EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr C Mitchell	**v**	**United Learning Trust**

Heard by CVP **On**: 26 January 2021

Before: Employment Judge Manley
Members: Mr H Smith
Mr J Turley

Representation

For the Claimant: In person
For the Respondent: Mr M Bloom, solicitor

RECONSIDERATION JUDGMENT

JUDGMENT having been given orally to the parties on the day of the hearing, a short judgment having been prepared with the employment judge's signature authorised but which might not have been promulgated before reasons were requested by email shortly after the hearing, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided.

REASONS

Introduction and issues

1 The tribunal heard the claimant's claims for direct discrimination on the grounds of race, age and/or sex and victimisation between 11 to 13 November 2020 and the reserved judgment was signed by the judge on 27 November and sent to the parties on 1 December 2020, with the claimant being successful on one of the four direct discrimination claims and the victimisation claim. We had already agreed to a remedy hearing on 26 January 2021 and the reserved judgment contained orders for a schedule of loss and bundle of documents for that hearing.

2 The claimant sent a schedule of loss. By email of 7 January 2021 the respondent sent a bundle of documents for the remedy hearing to the tribunal and the claimant. The bundle contained a copy of a Notice of Appeal to the EAT. The claimant considered that the bundle contained documents that did not appear to be relevant to remedy but there was no indication at that point of any intention to apply for reconsideration of the judgment. These documents were copies of the claimant's application form for employment with the respondent, documents about other employment tribunal claims which involved the claimant and emails about absence from work. The claimant told the tribunal at this hearing what he was very upset to see those documents in the bundle and did not know why they were there.

3 On 12 January 2021 the respondent wrote to the tribunal, copied to the claimant, making an application for reconsideration of part of the judgment sent on 1 December 2020. The letter explained the documents in the bundle were relevant to the reconsideration application. A written skeleton argument and two new witness statements accompanied the letter.

4 The employment judge decided not to reject the application on the papers which can be done under Rule 72 but to convert the remedy hearing into one where the application could be considered. Unfortunately, the parties did not receive that communication but they were, in any event, prepared to deal with the application at this hearing, the claimant having sent a detailed written objection to the application.

5 The issues at this hearing all fall to be determined under Rules 70-73 Employment Tribunal Rules of Procedure 2013. The first issue relates to the 14-day time limit in Rule 71. If the application is in time or time is extended, the second issue is whether it is in the interests of justice to reconsider the judgment (or part of it).

The hearing

6 The hearing was by CVP, as the earlier hearing had been. As indicated the tribunal had the additional bundle of documents, the reconsideration application and witness statements and a bundle of authorities from the respondent. The claimant had sent written objections to the reconsideration application with appendices and a witness statement for remedy.

7 The respondent's representative and the claimant also made relatively detailed oral submissions. The tribunal took some time to deliberate and the judge then gave oral judgment.

The Rules on reconsideration

8 Rules 70-72 are those that apply in the circumstances. Rule 70 sets out the principles and reads:

"*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".*

9 Rule 71 deals with the process for applications and reads:-

"Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why the reconsideration of the original decision is necessary"

10 Rule 72 explains the process, beginning with an initial consideration by the employment judge on whether to reject the application if it is considered there is no reasonable prospect of success. If it is not rejected, the application should be considered at a hearing unless the employment judge considers that a hearing is not necessary. Rule 72 provides that the reconsideration application should be considered by the employment judge or the full tribunal that made the original decision.

11 There is some guidance on the Rules and when new evidence can be considered in cases and this is set out below.

Submissions

12 The respondent's representative added to his written skeleton argument orally. In summary, it is submitted that the application is made within the time limit in Rule 71 because it is made *"in the course of a hearing*", that is within the remedy hearing. If the tribunal does not agree with that submission, the respondent asks that the tribunal extend time under Rule 5 which provides for a wide discretion to extend or shorten any time limit in the Rules. Lastly, the respondent says, the tribunal could decide to reconsider the judgment on its own initiative where no time limit applies. We were also reminded on the overriding objective to deal with cases justly. On the time limit point, we were referred to the case of Green and Symons Limited v Shickell EAT 528/83 which, we were told, said that a tribunal should extend time for reconsideration "even at a late stage". However, we have seen no copy of that judgment so do not know the context or any other details. In oral submissions Mr Bloom gave reasons for the delay by reference to the coronavirus pandemic, the difficulties of communications and that Christmas and New Year intervened.

13 The respondent's representative submitted that the tribunal now has a wide discretion to consider reconsideration applications, the previous suggestion that they should only be heard in exceptional circumstances no longer being good law (see Williams v Ferrosan (2004) IRLR 607 and Sodexho Limited v Gibbons (2005) ICR 1647). The tribunal is asked to reconsider those paragraphs of the judgment where the claimant was successful as, it is submitted, a grave injustice has been done.

14 The first ground for reconsideration is that new evidence is now available from Ms Fiona Morris, having been contacted on 6 January 2021, after, we were told, many attempts. Ms Morris left the respondent's employment in August 2019 and had moved to Hong Kong. She was involved in the decisions for two or the claimant's claims of direct discrimination, including the one where he was successful. Her witness statement was written having read the tribunal's judgment. In oral submissions, Mr Bloom said the respondent had taken the reasonable view that any necessary evidence could be given by Mr Wilson and Ms Morris was therefore not a witness in November. Once the tribunal had seen email exchanges involving Ms Morris and referred to in the judgment, it was decided to contact her. The tribunal was not told any details of the attempts to contact Ms Morris, save that there were "*many*" and that there was an 8 hour time difference.

15 There is also, it is submitted, new evidence from Mr Wilson who said, in his witness statement in support of the reconsideration application that he had "*conducted some extensive additional enquiries*" after he received the tribunal judgment. It is said that the result of those enquiries throw doubt on the claimant's credibility, particularly around the issue of whether he was aware of the vacancy where the tribunal found discrimination. It is submitted that there are discrepancies in the dates provided by the claimant of his employment in various schools when he applied to the respondent school with other dates indicated by pension records and his reason given for 2 absences whilst at the respondent school were untruthful. Finally, it is said that the claimant has brought or has threatened to bring employment tribunal proceedings against other schools, categorised by Mr Bloom as suggesting the claimant is a serial litigant. We were referred to Adegbuji v Meteor Parking Limited EAT 1570/09 as supporting the respondent's application where the new evidence relates to crucial findings of fact.

16 The second ground is that the respondent has identified what it considers to be errors of law in the judgment and reasons. It is submitted that the tribunal could use this opportunity to re-visit its judgment.

17 The claimant had managed to prepare relatively detailed written objections which he sent on 17 January 2021. He does not accept the

respondent's interpretation of Rule 71 that the application is made in the course of a hearing, referring to it as "tortuous" and points out that the delay is not just a little late but made 42 days after judgment was sent. He submitted in writing that it is not in the interests of justice to reconsider the judgment, submitting that Ms Morris' evidence was available to the respondent before the November hearing and that what is now said by her is after she has read the tribunal judgment. As for Mr Wilson's new evidence, he submits that evidence could have been gathered before, if relevant, which the claimant says it is not. He does not accept that there was an issue of credibility in the case and submits that the judgment is not based on preferring one piece of evidence over another. The finding of the tribunal with respect to the victimisation claim is based on Mr Wilson's own evidence. The claimant raised concerns about the process used by the respondent when making the application, such as sending a bundle with documents with no explanation of their relevance. He takes exception to the suggestion that he is a serial litigant because he has taken other tribunal proceedings.

18 In oral submissions, the claimant repeated and gave more detail of his objections. He reminded the tribunal that the respondent had taken 42 days to make the application and he had only 6 days to put in a response. This, the claimant says, is not putting the parties on an equal footing. The respondent has an HR department, it had counsel drafting a Notice of Appeal and a firm of solicitors. Mr Wilson, it seems, had access to senior people in other schools. He contrasted that with his own situation, working full time and having to do research and be ready to put forward his objections. The claimant did not accept that the pandemic has affected communications and stated that the respondent had not exercised due diligence.

19 The claimant referred the tribunal to the leading case of Ladd v Marshall 919540 EWCA Civ 1 which sets out the tests for considering new evidence. He expressed surprise that the respondent's representatives had not made reference to the case or the tests referred to there in their written or oral submissions. The first test is whether the new evidence could not have been found before the hearing with reasonable diligence. The claimant submitted that it could have been as his claim was presented whilst Ms Morris worked at the school and an earlier merits hearing listed for March 2020 had been delayed to November 2020, allowing plenty of time to gather her evidence. That which Mr Wilson seeks to give was also available. The second test is whether the new evidence *"would probably have an important influence on the result*". The claimant says it would not have such any influence as credibility was not an issue in the case. Thirdly, the new evidence "*must be such as is presumably to be believed….apparently credible, though it need not be incontrovertible".*

20 The claimant was very concerned by the extensive additional enquires undertaken by the respondent and submits that, if he had

been asked about those issues apparently discovered at the hearing, he had explanations for them. He submitted he could simply explain the alleged discrepancies in dates on the application form, the reasons given for absence and the tribunal claims, one of which he had been successful at a full hearing and in another reached a settlement. He pointed out that there was a 13 year gap between two of the claims and that it was his right to pursue a claim where he believed there had been discrimination. He cautioned that the sort of enquiries made by the respondent after a judgment against them might lead to people with justified claims feeling not able to pursue them.

21 Briefly, in reply Mr Bloom re-iterated that it had taken that long to get the information and referred to the problems in schools caused by the pandemic. He also reminded the tribunal that the claimant would have the opportunity to challenge the new evidence at a hearing if the reconsideration application was allowed to proceed.

Conclusions

22 The tribunal finds that the application has been made out of time. On any sensible reading of the Rules, the application must be made within 14 days of the judgment which is the subject of the application, whether or not a later hearing will determine remedy. It is part of the judgment on liability, sent to the parties on 1 December 2020, which the respondent wishes the tribunal to reconsider. The application is not made in the course of a hearing. As it was not made until 12 January 2021, it is out of time.

23 The tribunal therefore considered whether to exercise its discretion to extend time under Rule 5. Such an exercise of discretion must be based on factors such as the length of delay and the reasons for it, taking into account the overriding objective. The tribunal has decided it will not exercise its discretion. The delay is lengthy at 42 days. The reasons given for the delay were vague and unspecific, lacking any detail about how and when the respondent or its representatives attempted to contact Ms Morris or gather the other evidence in Mr Wilson's statement. Clearly, some issues have been caused by the pandemic but no specific communication issues were relied upon and that is not an area which, in the tribunal's view, where there have been particular difficulties. The respondent has not provided enough reasons which could lead the tribunal to extend time under Rule 5, bearing in mind the overriding objective and the need to deal with cases justly where there is an unrepresented party.

24 There are no reasons for the tribunal to reconsider its judgment on its own initiative. The application cannot proceed as it was made out of time and we do not extend time.

25 However, if we are wrong about that, and as we have heard the application in full with the claimant's objections, we have gone on to

consider whether we would have decided to reconsider part of the judgment in the light of new evidence.

26 The tribunal does not accept that this new evidence could not have been gathered with reasonable diligence before the November hearing. Ms Morris was a decision maker on two of the claimant's direct discrimination complaints. The emails which the tribunal considered and referred to in the judgment had been disclosed by the respondent and were contained in a relatively short bundle. The hearing should have taken place in March 2020 and there was plenty of time for Ms Morris to be contacted and arrangements for her to give evidence remotely, that way of conducting hearings being well known to parties by mid-2020. Secondly, the tribunal are not convinced that her evidence would have an "*important influence*" on the result, as the findings we made were very much on undisputed evidence. Her new evidence does not go to the victimisation claim at all. Only in a minor way might it be relevant to the one direct discrimination claim about the vacancy. She does not and cannot say whether the claimant was aware of the vacancy or not. The other point which would concern the tribunal is that she has made her statement after reading the judgment which is not something any other witness has been able to do.

27 As for Mr Wilson's new evidence, again the tribunal is not satisfied that it could not have been gathered before the November hearing with reasonable diligence. Presumably, the information was not sought as the respondent and its representatives did not believe that credibility was an issue. They were right about that. It was not. In any event, the new evidence can have no influence on the successful victimisation claim. The tribunal makes no finding as to the apparent credibility of the new evidence which would, if the matter had proceeded have to be tested by cross examination and any questions from the tribunal.

28 Even if the application had been made in time or we had extended time, we would have refused the application. It is not in the interests of justice to reconsider the judgment. The tribunal considered the evidence before it at the November hearing, most of which was not in dispute, and found some, but not all, of the claimant's claims to be successful.

29 The tribunal also decided it would not be right to reconsider on the basis of any alleged errors of law. Only where there is a very obvious mistake which can be remedied without the need for the EAT to look at it, would it be appropriate for the tribunal which deliberated, came to a conclusion and communicated that conclusion, to re-visit that conclusion. The matter has been appealed and it is not in the interests of justice to reconsider on those grounds.

30 Remedy will now be determined on the agreed date of Thursday 4 March 2021 at 10am by CVP. No further orders are needed.

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Employment Judge Manley
Dated: 28 January 2021