EMPLOYMENT TRIBUNALS

Claimant: Miss N Kumari

Respondent: Greater Manchester Mental Health NHS Foundation Trust

JUDGMENT

The claimant's application dated 1 October 2020 for reconsideration of the judgment sent to the parties on 18 September 2020 is refused.

REASONS

Introduction

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 3-page letter attached to an email dated 1 October 2020.

2. There was a delay in this application being referred to me. When it was referred, it became apparent that the application had not been copied to the respondent. I therefore directed that the application be sent to the respondent and that the respondent be given time to comment. This resulted in a further delay due to the heavy volume of correspondence currently being processed by the tribunal. However, the respondent's comments were received (in accordance with the Tribunal's request) on 1 December 2020 and I have taken account of them, alongside the claimant's application, in reaching this decision.

3. Although the claimant has contributed to the delay by not copying her application to the respondent, the main cause of delay in this matter has been the high volume of backlog of work (both administrative and judicial) which the Tribunal is currently subject to. I apologise to both parties for the length of time it has taken to deal with this application as a result.

4. References in square brackets (e.g. [25]) are references to paragraph numbers from the reasons promulgated with the judgment.

The Law

5. 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).

6. 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.

7. 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."**

8. 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."**

9. Broadly similar points are made in the authorities relied on by the respondent in its submissions.

10. 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.

11. I note finally that Miss Kumari in her application requested that a different Employment Judge reconsider the decision. Rule 72(3) provides that reconsideration should be by the same Employment Judge except where this is not practicable. An appeal to the Employment Appeal Tribunal is the appropriate route by which my decision can be scrutinised by a different (and more senior) Judge.

The Application

12. The majority of 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. 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 his favour.

13. That broad principle disposes of almost all the points made by the claimant. However, there are some points she makes which should be addressed specifically.

14. Miss Kumari complains that she did not understand that she should prepare evidence about the substance of her case, as she considered that the only point being considered was whether it had been presented in time. As Miss Kumari did not prepare any written evidence, her evidence emerged through questioning from me. She was given opportunity to expand her answers and add to her oral evidence as she wished. It was important for me to understand the context of her claim in order to make findings in relation to the time limit argument.

15. As this was a hearing on a preliminary point, the findings of fact recorded in the judgment are brief and include only the key facts necessary to understand the decision reached. I did not record all of the evidence given by Miss Kumari, particularly where that evidence was not challenged.

16. For the purposes of the limitation argument, I proceeded on the basis that Miss Kumari would be able to establish the facts as she has asserted them to be in her claim and in the letter of 1 May 2019 which provides further particulars. However, in making observations about the strength of the discrimination claim at [34] I was not concerned with the claimant's ability to prove the underlying factual allegations, but rather with the likelihood that a Tribunal would ultimately be able to link the treatment complained of to her race given that the claimant's own arguments in her letter of 1 May 2019 did not seem to support this. This linked to my conclusion that, if the claim was allowed to proceed, there would need to be further particularisation and clarification of the discrimination claim. Allowing a claim to proceed in those circumstances causes more hardship to a respondent than allowing a claim to proceed which is clearly articulated and in respect of which the parties can start to gather their evidence, and I therefore considered this assessment of the case as being relevant in weighing up the balance of prejudice.

17. Similarly, I did consider it appropriate to have some regard to prospects of success when it came to the allegation that the letter sent to Miss Kumari by Ms Press on 9 December 2019 was an act of discrimination. As this act of discrimination had not been complained about in the claim form, it would require an amendment to proceed with it. In considering whether to allow the amendment I had to balance the hardship which would be caused to Miss Kumari by not permitting the amendment, against the hardship which would be caused the respondent in permitting it. I considered it was relevant in the context of this case (particularly given that I had decided the other allegations could not proceed on limitation grounds) to note that the argument that Ms Press has acted in a discriminatory way appeared to be weak. Miss Kumari's application does not

explain or summarise any evidence she could have given, had she prepared differently, which would have changed my decision on this point.

18. In respect of Miss Kumari's mental state, this was relevant in relation to determining whether it was "reasonably practicable" for the unfair dismissal claim to have been presented earlier. I did not accept that Miss Kumari's mental state was so severely compromised that it was not reasonably practicable for her present her claim. It was not necessary to record the evidence she gave on that point in detail in order to reach that conclusion. The fact that she had not sought medical advice, and that there was no contemporaneous evidence to support her oral evidence that her abilities were compromised, was a relevant matter to take into account.

19. Miss Kumari suggested in her evidence that one reason she had not made an earlier complaint to her employer was that she was concerned about obtaining a reference. The respondent submitted that that was the first time that concern had been raised. That argument is recorded in the "Submissions" section of judgment which sets out the parties' arguments and not my conclusions. Miss Kumari's application complains that she could not have been expected to mention this earlier as the hearing was the point where the time limit issue was being dealt with. I accept that point, but it doesn't take Miss Kumari very far. Being concerned about the impact on a reference would not be enough to enable her to satisfy the "not reasonably practicable" test which is a very high threshold.

20. As the delay in presenting the discrimination claim was not lengthy (and that was a factor in Miss Kumari's favour) I did not consider the reason for the delay (on Miss Kumari's case, her mental health difficulties) to be particularly significant in determining whether it would be "just and equitable" to extend time for the presentation of the discrimination claim. The key factor in my consideration was the prejudice that would be caused to the respondent in facing a claim which was unparticularised and would inevitably be stale by the time it came to trial. Although the claim was only out of time by a few days, many of the acts complained about dated back much further than that and were also unlikely to be the subject of documentary evidence (see paragraph [34]) which was a significant factor in the prejudice I considered the respondent would face if the claim was allowed to proceed.

21. Finally, Miss Kumari complains that an updated Schedule of Loss was not included in the bundle by the respondent's solicitor. The Schedule of Loss did not play any part in my decision on this preliminary issue. There may well have been an error in respect of which version was included, but it is not a matter which would make it appropriate to reconsider the judgment.

Conclusion

19. 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. The application for reconsideration is refused.

Employment Judge Dunlop
DATE 9 December 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

17 December 2020

FOR THE TRIBUNAL OFFICE