EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mrs K White		**TW White & Sons Ltd**

JUDGMENT

Rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237

The application for reconsideration is refused, as there are no reasonable prospects of the judgment, sent to the parties on 19 February 2020, being varied or revoked.

REASONS

1. Rule 70 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that an Employment Tribunal may, either on its own initiative or on the application of a party, reconsider a judgment where it is necessary in the interests of justice to do so. On reconsideration, the judgment may be confirmed, varied or revoked.

2. Rule 71 states that 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.

3. Under Rule 70, a judgment will only be reconsidered where it is necessary

in the interests of justice to do so. This allows a Tribunal a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. The discretion must be exercised judicially, which means having regard not only to the interests of the party seeking the reconsideration, but also the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation.

4. The procedure upon a reconsideration application is for the Employment Judge that heard the case to consider the application and determine if there are reasonable prospects of the judgment being varied or revoked. Essentially, this is a reviewing function in which I must consider whether there is a reasonable prospect of reconsideration in the interests of justice. There must be some basis for reconsideration. If I consider that there is no such reasonable prospect, then the application shall be refused. Otherwise, the original decision shall be reconsidered at a subsequent reconsideration hearing before the original Tribunal pursuant to Rule 72(2).

5. This reconsideration application is a little unusual in terms of its chronology which I shall summarise briefly below.

6. This case brought by the Claimant was heard by a full Tribunal during a hearing lasting nine days in December 2019. The decision was reserved, and the Tribunal met in Chambers for three days, two of them in December 2019 and one in February 2020. A reserved judgment was sent to the parties on 20 February 2020.

7. The Respondent filed a notice of appeal with the Employment Appeal Tribunal ("the EAT Appeal") challenging the decision of the Tribunal. This was received by the EAT on 10 March 2020.

8. On 25 August 2020, Judge J Keith of the EAT made the following order in relation to the EAT Appeal:

> ***1. This appeal be stayed for a period of 21 days from the seal date of this order.***
>
> ***2. The appeal to be stayed to give opportunity to the Appellant to submit to the Employment Tribunal (and copy to the Employment Appeal Tribunal) an application for Reconsideration albeit out of time.***
>
> ***3. The Appellant is required to report to the Employment Appeal Tribunal the outcome of such an application.***
>
> ***4. The papers are to be restored for further consideration within 35 days of the seal date of this Order.***

9. The Respondent's application for reconsideration was submitted to the Employment Tribunal on 10 September 2020. Acknowledging that the

application had been submitted out of time, the application included the following submission:

> **8.** ***In respect of the time limit set out in Rule 71, it may, of course, be extended by the Tribunal on its own initiative or the application by a party by reason of Rule 5. For the avoidance of doubt, R hereby applies for such an extension on the ground that the EAT has stayed its appeal so as to enable this application to be made. It would defeat the purpose of the EAT's Order to now reject this application on the ground that it has been lodged out of time. It appears that the EAT requires the assistance of the Tribunal by way of a reconsideration so as to assist it in its response to R's application for permission to appeal.***
>
> ***9. These Rules are somewhat unclear as to the appropriate reaction of a Tribunal to an order such as the one which has been made by the EAT, and, in particular, as to whether or not the Tribunal has a discretion to refuse to reconsider the judgment.***
>
> ***10. It is respectfully submitted that even if the Tribunal does conclude that it has such a discretion, then given the fact that in the present case the EAT has considered the Grounds of Appeal submitted to it and, in light of the same, has gone on to make the Order which it has, the proper course for the Tribunal to take is to agree that there should indeed be a reconsideration and, given both the complexity of the matter and its potential significance, also to direct that the reconsideration should take place at a hearing before the full tribunal which made the original decision.***
>
> ***Suggested directions***
>
> ***11. Should this submission find favour with the Tribunal then it is respectfully submitted that it should make the following directions upon receipt of this Application:***
>
> ***(1) That R is granted permission to make this Application out of time;***
>
> ***(2) That the Application is to serve as T W White's "Reconsideration Pleading"***
>
> ***(3) That KW is to have 28 days to respond in writing with her own pleading in response to it;***
>
> ***(4) That the Tribunal's Reconsideration is to take place before the full Tribunal [Employment Judge Hyams- Parish, Mr M O'Connor and Mr R Greig] as soon as it can be listed [convenient to all the parties and their representatives] with a time estimate of 2 days [to include Tribunal deliberation time];***
>
> ***(5) That no later than 21 days before the said hearing solicitors for T W White are to produce a draft Index to the proposed Hearing Bundle to be used at the Reconsideration Hearing;***
>
> ***(6) That no later than 7 days thereafter solicitors for KW are to notify solicitors for K W White of any additional documents which KW***

> ***would like to be included in the proposed Hearing Bundle;***
>
> ***(7) [such further directions as the Tribunal may think necessary to reflect the possibility of the Reconsideration Hearing being held remotely- a prospect which T W White would readily embrace were it to be an option).***

10. The matter was then listed for a hearing in December 2020 and directions were given. Due to Counsel for the Respondent being unwell, the above hearing could not proceed. A new reconsideration hearing was listed for 6 and 7 April 2021. There then followed a sequence of events familiar to the parties and which I do not need to rehearse, resulting in me making an order to convert the 6 and 7 April hearing to a remedy hearing. This order was subject to an appeal to the EAT.

11. Whether the original intention of that hearing was to allow consideration of the application under Rule 72(1) having heard representations by the parties, or to combine consideration of the application under Rules 72(1) and (2), what is clear, and has been confirmed by the EAT, is that neither approach is permitted.

12. Prior to this point, the application for reconsideration has not been considered and therefore this reconsideration under Rule 72(1) is now being undertaken at the request of the EAT.

13. At certain points in the reconsideration application, I am referred to the grounds submitted as part of the EAT Appeal ("Appeal Grounds"). I have therefore considered the content of both documents together.

14. In addition to the above, I have only had regard to those documents which the parties agreed that I could have reference to, where necessary, namely, the evidence in the bundle and in witness statements, closing submissions, the reserved judgment and my own notes.

Grounds for reconsideration and decision

15. The grounds for reconsideration are set out under four headings which are summarised below, followed by my decision and reasons:

Ground one: Victimisation

16. The Respondent contends that it was not open for the Tribunal to consider the email of 7 April 2017 "*in context*" having found that, on its own, it was not a protected act. Even if it were entitled to consider the "*context*", the Respondent submits that "*the context"* required the Tribunal to consider the breakdown in the relationship between the Claimant and the Respondent which, the Respondent suggests, the Tribunal "*failed to do*".

17. The grounds continue to suggest that had the Tribunal "*engaged in the analysis required of it*" it would have inevitably found that the Claimant had used the allegation of discrimination as a negotiating chip in her dispute with the Respondent, and in so doing had acted in "*bad faith*".

Ground one: Decision

18. Whilst the hearing and meeting with members took place some time ago, this is a memorable case for a number of reasons. The Tribunal spent three full days' discussing the case, during which the Tribunal carried out a thorough review of the evidence. Much time was spent considering the victimisation allegation and whether there was a protected act. The Tribunal considered and discussed at length the two emails said to constitute a protected act, and what the Claimant believed having received them. In its reconsideration application the Respondent suggests if the Tribunal "*now considers its note of the evidence of the breakdown of relations which had occurred at that point, then it is bound to conclude that it erred in making findings that it did as to the relevant context at the time….*" The Respondent invites the Tribunal, in the interests of justice, to "*revisit the voluminous evidence of events which took place between October 2016 and April 2017*…"

19. The Tribunal spent a considerable amount of time going through all of the evidence and it would not be in the interests of justice to go through everything again, simply in the hope that the Tribunal would reach a different conclusion. The Tribunal was very much alive to the various disputes between the parties and made a large number of factual findings in relation to them. I do not believe there is any prospect that going back over the same evidence would result in conclusions which are any different to those already made in the judgment.

20. Regarding the submission that the Tribunal ought to have found that there was no victimisation because the allegations of sex discrimination were made in bad faith, I note that this was not a case put by the Respondent at the hearing. It was not an issue included in the list of issues or pleaded in the grounds of resistance. It was also not a point made in Respondent Counsel's closing submissions, including the list of findings of fact which he invited the Tribunal to follow. In any event, it was not the Tribunal's conclusion that the Claimant had lied or that the allegations were false. The Tribunal was not able to conclude, on the basis of the evidence before it, that the underlying allegations of sex discrimination were made out, but that is not the same as saying that the Claimant believed the allegations to be false. The Tribunal did not believe the Claimant had made false allegations, or allegations in bad faith, and I did not understand the Respondent to have been arguing that at the hearing.

21. For the above reasons, I believe there are no reasonable prospects of the

Tribunal's judgment being varied or revoked on this ground.

Ground two: Kate Basson

22. The Respondent contends that the Tribunal erred generally in failing to consider the evidence of Kate Basson. Had it done so, the Respondent submits that the Tribunal would have found in the Respondent's favour in respect of one or more allegations of unconscionable conduct, the victimisation allegation and the finding as to contributory fault.

Ground two: Decision

23. Here, once again, the effect of what the Respondent is inviting the Tribunal to do is reconsider the same evidence in the hope that it reaches a different conclusion. This is based on an assumption that the Tribunal did not consider all of the evidence presented to it.

24. The Tribunal considered very carefully all of the evidence relating to allegations of unconscionable conduct, including the evidence of Kate Basson, and made a number of findings of disputed fact in its decision. Where Kate Basson provided evidence supporting Neil White's version of events, the Tribunal considered this carefully. However, the Tribunal was left with a certain impression of Neil White's evidence and his credibility, set out clearly in the judgment, which undoubtedly influenced its conclusions in a very significant way. Notwithstanding the evidence provided by Kate Basson, the Tribunal concluded that Neil White was the person behind all of the decisions made in respect of the Claimant. For these reasons, I believe there are no reasonable prospects of the Tribunal's judgment being varied or revoked on this ground.

Ground three: Unfair dismissal

25. The Respondent invites me to reconsider the Tribunal's finding that the Claimant was unfairly dismissed, for the following reasons:

    (i) The finding depended in part upon the Tribunal's earlier [alleged] erroneous finding that the disciplinary process had been commenced due to victimisation.

    (ii) It was within the band of reasonable responses for Neil White to conduct the disciplinary hearing.

    (iii) The Tribunal failed to identify the documents referred to at paragraph 137 of its decision.

    (iv) It failed to consider whether the Respondent had in fact engaged in the acts which were alleged against her.

(v) The Tribunal's analysis leading it to conclude that the appeal did not cure the defects in the disciplinary process, was unsatisfactory

Ground three: Decision

26. Once all of the evidence was considered, the Tribunal had little difficulty concluding that the dismissal was unfair for all the reasons stated in its decision. There is nothing in the reconsideration application which leads me to conclude that it is in the interest of justice to revisit this claim. My response to each of the above points, using the same sub-paragraphs for ease of reference, is as follows:

(i) The victimisation finding is indeed relevant to the unfair dismissal claim in so far as the reason for dismissal is concerned. My conclusion on the victimisation claim is dealt with above.

(ii) This is just one aspect of unfairness; it is necessary to look at this failing and others referred to. In any event, what is suggested by the Respondent was not the conclusion reached by the Tribunal.

(iii) The Tribunal's conclusion was based on its findings at paragraphs 88-92 of the judgment.

(iv) The Tribunal applied the appropriate test required by s.98 ERA 1996, which concentrated on the actions of the Respondent and whether they fell within the band of reasonable responses.

(v) I believe the Tribunal's decision is clear on this point.

27. For the above reasons, I conclude there are no reasonable prospects of the Tribunal’s judgment being varied or revoked on this ground.

Ground four: *Polkey* and contribution

28. This ground follows as a natural consequence, the Respondent suggests, should we accept their grounds 1-3.

29. I have considered the grounds for reconsideration and can see no good reason to revisit the decision made by the Tribunal on this issue. Again, I believe there are no reasonable prospects of the Tribunal’s judgment being varied or revoked on this ground.

30. For the above reasons, the application for reconsideration is refused.

31. In view of the above, it is not necessary to determine the time limit issue.

……
Employment Judge Hyams-Parish
30 March 2021