



EMPLOYMENT TRIBUNALS

Claimant: Mrs T. Akinyosoye- Rodney
Respondent: NHS Nottingham and Nottinghamshire Clinical Commissioning Group
Heard at: Nottingham
On: 14 July 2021 (In Chambers)
Before: Employment Judge Broughton

Representation:
Claimant: Written representations
Respondent: No Representations

JUDGMENT ON A RECONSIDERATION

The Claimant's application for Reconsideration made on 29 April 2021 of the Judgment of Employment Judge Broughton dated 30 March 2021 following a hearing on 8 January 2021, is refused on the basis that there are no reasonable prospects of that Judgment being varied.

REASONS

Background

1. I have considered the Claimant's application for Reconsideration of the Judgment dated 30 March 2021 sent to the parties on the 7 April 2021. The application for Reconsideration was emailed by the Claimant and received by the Tribunal on 29 April 2021. It consists of just over 4 pages of submissions. I have taken the contents of the application into account.
2. The Claimant applied on 20 April 2021 for a 7 days extension of time to make the Reconsideration application. The 14-day time limit was due to expire on 21 April 2021. I granted the extension and the application for Reconsideration was submitted on 29 April 2021. It was placed before me on 12 June 2021 and I apologise for the delay therefore in this being dealt with.
3. The Claimant has not asked for this application to be dealt with at a hearing. I have dealt with it on the papers in accordance with Rule 72 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

4. In order to deal with the application, it is necessary to set out the background to this matter.

Background

5. The claim originally came before Employment Judge Jeram on 3 January 2020 at a closed preliminary hearing. Employment Judge Jeram made a number of orders, including that the Claimant provide further information in relation to her complaints and listed the case for an attended preliminary hearing to identify the claims, determine whether the claims had been brought in time and, if not, whether to extend time and to consider whether any claim should be struck out pursuant to rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 or a deposit order made pursuant to rule 39.
6. The case came before me at a preliminary hearing on 15 October 2020. The Respondent complained that, despite further provided by the Claimant, it remained unclear what the claims were. The entirety of that hearing was spent trying to clarify the claims and further orders were made as set out in the record of that hearing, including for further particulars of the claim.
7. In her claim form the Claimant complained that during meetings on 5 and 18 March 2019 to discuss a programme merger, there was no explicit reference to the role offered to her colleague DD. The Claimant in her claim form, asserts that she did not apply for a new role after the end of her fixed term contract, of Merged Programme Manager (MPM) because she felt it would be futile to do so, she had been working she complains, in a hostile and discriminatory environment. The Claimant was also complaining that she was not told about the role given to DD of Head Personalised Care (HPC). She complains in her claim form that DD was, as a white woman, "afforded extra support and consideration" and she referred to this within the heading of direct discrimination. However, the Claimant had also stated within her claim form that she accepted that the Respondent had a contractual duty to find DD a position once her secondment ended because DD (unlike the Claimant) was a permanent employee.
8. When I asked at the October 2020 hearing for the Claimant to clarify whether she was complaining about the role offered to DD as an act of direct race discrimination, the Claimant stated that she did not consider that the difference in treatment that she had received in connection with the role offered to DD was on the grounds of her race, she thought that DD was treated differently because she was a *permanent* employee hence she was slotted into another role.
9. The Claimant appeared to be alleging that the difference in treatment around the role offered to DD, was on the grounds that DD was a permanent employee rather than on a fixed term contract, Counsel for the Respondent raised with the Tribunal that the Claimant had not pleaded in her claim form a breach of The Fixed Term Employees (Prevention of less Favourable Treatment) Regulations 2002 hereafter referred to as the Fixed Term Regulations.
10. The Claimant also appeared to be complaining separately as identified at the October 2020 hearing, that she was *not told* about the role given to DD because of concern the Claimant may complain about what the Claimant referred to as '*preferential treatment*'. The Claimant complained that this was an act of discrimination on the grounds of her race however, I raised with the

parties that this complaint appeared to be more properly described as a claim of victimisation however, it had been pleaded as a direct discrimination claim. The Claimant was ordered to confirm what her complaint was more precisely and what type of claim she was bringing.

11. The Claimant submitted further particulars and an amendment application on 23 November 2020 to include a claim pursuant to the Fixed Term Regulations. The original claim had been filed more than a year before, on 17 September 2019.
12. There was then a further hearing on the 8 January 2021 to determine the following issues:
 - the Claimant's application to amend the claim;
 - determine whether the time limit in respect of the claims of unfair dismissal and discrimination should be extended or the claims struck out on the grounds that they have been brought out of time;
 - consider whether any of the claims/complaints should be struck out under rule 37 or the Claimant required to pay a deposit in order to proceed with any claim/complaint under rule 39;
 - make further case management orders as appropriate, to include relisting the case for a final hearing.

Fixed Term Regulations/ Victimisation amendment

13. The document setting out the amendment application attached with an email dated 23 November 2020, included at paragraph 1 reference to this application being to; "*request an amendment to the claimant's original submission to bring a claim for less favourable treatment than a fixed term employee in relation to the opportunity to secure a permanent position within the establishment – in violation of the Fixed Term Employees (Prevention of less Favourable Treatment) Regulations 2002*".
14. The amendment application went on at paragraph 3 and 4 to state that the claimant alleges; "*...they did into mention the new role created for DD... the claimant believes that this new role was not mentioned when the new structure and merged roles were being explained because the Respondent wanted to avoid the Claimant raising a complaint about preferential treatment, pursuant to s.27(1). Given that the claimant's counterpart was slotted into a post and there was a job available that the claimant could (was doing) , this amounts to unfair dismissal and the respondent had not fully composed [sic] with all material aspects of the regulations sufficiently to render the claimant's dismissal as fair.*"
15. The allegations set out on page 11 and 12 numbered paragraphs 6.1 to 6.8 were referred to as allegations of conduct which supported the amendment and referred to the act of discrimination alleged being victimisation. During the January 2021 hearing however the Claimant informed the Tribunal that allegations 6.1 to 6.8 were actually being relied upon in support of the claim under the Fixed Term Regulations rather than in support of the victimisation complaint in connection with the non-disclosure over the content of DDs role.

16. It was unclear given the references to both the Fixed Term Regulations and victimisation, what the Claimant was now alleging in respect of not being told about the role offered to DD.
17. The application to amend her claim to include a claim under the Fixed Term Regulations, being a new claim brought significantly out of time, was refused for the reasons set out in detail in the judgement.
18. I also addressed the possibility that the Claimant was also seeking to amend her claim to include a claim that the disclosure of information about DDs role was an act of victimisation.
19. An application to amend the claim to include a victimisation complaint (in connection with the failure to disclose details of the job offered to her colleague DD) under section 27 EqA was considered and refused. The detailed reasoning is set out in the judgment of 30 March 2021. The findings include that a grievance (potentially a protected act) was not made by the Claimant until *after* the team meetings to discuss the merger (when she complains DDs new role should have been explained) and therefore any complaint would have to be based on a claim that the decision not to disclose details of the role offered to DD was because of a *belief* that the Claimant may do a protected act. The Claimant alleges that DD was treated differently in being offered the role of HPC not because of race but because DD was a permanent employee, that this was the alleged reason is not consistent with an allegation that the details of DDs role were not disclosed to the Claimant because of a belief that the Claimant would raise a complaint of race discrimination, rather than for example a belief that she may raise a complaint under the Fixed Term Regulations.

Application for reconsideration

20. The Claimant is seeking a variation to the Judgement and as stated within her Reconsideration application this is;

*“..with a view to varying the same in respect of the Victimisation complaint brought by the complaint – **pursuant to the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.***

Specifically, the claimant is requesting that the Judgement be varied to include the Victimisation claim and evidence reference in support thereof, as part of the wider claim for Race Discrimination, pursuant to section 27 of the Equalities Act “

[Emphasis Added]

21. While this wording would seem apply to indicate that the Claimant is applying for reconsideration of the decision regarding the Fixed Term Regulations and the section 27 EqA claim she then goes on to state;

*“The claimant wishes to clarify that she **does** rely upon a protected act in bringing her Victimisation complaint and believes that she was not told about the role offered to DD because of the concern that she may make a protected Act.”*

22. It is unclear whether the Claimant is asking for the Tribunal to Reconsider her amendment application about not being told about the role offered to DD as a section 27 EqA claim or under the Fixed Term Regulations or both.
23. I have once again, treated this as an application in respect of both types of claims.
24. Within her application she sets out reasons why she considers it is 'just and equitable' to reconsider the original decision and *in summary* they are;
- *The victimisation complaint and evidence in support/acts described are both relevant to and intertwined with the wider complaint of race discrimination.*
 - *The evidence relied upon for the victimisation complaint is not new evidence and already included within the bundle by way of the investigation report commissioned by the Respondent.*
 - *Given that the report is the outcome of the Respondent's investigation, full witness statements are already contained therein.*
 - *In light of the investigation report by the Respondent this will not prejudice the Respondent.*
 - *In addition to references within the bundle, the evidence being relied on is also mentioned in the original claim form.*
 - *Furthermore, reference is previously made in the Claimant's response to Directors and Orders made by Judge Jeram.*

Rules of Procedure

25. Rule 72(1) of the 2013 Rules of Procedure empowers me to refuse the application without convening a Reconsideration hearing if I consider there is no reasonable prospect of the original decision being varied or revoked.
26. The test is whether it is *necessary in the interests of justice* to reconsider the Judgment (rule 70). Broadly, it is not in the interests of justice to allow a party to reopen matters heard and decided, unless there are special circumstances, such as a procedural mishap depriving a party of a chance to put their case or where new evidence comes to light that could not reasonably have been brought to the original hearing and which could have a material bearing on the outcome.

The application

27. The team meetings to discuss the merger, were organised by Programme Directors and the Claimant in her application for Reconsideration also seeks to correct a finding of fact set out in the judgment namely that it incorrectly states that RH was not a Programme Director. However, it is not alleged within her application that RH and Jane North were the only ones Programme Directors who organised the team meetings to discuss the new structure and her amendment application did not allege whether and if so, on what grounds it is alleged, that other Programme Directors were in some way complicit in the decision or influenced not to disclose the nature of the role offered (and

accepted) to DD role. In any event, that RH (and Jane North) were not involved in organising the team meetings was not the only reason for refusing the amendment as set out in the judgment and I do not consider there is any reasonable prospect of this particular point changing the decision as to its merits or the amendment application generally.

28. This application for Reconsideration is an attempt by the Claimant to have another chance to put forward submissions in support of the application to amend the claim. The Claimant is not submitting new evidence in her list of reasons why the amendment should be Reconsidered.
29. I consider that there is no reasonable prospect of the Claimant establishing that the Tribunal made an error of law, or that any of the conclusions were perverse. The Claimant does not in fact allege in her application that the findings were perverse or that an error of law has been made. Such contentions are in any event better addressed in an appeal than by way of Reconsideration.
30. The Claimant has not advanced any new evidence. A considerable amount of time has been spent attempting to clarify the Claimant's case. It is important to have finality in litigation and not re-open decisions unless it is in the interests of justice to do so and I do not find that there are in this case, grounds to re-open the decision. Other significant amendments were permitted and the crux of the Claimant's case which goes forward to hearing, is that she felt that she was treated differently on the grounds of her race and the comment about whether she was aggressive because of her culture, is clearly at the heart of it and the other comments and behaviours are she feels, to be viewed in the context of the 'unconscious' discrimination she considers to have been revealed/illustrated by that comment and that the termination of her employment was thus an act of discrimination.

Conclusion

31. Having considered all the points made by the claimant I am satisfied that there is no reasonable prospect of the original decision being varied. The application for Reconsideration is refused.

Employment Judge Broughton

Date 14 July 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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