EMPLOYMENT TRIBUNALS

Claimant: Mr D Stimpson

Respondent: Blue Bay Building Products Ltd

Heard on the Papers at: Cardiff (in private, by video) **On:** 19 July 2021

Before: Employment Judge C H O'Rourke
Mr M Pearson
Ms J Kieley

DECISION ON RECONSIDERATION APPLICATION

The Claimant's application of 10 May 2021, for reconsideration of the Judgment of 27 April 2021, is refused.

REASONS

Background and Issues

1. On 27 April 2021, the Tribunal gave judgment in this claim, of disability discrimination, striking it out, subject to Rule 37(1).

2. On 10 May 2021, the Claimant applied for reconsideration of that Judgment. A copy of the application was sent to the Respondent, for its response, which it provided on 21 June 2021.

3. Both parties were then invited to make further application to the Tribunal as to whether or not, subject to Rule 72(2), they considered that the matter could be dealt with without a hearing (the Respondent had already indicated this) and if they considered that no hearing was necessary, to submit any such further written representations as they wished. No further correspondence was received from either Party and therefore this matter was listed for discussion by the Tribunal today.

4. By way of brief history of this matter, we set out the following:

a. A case management hearing was held on 4 November 2020, setting out case management orders and listing the claim for hearing on 2 February 2021, with a time estimate of two days. The Order set out, amongst other matters, extensive advice, with links to further information, as to obtaining legal representation; what to expect at a hearing and how to prepare for one.

b. That hearing proceeded, but as recorded in a case management order of 2 February 2021:

'It proved impossible to proceed with the final hearing, listed for today and tomorrow, principally due to the Claimant's inability to access the document bundle. Subsequently, also, the Claimant dropped out of the Hearing and when contacted by Tribunal staff, stated that he was having internet problems. Therefore, in his absence, the Hearing was adjourned and will be re-listed for two days, again by CVP, before the same Tribunal, on the next available date.'

c. The hearing was re-listed for 26 and 27 April 2021, but as recorded in the Judgment of 27 April, the claim was struck out subject to Rule 37(1), for the reasons set out in that Judgment.

The Law

5. Rule 70 of the Rules of Procedure sets out the principles for reconsideration, in particular that a Tribunal may '*reconsider any judgment where it is necessary in the interests of justice to do so'*.

6. The case of **Fforde v Black UKEAT 68/80** indicates that the interests of justice ground only applies when something has gone radically wrong with the procedure, involving a denial of natural justice, or something of that order.

7. The case of **Redding v EMI Leisure Ltd UKEAT 262/81** sets out that 'the interests of justice' relate to the interests of justice to both sides. The EAT commented in that case, of a litigant stating that she had not properly presented her claim at hearing that '*when you boil down what is said on her behalf, it really comes down to this: that she did not do herself justice at the hearing, so justice requires that there should be a second hearing so that she may. Now, 'justice' means justice to both parties. It is not said, and as we see it, cannot be said that any conduct of the case by the employer here caused her not to do herself justice. It was, we are afraid, her own inexperience in the situation.'* The reconsideration process is not there to permit parties a '*second bite of the cherry'*.

8. The Respondent referred us to the case of **Outasight VB Ltd v Brown [2015] ICR D11, EAT**, in which it was accepted that the wording 'necessary in the interests of justice' in Rule 70 allows employment tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially, 'which means having regard not only to the interests of the party seeking the

review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation'.

9. In **Ladd v Marshall [1954] 3 All ER 745, CA,** the Court of Appeal established that, in order to justify the reception of fresh evidence, it is necessary to show:

    - that the evidence could not have been obtained with reasonable diligence for use at the original hearing

    - that the evidence is relevant and would probably have had an important influence on the hearing; and

    - that the evidence is apparently credible.

10. The 'Overriding Objective' (Rule 2 of the Rules of Procedure) sets out that cases be dealt with in ways which are proportionate to the complexity and importance of the issues and avoiding delay and expense.

Submissions

11. We summarise the Claimant's written submissions as follows:

    a. He did not consider the Tribunal process, or the Hearing, fair, as he had had to represent himself, placing him at a disadvantage.

    b. That the Tribunal 'sided with' the Respondent and he was the one made to feel 'on trial'.

    c. There is a potential further witness, 'Daniel', but whose contact details the Respondent would not release to him.

    d. He challenged the veracity of the Respondent's witnesses.

12. We summarise the Respondent's written submissions as follows:

    a. It referred us to Rule 70 and the **Outasight** case, emphasising that the factors set out in the pre-2013 Rules, at then-Rule 34, continued to apply (from which the only additional factor is, in our view, '*that there was new evidence available'*.)

    b. By the point of strike-out of the Claim, there had been three hearings, from which it was clear that it was not being actively pursued. The Claimant had failed to engage with disclosure and exchange of witness statements, but was nonetheless permitted to proceed, relying on numerous emails to constitute his witness statement.

    c. The Claimant was totally unprepared for both hearings.

d. He concluded his cross-examination of the dismissing manager at the last hearing.

e. He fails to understand that it is not simply enough that because he was on sick leave, a dismissal will be unfair.

f. The interests of justice apply to both parties, but despite having had two opportunities to present his claim, the Claimant now wishes for a third.

g. If the application were granted, the Respondent would seek to re-visit the issue of costs.

Conclusions

13. We refuse the Claimant's application, for the following reasons:

a. As stated, the 'interests of justice' apply to both parties and it cannot, applying **Redding**, be in such interests, to permit the Claimant a '*third* bite of the cherry', because he has failed to '*do himself justice at the hearing*'. We note what he says about being a litigant-in-person, but this is, unfortunately, an entirely common situation in the Employment Tribunal, with represented Claimants being very much in the minority, but unrepresented claimants nonetheless managing to put their case. That situation, alone, therefore, cannot be a persuasive factor. The Respondent is entitled to finality in this litigation and it would be disproportionate to expect to prepare for and fund a third substantive hearing. Also, further delay will inevitably affect the cogency of the evidence upon which the Respondent would seek to rely.

b. On the same point, we note that the Claimant was informed in the first case management order of potential sources of legal advice/representation, but seems not to have followed them through and nor, despite also, being pointed to sources of advice as to what to expect at a Hearing (and exceptionally, in his case, having already attended one substantive hearing), was he in any way prepared for the most recent hearing. He had not engaged with Tribunal orders as to disclosure and exchange of witness statements and had not prepared questions to effectively challenge the Respondent's evidence (the details of which he will have been aware from their statements).

c. We have no confidence, were we to grant yet a further hearing in this matter that that situation would change. The Claimant has given no indication in his application that he is seeking further legal advice/representation and therefore would again be unrepresented, with, again, we assume, the same difficulties as identified in our Judgment. While, in his application, he has not raised the matter of his mental health, that was extensively considered in the Judgment and we can only record, in this respect that we have no medical evidence before us as to the nature of the Claimant's mental health difficulties, the effect they may

have on his ability to conduct a hearing, or that this situation is in any way likely to be different at any future hearing.

d. We note the Claimant's mention (for the first time in his application) of potential evidence from a former colleague, Daniel, but applying **Ladd**, this is evidence that could have been made available at either or both of the last two substantive hearings. If it is true, as the Claimant asserts that the Respondent refused to provide him with contact details for Daniel, then that is a matter he could and should have raised with the Tribunal, either in writing, or at any of the three hearings (including the case management hearing), for the Tribunal to potentially order the disclosure of such information, but no such request was made. In the absence of the detail of any such evidence, we can have no idea as to its potential relevance or weight.

e. We note the Claimant's allegation that the Tribunal 'sided' with the Respondent. This is not a legitimate ground for reconsideration of the Judgment as, even if the application were to be granted, the same Tribunal would continue to hear this case. It was pointed out to the Claimant at the hearings that the Tribunal had to be an independent arbiter between the parties and could not effectively act as his representative, as he had none, but had to try to maintain a balance between the parties, contrary perhaps to the expectation the Claimant had prior to the hearings. As pointed out in the Judgment, the Claimant repeatedly refused to accept direction from the Tribunal, simply seeming to wish to get the matter over with as quickly as possible, requiring repeated instructions from the Tribunal. He also simply refused to accept the point that merely being in possession of a fit note was not a bar to dismissal, several times re-visiting this issue.

f. The manager who dismissed the Claimant has completed his evidence and it seems inherently unlikely, were he recalled that that evidence would be subject to change.

g. Applying the 'Overriding Objective', we consider that the Claimant has, within the limits of what the Tribunal can achieve, been placed '*on an equal footing'*. It is no longer proportionate, we consider, to allocate further Tribunal resources to this matter, it having now used six sitting days (and if permitted to continue, eight), for a case that at the maximum, required three. The Claimant has had ample opportunity for '*proper consideration of the issues'*, but a moment has been reached where further delay and expense, particularly bearing in mind the number of cases awaiting hearing, is unwarranted.

Employment Judge O'Rourke

Date: 19 July 2021

SENT TO THE PARTIES ON 20 July 2021

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FOR EMPLOYMENT TRIBUNALS
Mr N Roche