Case Number: 2201129/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs E MacFarlane	v	Commissioner of Police of the Metropolis

Tribunal: London Central

Dated: 16 June 2020

Before: Employment Judge A James

RECONSIDERATION JUDGMENT

(1) The application for reconsideration of the Judgment dated 14 October June 2020 (Employment Tribunals Rules of Procedure 2013 – Rules 70 to 73) is refused for the reasons set out below.

REASONS

1. The written reasons for the judgment delivered orally on 8 October 2020 was finalised on 14 October 2020 and subsequently sent to the claimant.
2. An application was made by the claimant on 28 October 2020, for a reconsideration of that amendment to the judgment. It is most unfortunate that this request was not forwarded to me until 15 June 2021, after which it has been dealt with as quickly as time has allowed. I apologise to the EAT and to the claimant on the tribunal's behalf for the delay in it being dealt with. I have assumed that the application was submitted in time; even if not, I would have extended time in these circumstances in any event.

The law

3. Rules 70, 71 and 72 of the Employment Tribunal Rules of Procedure 2013 provide as follows:

RECONSIDERATION OF JUDGMENTS

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.*
>
> ***Application***
>
> ***71.*** *Except where it is made in the course of a hearing, 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.*
>
> ***Process***
>
> ***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 (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.*

4. Whilst the discretion under the rules is wide under the 'interests of justice' test, it is not boundless; it must be exercised judicially and with regard, not just to the interests of the party seeking the review, but also to the interests of the other party and to the public interest requirement that there should, as far as possible, be finality of litigation - *Flint v Eastern Electricity Board* *[1975] ICR 395 at 401***,** per Phillips J, at 404.

5. I have carefully considered the contents of the application for reconsideration under Rule 72(1) and decided that there is no reasonable prospect of the decision being varied or revoked. A hearing is not therefore necessary. The reasons are as follows.

The grounds for the application

6. It is somewhat difficult to understand what the grounds of the application are. The application takes issue with various parts of the judgment, without setting out in a structured way why it would be in the interests of justice to reconsider the judgment (and as a result, to arrive at a different conclusion).

7. In my judgment, a line by line response would not be proportionate. I have therefore limited this judgment to what I consider to be the main points raised by the claimant. References to 'EJX' are references to the judgment, 'X' being the paragraph number in the judgment; references to 'RAX' are to the corresponding paragraph in the claimant's reconsideration application. The headings used by the claimant have been adopted, with the occasional modification.

The respondent's response

8. At RA5, the claimant contends that the contents of Box 15 of the claim form were not taken not account. That is not correct. They were, as is clear from EJ8-9.

9. At RA7, the claimant refers to the progress of her claim being hampered by alleged continuing mistakes by the respondent in their response to the claim form and this has not ben taken into account. The Judgment does in fact set out in detail the background to the application to amend the claim and makes it clear that allowances have been made for the fact the claimant is a Litigant in Person (LiP) – see the Background Facts and see EJ37, 38, 39, 45 and 48.

Chronology and Protected disclosures documents

10. At RA8 the claimant complains that there is no mention in the hearing of the claimant's chronology and list of protected disclosures. The alleged disclosures are listed in the claimant's document dated 1 September 2020 and were considered; they are specifically referred to at EJ39. The chronology was considered but its contents did not materially affect the decision.

Respondent spoke first

11. At RA10, the claimant complains that Mr P Martin, the respondent's counsel, was asked to address me first and that she was disadvantaged by that. The reasons for taking that step are set out at EJ31. This is in line with the updated Equal Treatment Bench Book at page 30, paragraph 75. It did not disadvantage the claimant. The claimant was not prevented from addressing me in relation to her prepared submissions. The claimant was advised by me on occasions during her submissions that some of the points being made were not relevant to the issues before me and was asked to concentrate on those matters that were relevant. At the conclusion of her submissions, Mr Martin raised two matters which she had not addressed and the claimant subsequently dealt with those.

Open/closed hearing

12. At RA11 the claimant refers to reference being made to the hearing being a 'closed' hearing whereas in fact there were 'guests' present. I cannot recall exactly but the respondent's solicitor was I think present and there may have been someone present from the respondent as well. The hearing was not however open to members of the public or press.

Not a new complaint as already stated in Box 15

13. The claimant asserts at RA25 that her claim form did contain a whistle-blowing claim. In fact the only mention of whistle-blowing is in box 8.2 of the claim form in which the claimant states:

    I'd repeatedly asked HR for Whistle-blowing and Grievance procedures, with no response. On 12/12/19 I got the contact and phoned Met Whistle-blowing team, Department of Professional Standards DPS. They gave me Whistle-blowing status…

14. Further, Box 10.1 has been ticked; Box 10 is headed up: 'Information to regulators in protected disclosure cases'.

15. The possibility that the claimant intended to bring a whistleblowing claim was specifically canvassed at the first preliminary hearing on 16 June 2020. The claimant made it clear that she was not intending to raise a whistle-blowing claim in her claim form; her claim was for constructive dismissal due to her raising health and safety concerns – see EJ36-7. A considerable amount of time was then spent at the hearing in relation to the claimant's employment status, as a result of the claimant repeatedly asserting that she did not need to be an employee, in order to bring a s.100 Employment Rights Act 1996 claim, despite it being pointed out on a number of occasions that her assumption in that regard was erroneous.

16. (I note in passing that the hearing took place before the restriction of the coverage of Section 44 Employment Rights Act 1996 to 'employees' was successfully challenged in *International Workers Union of Great Britain v Secretary of State for Work and Pensions [2020] EWHC 3039 (Admin)* on the basis that the EC directives require coverage of 'workers'. That decision was issued on 13 November 2020. It is understood that s.44 Employment Rights Act 1996 is to be amended to include 'limb (b) workers' under s 230(3)(b) but such amendment has yet to be finalised and implemented.)

17. At RA26 the claimant asserts that her claim form contained matters which she also relied on as protected disclosures. It is accepted that there is some overlap, between some of the factual matters relied on in the claimant's claim form as health and safety issues which had been raised by her, and the matters later relied on as protected disclosures. The fact remains that there were about four or five complaints of health and safety concerns mentioned in the claim form, which the claimant later relied on as protected disclosures; but in the further lengthy documents subsequently submitted to the tribunal, further clarifying her claim, she relies on 17 protected disclosures (EJ14-15). That is a substantial expansion of her claim.

18. Further, having expressly asserted that her claim form did not and was not intended to include a whistle-blowing claim on 16 June, the claimant's change of position a few days meant in my judgment that this was no longer simply a case of re-labelling. Any potential ambiguity as to the basis of the claimant's claim had been clarified by the claimant quite unequivocally on 16 June. This was not a case, such as *McLeary v One Housing Group Limited UKEAT/01241/18/LA* or *Mervyn v BW Controls Limited [2020] EWCA Civ 393* where the contents of the claim form 'shouted out' that a whistle-blowing claim was clearly intended. The mere ticking of box 10.1 and the mention of whistle-blowing status in box 8.2 simply indicated that it might do. The claimant unequivocally asserted on 16 June that was not the case. In any event, the substantial expansion of the facts relied on mean that this was far more than a simple re-labelling of the same facts.

19. Yet further, in refusing the amendment, the potential merits of the claim were considered at length – see EJ49-59. See in particular, EJ51.

Selkent Principles

20. The claimant's assertion at RA31 that she was not familiar with the *Selkent* principles is noted. The fact remains that in its letter to the tribunal dated 8 July 2020, objecting to the amendment application, the respondent set out its submissions by reference to the *Selkent* factors/balance of hardship test. In her 16-page response to those objections, the claimant adopted the same

headings. The contents of that document were carefully considered in relation to the application to amend. The claimant did address these matters at length, even if she was (understandably, as an LiP) unfamiliar with the _Selkent_ case itself.

‘Disavowal’

21. The claimant appears to take exception (see RA35) to the use of the word ‘disavowal’. See paragraph 15 above in relation to the claimant’s unequivocal indication at the preliminary hearing on 16 June that she was not pursuing a whistle-blowing claim.

Protected disclosure details and documents

22. The claimant asserts (RA37) that her protected disclosure claim was clear from the further details provided by her. I have nothing to add to what is said in EJ38-9. The contents of those paragraphs show again that the fact that the claimant was acting in person was taken into account and allowances were made for that fact.

Legal advice assumption error

23. At RA41 the claimant identifies that at EJ45, an assumption appears to have been made that the claimant had been able to take advice after the preliminary hearing on 16 June 2020. That assumption was probably made on the basis of the statement in the claimant’s 25 June 2020 document by the claimant to the tribunal that:

    The Claimant has received legal advice which advises her that the type of dismissal in the Claim is automatically unfair constructive dismissal.

24. RA15 suggests that the claimant may have received some advice from Acas before she submitted her claim form. Whether the claimant received advice before and/or after her claim form was submitted and after the 16 June 2020 hearing is not material to the judgment.

25. The claimant asserts at RA42:

    The Respondent had stated in their ET3 that my ET1 foreshadowed a Whistleblowing Claim. PH1 did not then return to the discussion of Health and Safety Laws and was from then on purely about my employee status.

26. This mispresents the position. The question of the claimant’s employee status became relevant because of the claimant’s insistence that her claim was not about whistleblowing, but was, as stated in box 8.1 of her claim form (see EJ2)

    A kind of constructive dismissal because of failures of health and safety, and lack of support after an incident.

27. The fact that a considerable amount of time was spent discussing the claimant’s employment status was because of her insistence that she did not need to be an employee in order to take a section 100 Employment Rights Act 1996 claim - see further, paragraph 15 above

Balance of Hardship

28. At RA46 the claimant asserts that her claim “always included the factual allegations and whistleblowing claims which the respondent conceded in pH 2”. Again, that misrepresents the position. The matters set out in her claim form were asserted by the claimant at 16 June hearing to be complaints about health

and safety; and that as a result of the failure of the respondent to respond to those complaints or act on them, she resigned. See further, paragraphs 15 and 17 above.

Claimant's chronology

29. The claimant asserts at RA48 that her chronology was not considered. It was received before the hearing and it was considered. Its contents do not materially affect the judgment.

Conclusion

30. For all of the above reasons, the reconsideration application is rejected under Rule 72(1).

Employment Judge A James
London Central Region

Dated 17 June 2021

Sent to the parties on:

22/06/2021.

For the Tribunals Office
response.

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