EMPLOYMENT TRIBUNALS

Claimant: Ms S McKenzie
Respondents: 1) Ms M Polland
2) Top Shop/Top Man Ltd (in administration)

JUDGMENT

The Respondent's application dated 24 December 2020 for reconsideration of the Judgment dated 30 November 2020 and Reasons dated 8 December 2020 is refused.

REASONS

1. On 24 December 2020, solicitors for the Respondents presented an application for reconsideration of the Judgment which was sent to the parties on 1 December 2020 and the Reasons sent to the parties on 12 December 2020. In support, the Respondents provided a bundle of documents and copies of a number of Employment Tribunal decisions.

2. The ability of the Second Respondent to present an application for reconsideration and for it to be adjudicated upon must be in question given the effect of its entering administration on 30 November 2020. Proceedings are automatically stayed and the permission of the administrators is required to proceed. The Respondents' solicitors need to advise the Tribunal accordingly of its locus to proceed.

3. However, for the benefit of the First Respondent and the Claimant, the application has been considered.

The Tribunal Rules on Reconsideration

4. Under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1:

"(Rule) 70. Principles

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.
…

72.— Process
(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 reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a 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."

5. The Employment Appeal Tribunal has given guidance as to the nature of a request for reconsideration:

   a) Reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to re-argue matters in a different way or adopting points previously omitted.

   b) 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.

   c) It is not a means by which to have a second bite at the cherry, or is it 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.

   d) 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.

Conclusions

6. Having regard to the circumstances, I determined that a hearing is not necessary in the interests of justice. The Respondents' application is very full and the Claimant has not responded beyond asking for the matter to be resolved sooner rather than later given the Second Respondent's financial position.

7. The grounds of the application challenge the Judgment and Reasons both as to liability and remedy.

8. Broadly, the Respondents' criticisms of the Judgment and Reasons are summarised and addressed as follows.

9. The principal criticism is that the Tribunal in effect looked at the various allegations made by the Claimant, some of which formed part of the complaints before the

Tribunal, as set out in the agreed list of issues and some which were part of the background to events, and we effectively "joined up the dots" to determine whether or not there was unlawful race discrimination.

10. The role of an Employment Tribunal in discrimination cases is to draw appropriate inferences from primary facts and to look at matters individually and then take a general overview. This is what the statutory test and case law directs us to do. The standard of proof is balance of probability. We were not present during the events under scrutiny, respondents by and large always deny acting unlawfully and so if a set of factual circumstances points towards possible unlawful discrimination and does not add up, then as appropriate we are entitled to join up the dots so to speak. We set the statutory test and case law out clearly at paragraphs 160 to 165 of the Reasons.

11. The Respondents' position was not helped by the lack of evidence, as we indicated in paragraph 166 of our Reasons. The significance of this in reaching a determination of whether or not the Respondents had put forward a non-discriminatory explanation was highlighted, particularly in respect of the allocation of overtime and the recruitment of staff.

12. Whilst there were matters raised by the Claimant in her witness statement which the Respondents refer to as "new allegations", we determined at the outset of the case what these were, and that they would be considered as background as appropriate. Indeed, it does happen in cases where a claimant is unrepresented that a witness statement will extend out to include matters which do not form part of the complaints that the Tribunal is required to adjudicate upon but will take into account whether the respondent is in a position to deal with them or not and so the degree of prejudice that would be caused to one or other party. Simply because they are background matters does not mean a Tribunal should simply ignore them. The Respondents had received the Claimant's witness statement on exchange, they had the opportunity to consider the contents and the First Respondent was able to produce a supplementary witness statement in response to the new allegations. The Respondents were able to ask their own witnesses, as well as the Claimant, questions arising from the new allegations and the Tribunal asked questions as well. In as far as their witnesses could not deal with any of those matters, we did take that into account where appropriate. But all that being background matters means is that they are not complaints of unlawful discrimination which we are able to adjudicate upon. It does not mean that we cannot take them into account where appropriate in determining the complaints of unlawful discrimination.

13. As to the pay errors. We were required under the agreed list of issues to consider a series of payroll errors between October 2017 and July 2019 as amounting to incidents of direct discrimination (at paragraph 1.1.1). This is wide and we have not broadened this out in the way that is suggested by the Respondents. Indeed, in the wider context of our findings it was an appropriate inference for us to draw from the way the First Respondent dealt with the Claimant when she raised concerns and this is clearly reflected within paragraph 92 of our Reasons. We do not see the criticism of paragraph 76 as to the limited comparative evidence provided is made out, as the Respondents' assert. We would draw the Respondents' attention to paragraph 91 of our Reasons.

14. As to the size of the award of injury to feelings. The Tribunal has a wide discretion as to the award of compensation. We do not feel that the amount we decided upon is open to challenge on the circumstances which we found. Whether different amounts have been awarded in other Employment Tribunal cases is of limited relevance. We are not obliged to follow isolated Employment Tribunal decisions

unless they have gone to appeal. Employment Tribunal decisions are of persuasive value and even then we might only choose to follow them if they are in identical circumstances to the claim before us. The Employment Appeal Tribunal has said that it is not helpful for representatives to draw an Employment Tribunal's attention to other Employment Tribunal decisions as to levels of awards for injury to feelings and cast doubt on the usefulness of comparative information of amounts of awards which were regularly reported within a number of employment publications.

15. Having considered the Respondents' application, in the circumstances, there is no reasonable prospect of original decision being varied or revoked and the application is refused.

Employment Judge Tsamados
Date: 3 February 2021