EMPLOYMENT TRIBUNALS

Claimant: Ms L Kelly

Respondent: Sense, The National Deafblind and Rubella Association

RECONSIDSERATION JUDGMENT

The respondent's application for reconsideration is refused.

REASONS

1. This decision has been made by the Employment Judge without a hearing, in accordance with rule 72(1).

2. There was a video (CVP) preliminary hearing on 19 November 2020 in the Midlands (East) region during which, amongst other things, I [Employment Judge Camp] gave a reasoned decision refusing the respondent's application for a strike out or deposit order in relation to the claimant's claim, which is a public interest disclosure / whistleblowing claim. By way of background, please see the "*Case Summary*" section of the written record of that hearing. The written judgment and that written record were both signed by me the following day.[1] The respondent requested written reasons. These were sent out on 4 January 2021, and I refer to them. The respondent, through its solicitors, has applied for reconsideration of the decision not to make a deposit order by an email of 14 January 2021. The reconsideration application is contained in a 3 ½ page letter, to which I refer.

3. Legal experts hold different views about whether a decision to make or not to make a deposit order is, technically, a judgment or an order; and therefore about whether it is possible to apply for reconsideration of such a decision (because only judgments can be reconsidered). I take the view that such a decision is a judgment. It is, anyway, always possible to apply to set aside or vary a Tribunal order under rule 29. If a deposit order decision is in fact an order and not a judgment, this should be treated as my decision on an application to set aside or vary under that rule.

4. The respondent's application for reconsideration is misconceived and there is no reasonable prospect of the original decision being varied or revoked. I can see no error of

[1] In the 'header' of that written record and of the Judgment, I accidentally omitted to include the date the hearing took place: 19 November 2020.

law or other significant mistake in my decision; I would probably have been making an error of law were I to have acceded to the application for a deposit order.

5. I shall now deal with the respondent's two main points.

6. The first is that (from towards the bottom of the second page of the respondent's solicitors' letter) there was "*a failure to apply the ratio of the EAT's decision in Van Rensburg – in considering an application for a deposit order, there can be (and in our submission should reasonably have been in this case) a consideration of the likelihood of the facts being established.*"

    6.1 I am (and was at the time of the hearing) well aware that a Tribunal, when dealing with an application for strike out / deposit order against a claimant, can – and in many cases should – consider whether there are no or little reasonable prospects of the claimant proving the facts they rely on. Within my decision I said something along those lines and addressed the facts, as explained immediately below.

    6.2 Reading paragraphs 6 and 8 of the Reasons together, I said this: "*The test to be applied is whether there is* [little] *significant chance of the trial Tribunal, properly directing itself in law, deciding the claim in the claimant's favour. Subject to one proviso, in applying this test I must assume that the facts are as alleged by the claimant. The one proviso or qualification is that I do not make that assumption in relation to any allegation of fact made by the claimant so implausible that I think there is* [little] *significant chance of any Tribunal accepting the allegation as true.*"

    6.3 I also said this (paragraphs 11 and 13 of the Reasons): "*the claimant is not alleging anything inherently very implausible* [and] *I cannot possibly be satisfied that there are no or little reasonable prospects … of the Tribunal deciding at trial that what she says happened actually happened*"; "*I cannot say there is no or little prospect of the Tribunal at the final hearing deciding that: the remark* [relied on as a detriment] *was not made; the remark was not a detriment; the remark was not made because the claimant blew the whistle*".

7. The nub of the respondent's argument seems to be this, from a paragraph near the top of the third page of the respondents' solicitors' letter: "*In addressing 'the likelihood of the facts being established' then, the starting point would be that 'one word against another' cannot ever be better than a 50:50 chance. … A party to litigation who has a 50/50 chance cannot reasonably say they have 'reasonable prospects of success', they would on that basis have an equal 'reasonable prospect of failure'. A party with a reasonable prospect of failure, must also have 'little reasonable prospect of success'*."

8. That is wrong as a matter of law and illogical as a matter of reasoning.

    8.1 It does not follow from the fact that the evidence on a particular issue will consist of one person's word against another's that it will never be anything other than a 50/50 issue. The inherent probabilities of the situation, the surrounding circumstances, the individuals involved, and so on, may well make the likelihood of success higher or lower than 50 percent.

8.2 As a matter of language (and law) "*reasonable prospect*" does not mean 'better than even' and "*little reasonable prospect of success*" does not mean a 50/50 chance of success or worse. If it did, then: deposit orders could be made in every single case; in a true 50/50 case, deposit orders could be made against both sides – and, indeed, could (by the respondent's logic) potentially have been made against the respondent in the present case.

8.3 A case can simultaneously have both a reasonable prospect of success and a reasonable prospect of failure; many, perhaps most, cases do.

8.4 When considering an application for a strike out or deposit order, the focus is on whether the claim has no prospect of success or little prospect of success. The word "*reasonable*" in rules 37(1)(a) and 39 is doing a similar job to the word "*real*" in rule 24.2 of the Civil Procedure Rules (concerning summary judgment in the County and High Court): to show that the Court / Tribunal must make a reasonable and realistic assessment of the prospect of success. The key question for the Tribunal under rule 39 is not "is there a reasonable chance of success?" but "is there little chance of success?".

3 February 2021

EMPLOYMENT JUDGE CAMP

SENT TO THE PARTIES ON

5 February 2021

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FOR THE TRIBUNAL OFFICE