EMPLOYMENT TRIBUNALS

Claimant Ms C Higgins

Respondent: Sainsburys Supermarkets Limited

JUDGMENT

The claimant's application dated 3 June 2021 for reconsideration of the judgment sent to the parties on 20 May 2021 is refused.

REASONS

The relevant law

1. Rule 70 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 provides that a Tribunal may reconsider any judgment where it is necessary in the interests of justice to do so.

2. Rule 71 provides 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 as necessary.

3. Rule 72 provides that an Employment Judge shall consider any application made under Rule 71. Where practicable the consideration shall be made by the Employment Judge who made the original decision or who chaired the full tribunal which made it. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked the application shall be refused.

4. At tribunal dealing with an application for reconsideration must seek to give effect to the overriding objective to deal with cases fairly and justly contained within Rule 2 of the Regulations. This includes ensuring that the parties are an equal footing, dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay, so far as compatible with proper consideration of the issues, and saving expense.

5. Consideration of whether reconsideration is "necessary in the interests of justice" allows the Tribunal a broad discretion which must be exercised judicially which means having regard not only to the interests of the party seeking the reconsideration but also to the interests of the other party to the litigation, and to the public interest requirement that there should be so far as possible finality in litigation.

Background to this application for reconsideration

6. The claimant's claim for disability discrimination (and unfair dismissal) came before the employment tribunal at a preliminary hearing to determine disabled status on 14 May 2021. The claimant was a litigant in person. The respondent was represented by Counsel. The claimant gave evidence and each side made closing submissions. I reserved the decision in order to take more time to look at the medical records.

7. My judgment that that claimant was not disabled for the purposes of Section 6 Equality Act 2010 was sent to the parties on 20 May 2021. The claimant made an application for reconsideration dated 3 June 2021. Her application was made within time. Her grounds for reconsideration, which I summarise from her letter, are:

a) Lack of procedural fairness in that the claimant did not have adequate time to prepare her case having only seen the bundle the day before the case.

b) Lack of procedural fairness in that the Employment Judge said in her judgment that the claimant had only disputed the content of documents for the first time at hearing when this was not factually true.

c) Lack of procedural fairness in that the Tribunal failed to follow Equal Treatment Bench Book guidelines and tell the claimant that she may if there is unresolved disagreement about the content of the bundle bring additional disputed documents to the hearing.

d) Lack of procedural fairness in that the claimant did not know she could provide documents eg Return to Work minutes and Investigation / Disciplinary Hearing notes that the respondent already had

e) Lack of equality of arms in the claimant not being allowed to provide additional documents on the day

f) Judge making findings without supporting evidence – eg describing the claimant's heart condition as a nuisance that people learn to live with, the Judge took into account the wrong medical conditions.

g) The Judge reached a perverse decision because the claimant has been referred for ablation therapy

h) The Judge reached a perverse decision because she used the fact that the claimant had not attended the doctors surgery often to conclude that the claimant was not disabled

i) The Judge reached a perverse decision because she concluded that the claimant had been able to undertake a masters degree and therefore could not be disabled.

j) The Judge reached a perverse decision about work related stress because the Judge related it to the claimant being "performance managed" at work.

My application of the law to this application

I reject the request for reconsideration on the ground that it is not necessary in the interests of justice as there is no reasonable prospect of the original decision being varied or revoked.

8.1 In relation to the bundle and the time to prepare (grounds a,c,d and e)
The bundle comprised documents all of which the claimant accepted that she had seen before the bundle was finalised. At paragraph 5 of my judgment I record that the claimant had agreed the content of the bundle and was able to raise an issue about a page having been omitted. There was a copying error and it was agreed that the page was not material to the disabled status issues before me. I record in my reserved judgment *"the claimant was happy to proceed and confirmed that every document she wished me to refer to was included within the bundle".*

There had been two previous case management hearings at which guidance and direction had been given by two different judges to the claimant and respondent about disclosure and preparation of the bundle. I see nothing in those case management summaries and Orders to suggest that the Equal Treatment Bench Book guidance was not followed.

A previous final hearing on 15 December 2020 had been converted to a case management hearing because the bundle was not ready. EJ Benson gave guidance and made an Order that "*the claimant shall provide to the respondent copies of all documents she has in her possession relating to the medical conditions upon which she relies in her disability discrimination claim. This will include copies of correspondence between her GP and specialists, OH referrals by her employer and OH reports themselves and any other relevant medical documentation*." I have added the underlining to emphasise that the claimant had long been aware that she could include any medical documentation in that bundle that she wanted to. EJ Benson varied EJ Shotter's previous Order in relation to preparation of the bundle to allow more time for it to be finalized. The claimant had had adequate opportunity to see the respondent's documents and to have any documents she wished to include, included within the bundle.

The claimant did not say that she had had inadequate time to prepare at the final hearing on 14 May 2021. She agreed that the bundle in the exact format used at the hearing had only been sent to her electronically the day before the hearing but it contained documents that had long been in the possession of both parties. She made no application for postponement. The claimant was keen to proceed on 14 May 2021.

8.2 The Judge saying the claimant had not protested before (ground b)
This was addressed at paragraph 59.2 of the judgment. There was no evidence before me of the claimant ever having protested, until she was cross examined, that the return to work meeting notes made by Lee McCabe in December 2018 were inaccurate. The claimant had ample opportunity at case management and preparation stage of the case to include any document in which she says she protested about the inaccuracy of the notes and did not do so.

In any event, the content of those notes was not determinative of my application of the test of disabled status as can be seen from the judgment. Even if the claimant could show me that she had challenged Lee McCabe at the time in December 2018 about the accuracy of those notes it would not change my decision, because even if she did not say she was fine, she did go back to work and was not able to demonstrate substantial adverse impact of any condition on her ability to do her work and day to day activities at that time.

8.3 The Judge's decision on disabled status (grounds f,g,h,i and j)
The application of the test in Section 6 is clearly set out in the judgment. Considerable effort was made to explain the timeline to the claimant and checking back questions were used to ensure the claimant understood that the test is applied as at the dates of the acts

of discrimination complained of, so that the subsequent referral for ablation therapy would not of itself be determinative. Attending the GP surgery and having adverse effect of a condition noted could be a relevant factor in application of the Section 6 test as could being well enough to complete a masters degree without the need for adjustments. They both go to the extent of the adverse impact (if any) of the condition on the claimant's ability to perform her normal day to day activities at the relevant time. The claimant's response to the respondent managing her absence (performance managed) could also be a relevant factor in looking at the impact of the condition on the claimant's ability to carry out her normal day to day activities.

To say that a decision is perverse is to say that the Judge reached a decision that no reasonable tribunal would have reached. For the reasons set out above I find that the claimant would not be able to establish perversity. It is not in the interests of justice to reconsider the decision.

In reaching the decision not to reconsider I have had regard to the importance of finality in litigation for both parties and I have had regard to the overriding objective to deal fairly and justly with this case. The claimant did not meet the test in Section 6 and is seeking to have another opportunity to do so. Reconsideration should not be used to seek to obtain "a second bite at the cherry". The application for reconsideration is denied.

Employment Judge **Aspinall**
Date 26 July 2021

JUDGMENT SENT TO THE PARTIES ON
28 July 2021

FOR THE TRIBUNAL OFFICE