# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs H. Jaleel**

**Respondent:** **Southend University Hospital NHS Foundation Trust**

**Heard at:** **East London Hearing Centre**

**On:** **5 and 6 November 2020**

**Before:** **Employment Judge Massarella**
**Members:** **Mr G. Tomey**
**Mr M. Wood**

**Representation**
Claimant: Mr O. Ojo (Solicitor)
Respondent: Mr B. Gil (Counsel)

# JUDGMENT

**The judgment of the Tribunal is that: -**

1. **upon reconsideration of the Tribunal's conclusions in relation to Issues 3(H)(ii) and 3(I), the Tribunal's Judgment, sent to the parties on 17 February 2020, is confirmed.**

# REASONS

*This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V (CVP): the parties attended by video; the Tribunal panel sat together in person at East London Tribunal Centre. A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.*

**The hearing**

1. Following the full merits hearing, which took place on 27 and 28 June, 3 July and 17 October 2019, the Tribunal reserved its judgment. The written judgment and reasons, dated 17 February 2020, were sent to the parties on that date.

2. Having heard from the Claimant and the witnesses for the Respondent, and having considered the documents we were referred to, the Tribunal rejected the Claimant's claims of race discrimination, but upheld her claim of unfair (constructive) dismissal, in a reasoned judgment which consisted of 186 paragraphs over 35 pages.

3. By letter dated 26 February 2020, the Claimant applied for reconsideration of the Tribunal's conclusion as to Issue 3(h)(ii) (a claim of direct race discrimination in relation to the readvertising of the DME role) and Issue 3(l) (a claim of harassment related to race in relation to the conduct of the interview for that role). In respect of both claims, the Tribunal decided that the Claimant had not proved facts from which the Tribunal could reasonably conclude that race was a factor in the treatment complained of, and that those claims failed at the first stage of the analysis.

4. The Respondent wrote to the Tribunal providing brief comments, opposing the application.

5. By letter dated 7 March 2020 the Employment Judge ordered that the case be listed for a two-day hearing (dates to follow) at which the Claimant's reconsideration application would be heard by the full Tribunal. Submissions would be heard from both parties, the Tribunal would then deliberate, give judgment on the application, and proceed directly to hear evidence and submissions as to remedy in respect of those claims it has upheld, whether or not that included the matters which were the subject of the reconsideration application.

6. In the same letter, the Judge ordered that the Respondent send to the Tribunal by 26 March 2020 any further response it wished to make to the Claimant's reconsideration application. Further case management orders for the preparation of the hearing were made.

7. On 9 March 2020 a notice of hearing was sent to the parties, listing the matter for two days on 14 and 15 May 2020. On 11 March 2020 the Respondent applied for the hearing to be relisted, as its Counsel, who represented it at the liability hearing, was not available on those dates. By letter dated 11 March 2020, the Claimant raised no objection; both parties provided dates to avoid. The Judge granted the postponement application in an Order sent to the parties on 24 April 2020.

8. Unfortunately, by that point, the effects of the Covid-19 pandemic were at their height. No open hearings could be listed before the end of June, and it was unclear when the Tribunal would be in a position to resume such hearings. By July, sufficient progress had been made in developing CVP hearings that there was a realistic prospect of the case being listed. The Judge ordered that a short telephone hearing take place, to discuss with the parties whether the case was suitable for CVP hearing, to relist the hearing, and to give any further directions required.

9. Both parties agreed that the hearing could take place by CVP. In the event, a hybrid hearing took place, with the Tribunal panel sitting together in person, and the parties attending by video.

10. The parties provided a separate reconsideration/remedy bundle. The Tribunal had written submissions from both representatives, which they supplemented orally. The panel deliberated and gave an oral judgment on the first day in relation to the Claimant's reconsideration application.

11. After the telephone preliminary hearing, and shortly before the reconsideration/remedy hearing the Respondent lodged an application for third-party disclosure and its own reconsideration application. On the second day, the Respondent's third-party disclosure application was determined, and consideration was given as to how its reconsideration application should be progressed. Those matters are dealt with in a separate Order. As a result of the approach the Tribunal decided to adopt, the remedy hearing was postponed to 4 and 5 February 2021.

## The Claimant's reconsideration application: the law to be applied

Reconsideration

12. Rules 70 to 73 of the Employment Tribunal's Rules of Procedure 2013, make provision for the reconsideration of Tribunal Judgments as follows:

> **Principles**
> **70**
> **A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.**
>
> **Application**
> **71**
> **Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.**
>
> **Process**
> **72**
> **(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.**
>
> **(2) If the application has not been refused under paragraph (1), the original decision shall be considered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.**

13. In *Outasight VB Ltd v Brown* UKEAT/0253/14 the EAT held (at [46-48] that the Rule 70 ground for reconsidering Judgments (the interests of justice) did not

represent a broadening of discretion from the provisions of Rule 34 contained in the replaced 2004 rules. HHJ Eady QC explained that the previous specified categories under the old rules were only examples of where it would be in the interests of justice to reconsider. The 2014 rules remove the unnecessary specified grounds leaving only what was in truth always the fundamental consideration: the interests of justice. This means that decisions under the old rules remain pertinent under the new rules.

14. The key point is that it must be in the interests of justice to reconsider a Judgment. That means that there must be something about the case that makes it necessary to go back and reconsider, for example a new piece of evidence that could not have been produced at the original hearing or a mistake as to the law. It is not the purpose of the reconsideration provisions to give an unsuccessful party an opportunity to reargue his or her case. If there has been a hearing at which both parties have been in attendance, where all material evidence had been available for consideration, where both parties have had their opportunity to present their evidence and their arguments before a decision was reached and at which no error of law was made, then the interests of justice are that there should be finality in litigation. An unsuccessful litigant in such circumstances, without something more, is not permitted to simply reargue his or her case, to have 'a second bite at the cherry' (per Phillips J in *Flint v Eastern Electricity Board* [1975] IRLR 277).

15. The expression 'necessary in the interests of justice' does not give rise to an unfettered discretion to reopen matters. 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.'**

16. In *Liddington v 2Gether NHS Foundation Trust* EAT/0002/16 the EAT, *per* Simler P, held at 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.'**

<u>The Burden of Proof</u>

17. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**

> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision 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.**

18. The effect of these provisions was conveniently summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 (at para 18):

> **'18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*. He explained the two stages of the process required by the statute as follows:**
>
> **(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**
>
> > **"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.**
> >
> > **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**
>
> **(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**
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> > **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**
>
> **He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.**

19. In *Hewage v Grampian Health Board* [2012] ICR 1054 the Supreme Court held (at para 32) that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

## Conclusions: the Claimant's application for a reconsideration

20. In relation to the first disputed allegation (Issue 3(H)(ii)), the Tribunal concluded (at para 164) that the Claimant could point to a difference of treatment and a difference of race, although an issue remained as to whether she could point to a comparator whose circumstances were materially the same as hers. The Tribunal put that issue to one side, a step which both representatives accepted could only be in the Claimant's favour at that stage of the analysis, since it removed a potential obstacle in her path.

21. In relation to the second disputed allegation (Issue 3(I)), the Tribunal found that the Claimant was subjected to unwanted conduct, which is the first

necessary element of a successful claim of harassment related to race. Self-evidently, the mere existence of conduct that is unwanted does not, in itself, prove that the conduct was tainted by considerations of race.

22. The Tribunal then went on to consider whether the Claimant had discharged the burden, which the authorities are clear falls on her at the first stage, to prove facts from which a reasonable Tribunal could properly conclude, absent an adequate explanation from the Respondent, that there was unlawful discrimination. To use the phrase which appears in the authorities, had she proved the 'something more' sufficient to shift the burden to the Respondent, requiring it to provide an adequate non-discriminatory explanation for the treatment, failing which the claim must be upheld?

23. The Tribunal found (at paras 167 and 168) that she had not. For the reasons we gave there, we were not satisfied that she had provided any evidence that race was a factor; alternatively, having regard to the evidence which she did adduce, we concluded that it was not such that a reasonable Tribunal could properly conclude that there was unlawful discrimination.

24. Since the burden of proof did not shift the Respondent, there was no requirement on it to prove an adequate, non-discriminatory reason for the treatment.

25. Mr Ojo criticises that conclusion (at paragraph 7 of the application) on the basis that no express or implied finding was made by the Tribunal as to whether it accepted or rejected the Claimant's allegation of direct race discrimination/harassment related to race. We reject that criticism: the Tribunal made an express finding that both claims failed, because the Claimant had not discharged the initial burden on her. For the avoidance of doubt, this was not a case where the Tribunal felt able to move directly to the 'reason why' question; it was for that reason that we had regard to the burden of proof provisions.

26. The Tribunal accepts Mr Gil's submission that the real question is whether, having made that finding, it was sustainable. The authorities are clear that the bare facts of a difference in status and a difference in treatment only point to the possibility of discrimination. Those two factors, without more, do not amount to facts from which a Tribunal could conclude that the Respondent had committed an unlawful act of discrimination (*Madarassy*). It was for that reason that we rejected the matters relied on by Mr Ojo in his written closing submissions at the liability hearing: because they fell into the trap of assuming that that those differences were enough in themselves. The Tribunal agrees with Mr Gill submission that Mr Ojo has fallen into the same trap again in making this reconsideration application.

27. Mr Ojo refers to the fact that the Tribunal heard evidence of other employees whose roles were not readvertised, and submitted that this could amount to the 'something more' required to shift the burden of proof. We do not accept that submission. The existence of other potential comparators merely provides further possible evidence (subject to the Tribunal being satisfied that they were in materially the same circumstances) of difference of treatment/difference of race. It does not provide the 'something more' required.

28. Mr Ojo then submitted that the Tribunal reversed the burden of proof, arguing that once it had found that the conduct alleged had occurred, it was for the Respondent to show that the reason for it was not as a result of the Claimant's race, and that it was not for the Claimant to explain the Respondent's conduct. That is to misunderstand the operation of the burden of proof: the burden only shifts to the Respondent to show that the reason for the treatment was in no sense whatsoever because of the Claimant's race, if the Claimant has discharged the initial burden, which she had not.

29. Mr Ojo then points to paragraph 161 of the judgment, in a passage dealing with 'conduct extending over a period' in the context of limitation, in which the Tribunal found that 'there is a strongly arguable connection between the decision to advertise the DME role in January 2018 and the later conduct of the interview in April 2018'.

30. All that the Tribunal was finding there was that there was a factual nexus (almost too obvious to be stated) between the advertising of a role and the interview for it. There is nothing in that finding which could be probative of race being a factor in either decision.

31. For these reasons, the application for reconsideration is refused. In the Tribunal's judgment, there are no good grounds for reopening its conclusions in respect of these two matters, and it is not in the interests of justice to do so. The original decision is confirmed.

**Employment Judge Massarella**
**Date: 11 November 2020**