 17** of her application, the claimant refers to working conditions in the piovan area. The issues to be determined by the Tribunal

were addressed at the hearing and the preliminary hearing and are summarised in paragraph 6 of the Judgment. She seeks to raise new evidence which was not before the Tribunal with regard to what she had to do and what she says happened to her. These were matters that ought to have been put before the Tribunal and to the relevant witnesses for the respondent. No explanation has been given as to why the points are only being raised now.

19. In any event the Tribunal found that the Claimant was offered two alternative roles in other parts of the business, which would have removed any concern the claimant had about the work and/or conditions but found that she did not accept these alternative roles nor pursue these roles any further. See paragraphs 35 and 64 of the judgment. No issues have been raised in connection with that evidence, which would have resolved the concerns the claimant has raised in the facts she raises in her application (see paragraph 64 of the judgment).

20. At **paragraph 18** of the application the Claimant states that she "did not continue to work in the piovan area". This issue was considered by the Tribunal and it was accepted that the Claimant's refusal to carry out a significant part of her role was one of the reasons for her dismissal. At paragraph 65 of the judgment it was noted that the area of the business that the claimant was to clean was an important part of the business and formed an important part of her duties. If she did not do that work, there would have been little substantive cleaning left for her to do. She was offered alternative roles which would have resolved any concerns she had but she did not accept those roles and those findings are not in dispute.

21. At **paragraphs 19 to 22** of her application, the claimant states she was issued with a verbal warning on 5 June 2018. She was issued with a verbal warning on 5 July 2018 following her refusal to wear PPE. The claimant's refusal, and the subject of PPE generally, was considered by the Tribunal which accepted that refusing to wear PPE, a mandatory component of the Claimant's role, was one of the reasons for her dismissal. The Tribunal considered the evidence that was before it.

22. As set out at paragraphs 46 to 48 of the judgment the claimant was issued with a verbal warning and reminded of the importance of wearing PPE. The respondent took into account the issues the claimant had raised. It was essential that PPE was worn and no issue with regard to the PPE had been identified. All staff were treated in the same way.

23. The issues set out at **paragraphs 23 to 26** of her application deal with facts that were considered at the hearing. Paragraph 52 of the judgment deals with the outside working conditions and the steps the respondent took in this area.

24. At **paragraph 27** of the claimant's application, she refers to "evidence" that the respondent received from her doctor. The only evidence the respondent had at the time relating to the claimant's sickness (which was presented to the Tribunal) were the fit notes referred to at the hearing (see paragraphs 55, 60, 68 and 70). In any event, the issue of the claimant's refusal to follow the reasonable instruction of the respondent and perform

her duties was considered at the hearing (see paragraph 72 of the judgment).

25. At **paragraph 28** of her application she raises her refusal to work outside. At paragraph 61 of the judgment it is noted that the claimant did not want to work in areas of varying temperatures. That environment was no different to that where other staff worked. This was a matter the Tribunal considered.

26. **Paragraphs 29 to 32** of the claimant's application sets out information as to what equipment the claimant says she wore. The Tribunal considered the evidence that was before it at the time. Paragraph 52 sets out the steps the respondent had taken in that regard. No explanation is given by the claimant why the issues she raises in her application were not put to the respondent's witnesses or raised by her at the hearing. She was aware as to what information the respondent had provided to the Tribunal. No other staff member had raised any issues, which was not challenged by the claimant.

27. **Paragraphs 33 and 34** of the application deal with the new role offered to the claimant. Paragraph 67 of the judgement deals with one of the new roles. The Tribunal accepted the respondent's evidence that they believed the claimant had decided not to accept the role as she did not accept their offer and did not pursue the option further. That role would have resolved the issues the claimant had. The respondent did not act unreasonably in their approach.

28. At **paragraph 35** of her application the claimant asks why the respondent did not offer her the original role as production operator as an alternative to dismissal. This was not something that was put to the respondent's witnesses at the time nor suggested by the claimant. There was no suggestion that any such vacancy existed. In any event the claimant had been carrying out her current role for over 2 years. References to Scottish Law are irrelevant given the events took place in England. That was my error (for which I apologise) given the reference to Scots law which should have been English law. English law applied and was applied to this case. That does not make any material difference to the decision since the claimant worked in the role without any challenge for over 2 years. That was the role she was carrying out.

29. It is not correct to say (as the claimant contends) that under Scots (or indeed English) law an employer is obliged to conduct proceedings in a neutral environment or await the employee's return to work. The key question was whether the employer acted fairly and reasonably in all the circumstances, applying the statutory wording from section 98 of the Employment Rights Act 1996. This is what the Tribunal did from the facts it found from the evidence before it.

30. **Paragraph 37** (as there is no paragraph 36) raises the same issue set out at paragraph 28 above.

31. **Paragraph 38** of the claimant's application asks if employment can be terminated if an employee is ill. This was a matter dealt with during submissions and as set out at paragraph 30 above, the issue is whether or

not the employer acted fairly and reasonably in all the circumstances (taking account of equity and the substantial merits of the case). In this case the Tribunal concluded from the evidence it had heard that the employer did act fairly and reasonably in all the circumstances. The decision to dismiss in all the circumstances fell within the range of responses open to a reasonable employer on the facts of this case.

32. **Paragraphs 39 to 42** of the application refer to "victimisation". To the extent this refers to the legal claim of victimisation, the Tribunal deal with this at paragraphs 127 to 133 of the judgment, applying the law to the facts as found by the Tribunal from the evidence before it.

33. The claimant's application refers to "aggression". Paragraph 73 of the judgment sets out what the Tribunal concluded was in the mind of the respondent that caused the claimant's dismissal, the reason for her dismissal. While there had been evidence that the claimant had been aggressive on occasion (see paragraph 46 of the judgment for example) this was not a reason for her dismissal and not a relevant consideration in respect of the claims before the Tribunal.

34. **Paragraph 45** (which follows paragraph 42) of the claimant's application refers to immediate termination in the event of aggression. The position in English law is no different to that of Scots law in this regard. In this case the reason for the claimant's dismissal was that set out at paragraph 73 of the judgment and in all the circumstances the Tribunal concluded that the dismissal fell within the range of responses open to a reasonable employer from the facts presented to the Tribunal.

35. **Paragraphs 46 to 52** of the claimant's application deals with the toilet issue which was a matter the Tribunal considered from the evidence before it. The Tribunal carefully considered the evidence that had been led. Paragraphs 25 to 29 of the judgment set out the facts the Tribunal found in this regard from the evidence presented. In all the circumstances there was no less favourable treatment for the reasons set out at paragraphs 118 to 126 of the judgment.

36. Paragraph 122 of the judgment noted that the claimant had accepted that from 18 March 2018 she was satisfied that no sanitary issues arose. As a consequence, her claim, even if there were issues prior to that time, was out of time and there was no evidence that would have justified the time limit being extended. In any event the Tribunal accepted the respondent's evidence that the conditions of the toilets were the same for both men and women (paragraph 121 of the judgment).

37. **Paragraphs 52 to 55** make reference to a Base Code and the International Labour Organisation, which had not been referred to the Tribunal. Nevertheless the Tribunal carefully considered the evidence that was presented and found that there were no issues with regard to the condition of the toilets (which the claimant herself confirmed was the case at least from 18 March 2018). The Tribunal's decision was based upon an assessment of the evidence before it. Its conclusions in this regard are set out at paragraphs 27 to 29 and paragraphs 119 to 122 of the judgment.

38. The Tribunal reached a decision from the evidence before it and applying the statutory tests. The claimant asks at paragraph 55 of her application whether an employer can terminate an employee's employment if the law has not been followed or "conditions" have been violated. It was not correct to say that "women's international rights were suppressed". The Tribunal found in this case that the law was followed and that the claims raised were ill founded. That was a decision reached after fully considering all the facts and applying the legal framework.

39. In all the circumstances and having carefully considered the evidence presented to the Tribunal, the Tribunal was satisfied that the respondent had acted fairly and treasonably and that the dismissal was fair. The decision to dismiss fell within the range of responses open to a reasonable employer. Her unfair dismissal claim was therefore ill founded.

40. The claimant was not treated less favourably because of her sex (which was, in any event, raised outwith the statutory time period). As a consequence, her claim for sex discrimination was ill founded.

41. The reason for the claimant's dismissal was in no way whatsoever connected to any protected act (for the reasons set out at paragraph 131 of the judgment). Her claim for victimisation was also therefore ill founded.

42. As there was no redundancy situation as defined in the Employment Rights Act 1996 and given she was not dismissed by reason of redundancy, her claim for a redundancy payment failed.

43. Her application at **paragraph 56** to have the judgment set aside is considered as a whole in this judgment.

44. The claimant's application states, at **paragraph 57**, that her claim for "responsibility for my damaged health" was outstanding. This is not a claim in respect of which the Employment Tribunal has jurisdiction. In any event, the claims the Tribunal dealt with were those that the parties agreed were to be considered (as set out at paragraph 6 of the judgment which had been discussed and agreed at the outset of the hearing, and at the case management preliminary hearing). All of the claims before the Tribunal were carefully considered.

45. In short, the claimant has not presented any new evidence or compelling reason as to why the original decision should be reconsidered.

Not in the interests of justice to allow reconsideration

46. The points raised by the claimant are attempts to re-open issues of fact on which the Tribunal heard evidence from both sides and made a determination having considered the facts presented during the hearing and applied the law. In that sense they represent a "second bite at the cherry" which undermines the principle of finality. Such attempts have a reasonable prospect of resulting in the decision being varied or revoked only if the Tribunal has missed something important, or if there is new evidence available which could not reasonably have been put forward at

the hearing. A Tribunal will not reconsider a finding of fact just because the claimant wishes it had gone in her favour.

47. That broad principle disposes of all the points made by the claimant. There is no evidence that shows the Tribunal has missed something important or that new evidence is being presented that could not reasonable have been put forward at the time. The claimant was given a fair opportunity to present her case and challenge the respondent which she did. The hearing concluded and the judgment was issued on the basis of the information before it.

48. As paragraph 4 of the judgment records, the claimant was advised of the need to ensure that all relevant evidence was placed before the Tribunal to ensure it had all the information on which to make its decision. Time was spent during the hearing discussing this and the rules as to evidence and how a Tribunal reaches its decision. The claimant was given a fair and fully opportunity to present her case, which is what she did. The Tribunal carefully considered the facts and reached a conclusion in light of those facts whilst applying the law.

Conclusion

49. Having considered all the points made by the claimant I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The points of significance were considered and addressed at the hearing. It is not in the interests of justice to reconsider the decision the Tribunal reached.

50. The application for reconsideration is therefore refused under rule 72(1) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

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Employment Judge Hoey

Dated: 1 September 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

2 October 2020

FOR THE TRIBUNAL OFFICE