



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss T Brangman

**Respondent:** NCO Europe Limited

Judgment was sent to the parties on 7 November 2020. The tribunal has treated the claimant as having applied for reconsideration of that judgment.

## JUDGMENT

The claimant's reconsideration application is refused.

## REASONS

### Introduction

1. The heading to this judgment is marked, "Code P", which means that the judgment was issued without a hearing.
2. This application has taken over five months to be referred to me for a decision. I apologise for the delay, which was caused by an administrative error.
3. These reasons should not be confused with written reasons for the original judgment sent to the parties on 7 November 2020. Written reasons for that judgment have not been requested. A short summary of those reasons is set out in a separate case management order also sent to the parties on 7 November 2020.

### The claim

4. By a claim form presented on 24 July 2019, the claimant indicated that she was raising the following complaints:
  - 4.1. Unfair dismissal;
  - 4.2. Race discrimination;
  - 4.3. "Failure to adhere to Disciplinary Policies & Procedures"
  - 4.4. wrongful dismissal; and
  - 4.5. "defamation of character"

5. The claim form provided a brief history of events taking place on 28 May 2019 and explained why, in her view, she had been “fired without a valid reason”.
6. The complaint of unfair dismissal and the claim for damages for breach of contract were both struck out by Employment Judge Holmes in a judgment sent to the parties on 19 November 2019.

### **The preliminary hearing**

7. Following preliminary hearings on 18 October 2019 and 29 July 2020, the case was listed for a further preliminary hearing in public before me on 30 September 2020. The purpose of the preliminary hearing was to consider whether or not the claim, or any part of it, should be struck out.
8. Prior to the preliminary hearing, the claimant had prepared a schedule of allegations. The respondent’s position was that the schedule lacked essential information so that the respondent could not understand the case it had to meet. The claimant also provided a witness statement dated 12 July 2020. The statement ran to 27 pages, containing 56 densely-typed paragraphs. Amongst those paragraphs were many allegations that did not appear either in the claim form or in her schedule of claims.

### **The oral judgment**

9. During the course of the hearing I gave an oral judgment and explained my reasons. I informed the parties that written reasons would not be provided unless a party made a request in writing at the hearing or within 14 days of the date on which the judgment was sent to the parties.
10. My decision was:
  - 10.1. That the claim should not be struck out;
  - 10.2. That various allegations of direct discrimination did not require any amendment to her claim, and should proceed;
  - 10.3. That the claimant had permission to amend her claim to include one complaint of harassment; and
  - 10.4. That certain parts of the claimant’s proposed claim would require an amendment, which I refused.
11. I also made a disputed case management decision for which I also gave reasons. The claimant is also dissatisfied with that decision. I deal with that matter in a separate document.

### **The claimant’s e-mails of 1 and 2 October 2020**

12. On 1 and 2 October 2020, before the written judgment was sent to the parties, the claimant sent two e-mails to the tribunal.
13. Attached to the e-mail of 1 October 2020 were four letters, each bearing the date 1 September 2020 (which I presume to be a typographical error). One of the letters related to case management, which I deal with in a separate document. Another letter seeks to “make an appeal” in relation to the judgment striking out her breach of contract claim. That letter will be referred to Employment Judge Holmes.

### **The additions letter**

14. The third letter I will call “the additions letter”. Here is a summary of its main points:
  - 14.1. The letter began, “I would like to request reconsiders/appeal on additions to claims.”
  - 14.2. It continued, “I would also like to inform that only Victimisation, Race discrimination and Harassment were discussed during the... Hearing.
  - 14.3. The claimant referred to her attempt to “add to my claims”, complaining that “my attempt to do so was not considered nor allowed”. She added, “I would like to uphold all my claims of Wrongful Dismissal, Discrimination, Victimisation, Harassment, Retaliation and Breach of Contract.”
15. I treated this letter as an application for reconsideration of the judgment refusing permission to amend the claim.

#### The victimization letter

16. I refer to the fourth letter as “the victimization letter”. In summary, the letter made the following points:
  - 16.1. “I would like to make an appeal on the claim of Victimisation that has been stricken out...”
  - 16.2. The letter then set out certain exchanges which, she said, had taken place at the preliminary hearing. Her grounds for wanting to “appeal” appear to be:
    - (a) That her victimization complaint had been struck out because she was unable to give a dictionary definition of victimization;
    - (b) That I had asked questions about her claims “in the manner that caused confusing” and that she had indicated that she did not understand the questions;
    - (c) That there was sufficient evidence in her witness statement to support all her claims; and
    - (d) That the claimant was prevented from making “a second particle attempt” to contest the victimization strike-out at about 5.45pm.
17. At the time of writing the victimization letter, the claimant appeared to have misunderstood the oral judgment that I had given the previous day. I had not struck out any part of her claim. What I had done was to determine that her original claim had not contained a complaint of victimization, so that she would need to amend her claim if she wanted to pursue that complaint. I went on to refuse permission to amend. I treated the victimization letter as putting forward further grounds for reconsidering my amendment decision generally, and my decision on her proposed victimization complaint in particular.
18. One further letter was attached to the e-mail of 2 October 2020. This letter related to a case management order and is dealt with separately.

#### **The written judgment**

19. The written judgment was sent to the parties on 2 October 2020. Below the signature block, the judgment contained the following notes:

...

(2) Reasons for the judgment were given orally at the hearing. Written reasons will not be provided unless a party makes a request in writing within 14 days of the date when this judgment is sent to the parties. If written reasons are provided, they will be entered onto the tribunal's online register, which is visible to internet searches.

(3) The parties should read the guidance which explains the procedure for appealing to the Employment Appeal Tribunal. Links to that guidance are provided in a document which accompanies this judgment. It is not sufficient to send an e-mail to the tribunal indicating a wish to appeal.

### **Relevant law**

20. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides the tribunal with a general power to reconsider any judgment "where it is necessary in the interests of justice to do so".
21. Rule 71 sets out the procedure for reconsideration applications.
22. By rule 72(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... the application shall be refused..."
23. The overriding objective of the 2013 Rules is to enable the tribunal to deal with cases fairly and justly. By rule 2, dealing with cases fairly and justly includes putting the parties on an equal footing, avoiding delay, saving expense, and dealing with cases in ways that are proportionate to the complexity and importance of the issues.

### **Discussion**

24. I have examined the contents of all five letters together. I took into account any point that appeared to be relevant to my amendment decision, regardless of which letter it appeared in.
25. I deal with what I understand to be the main grounds of reconsideration in turn.

#### Failure to consider complaints beside discrimination, harassment and victimisation

26. The only complaints to which the claimant had referred, beside discrimination, harassment and victimisation, were "breach of contract", "wrongful dismissal", and "retaliation".
27. The breach of contract claim had been struck out. It would have been wrong for me to consider it.
28. Wrongful dismissal is just another name for a particular type of claim for damages for breach of contract. It was clearly within the scope of the complaint that had been struck out, as the written reasons for the strike-out judgment make clear.
29. I did consider the claimant's wish to introduce a complaint of retaliation. As an ordinary English word, "retaliation" is easily understood. It is not, however, a recognised name for any complaint that an employment tribunal has the legal power to consider. If it is clear to a tribunal that, by "retaliation", a claimant is actually referring to a recognisable complaint, it may deal with the substance of the

complaint and disregard the fact that it has not been given the correct legal label. Sometimes an employee takes certain action and the employer retaliates. Whether or not the retaliation breaches the employee's legal rights will depend on what action the employee took, or was about to take, that motivated the employer to retaliate. In this case, the claimant did not suggest that she had done anything to engage legal protection against retaliation. I did attempt to clarify this point with the claimant, including asking her what her "protected act" was. Even then, the claimant did not mention anything to me that would amount to a protected act. I looked through her witness statement to see if that made her allegation of "retaliation" any clearer. Paragraph 45 referred to a complaint of discrimination in her appeal against dismissal. If that was the reason for the alleged retaliation, it would amount to victimisation. The allegation of "retaliation" appeared to stand or fall with the proposed victimisation complaint and I dealt with it accordingly.

30. There are no grounds here for varying or revoking my amendment decision.

"My attempt ... was not considered or allowed"

31. The hearing started at 10.10am and lasted until after 5.30pm. Most of that time was spent attempting to clarify the claimant's claim. We discussed comparators. I attempted a number of different ways of explaining to the claimant what a comparator was. At about 2.30pm, the claimant informed me that her claim was that all her colleagues were treated better than she was. For every allegation, she wanted the tribunal to compare the way in which she was treated with the way each of her colleagues were treated.

32. Shortly afterwards, once the claimant had clarified her allegations of discrimination, she said that she also wanted to pursue complaints of victimisation and harassment. She said that these were part of her claim because they were contained in her witness statement. At 2.38pm I gave her the chance to present oral arguments as to whether or not she should be permitted to proceed with those claims. At about 4.00pm, the claimant said that she wanted to proceed with all her claims, as set out in her witness statement. She added, "I don't want to accept that they have been taken out." At 4.56pm, I informed her that I was proposing to allow her to go forward with the complaints that she had listed in her schedule of allegations, and gave her a final opportunity to say why I should allow her to introduce all the allegations that were in her witness statement. She made some further submissions, which included an assertion that victimisation "was part of my claim," and "What I put in my witness statement went on."

33. With a view to clarifying the proposed amendment, I asked the claimant what her protected act was. The claimant could not say.

34. The claimant read out a statement. At 5.06pm I attempted to persuade her to focus on the question of whether or not she should be permitted to pursue the additional allegations in her witness statement. She repeated, "I want to stick with all my claims". She made some further submissions, saying that she "could not cover the law", as she did not "have professional certification", but had "documented things on paper" and that everything in her witness statement was relevant to all of her claims.

35. I determined the amendment dispute partly in the claimant's favour, by allowing her to introduce an allegation of harassment. In relation to the rest of the amendment

dispute the claimant was unsuccessful, but that does not mean that I did not consider her application.

36. The claimant had a fair opportunity to contest the amendment dispute. In any case, now that she has had the chance to put her argument in writing, I do not think that there is any reasonable prospect of my decision being different. Her letters do not really put forward any new argument of substance.

Lack of knowledge of legal definitions

37. I did not hold it against the claimant that she did not know the legal definition of victimisation. Her difficulty, when it came to introducing the victimisation allegations, was that she was unable to tell me what facts she was alleging that would support her proposed complaint. I took that into account when deciding on the balance of disadvantage that would be caused by either granting or refusing the amendment.

Confusing questions

38. It is true to say that the claimant appeared to have some difficulty in understanding what was meant by a comparator, despite my attempts to explain it in different ways. The victimisation letter gives the impression that she still has not understood the question that I was trying to ask her. I did not ask, as the victimisation letter suggests, "Are the claims based on hypothetical comparators or race?" I repeatedly explained to the claimant that I understood that her case was that she was treated less favourably because of her race. What I was also trying to explain to her was the difference between actual and hypothetical comparators. I did not use that terminology. I asked her whether or not she was saying that she had been treated less favourably than another person was actually treated. I told her that, if that was her case, it was important for her to say who that other person was. In fact, she did eventually provide this information in relation to most of her allegations. I also sought to reassure her that it was not fatal to her claim if she could not name a person who was treated better than she was treated. She can still argue that an imaginary person of a different race would have been treated better than her in the same circumstances.
39. I do not believe that these exchanges had any real impact on the claimant's ability to contest the amendment issue and there is no reasonable prospect that I would decide it differently were I to reconsider the matter.

Supporting evidence in the witness statement

40. This reconsideration ground misses the point. The fact that an allegation is contained in a witness statement does not mean that the tribunal will necessarily adjudicate upon it. Tribunals adjudicate upon issues. The issues are defined by the claim form and the response. The purpose of witness statements is to set out the evidence that is relevant to the issues. The issues are not defined by what is in the witness statement, otherwise there would be no limit on what a witness statement could contain or how many decisions a tribunal could be expected to make. Parties may clarify or seek to amend their claim or response, but that is not done in witness statements for precisely that reason. The claimant must have known this because it had been explained in a previous case management order and she had already produced a schedule of allegations in a document that was entirely different from her witness statement.

41. As it happened, I did read the witness statement to see if would help me understand the claimant's case as set out in the claim form and schedule of allegations. For example, in my oral reasons, I referred to paragraph 45 which set out something that was capable of being read as a protected act.
42. My reason for refusing the amendment was not that the supporting evidence was missing. It was because the disadvantage to the respondent caused by allowing the amendment would have outweighed the disadvantage caused to the claimant by refusing it.

"Second particle attempt"

43. I am not entirely sure what the claimant is referring to here. I have a brief note of the claimant asking, just before the end of the hearing, how she could appeal against my judgment. As the claimant says, it was after 5.30pm by that stage. If what the claimant was seeking was a further opportunity to make submissions on the amendment dispute, I would have refused it, as I had already made my decision and there was insufficient time left to embark upon a reconsideration application.

**Conclusion**

44. For the above reasons, my view is that there is no reasonable prospect of the judgment being varied or revoked. The reconsideration application is therefore refused.

Employment Judge Horne  
9 March 2021

SENT TO THE PARTIES ON

12 March 2021

FOR THE TRIBUNAL OFFICE