



EMPLOYMENT TRIBUNALS

Claimant: Ms N Soruklu

Respondent: Shelter, The National Campaign for Homeless People

Heard at: East London Hearing Centre

On: 19 May 2021

Before: Employment Judge Burgher

Appearances

For the Claimant: Claimant's Written submissions

For the Respondent: Written submissions from Ms S Bowen (Counsel)

JUDGMENT FOLLOWING RECONSIDERATION

1. The Claimant's application to revoke the judgment sent to the parties on 8 July 2020 is refused.

REASONS

1. The Claimant applies for reconsideration of the judgment made on the 6 July 2020 which stated the Tribunal did not have jurisdiction to consider the Claimant's claim for disability discrimination relating to the disciplinary action that she was subjected to by the Respondent and the Respondent referring her to the Solicitors Regulation Authority.

2. The Claimant submitted a detailed reconsideration application on the 19 July 2020 including:

2.1 A 19 paragraph further statement from the Claimant dated 18 July 2020 with evidence in support;

2.2 A statement from the Claimant's mother, Ms Sonja Mitterhuber dated 13 July 2020; and

- 2.3 A statement from the Claimant's father, Mr Bulent Soruklu dated 19 July 2020.
3. The Claimant's witness statement dated 18 July 2020 stated:
 - 3.1 That her medical file of June 2020 observed that she was having dissociative moments during which she appeared not to be aware of herself or what she was saying, and as such is quite possible for her to come across as suspicious and incredulous;
 - 3.2 that she was seriously prejudiced at the Preliminary Hearing (PH) by the lack of medical evidence post November 2019 and this became apparent to her during the hearing. The Claimant alluded to the legal advice that she was receiving at the time that meant it was not necessary to obtain any further medical evidence;
 - 3.3 that she did the best to prepare for the PH and obtain all the medical evidence. She was required to chase two hospitals in Homerton and Chase Farm. This was a difficult process and COVID-19 made it even more difficult for her to obtain her records;
 - 3.4 that she was unable to obtain updated medical records for the purposes of her reconsideration application and that she did not miraculously recover overnight on 7 November 2019.
 - 3.5 that the Respondent was not majorly prejudiced by the lapse of time and it was in the wider public interest for discrimination matters to be properly vented.
 4. The Respondent responded to the Claimant's reconsideration application by way of submissions dated 27 September 2020. The Respondent maintained:
 - 4.1 that the judgment should not be reconsidered as there was no new information to make it just and equitable to extend time;
 - 4.2 that it was not necessary in the interests of justice to reconsider and it was not in accordance with the overriding objective of dealing with the case fairly and justly;
 - 4.3 that the Tribunal has a wide discretion to determine whether the reconsideration of a judgment is appropriate and the Tribunal should consider all the relevant facts and circumstances.
 - 4.4 This does not mean that the Claimant is entitled to another bite of the cherry in respect to the time limit argument simply because she has been unsuccessful.

5. In respect of new evidence, the Respondent referred to the case of Ladd v Marshall [1954] 3 All ER 745, CA. This case held that to justify consideration of fresh evidence it is necessary to show:

- 5.1 That the evidence could not have been obtained with reasonable diligence for use at the original hearing;
- 5.2 That the evidence is relevant and would probably have had an important influence on the hearing; and
- 5.3 The evidence is apparently credible.

6. There was disagreement between the parties as to whether the reconsideration application should be considered in writing or in person. The Claimant maintained that it should be by written representations. The Respondent maintained that it should be in person as there were important issues of credibility that needed to be explored through questioning. I concluded that it was appropriate for the matter to be dealt with by a hearing and as such the matter was listed to take place in person, by CVP.

7. The hearing was initially listed to take place on the 21 December 2020. However, on 14 December 2020 the Claimant sought an adjournment to obtain the necessary medical evidence in support of her application for reconsideration. She stated that the delay was partly due to the Covid -19 pandemic and it being the Christmas season. The Respondent objected to this application but the postponement application was granted and relisted to take place on 29 January 2021.

8. The Claimant provided further submissions on 27 January 2021 that stated, amongst other things, that she was unwell at the PH on 6 July 2020.

9. The reconsideration hearing was held on 29 January 2021. I adjourned the hearing having concluded that it was not appropriate to proceed with that hearing given my concerns about the Claimant's ability to fully engage with the issues and process on that date. I ordered further written submissions as well as the provision of medical information be provided and I would then determine the most appropriate way to proceed.

10. On 1 March 2021 the Claimant provided a letter from Dr Gillian Fine, Speciality Psychiatrist. Dr Fine stated that the Claimant has a diagnosis of bipolar affective disorder and may have exaggerated emotional reactions. Dr Fine stated that the Claimant had capacity to give instructions to participate in the hearing and clearly understands the nature and purpose of the hearing and can articulate her understanding and can convey her perspective. It was stated that an appropriate reasonable adjustment may be to consider hearings based on written evidence rather than conduct a live hearing as this would give the Claimant an opportunity to moderate her emotional responses.

11. It was Dr Fine's opinion that a hearing based on written evidence is the best option but it may be helpful if the Claimant is accompanied by someone to represent her as an advocate who could speak to her. She stated that if the hearing was going

to be a live hearing it would be helpful for the Claimant to be made aware the content of all representations prior to these being posed to her. Dr Fine stated that the Claimant could attend a hearing in future and was hopeful that the Claimant's mental health state will improve although the timescale is unknowable.

12. The Tribunal had no indication of when, in the foreseeable future, the Claimant would be able to attend a hearing. Had it been necessary to do so I would have considered the guidance provided in the Equal Treatment Bench Book on mental health for appropriate steps in progressing the application and the case generally.

13. On 12 March 2021 the Claimant provided her full written response to the Respondent's objection to the reconsideration application dated 27 September 2020. The Claimant referred to paragraphs 37 – 39 of her Counsel's advice that was provided in respect of the extension of the time limit.

“with regards to the Claimants mental health from October 2019 the date of filing her claim in February 2020, I have not seen medical evidence covering that period, but the Claimant explained to me the circumstances which I think will convince the ET that she was too unwell to file her claim:

- (a) The Claimant tells me that when she was discharged from hospital until late December she was living at her father's house and was being looked after by him 24 hours a day. She says she hardly left the room.*
- (b) The Claimant tells me that although she managed to move out of her father's in January 2020 she still was very unwell and was not leaving the house or able to deal with her affairs. She explained the circumstances of filing the claim; it was her mother who was driving it and who ultimately presented the ET1. The Claimant had nothing to do with the presentation of the claim.*
- (c) The Claimant also tells me that she was seeing Sarah Johnson, Clinical Practitioner in Psychotherapy for the whole of that period and could produce notes from sessions with her if necessary.*

14. The Respondent replied to these Claimant's submissions on 2 April 2021. It contended that Mr Soruklu's and Ms Mitterhuber's evidence could, with reasonable diligence, have been submitted prior to the PH on 6 July 2021. In any event:

- 14.1 Mr Soruklu's evidence omitted any reference to the SRA proceedings that the Claimant was dealing with following her discharge from hospital;
- 14.2 Ms Mitterhuber's evidence was inconsistent with the Claimant's evidence at the PH and would not have had any effect on the original decision. There is no explanation why Ms Mitterhuber did not contact ACAS before December 2019 or seek advice on her daughter's behalf well before that date, if as she asserts, she acted without the Claimant's input and was aware that the time limit expired in March 2019.

New witness statement evidence

15. I accept the Respondent's submissions regarding the admission of statements from Mr Soruklu and Ms Mitterhuber's as fresh evidence and following the guidance in Ladd v Marshall I do not consider these statements for the purposes of the reconsideration application. These statements ought to have been submitted before 6 July 2020, I do not consider that they would not have had an important impact on the outcome of the hearing and there were inconsistencies with the evidence that was given at the PH.

16. A reconsideration hearing is not an opportunity to have a second chance to present a case.

17. In this context, I do not accept that the Claimant was too unwell at the PH on 6 July 2020 to have a fair hearing. The medical reports that the Claimant alludes to in this regard do not address the fact that she was able to seek legal advice about the time limit issue; draft her statement dated 2 July 2020; participate in the hearing on 6 July 2020; and subsequently prepare a fully argued application on 18 July 2020 for reconsideration with supporting evidence and statements Ms Mitterhuber and Mr Soruklu.

18. Further at the PH, the Claimant gave evidence in a decisive manner, she sought clarification of questions when necessary and time allowed for her to confirm her evidence under oath. Whilst the Claimant was anxious during the PH she was keen to proceed and answered questions clearly and coherently and she did not exhibit any exaggerated emotional response during that hearing.

Further medical evidence

19. In paragraph 14 of the PH judgment of 6 July 2020 I record:

14 The Claimant stated that the reference to being grounded and spending time with a group of friends was a lie and she said this to Ms Sarah Johnson because of pressure created by her father's changing living circumstances, he was expecting another child and she needed to move and there was insufficient space. Contrary to the Claimant's assertion, there was no subsequent record in Ms Johnson's notes recording that the Claimant had informed her that the entry of 7 November 2019 was a lie, the last reference from Ms Johnson is the indication about the session on 12 December 2019.

20. Further medical evidence has now been provided by the Claimant in this regard and I admit this for the purposes of the reconsideration application as I accept that the Claimant could not have obtained it before the 6 July 2020 due to the difficulties caused by the COVID – 19 pandemic.

21. On 2 October 2019 Ms Sarah Johnson wrote to the Claimant recording that she was unable to attend appointments on 25 September and 2 October 2019.

22. On 7 October 2019 the Claimant wrote to Ms Johnson stating *"I have not been feeling too great, that's why I missed the appointments. When can you offer more appointments for?"*

23. On 8 October 2019 Ms Johnson offered the Claimant an appointment on 22 October 2019. This was arranged. However, on 22 October 2019 the Claimant cancelled this appointment at short notice and requested another date.

24. On 24 October 2019 Ms Johnson arranged an appointment for 7 November 2019. The Claimant attended this appointment. Ms Johnson records:

Nisa reported feeling more stable and her mood is not fluctuating so much. She feels more 'grounded' and cares less about what others think about her. She has been spending time with a friend and went out with a group of friends last Friday which went well.

Nisa said that she had sent the letter to the Solicitor Regulatory Body but they have requested a medical letter. I advised her to suggest that they email the service directly outlining what information they would want in a medical review. Nisa was unsure why they required more information.

25. The Claimant stated in during evidence on 6 July 2019 that she lied to Ms Johnson during the 7 November 2019 meeting. At that hearing there was no medical evidence to support this. However, in support of the reconsideration application the full file of Ms Johnson has now been provided.

26. It is clear from Ms Johnson's entry on 11 November 2019 that the Claimant had informed Ms Johnson about the SRA investigation and a draft response to be sent to the SRA in respect of the Claimant's mental health is provided.

27. On 23 November 2019 Ms Johnson records an email from the Claimant in the following terms:

"I am more than happy to attend. I need the help desperately. When I saw you last on 7 Nov I wanted to you to feel that helping me was not a waste of time and said I had been socialising. The truth is I am in a terrible dark place and need help."

28. I observed that this is consistent with the Claimant's evidence at the PH that she had lied to Ms Johnson as to her state of health at the meeting on 7 November 2019.

29. A meeting was arranged with Ms Johnson on 19 December 2019 which the Claimant did not attend.

30. On 14 January 2020 the Claimant attended a MBT & Outreach session on mentalising. It was recorded that *"It was hard to gauge Nisa's emotional state and a close eye is being kept on her."*

31. On 21 January 2020 it was recorded that the Claimant was knocked off her bike and was in A&E and that was why she did not attend the group meeting arranged for that day.

32. The Claimant did not attend the meeting for 28 January 2020. On 31 January 2020 she emailed Ms Johnson that she was *'really struggling mentally these past few days I feel I really need help. I'm having uncontrollable bouts of crying and I'm really suffering'*

33. On 4 February 2020 Ms Johnson records that the Claimant described extremes of emotional experience, either feeling overwhelmed or feeling empty. The Claimant said that she was feeling nothing was as difficult to cope with as being overwhelmed. She thought her attitude to emotions was related to how her mother managed her emotions. She described her mother as 'stoic'.

34. The Claimant's ET claim was presented on 5 February 2020.

35. The Claimant attended a group session on 11 February 2020.

Law

36. Rule 70 of the 2013 ET Tribunal rules states:

Principles

70. 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.

Conclusion

37. The above medical records demonstrate that the Claimant was continuing to suffer from poor mental health of varying degrees throughout the period. However, it does not demonstrate that the Claimant was not able to apply her mind to an Employment Tribunal complaint in periods of stability.

38. It is clear that the Claimant provided information relating to her SRA complaint and she was also able to communicate with Ms Johnson and journey on her bike when her emotional state was more stable.

39. Importantly, for the purposes of this reconsideration application the medical evidence does not change my finding at paragraph 16 of the PH judgment that:

"If as the Claimant asserts, she was able to lie to Ms Johnson to generate an outcome to move from her father (which she did in January 2020), I would have concluded that she would have been able to have sought and give instructions in relation to presenting a complaint to the Tribunal."

40. I conclude, that notwithstanding consideration of further medical evidence that was not at the PH, the Claimant was in a position to have considered an Employment Tribunal complaint earlier than the claim that she now says was submitted by her mother without her input. Consequently, I do not conclude that it is in the interests of justice to revoke the PH judgment.

41. Therefore, the Claimant's application to revoke the original decision is refused.

Employment Judge Burgher
Date: 20 May 2021