



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss P Piotrowska

**Respondent:** Optimal Claim Limited

**Heard at:** Manchester

**On:** 3 September 2020

**Before:** Employment Judge Sharkett

## JUDGMENT ON APPLICATION FOR RECONSIDERATION

The respondent's application dated 18 November 2019 for a reconsideration of the Tribunal's Judgment promulgated on 5 November 2019, is refused on the grounds that it has no reasonable prospect of success.

## REASONS

1. This is an application by the Respondent for reconsideration of the Judgment of the Employment Tribunal Promulgated on 5 November 2019 by which the claimant's claim of automatic unfair dismissal by reason of making a protected disclosure was upheld.
2. The tribunal's powers concerning reconsideration of judgments are contained in rules 70 to 73 of the Employment Tribunals Rules of Procedure 2013. A judgment may be reconsidered where "it is necessary in the interests of justice to do so." Applications are subject to a preliminary consideration. They are to be refused if the judge considers there is no reasonable prospect of the decision being varied or revoked. If not refused, the application may be considered at a hearing or, if the judge considers it in the interests of justice, without a hearing. In that event the parties must have a reasonable

opportunity to make further representations. Upon reconsideration the decision may be confirmed, varied or revoked and, if revoked, may be taken again.

3. Under rule 71 an application for reconsideration must be made within 14 days of the date on which the judgment (or written reasons, if later) was sent to the parties. The approach to be taken to applications for reconsideration was set out in the recent case of **Liddington v 2gether NHS Foundation Trust** UAEAT/0002/16/DA in the judgment of Simler P. The tribunal is required to:

*(a) identify the Rules relating to reconsideration and in particular to the provision in the Rules enabling a Judge who considers that there is no reasonable prospect of the original decision being varied or revoked refusing the application without a hearing at a preliminary stage;*

*(b) address each ground in turn and consider whether is anything in each of the particular grounds relied on that might lead ET to vary or revoke the decision; and*

*(c) give reasons for concluding that there is nothing in the grounds advanced by the Claimant that could lead him to vary or revoke his decision.*

4. In paragraphs 34 and 35 of the judgment Simler P included the following:

*“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 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. Tribunals have a wide discretion whether or not to order reconsideration.*

*Where ... a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application.”*

5. By email of 18 November 2019 the respondent sought a reconsideration of the Judgment of the Tribunal promulgated on 6 November 2019 on the following grounds pleaded by the respondent.

**Ground 1** *That the Tribunal failed to determine the exact date the Claimant made the protected disclosure to Mr Zacwieracz. The Tribunal finds that this disclosure was the principle reason for the Claimant's dismissal on 13 April 2013. If the disclosure was made after 5 April 2018 the Tribunal cannot find that the disclosure was not the principle reason for dismissal as the decision to dismiss had already been made. If the disclosure was made before 5 April 2019 there is evidence throughout the bundle to suggest that the dismissal was performance related.*

In support of this ground the respondent relies on the fact that the Claimant's performance was addressed on several occasions during March and April and during February and, that there is also evidence that Ms Harding had had numerous discussions about the claimant's performance before the protected disclosure was made. The respondent also refers to the evidence of Miss Jankowska who had given evidence of the Claimant's poor performance but that this had not been considered in the Judgment and in particular paragraph 25 which refers to the Claimant not being told of her poor performance.

**Ground 2** is the fact that the Tribunal has relied on the highlighted line on the record of the Claimant's performance as reference to the Claimant's performance when it had been brought to the Tribunal's attention that the Claimant was the person under the highlighted line.

**Ground 3** That the Tribunal did not accept the oral evidence of Mr Germaine that this was so, nor the documentary evidence in support of the assertion that the Claimant was the worst performer. The respondent submits that failure to accept this evidence is not in keeping with the overriding objective and that paragraph 23 of the Judgment is not a true reflection.

**Ground 4** is that the Tribunal failed to consider the fact that the Claimant was within her probationary period and that her contract provided for the termination of her employment during the probationary period; and that if an extension of the probationary period is applied performance and suitability will be monitored.

**Ground 5** that although the Tribunal accepted that the claimant regularly disagreed with Mr Zawieracz, it failed to consider whether the constant insubordination was a reason for the dismissal in addition to her performance.

**Ground 6** that there was no evidence that the primary reason for the dismissal was the protected disclosure

**Ground 7** that the Tribunal acknowledged that there had been frequent exchanges between the claimant and Mr Zawieracz about her view of the way in which claims were taken on and yet no action had been taken as a result of

these 'protected disclosures'. The Tribunal had failed to ask the question why in the light of the previous incidents where no action had been taken was the decision to dismiss taken on 13 April 2019.

**Ground 8** that the Tribunal substituted its own reason for dismissal when it found that the claimant was dismissed because Mr Zawieracz did not want her on his team because of her objections. The respondent submits that although the Tribunal had not found that the Claimant was the poorest performer it had found that there may have been some concerns about her performance and therefore given that she was in her probationary period it was entirely reasonable for the respondent to dismiss the claimant

6. It is clear that the respondent's application is largely based on an assertion that the Tribunal failed to take account of relevant evidence and used, what it considers to be, irrelevant findings upon which to reach its decision. The Tribunal had full regard to all the evidence before it and in particular paid close attention to the evidence on which the respondent sought to show that the claimant was the poorest performer. It is clear that the respondent does not like the findings of the Tribunal and the above grounds seek to do nothing more than attempt to relitigate matters already determined by the Tribunal and as such have a second bite of the cherry. In addition ground 5 of the application seeks to introduce an additional argument not relied on before the Tribunal.
7. In its Judgment the Tribunal sought to avoid making direct findings of the credibility of individual witnesses who gave evidence before it, having made its views clear at the hearing in relation to how it regarded the significant failures of the part of a professionally represented respondent to fully disclose relevant documentary evidence in accordance with the orders of the Tribunal, and, having assured the Tribunal that disclosure was complete, the piecemeal disclosure during the course of the hearing, of large numbers of further documents not all of which were relevant, which resulted in a significant delay to the timetabling of the hearing and the case being part-heard.
8. In respect of this application I deal with each of the grounds although not necessarily in the same order as submitted by the respondent.
9. Grounds 2 and 3 both relate to the documentary evidence that the respondent relied on to demonstrate the claimant as the poorest performer. The Tribunal heard evidence from three witnesses in respect of this contention. The first was Ms Jankowska; she confirmed in oral evidence that the statistics disclosed by the respondent and highlighted as being reference to the performance of the claimant, did not show the claimant as a poor performer. She did not seek to say that the statistics referred to did not relate to the claimant. On the penultimate day of the hearing we heard from Mr Zawieracz, who Ms Harding said in oral evidence had shown her the statistics included in the bundle as showing the claimant to be a poor performer during the meetings they had to discuss the claimant's progress. The Tribunal noted that

there were no notes of these discussions and Mr Zawieracz confirmed in oral evidence that the documents contained in the bundle and which he refers in his witness statement as productivity records, were not his documents, and he had not previously seen them. He also accepted that the records in the bundle did not show the claimant as underperforming or 'consistently the worst' ; terms he uses as descriptions of her performance in his witness statement.

10. When Mr Zawieracz was questioned he not suggest that the Tribunal was looking at incorrect documents or that a mistake had been made in highlighting the incorrect line in the document. He further confirmed that he did not know why the documents in the bundle were referred to in his witness statement. He confirmed he had been assisted in preparing his witness statement by the last of the respondent's witnesses Mr Germaine. Mr Germaine confirmed that he had assisted with the preparation of all the witness statements produced on behalf of the respondent.
11. Mr Germaine who had been present throughout the hearing was the last of the respondent's witnesses to give evidence. For the first time he raised in oral evidence that the highlighted line which the Tribunal had been told was the claimant's performance record, was in fact not hers at all and that a mistake had been made. Contrary to the respondent's Ground 2 *that the Tribunal has relied on the highlighted line on the record of the Claimant's performance as reference to the Claimant's performance when it had been brought to the Tribunal's attention that the Claimant was the person under the highlighted line*" the Tribunal had not been informed of this until Mr Germaine gave oral evidence, which was after Mr Zawieracz had disowned the same as his own and both he and Ms Jankowska had confirmed that the highlighted area of the document did not show the claimant to be a poor performer. At all times prior to Mr Germaine's evidence the Tribunal had been directed to the highlighted line as the claimant's performance. No further evidence was produced to demonstrate to the Tribunal how an alternative unidentified line on the pages might be relied on as evidence as being that of the claimant's performance. The Tribunal had been taken to the highlighted line in the documents as reference to the claimant's performance when hearing evidence from both Ms Jankowska and Mr Zawieracz. At no time during their evidence was there any suggestion from either witness or the respondent's representative that a mistake had been made. The Tribunal was of the view that given the inconsistency between Mr Zawieracz's written and oral evidence and the fact that both he and Ms Jankowska had been questioned on the same, it was not credible that such a mistake could have been allowed to continue until the last morning of the hearing when all witnesses and representatives had been present throughout the hearing.
12. Having considered all the evidence in the round including that of Ms Harding' which was also inconsistent with that of Mr Zawieracz, the Tribunal determined that the oral and documentary evidence on this issue was

unreliable and little weight if any could be attached to the documents relied on as evidence of the claimant's poor performance.

13. Consequently contrary to Ground 3, paragraph 23 of the Judgment is a true reflection of the findings of the Tribunal as it did not accept Mr Germaine's evidence as credible for the reasons set out above.
14. In respect of Ground One the Tribunal was not required to identify an exact date on which the claimant made a protected disclosure, as long as it is satisfied on the balance of probabilities that a disclosure to Mr Zawieracz took place before a decision was taken to dismiss her. The claimant accepts that she raised issues with HR for the first time on 5 April 2018, however, it was her evidence which the Tribunal accepted, that throughout her time working under the management of Mr Zawieracz she frequently went to him to raise her concerns about what she believed were fraudulent claims with no prospects of success, explaining by way of example that she would object to being asked to go back to drivers involved in accidents to ask again if there were passengers in the vehicle concerned when she had already established that there were not or to make further calls about possible injuries when there were none to record. The fact she did this was confirmed in oral evidence by Ms Jankowska who told the Tribunal that throughout the time the claimant worked under her supervision she sat two rows behind and had day to day contact with her. She confirmed that the claimant frequently expressed that cases in the system had no prospects of success and that she did not want to log the claims. Mr Zawieracz, confirmed in oral evidence that the claimant would often come in to him complaining about cases having no prospects of success and why they didn't. It was clear to the Tribunal that the claimant made multiple disclosures of information to Mr Zawieracz in respect of different cases, and that there were occasions when she did this prior to 5 April 2018 which was the date on which the respondent made the decision to dismiss the claimant and not 11<sup>th</sup> December as now suggested in this application.
15. Grounds 4,5 6 &7 can be dealt with together. The Tribunal had regard to the fact that the claimant was in an extended probationary period. However, it further had regard to the fact that the respondent had agreed to extend the claimant's probation for a further period of three months as Mr Germaine had identified that she had not perhaps been given adequate training when she first started work with them. Having recognised the disadvantage that may have caused the need to extend her probationary period, the respondent cut short her period of probation after only two months, on the recommendation of Mr Zawieracz. The issue to be determined by the Tribunal was to identify the primary but not necessarily the only reason for dismissal. The respondent has been inconsistent in its identification of the reason for dismissal. In the ET3 the respondent seeks to rely on the claimant's lack of enthusiasm. Mr Germaine confirmed that this was not the reason but could not explain why it had been relied on in the ET3 other than to say it was a mistake, and could

not explain why the mistake had not been subsequently rectified by amendment. The evidence before the Tribunal was that the claimant made protected disclosures about her belief in wrongdoings in the respondent's practices that were carried out on the instruction of Mr Zawieracz. It was clear to the Tribunal from his oral evidence that Mr Zawieracz did not appreciate the claimant's interventions but there is no evidence that she was informed that the concerns she raised or complaints she voiced were considered insubordinate or acts of misconduct. Within a short period of time Mr Zawieracz had asked permission to dismiss the claimant on the grounds of her performance. The Tribunal found that the evidence before the tribunal did not reliably show to the required standard that performance had been a genuine cause for concern when viewed in light of others. Having considered all the evidence in the round, and having had regard to the identity of the person to whom the disclosures were made and the person who instigated and executed the act of dismissal, it was open to the Tribunal to conclude on the balance of probabilities that the primary reason for the dismissal was that she had made those protected disclosures.

16. Having considered all the points made by the respondent 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. The application for reconsideration is refused.

Employment Judge Sharkett  
Date: 23 November 2020

JUDGMENT SENT TO THE PARTIES ON  
24 November 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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