EMPLOYMENT TRIBUNALS

Claimant: Mr D Loftus

Respondent: Her Majesty's Revenue and Customs

UPON APPLICATION made by a document from the Claimant, attached to an email dated 11 April 2021, to reconsider the Judgment, reasons for which were sent to the parties on 28 March 2021 ("**Judgment**"), under rule 71 of the Employment Tribunals Rules of Procedure 2013 ("**Rules**").

JUDGMENT

The Claimant's application for reconsideration is refused and the Judgment is confirmed.

REASONS

Preliminary Issue

1. The Claimant's document attached to his email of 11 April 2021 set out his application for reconsideration of the Judgment. In that Judgment the Tribunal had concluded that the Claimant's various claims should be dismissed.

2. Judgment in this case was in fact delivered, together with reasons, orally on the afternoon of 5 March 2021, and no request for written reasons was made at that point. The written judgment was then sent to the parties on 8 March 2021.

3. The Claimant submitted an email to the Tribunal, on 14 March 2021, requesting a reconsideration of the Judgment and written reasons. He submitted further emails on 15 and 17 March 2021 relating to reconsideration. An email was then sent to him in response, dated 17 March 2021, noting that, as a first step, written reasons would be produced, and that if the Claimant wished to amend his reconsideration application he would then have 14 days from the date on which the

reasons were sent to the parties in which to do so. Those reasons ("Reasons") were then sent to the parties on 28 March 2021.

4. Later on that day, the Claimant sent an email to the Tribunal asking, in light of his previous confirmation of a diagnosis of Autism Spectrum Disorder ("ASD"), if additional time might be made available to take account of his "*lifelong intellectual disability (diagnosed just last week)*". A reply was sent at my direction, on 31 March 2021, noting, "*that there is power to extend any time limit specified in the Employment Tribunals Rules of Procedure, but that a Judge must be satisfied that it is in furtherance of the overriding objective for an extension to be granted*". The email further outlined the time limit within which reconsideration applications are to be made, and stated that, "*If the Claimant wishes for an extension of the time within which to submit a reconsideration application, he must provide evidence indicating why, by virtue of any condition, he is unable to comply with the primary time limit and, if so, the period of time it is considered is required in order for him to submit any such application*".

5. The Claimant replied by email on 2 April 2021, noting that he had no idea what practical next step might be required from him in order for time to be extended. He also asked that, "*in future, as a matter of routine, that in instances of a Claimant having a physical disability and when they have communicated that they require posture breaks that this information is acted upon by the Judge/panel and regular breaks are actually scheduled into the timetable*", the implication of that appearing to be that his physical disability was not catered for within the hearing.

6. The Claimant's reconsideration application does not make any further reference to adjustments for his physical disability, but, for the avoidance of doubt, I indicated to the Claimant, at the start of the "live" stage of the hearing on the afternoon of the first day, that if he wished to stand or stretch at any time he should feel free to do so. The Claimant, participating from his home, had an adjustable desk and that desk was observed rising and falling from time to time throughout the hearing when the Claimant either stood or sat. In any event, as is customary in video hearings, short breaks were taken around the middle of each morning or afternoon session, such that the longest period without a break was one hour and thirty-eight minutes.

7. Returning to the Claimant's request for an extension of time within which to submit his reconsideration application, a reply was sent on 7 April 2021, again at my direction, noting that a letter confirming the diagnosis of ASD had been provided, but that it did not provide the information requested in the Tribunal's email of 31 March, i.e. that set out at the end of paragraph 4 above. The email went on to say, "*If therefore, the Claimant wishes for the time in which to submit a reconsideration application to be extended, he must provide evidence of why, by virtue of his ASD, he is unable to comply with the time limit, and, if he is unable to comply with it, the additional period of time it is considered he requires to submit it. At the moment, all that has been provided is the Claimant's assertion that he requires more time. No evidence has been provided, from the person who confirmed the ASD diagnosis or even from the Claimant himself, of why the condition*

causes him to be unable to comply with the primary time limit. If that evidence is provided the issue can be considered further".

8. The Claimant sent a further email later that day, noting that the diagnosis letter was clear that ASD meets the criteria for a protected characteristic of disability under the Equality Act. He did not provide any further evidence or information relating to any difficulty his condition might have caused him in relation to compliance with time limits, and then submitted a detailed reconsideration application under cover of an email which was submitted within the required time limit. He did however preface that document by saying that if an additional time extension was granted then a complete and more comprehensively referenced version of the document would be submitted.

9. The Employment Appeal Tribunal, in Islam v HSBC Bank PLC (UKEAT/0264/16/DM), noted, at paragraph 47, albeit in the context of a retrospective application for an extension of time rather than a prospective one, that a Tribunal "*is entitled to look to the party seeking an extension of time to adduce proper evidence*". In this case, the Claimant did not submit any evidence of any particular impact that his ASD condition had on his ability to comply with the specified time limit. At no time during the hearing did the Claimant raise any issue regarding his ability to comprehend or respond, and nor does it seem did he do so at any preliminary stage. Our perception of the Claimant was someone who was very capable of understanding what was being said to him and of reacting to it, whether verbally or in writing, and he ultimately was able to submit a detailed reconsideration application.

10. I did not therefore consider it appropriate to grant any extension to the time limit for submitting the reconsideration application, and proceeded to consider the Claimant's application as submitted.

Reconsideration application

Law

11. Rule 70 of the Employment Tribunals Rules of Procedure ("Rules") provides that reconsideration of a judgment will take place where the Tribunal considers that it is necessary in the interests of justice to do so.

12. Rule 71 provides that applications for reconsiderations of judgments should be presented in writing within 14 days of the date on which the written record was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and should explain why reconsideration is necessary. The Claimant's document satisfied those requirements and therefore a valid application for reconsideration was made.

13. Rule 72(1) notes that an Employment Judge shall consider any application for reconsideration made under rule 71, and that if the Judge considers that there is no reasonable prospect of the original decision being varied or revoked then the application shall be refused and the Tribunal shall inform the parties of the refusal. Alternatively, rule 72 sets out the process that is then to be followed for further consideration of the application.

14. Rule 72(3) provides that, where practicable, the consideration under Rule72(1) shall, in a case such as this where a full tribunal was involved, be by the Employment Judge who chaired that tribunal.

The Application

15. Nearly the entirety of the first ten pages of the Claimant's application summarises, by reference to the numbers of the paragraphs within the Reasons, his objections to them. He then lists ten specifically numbered points (the list actually goes up to "9", but there are two paragraphs numbered "3"), most of which appear to set out further objections to factual conclusions within the Reasons.

16. Whilst the Claimant's application goes into significant detail, the core of it is that he is in disagreement with the Tribunal's factual findings and conclusions. The reconsideration process is not designed however to give a disappointed party the opportunity to have a "second bite of the cherry".

17. One paragraph (number 4) did appear to rise two fresh, connected points. One was that a claim of indirect discrimination should have been entertained, the Claimant indicating that he made an attempt to raise a verbal claim of that type on 5 March 2021. The other was that his ASD may have been a significant factor in his misunderstanding of what was said to him at earlier preliminary hearings about such a claim.

Conclusions

18. As I have indicated above, the core of the Claimant's reconsideration application is a disagreement with the Tribunal's findings, and it is not in the interests of justice for a tribunal to reconsider a judgment in such circumstances.

19. To possibly assist the Claimant however, it may help if I record my observation that the key findings of the Tribunal were as follows:

    a. That the work station assessment carried out on 14 April 2019 did not primarily recommend the "RH Logic 400" chair, but rather recommended the "Senator Freeflex Mesh Task" chair with lockable castors. In addition, the assessment recommended an "electric sit-stand desk" and an "11 degree wedge cushion".

    b. Those items were in situ from 8 July 2019 onwards, and we considered that the Respondent had therefore complied with the occupational health adviser's recommendations at that date.

    c. Whilst there was a subsequent work station assessment in August 2019, that only assessed the incorrectly working RH Logic chair, and did not assess the Senator Freeflex chair. We did not therefore consider that that assessment altered the situation that we felt had prevailed since 8 July 2019.

We reached those conclusions after taking into account all the evidence, including that of the Claimant.

20. With regard to the points advanced by the Claimant referred to at paragraph 17 above, 5 March 2021 was not a day when the Tribunal heard evidence or submissions, it simply delivered judgment in the afternoon of that day. There was therefore no verbal indication of a possible indirect discrimination claim on that day.

21. Even if the Claimant is mistaken about the specific day, I have no record or recollection of anything said by the Claimant which might have been considered as an attempt by him to advance a claim of indirect discrimination, which would have to have been done by way of an application to amend.

22. In any event, had there been such an application, it is difficult to see how it could have been granted. The Claimant's employment ended in September 2019 and he brought his Tribunal claim in October 2019. Three preliminary hearings were held for case management purposes.

23. The first, before Employment Judge Moore on 23 January 2020, led to her identifying the claims being pursued as being ones of discrimination arising from disability and failure to make reasonable adjustments. She ordered the Claimant that, if he did not agree with the claims and issues as clarified, he should write to the Tribunal with his full reasons as to why not.

24. The Claimant did write in with a lengthy document, appearing to add claims of direct discrimination and harassment, as well as providing more detail of his previously identified claims. A second preliminary hearing then took place before Employment Judge Harfield on 26 June 2020. Following that hearing, she completed a revised list of claims and issues, including a claim of direct discrimination, and ordered the Claimant to confirm whether she had accurately summarised the claims he sought to bring. If not, he was to provide an amended, succinct summary.

25. The Claimant subsequently wrote to confirm that he would like to proceed on the basis of the entirety of Judge Harfield's summary with a number of additional factual points.

26. A further preliminary hearing was held on 15 October 2020, again before Judge Harfield. She dealt with the Claimant's proposed additions to his claim as an application to amend, accepting some and rejecting others. She then produced a revised list of claims and issues, which included a direct discrimination claim.

27. The Claimant had therefore had ample opportunity to have raised an indirect claim had he wished to do so. I further observed that, whilst by no means the same, a claim of indirect discrimination under section 19 of the Equality Act 2010 has parallels with a claim of failure to make reasonable adjustments under sections 20 and 21 of the Act. Both involve the application of provisions, criteria or practices, which put a claimant at a disadvantage. It is difficult to see therefore what the Claimant could have

gained from pursuing an indirect discrimination claim when he was already pursuing a reasonable adjustment claim covering a range of issues.

28. With regard to the Claimant's ASD, I have already noted that a diagnosis has now been provided after the hearing in this case, although I appreciate that the diagnosis should not be confined to subsequent periods. However, the letter submitted by the Claimant only confirms his diagnosis, it does not set out any specific difficulty that the Claimant may have experienced as result of it, and it is, of course, a "spectrum", with individuals with the condition being impacted in a range of ways and to a range of degrees.

29. For our part, at no point during the hearing did the Claimant raise any issues about his capacity to comprehend or participate, and nor does it seem that he did so at any preliminary stage. Certainly our perception of him, throughout the hearing and from reading the documents in the bundle, was of someone who was capable both of understanding what was being said to him, and of reacting to it, whether verbally or in writing.

30. Overall therefore, I did not consider that there was any reasonable prospect of the Tribunal's original Judgment being varied or revoked and I concluded that the Claimant's application for reconsideration should be refused.

Employment Judge S Jenkins

Date: 28 April 2021

JUDGMENT SENT TO THE PARTIES ON 29 April 2021

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FOR THE TRIBUNAL OFFICE