Case No: 1805748/18, 1800670/19

EMPLOYMENT TRIBUNALS

Claimant: **Mr. G. Steshov**

Respondent: **Ministry of Defence**

London Central
Employment Judge Goodman **11 May 2021**

ORDER

The claimant's application dated 12 November 2020 for reconsideration of the judgment sent to the parties on 28 October is dismissed under rule 72 because it has no reasonable prospect of success .

REASONS

1. A reserved judgment and reasons in these two claims was sent to the parties on 28 October 2020. On 12 November the claimant applied for reconsideration. That email should then have been forwarded to me as the hearing judge, but I regret to say that it was not sent to me until yesterday afternoon, after the claimant had chased up the lack of response.

2. Failures on the part of the employment tribunal's administrative staff to refer material emails to judges have unfortunately been very common since the pandemic began. In part it has been due to extensive staff absence, a shortage of managers, and lack of a cloud based IT system, all impeding working from home. This was exacerbated by closure of the building to staff in mid-December. Judges do not have access to the London Central ET inbox. Many emails have only come to light when a search is made because of an impending hearing date, or when, as now, there is a complaint.

3. Given the long delay, I have put aside other work to deal with the application. I do not have access to the paper file or to my hearing notes. The building recently reopened and many, but not all, staff are now

working there, but I do not want to hold up the claimant's appeal further by checking some of his points against the file. If required by the EAT to produce evidence relevant to bias, that will be done then.

Relevant Law

4. Under the Employment Tribunal Rules of Procedure 2013 a request for reconsideration may be made within 14 days of the judgment being sent to the parties. By rule 70 a Tribunal "may reconsider any judgment where it is necessary in the interest of justice to do so", and upon reconsideration the decision may be confirmed varied or revoked.

5. Rule 72 provides that an Employment Judge should consider the request to reconsider, and if the judge considers there is no reasonable prospect of the decision being varied or revoked, the application shall be refused. Otherwise it is to be decided, with or without a hearing, by the Tribunal that heard it.

6. Under the 2004 rules prescribed grounds were set out, plus a generic "interests of justice" provision, which was to be construed as being of the same type as the other grounds, which were that a party did not receive notice of the hearing, or the decision was made in the absence of a party, or that new evidence had become available since the hearing provided that its existence could not have been reasonably known of or foreseen at the time. The Employment Appeal Tribunal confirmed in Outasight VB Ltd v Brown UKEAT/0253/14/LA that the 2013 rules did not broaden the scope of the grounds for reconsideration (formerly called a review).

7. When making decisions about claims the tribunal must have regard to the overriding objective in room 2 of the 2013 regulations, to deal with cases fairly and justly, which includes ensuring that the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay, and seeking expense.

Discussion

8. The application is long. In essence, it is argued that the factual findings made by the panel are "repeatedly and consistently" wrongly made, because the judge chairing the panel was biased against the claimant.

9. There are also points made, said to show bias and unfairness, about case management decisions in the hearing, and that the claimant was obstructed in cross-examination, and given too little time to make a submission.

10. The claimant made a recusal application on day three of the hearing. The panel heard the application, adjourned to collect information and discuss it, then returned and gave oral reasons which have been summarised in the written reasons. It is not useful to reargue these, save to add from memory that, in relation to the decision in 2019 to grant an extension of time to file the response, that the claim form had been returned by Royal Mail, the envelope showing this being on the file. I also reiterate, as stated

in the written reasons, that in 2019 I had identified (as the administration had not) that his letter to the tribunal complained about a judge, and so should be referred to the regional employment judge for handling, but I had never heard any more about it, and did not see the file again until September 2020 when it was in the list for me to hear, and I was asked to decide the claimant's postponement application and the respondent's unless order made shortly before the hearing, and even then did not read back far enough into the correspondence to appreciate that I had made the decision allowing an extension of time to file a response. The unless order set out the full reasons for making it, and also includes the text of the letter sent refusing the postponement application, and was signed 17 September. I rely on those written reasons, which were considered by the panel when deciding the recusal application, to show why the panel concluded that an informed and fair minded observer would not conclude there was a bias in these circumstances.

11. There is nothing in the claimant's application to suggest that the recusal decision itself should be reconsidered.

12. On the many points made by the claimant about the factual findings, these amount to perversity arguments. I can only say that although the decision is written by the judge, the findings on the evidence were made by all three members of the panel. In many cases there are conflicts of evidence. The panel has to consider the evidence and make findings on the relevant matters. We did not always accept what the claimant said. In most cases we found there was no less favourable treatment. In the harassment claim we found that if experienced as harassment, it was not related to race. In the case of the policy document, our decision is a construction of the plain meaning of the text. We did not take evidence on how it should be read.

13. On the disclosure application made on the first day, the tribunal heard the parties, and concluded that there should be no order made. The document was the alleged document discharging the claimant from the Army in 2010 which the respondent said it did not have. It related to a matter that was not part of the claim, but formed part of the background to his case on the reasons why later treatment occurred. The tribunal decided it was not proportionate to the issues. Other material from 2010 from this episode was available, including the claimant's complaint at the time about his treatment in the Parachute regiment training. It is not clear how this was not in the interest of justice and requires the decision to be reconsidered. If it said to be evidence of bias, I comment only that it was a late disclosure application which was treated, as any other case management matter, in the light of the overriding objective. The written reasons deal with the evidence we heard on whether the claimant was discharged in 2010. There is no evidence that he was discharged; it may have been what was intended, but it did not happen, and he was transferred to the Yorkshire regiment instead.

14. On control of cross examination, without being taken to specific interventions, I can only say that it is likely the claimant was being asked, where it was not obvious, to which issue the question related, and to focus on the issues. As to the respondent not being subject to similar intervention, it is rarely necessary to intervene with counsel, and

presumably was not in this case, as trained barristers are aware that if they ask unrelated questions they will be pulled up, and will not be treated as tolerantly as litigants in person are.

15. On the point made about submissions, the first day was lost because the claimant was attending his doctor, some time on the second day was lost to the disclosure application, and some on the third day to the recusal application. I was unavailable on another day due to pre-booked annual leave. This sometimes happens, usually because no other judge is available for a long hearing, and it is managed by taking into account that cases are listed with a generous time allocation because the content of the witness statements is unknown when it is set, and it is better to err on the generous side to avoid going part-heard. The claimant wanted to file a written submission, and more time in which to do so, but that would have meant we lost the remaining time set aside for panel discussion of the evidence and our findings, and if received outside the time allocated, would require an opportunity for the respondent to reply to any new point, and for the panel to reassemble for one or more days, which would not have been until January 2021. The claimant could have made a longer oral submission instead. As it was, we read his written submission and heard his oral submission. It is hard to understand that the interests of justice require a rehearing or reconsideration because of this.

16. The claimant makes a point about there being no agreed bundle. I am not sure if he is saying this indicates injustice. We were referred to and read from both bundles. Some documents were in both. The duplication and lack of a common bundle did slow the hearing down from time to time. The claimant has not said what was not agreed about the bundle the respondent had prepared after exchange, but if he considered relevant material had been omitted by the respondent, they were in the bundle he gave us, which we used. This sometimes happens if the parties dispute what should be included.

17. On the application for witness orders, the claimant did not name any witnesses, nor state what they would give evidence about, or in relation to which issues, nor why the application was only made at that very late stage. All this would have to be stated before an order could be made. I cannot envisage any hearing judge acting differently. The application was not refused – it was not made.

Conclusion

18. I cannot see there is any factor in the claimant's application showing that it is in the interest of justice to reconsider the decision made. The evidence and arguments were heard and considered by a panel of three. The panel had also heard the application to recuse and decided it was not necessary in the circumstances.

Employment Judge GOODMAN

Date 11/05/2021
JUDGMENT SENT TO THE PARTIES ON

11/05/2021

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FOR THE TRIBUNAL OFFICE