



EMPLOYMENT TRIBUNALS

Claimant: Ms A McDermott

Respondents: 1. Sellafeld Limited
2. Nuclear Decommissioning Authority
3. Ms H Roberts

HELD AT: Manchester **ON:** 15 January 2021

BEFORE: Employment Judge Batten (sitting alone)

REPRESENTATION:

For the Claimant: in person, assisted by her husband
For the Respondents: 1 and 3: Mr D Panesar, one of Her Majesty's Counsel
2: Mr E Smith, Solicitor

JUDGMENT ON A RECONSIDERATION

The claimant's application dated 14 August 2020 for reconsideration of the preliminary hearing Judgment sent to the parties on 13 August 2020 is refused and the preliminary hearing Judgment is confirmed.

REASONS

1. The Tribunal has considered the claimant's application for reconsideration of the Judgment. The application was emailed by the claimant and received by the Tribunal on 14 August 2020. It consists of 6 numbered points, of which the first 4 points raise issues about the claimant's ability to communicate with her barrister and with the Tribunal during the preliminary hearing on 7 July 2020, the fifth point submits that new

evidence has come to light which needs to be considered by the Tribunal and refers to an email with attachments and submissions sent by the claimant to the Tribunal on 5 August 2020, and the sixth point seeks clarification on whether the reconsideration will cause a delay to the substantive hearing. On 19 August 2020, the claimant sent further submissions to the Tribunal repeating and expanding on the points made in her application of 14 August 2020, and requesting an in-person hearing which she contended should be recorded. On 1 October 2020, the claimant wrote to the Tribunal in response to the second respondent's written submissions and she provided an expanded statement of the grounds for her application, a document which she confirmed was written after seeking further legal advice.

2. The second respondent provided written submissions by email on 25 September 2020 in response to the claimant's application. The first and third respondents provided joint written submissions by a letter dated 6 October 2020. All 3 respondents objected to the claimant's application for reconsideration.
3. The Tribunal sought the views of all parties on whether the reconsideration application should be dealt with at a hearing and, if so, what the arrangements for that hearing that should be. After the reconsideration hearing was listed, the UK Government announced a further "Lockdown" due to the COVID-19 pandemic. As a result, all parties have consented to the claimant's application being dealt with by the Tribunal at a hearing conducted by cloud video platform.
4. At the hearing, the Tribunal listened to detailed and lengthy submissions from each of the 3 representatives and also comments from the claimant's husband on her behalf, such that the hearing lasted a full day, from 10am until 4.30pm with a lunch break of 30 minutes in order to give all parties a full opportunity to provide oral submissions. The majority of the reconsideration hearing was devoted to the claimant's submissions, which included oral contributions made by her husband.
5. In reaching its decision, the Tribunal has taken into account the contents of the application, the documents referred to as set out in paragraph 1 above, and the contents of the responses set out in paragraph 2 above. In addition, the Tribunal was referred to the original 2 bundles prepared for the preliminary hearing and to a further bundle of 116 pages of documents prepared by the claimant for this reconsideration hearing.

Rules of Procedure

6. Rule 72 of the 2013 Rules of Procedure empowers the Tribunal to consider an application for reconsideration without convening a hearing if

the parties so agree. In this case, the claimant specifically requested a hearing of her application because she wished to make oral representations in addition to the various written submissions that she has sent to the Tribunal.

7. The test for reconsideration is whether it is necessary in the interests of justice to reconsider the Judgment (rule 70). Broadly, it is not in the interests of justice to allow a party to reopen matters heard and decided, unless there are special circumstances, such as a procedural mishap depriving a party of a chance to put their case or where new evidence comes to light that could not reasonably have been brought to the original hearing and which could have a material bearing on the outcome.

The application

8. The claimant's application for reconsideration and her further written submissions largely express her dismay and disagreement with the conclusion that her application should be refused.
9. Despite the points raised in her application for reconsideration, the claimant has not established that the Tribunal made an error of law, or that any of the conclusions in the Judgment on her application for strike-out, alternatively for deposit orders, were perverse. Such contentions are in any event better addressed in an appeal than by way of reconsideration.
10. However, the claimant's application contains two substantive points. The purpose of this preliminary hearing and the points made in the claimant's application for reconsideration were usefully summarised in a letter dated 26 November 2020, sent by Regional Employment Judge Franey to the parties, regarding this and other matters in the ongoing proceedings. Paragraphs 7 and 8 of that letter state:

7. The reconsideration hearing remains listed for one day. It is not simply a re-run of the last hearing before EJ Batten. It is an opportunity for the claimant to establish that it is in the interests of justice for that judgment to be revoked, and her application to strike out the responses heard afresh. There is no point reiterating arguments heard and rejected last time. The focus has to be on why the claimant argues that the last hearing before EJ Batten did not lead to a fair and just result.

8. The application appears to be based on two main points. The first is that difficulties encountered by the claimant in communicating with her barrister during the hearing undermined its fairness. The second is that there is new evidence available that could not reasonably have been put forward at the earlier hearing which

shows the outcome to be unjust. All parties will have an opportunity to make submissions on those matters. Witness evidence is not required or appropriate, but a party wishing to rely on new documents must ensure the other parties and the tribunal have those documents at least seven days before the hearing.

11. At the beginning of this preliminary hearing, the Tribunal read out the above paragraphs of the Regional Judge's letter and explained the procedure by which the claimant's application would be heard, to which all parties agreed. The claimant agreed that her application consisted of the above two points and addressed each of them. The Tribunal has considered each point in turn.

The claimant's ability to communicate with her barrister and the Tribunal during the preliminary hearing

12. Paragraphs 12 and 13 of the Judgment sent to the parties on 13 August 2020 sets out the arrangements for representation and communications which were explained to and agreed with the parties at the start of the preliminary hearing on 7 July 2020.
13. The claimant acknowledged in point 4 of her application that she was able to and did email her barrister during the preliminary hearing. At no point, during the hearing, did the claimant's barrister raise any difficulty with his ability to communicate with his client nor did he ask for time to take instructions from her.
14. The Tribunal is satisfied that the claimant had a reasonable opportunity to present her case at the preliminary hearing. The claimant was represented by experienced Counsel throughout who was thoroughly briefed, who participated fully, and who presented detailed oral submissions on the claimant's behalf. Prior to the preliminary hearing, the claimant and her barrister had worked together to revise her original application in order to re-submit the application shortly before the preliminary hearing, together with detailed written submissions extending to 27 pages accompanied by 9 case law authorities.
15. The Tribunal rejects the claimant's suggestion that her rights under Article 6 of the European Convention on Human Rights – the right to a fair trial - were breached because she found herself unable to make comments directly to the Tribunal despite being represented by Counsel. The agreed arrangements for speaking during the preliminary hearing are dealt with in paragraph 13 of the Judgment. There was no procedural mishap. Even at an in-person hearing, a party would not generally be allowed to address the Tribunal directly where there was a representative appointed.

New evidence

16. In the case of *Ladd v Marshall [1954] 3 All ER 745* the Court of Appeal held that new evidence should not be admitted on appeal (likewise on reconsideration) unless the evidence in question could not have been obtained with reasonable diligence for the original hearing. The new evidence must also be such that it could have a material effect on the outcome of the original hearing.
17. At point 5 of the claimant's application for reconsideration, it was suggested that new evidence has come to light and reference is made to the claimant's email of 5 August 2020 sent to the Tribunal. Attached to that email are 2 documents, being an email from a caseworker at the Information Commissioner's Office ("ICO") dated 30 July 2020 and a paper dated 3 July 2020, setting out the ICO's view that the first respondent had infringed GDPR by failing to protect the security of the claimant's personal data. Only the email dated 30 July 2020 was not therefore available at the time of the preliminary hearing. The email expresses an opinion on whether the first respondent could be said to be the data controller in relation to letters of complaint about the claimant. The Tribunal considered that the contents of such did not render the preliminary hearing unfair nor that it would have had a material effect on the outcome of the preliminary hearing had it been available to the Tribunal on 7 July 2020.
18. Despite point 5 of the claimant's application for reconsideration being put on the basis of the ICO email, the claimant's submissions about "new evidence" became an attempt to reopen matters heard and decided at the preliminary hearing. This included returning to documents referred to at that hearing because the claimant wished to explain them further, and to the pursuit of very serious allegations about the professional conduct of the first respondent's solicitor and Counsel which had not been pursued by the claimant's barrister at the preliminary hearing. As explained above, at paragraph 7, and at the beginning of the reconsideration hearing, it is not in the interests of justice to revisit matters previously heard and decided because a party simply disagrees with the Tribunal's conclusions nor to raise new matters which could have been pursued before.

Other matters

19. In the course of submissions at the reconsideration hearing, the claimant sought to criticise the conduct of the respondents and their representatives both before and at the hearing on 7 July 2020. The Tribunal rejects the claimant's assertion that the respondents had engaged in any misrepresentation of information at the preliminary hearing. The Tribunal considers that a respondent is entitled, in the course of litigation, to deny matters as alleged by the claimant, and to ask the Tribunal to determine

the factual and legal issues arising. As stated in paragraph 50 of the Judgment, there remains a significant core of disputed facts in this case which the Tribunal considers are best dealt with through oral evidence at the final hearing later this year.

Conclusion

20. Having considered all the points made by the claimant the Tribunal is satisfied that there are no grounds for reconsideration of the original decision. The application for reconsideration is refused.

Employment Judge Batten
Date: 26 January 2021

JUDGMENT SENT TO THE PARTIES ON:

29 January 2021

FOR THE TRIBUNAL OFFICE