EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr M Zaib		**Mitie Custody and Care Ltd**

JUDGMENT

UPON an application by the Claimant for reconsideration pursuant to Rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the application is refused as there are no reasonable prospects of the judgment, sent to the parties on 4 June 2021, being varied or revoked.

REASONS

Legal principles

1. Rule 70 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") 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 of the Rules 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. Rule 72(1) of the Rules states that 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. Rule 72(2) of the Rules states that if the application has not been refused under Rule 72(1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under Rule 72(1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

Application

5. The case was heard by a Tribunal with members over a period of 6 days commencing on 14 April 2021. The Tribunal spent two days in chambers considering its decision.

6. The Claimant made the following claims against the Respondent:

   6.1. Disability discrimination contrary to s.13 and s.15 Equality Act 2010 (“EQA”).

   6.2. Race discrimination contrary to s.13 and s.26 EQA

   6.3. Unlawful deduction from wages contrary to s.13 Employment Rights Act 1996 (“ERA”).

7. In a reserved judgment sent to the parties on 4 June 2021, the parties were informed that all claims had failed and were dismissed.

8. By an email from the solicitors for the Claimant, sent to the Employment Tribunal on 18 June 2021, the Claimant seeks a reconsideration of the decision, which he criticises in three particular respects. The Claimant alleges that the Tribunal failed to:

8.1. take into account the evidence relating to a comparator, Robert May, when reaching its conclusions as to whether the Claimant had suffered and act of direct discrimination;

8.2. draw appropriate inferences from the failures of Mr Jackson with regards the investigation process; and

8.3. properly consider whether there was any underlying racial motive behind Mr Heath's email, which the Claimant alleged was a "rebuke", questioning the Claimant as to who had given him authority to obtain a flu vaccination.

Conclusions and analysis.

9. I shall deal with each issue separately.

Ground 1: Robert May

10. It is important to deal with one matter at the outset, which is the Claimant's apparent suggestion in the reconsideration application, that Mr May was a comparator for the purposes of the direct discrimination claim. The paragraph dealing with this matter in the reconsideration application is headed "*Direct Race Comparator of Roy May*" and includes the following statements:

> ***At paragraph 12***
>
> ***The Tribunal, in turn, has failed to factor this primary point of fundamental and substantial fact into its consideration on the question of direct race discrimination. Robert May is a direct and prime comparator to the Claimant in regards to the actions in question.***
>
> ***At paragraph 20***
>
> ***The Tribunal entirely side-stepped the glaring contemporary comparator case of Robert May which arose in December 2017, which was two months prior to that of the Claimant in February 2018.***
>
> ***At paragraph 35.***
>
> ***But, again, like with the earlier matter of Robert May (race comparator), it failed to entirely to engage…..***

11. The apparent suggestion by the Claimant in this reconsideration application that Mr May was a comparator is somewhat surprising given the Employment Tribunal's clear understanding that there were no direct comparators in this case, as is clear from the footnote to paragraph 7.1 of

the judgment. I do not believe this is a misunderstanding on the Tribunal's part as the following points appear to support that understanding:

11.1. There is no reference to Mr May in the Claimant's pleadings or any reference to comparators;

11.2. In their grounds of resistance, the Respondent requested that the Claimant provide particulars of any actual comparators relied on, and if there are none, to provide details of the hypothetical comparator.

11.3. In response to the above, the Claimant does not identify comparators as he was requested to do. The most he says, in its response to the Grounds of Resistance, is as follows:

> ***Paragraph 4***
> ***Race Discrimination —There has been issues in the past, where Jason Dodds the OSE coordinator and other staff members have made inappropriate comments about Muslims on a social media platform Facebook, which the company has never acted on, despite it being raised to the management on the 27 November 2015. I made the complaint and they never took it seriously. I was treated differently here due to my ethnic background.***
>
> ***Paragraph 5***
> ***Race Discrimination — in relation to Ben Martin's email dated the 18th March 2018, has the company acted against John Deegan for his childish behaviour for refusing ICE work duties, has he been punished or as I was an ethnic minority, I was punished as a result.***
>
> ***Paragraph 17***
> ***I disclosed my personal Facebook page to Carl Jackson on the 9 April 2018 by email, to show that I did not post anything on Facebook. I was a member of a closed group "The Job". I disclosed the whole group by email to him on the 18 April 2018 at 18:54pm, he acknowledges it and requested colour copies of the group.***
>
> ***Paragraph 18.***
> ***Two managers James Heath and James Winder were part of this social media group "THE JOB". People actively posted on this group and James Heath commented on the group on the 25 March 2018 after an employee posted "Just on the off chance, has the charter txt gone out yet and he responded by saying " call me Monday mate, off this weekend ".***

11.4. At a case management hearing on 23 October 2020, at which the Claimant was legally represented, much time was spent with the

parties and representatives agreeing the specific issues to be determined at the final hearing. These were used by the Tribunal after seeking confirmation from Counsel that they were still an accurate list of issues. The following is an extract from the note of the case management hearing, prepared by the Employment Judge, and records the complicated history of the case and the attempts to clarify the issues:

> ***These cases have a somewhat complicated history. Case No. 3331220/18 (Case 1) was presented to the Watford tribunal on 8 July 2018. Case No. 2302376/2019 ('Case 2') was presented to the London South tribunal on 18 June 2019. Case 1 was subsequently transferred to London South and the two cases are to be heard together.***
>
> ***The tribunal notes that a third case (Case No. 2305269/2020) was presented by the Claimant on 21 September 2020, again to the London South tribunal, but no ET3 has yet been presented in that case and on its face it is brought against a different Mitie company (and a number of individuals) and so it is unclear at present whether it will be appropriate for it to remain as a separate case or to be heard with Cases 1 and 2. As things stand, it is only Cases 1 and 2 that that are being dealt with at this PH and in respect of which a final a final hearing has already been listed for April 2021.***
>
> ***There have been a number of PHs in Cases 1 and 2 at which attempts have been made to clarify the claims and issues, and orders have been made for further clarification to be given and/or a list of issues to be agreed.***
>
> ***As the tribunal understands it, various attempts have been made by the parties to agree the live claims and issues in these cases but, even on the evening before and on the morning of this PH, the Claimant filed further documents which were said to set out his claims, but which were not agreed by the Respondent.***
>
> ***This PH had been listed for 3 hours to consider time points and strike out / out deposit arising in respect of various of the claims in Cases 1 and 2. As discussed and agreed with the parties at the start of the PH, the tribunal could not begin to consider those substantive matters unless and until the live claims had been fully clarified, which they had not been.***
>
> ***The tribunal therefore spent considerable time discussing and agreeing with the Claimant and his representative the full extent of his live claims, which is recorded below. The tribunal records that the claims and issues identified below have now been agreed by the Claimant as the full extent of his claim. It has been confirmed by the Claimant, who had every opportunity during the hearing to disagree, that there***

are no other claims.

11.5. In his closing written submissions, Mr Sprack (Counsel for the Claimant) did not mention Mr May as a comparator. During the hearing, the Tribunal heard evidence of others who had posted items on Facebook and the Tribunal made reference to Mr Jackson's evidence as to how they were dealt with. Had Mr May been an actual comparator, then the Tribunal would have needed to look more closely at the circumstances of Mr May to ascertain whether he was an appropriate comparator.

11.6. In his closing submissions, it is clear that Mr Zovidavi (Counsel for the Respondent) had also understood the Claimant to be comparing himself to a hypothetical comparator. He wrote as follows:

> ***Ultimately however it is none of those things that triggered the investigation. What triggered the investigation is the breach of the Respondent's social media policy. That is the very same misconduct for which two white colleagues, Mr Froud and Mr Malcolm, were dismissed. In the circumstances the Claimant is not able to show that he was treated less favourably than an actual or hypothetical white comparator.***

12. The Claimant cannot now construct a different case than the one presented at the hearing.

13. Even if one were to look at Mr May as someone the Claimant compared himself with, it is important to consider the claim that was brought by the Claimant. His direct discrimination claim was expressed as follows in the above-mentioned case management order:

> ***The instigation of disciplinary proceedings against the Claimant in March 2018 and continuing those proceedings, based on three specific allegations, until June 2019.***

14. The evidence was clear that the investigation, whilst it started with an allegation about a Facebook posting, quickly developed into more than that, including the allegation that he had falsified a text message to give the impression that he had not been summoned to work. An appropriate comparator would therefore be someone not of the same race as the Claimant, who is investigated for the same allegations as the Claimant was required to answer.

15. The Tribunal found as fact that the Claimant had manipulated the text in the manner alleged by the Respondent. Whilst the Tribunal criticized the

manner in which Mr Jackson had handled the investigation, it did not consider the decision to commence an investigation into these matters as wrong or discriminatory. The Tribunal considered very carefully whether the decision to start an investigation was in any way influenced by the Claimants race. Had the allegations had no basis whatsoever, the Tribunal might have reached a different conclusion. The Tribunal concluded that it was reasonable for Mr Jackson to have concluded that an investigation was appropriate, strengthened by the allegations surrounding the Claimants integrity arising out of the manipulation of the e-text.

16. For the above reasons, I have concluded that there are no reasonable prospects of the Tribunal's decision on this allegation as being varied or revoked.

Ground 2: Failing to draw appropriate inferences

17. Ground 2 is difficult to understand from the application. However the nub of this ground appears to be that the Tribunal failed to assess the significance of additional and extraneous allegations being added onto the case against the Claimant, in Mr Jackson's investigation report. It is alleged that the Tribunal failed to consider the mindset and motivation of Mr Jackson in presenting what the Claimant says are wholly unsupported allegations.

18. There is little more that can be said in response to this criticism save that the Tribunal looked carefully at the “reason why” Mr Jackson took the steps he did, and concluded that they were not because of, or related to, the Claimants race. The reasons for this conclusion are set out in the judgment.

19. I have concluded that there are no reasonable prospects of the Tribunal's decision on this allegation being varied or revoked.

Ground 3: Mr Heath’s rebuke

20. The Claimant criticizes the decision on this allegation for failing to take into account the racial hostility or bias of Mr Heath.

21. A fundamental aspect of the Tribunal's findings on this allegation was that the Claimant was not rebuked, as was alleged. There was no actual comparator to support this allegation; the Claimant relied on a hypothetical comparator. The Tribunal concluded that there was not the slightest evidence that this comment was because of, or related to the Claimant’s race. As far as the harassment is concerned, it was not a comment which could reasonably be said to have violated the Claimant’s dignity or created

an intimidating, hostile, degrading, humiliating or offensive environment for him. The Tribunal considered this allegation to be very weak.

22. For the above reasons, there are no reasonable prospects of the Tribunal's decision on this allegation as being varied or revoked.

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Employment Judge Hyams-Parish
1 July 2021