EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4100537/2020

Employment Judge: Rory McPherson

Held in Glasgow on 17 December 2020 (In Chambers)

Mrs A Bovill	**Claimant** **In Person** **(Written Submissions)**
15:17 Ltd	**Respondent** **Mr W Laing – Solicitor** **(Written Submissions)**

RECONSIDERATION JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that

1. On reconsideration under **Rule 70** of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the 2013 Rules), the judgment dated **4 November 2020** and sent to the parties on 11 November 2020 is not revoked, on the basis of the claimant's application for reconsideration; and

2. The claimants' application for reconsideration is dismissed.

REASONS

1. The following background narrative reflects the documentation available to the Tribunal and or where appropriate the existing finds of fact set out in the written judgment dated 4 November 2020 and sent to the parties on 11 November 2020 (the judgment).

2. The claimant presented her ET1 on 28 January 2020 following ACAS Early Conciliation following the termination of her employment on 9 November 2019. The ET1 identified that she was represented. At 8.1 of the ET1 the

claimant does not identify that she was seeking to assert any claim for any form of discrimination. The paper apart to the ET1 does not identify any claim for discrimination.

3. The respondents ET3 was presented 20 May 2020 and accepted upon consideration of an application for extension of time, as received at the Preliminary Hearing on 22 May 2020. The ET3 set out the responses to the issues raised by the claimant in her ET1.

4. The Tribunal at Preliminary Hearing on 22 May 2020, at which the claimant was represented, identified the issues as being

   a. Wrongful Dismissal/Notice pay,

   b. Holiday Pay;

   c. Unauthorised Deductions of Wages,

   d. Breach of Contract (car allowance)

and identified that those were the matters which the Tribunal at the Final hearing would require to decide. Tribunal issued orders dated 22 and sent to the parties 29 May 2020 set out that that the claimant should provide further specification of holiday pay claim, unauthorised deduction of wage and details of financial loss. Those orders were complied with, by the claimant's then representatives and the respondents provided responsive Further and Better Particulars in relation to same on 9 July 2020.

5. In addition, the Tribunal ordered that by no later 26 June 2020 the parties required to disclose to each other the documents on which they intend to rely at the hearing and that a joint set of documents required to be sent to the Tribunal no later than 10 July 2020. Those Orders were complied with. In addition, witness statements were ordered and witness statements including that of the claimant were provided for the Final Hearing.

6. In advance of the Final Hearing, the respondent set out their proposed written submissions on 11 September 2020 the respondent submissions setting out

their position in relation to the issues set out in the Tribunal's note following the Preliminary Hearing.

7. The claimant by e-mail on 16 September 2018 set out that at "*the conclusion of the final hearing, the Claimant intended to present written submissions (and, as part of this, refer to case law authorities). Given the final hearing will take place by CVP, she thought it prudent to lodge these in advance, and duly attach them in pdf format."* The opening paragraph of the claimant's written submissions state they "*follow the structure of the issue set out in the Tribunals note following preliminary hearing"* and follow the headings "*Wrongful Dismissal/unauthorised removal of money/ Unacceptable behaviour/ Wrongful Dismissal/ Ted Ward actings… /Holiday pay/ Unauthorised Deductions/ Breach of contract."* While in relation to the Ted Ward actings heading, opening reference was made to s26 (1) of the Equality Act 2010, there was no application made to amend the claim pled. There was no notice of any potentially qualifying condition. There was no application made to include any additional claim, including to assert that the claimant had any qualifying condition in terms of s6 of the Equality Act 2010, nor that any alleged conduct related to a protected characteristic respect of the Equality Act 2010. There was no pled notice to the respondent of any claim in terms of the Equality Act 2010. The substance of the Ted Ward actings submission related to assertions around his status as a disqualified director.

8. At the conclusion of the Final Hearing on 18 September 200 both the respondent and the claimant referred to their respective written submissions.

9. The judgment dated 4 November 2020 and sent to the parties on 11 November 2020 addressed the heads of claim listed for consideration at the Final Hearing.

10. The claimant was unrepresented at the CVP Final Hearing on 18 September 2020; however, she had been represented at least until the Preliminary Hearing before the Final Hearing.

11. The claimant intimated application for reconsideration on 24 November 2020.

12. The application for reconsideration was referred to myself, I did not refuse it on initial consideration.

13. The respondent was afforded an opportunity to respond and set out their position. The respondent in summary sets out that the application is opposed. The respondent argues that, if the claimant is seeking to argue for reconsideration on the basis of "*new evidence available*" the Tribunal should have regard to the decision of the English Court of Appeal in **Ladd v Marshall** [1954] I IWLR 1489 (**Ladd**) which sets out that the party seeking to make the application needs to be able to show that that the new evidence

    a. Could not have been obtained with reasonable diligence for use at the original hearing;

    b. Was relevant and would probably have had an important influence on the hearing; and

    c. Was apparently credible

    The respondent notes that accompanying the claimant's application is a document branded MIND and dates from 2018.

14. Both parties were invited to confirm whether they wished the matter to proceed to a hearing. The respondent set out that they did not consider that a hearing was appropriate while the claimant intimated that she would prefer that a hearing via CVP take place.

15. Having regard to both parties' positions and having regard to the overriding objective I have concluded that it would in accordance with the overriding objective to proceed on the basis of claimant and respondents written submissions, including having regard to the respondent's position on this matter that the application does not appear to engage points of law which could not be argued by written submissions alone.

16. The claimant in her application for reconsideration asserts at para 1 that *"**At the time of my dismissal** I was suffering from PTSD, stress, grief and depression. **I had** been diagnosed by a psychologist as having PTSD*" and

describes what she says is one of the many symptoms. I do not consider it appropriate to set out the full terms of the application.

Relevant Law

17. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides as follows.

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.

Rule 71 Application

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 reconsideration of the original decision is necessary.

Rule 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 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. …

18. The approach to be taken to applications for reconsideration was set out in **Liddington v 2gether NHS Foundation Trust** [2016] UKEAT/0002/16 (**Liddington**) in the judgment of Simler P. The tribunal is required to:

18.1. identify the Rules relating to reconsideration and in particular to the provision in the Rules enabling a Judge who considers that there is no reasonable prospect of the original decision being varied or revoked refusing the application without a hearing at a preliminary stage;

18.2. address each ground in turn and consider whether is anything in each of the particular grounds relied on that might lead ET to vary or revoke the decision; and

18.3. give reasons for concluding that there is nothing in the grounds advanced by the Claimant that could lead him to vary or revoke his decision.

19. In paragraph 34 and 35 of the judgment Simler P included the following:

"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 ***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. 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."*

20. I have further reminded myself the EAT has issued guidance including decisions that the interests of justice include the public interest in the finality of litigation in **Flint v Eastern Electricity Board** [1975] ICR 395 (**Flint**) per Phillips J at 404G-405B: "*it is very much in the interests of the general public that proceedings of this kind should be as final as possible; that is should only be in unusual cases that the employee, the applicant before the tribunal, is able to have a second bite at the cherry."*

21. Further Underhill J in **Council of the City of Newcastle upon Tyne v Marsden** [2010] ICR 743 (**Marsden**), having reviewed the relevant case law, said at [17]: *" … the weight attached in many of the previous cases to the importance of finality in litigation – or, as Phillips J put it in Flint (at a time when the phrase was fresher than it is now), the view that it is unjust to give the losing party a second bit of the cherry – seems to me entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final …"*

22. Judge Hand QC, considering the new reconsideration jurisdiction under the 2013 ET Rules in the light of the previous case law, said in **Serco Ltd v Wells** [2016] ICR 768 (**Wells)** at [43(a)]: "*The draftsmen of both sets of Rules must be taken to have drafted them with the same universal principle in mind, namely what I have described as finality and certainty of decision and orders and the integrity of judicial decisions and orders; this principle, as the authorities in both jurisdictions illustrate, usually directs any challenge to an order towards an appeal to a tribunal of superior jurisdiction and discourages seeking the same judge or another judge of equivalent jurisdiction to look again at an order or decision, save in carefully defined circumstances.";*

23. The Court of Appeal considered Rule 70 in **Ministry of Justice v Burton** [2016] ICR 1128 (**Burton**). Elias LJ said at [21]: *"An employment tribunal has a power to review a decision 'where it is necessary in the interests of justice': see rule 70 of the Employment Tribunals Rules of Procedure 2013. This was one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, as Underhill J pointed out in* **Newcastle**

upon Tyne City Council v Marsden *[2010] ICR 743, para 17 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 & 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."*

24. I have reminded myself that in **C v D** [2020] UKEAT 0132*/*19 (**C v D**) the EAT at para 12 sets out that in the claim form "*the author should seek to set out a brief statement of relevant facts, and the cause of action relied upon by the Claimant. The purpose of doing so is to allow the other side to understand what it is that they have done or not done which is said to be unlawful."* Further I have reminded myself that as the EAT observed in **Khetab v AGA Medical Ltd** [2010] 10 WLUK 481 (**Khetab**) that the purpose of pleadings *"…is so that the other party and the Employment Tribunal understand the case being advanced by each party so that his opponent has a proper opportunity to meet it",* and further in **Chandhok and Another v Tirkey** [2015] IRLR 195 (**Chandhok**) Langstaff J, commented at para 18 the parties should set out the essence of their respective cases and "*… a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it".*

25. While Ladd is a decision of Court of Appeal, I have reminded myself that Lord MacFayden in the Court of Session in a Judicial Review **ST Nazir v the Secretary of State for the Home Department** P753/00 (**Nazir**) in 2010 indicated general approval of the tests set out in **Ladd**, to the effect in that if a fresh claim depends on new evidence, it had to satisfy tests, analogous to those in **Ladd,** of previous unavailability, significance and credibility. Further I have reminded myself that Lord Reed in the Inner House in **Rankin v Lochill Equestrian Centre** [2010] CSIH 48 **(Rankin)** when considering an application for a hearing on additional evidence commented at para 25

"Applications for additional proof… following proof … are rarely made, and even more rarely granted. There are strong reasons for this approach, which has a long pedigree. The principal reason … is the importance of finality in litigation. This has long been recognised by the court as a compelling consideration ... The importance of finality, in the interests of legal certainty, is obvious…. I would add that prolonged litigation can also be a cause of great anxiety as well as expense."

Discussion and decision

26. The tribunal's powers concerning reconsideration of judgments are contained in rules **70** to **73** of the Employment Tribunals Rules of Procedure 2013 (the 2013 Rules). A judgment may be reconsidered where "*it is necessary in the interests of justice to do so."* Applications are subject to a preliminary consideration. They are to be refused if the judge considers there is no reasonable prospect of the decision being varied or revoked. If not refused, the application may be considered at a hearing or, if the judge considers it in the interests of justice, without a hearing. In that event the parties must have a reasonable opportunity to make further representations. Upon reconsideration the decision may be confirmed, varied or revoked and, if revoked, may be taken again.

27. Under rule 71 of the 2013 Rules an application for reconsideration must be made within 14 days the date on which the judgment (or written reasons, if later) was sent to the parties.

28. Broadly the claimant is seeking to argue that she had at the relevant time a qualifying condition within terms of s 6 of the Equality Act 2010. She does not offer to explain what further relevant provisions of the Equality Act 2010 would be said to be breached, had she elected to give relevant fair notice, timeously to the respondent.

29. The claimant had been represented until some point before the Final Hearing at which stage no such claim was made out in the pled claim giving notice of same. Indeed, had she wished to do so, at the stage she was unrepresented, she could have sought to amend her claim, had she wished to do so at the

point she was unrepresented in advance of the Final Hearing. She does not set out why she did not seek to amend in a claim on the basis of position now set out in her application.

30. The claimant does not identify any basis upon which it may be suggested that the primary time limit for asserting a discrimination claim in terms of s 123 (1) (a) and (b) of the Equality Act 2010 may be disregarded.

31. The claimant does not offer any explanation for the condition which she asserts she had at the time of her dismissal, not having been placed before the Tribunal as a relevant issue for the Tribunal at the Final Hearing, including at the time she had represented herself.

Conclusion

32. A tribunal is required to receive the submissions of the parties before it. It is required to form a judgment as to the submissions which have persuasive force in coming to a conclusion. It is not required to set out extensively the submissions of the parties in every case. It is required to explain the basis upon which it reaches its conclusion. Sometimes that requires it to set out submissions in summary and on other occasions more fully.

33. Having regard to paragraphs 1 to 21 and the remainder of the claimant's application, it is the decision of the Tribunal that they do not support an application for reconsideration. The claimant appears to be arguing that had she elected to bring a differently articulated claim (and had given fair notice of the basis of same to the respondent) that the Tribunal ought to have made different findings of fact.

34. I consider having regard to the case law as set out above, that there is nothing before me which persuades me that it is necessary in the interests of justice, in the present case, that this application for reconsideration should be granted.

35. If the claimant considers that the Tribunal erred in law, that is a matter that can be canvassed before the Employment Appeal Tribunal.

36. Taking all these matters into account the Tribunal concludes that there is no reasonable prospect of the original decision being varied.

37. For those reasons the Tribunal, refuses the claimant's application for reconsideration of the claimant's application.

5

10 Employment Judge: Rory McPherson
Date of Judgment: 18th December 2020
Entered in register: 22nd January 2021
Copied to parties