EMPLOYMENT TRIBUNALS

Claimant: Ms C de Nyary Comandini

Respondents: White Label Productions Ltd (1) Sarah Watson (2)

Sophie Blythe (3) Will Toll (4) Ellen Chisholm (5)

Cheryl Grant (6)

JUDGMENT

The claimant's application of 13 April 2021 for reconsideration of the judgment which was sent to the parties on 30 March 2021, is refused under rule 72 of the Employment Tribunals Rules of Procedure 2013.

REASONS

1. Under the Employment Tribunal Rules of Procedure 2013 an application for reconsideration may be made within 14 days of the judgment being sent to the parties. By rule 70 a tribunal may "reconsider any judgment where it is necessary in the interest of justice to do so" and upon reconsideration the decision may be confirmed, varied or revoked.

2. Rule 72 provides that an Employment Judge should consider the application to reconsider, and if the judge considers there is no reasonable prospect of the decision being varied or revoked, the application shall be refused. Otherwise it is to be decided, with or without a hearing, by the tribunal which heard it.

3. Under the 2004 rules prescribed grounds were set out, plus a generic "interests of justice" provision, which was to be construed as being of the same type as the other grounds, which were that a decision was wrongly made as a result of an administrative error, a party did not receive notice of the hearing, the decision was made in the absence of a party, or that new evidence had become available since the hearing provided that its existence could not have been reasonably known of or foreseen at the time. In Outasight VB Ltd v Brown UKEAT/0253/14/LA

the EAT confirmed that the 2013 rules did not broaden the scope of the grounds for reconsideration (formerly called a review).

4. The Court of Appeal in Ministry of Justice v Burton [2016] EWCA Civ 714 has since provided the following guidance on the approach to be taken by a tribunal when exercising its discretion under rule 70 on the ground of 'interests of justice': (1) the discretion must be exercised in a principled way; (2) there must be an emphasis on the desirability of finality, which militates against the decision being exercised too readily; (3) it is unlikely to be exercised because a particular argument was not advanced properly; and (4) it is unlikely to be exercised if to do so would involve introducing fresh evidence, unless the strict rules on admissibility are satisfied (see Outasight; and also Flint v Eastern Electricity Board [1975] ICR 395, QBD).

5. The importance of finality in litigation was also emphasised by Underhill J, as he then was, in Council of the City of Newcastle-Upon-Tyne v Marsden [2010] ICR 743, EAT:

> "The weight attached in many of the previous cases to the importance of finality in litigation…seems to me to be entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final (subject, of course to appeal)."

6. A reconsideration will not generally be appropriate if the reason for a point of importance not being dealt with at the hearing is the mistake of oversight of a party or their representative (see Ironsides Ray and Vials v Lindsay [1994] IRLR 318, EAT).

7. The test laid down in Ladd v Marshall [1954] 3 All ER 745, CA in conjunction with the overriding objective will apply where a party applies for reconsideration on the basis of new evidence (see Outasight). This test has the following three elements: (a) the evidence could not have been obtained with reasonable diligence for use at the original hearing; (b) it is relevant and would probably have had an important influence on the hearing; and (c) it is apparently credible. Although there may be other circumstances or mitigating factors relating to the failure to produce evidence at the original hearing which would permit fresh evidence to be adduced.

8. The claimant made this application by email on 13 April 2021 and followed this up with a second email on 23 April 2021 in which she made further written representations. I have considered all of the claimant's submissions. If I do not refer to every point which the claimant has made in those submissions that does not mean that I have not considered them. Having done so, I find that there is no reasonable prospect of the judgment being varied or revoked.

9. Firstly, the claimant has made a number of assertions in relation to the tribunal's fact-finding, the weight given to the findings, the credibility of witnesses and the drawing of inferences. In my view this amounts to an

attempt to relitigate the case on the merits and does not provide any basis for reconsideration.

10. Secondly, the claimant says that the judgment contains the following "clear factual inaccuracies": (i) Mrs Watson admitted to knowing that the claimant was not an English native speaker before the April 2019 incident; (ii) the timing of when one or more of the respondents were first aware that they still had possession of the claimant's belongings.

    (1) In relation to the first matter, I have reviewed my note of Mrs Watson's evidence: although Mrs Watson agreed that the claimant had in early 2018 told her about her family background i.e. the nationalities of her parents and the fact that she had come to England as a child, her evidence was also that she thought the claimant's English was as good as her "native" languages of Italian and French, and she understood the claimant to have an Essex accent. We therefore found that Mrs Watson (as well as the claimant's other colleagues) assumed that the claimant was an English native speaker for the reasons set out at paragraph 36 of our judgment so that

        > "The struggles which the claimant faced in learning and gaining confidence to speak English as a child were not therefore apparent to her colleagues and managers".

        On reflection, our finding on this point could have been better expressed to clarify that in Mrs Watson's case, she "treated" the claimant as an English native speaker in that her interactions with her were based on the assumption that she had the same command of English (as an English native speaker), however, this would have had no effect on our finding on this issue which reflected the overall evidence which Mrs Watson gave and which we accepted. This is alluded to at paragraph 64 of our judgment in which we set out our finding that although the descriptor "native speaker" was used by Mrs Watson on the occasion in question neither she nor her other colleagues were laughing at Carlos because he was not a native speaker but for other reasons; and in Mrs Watson's case she did not

        > "perceive this discussion to be in any sense related to the claimant's national origin or her proficiency in English".

    (2) In relation to the second matter, although the claimant has not stated in what way the tribunal's fact-finding is inaccurate and how this is material to the conclusions we came to the victimisation complaint (including allegation 9.2.8 (aa)) failed because we found that the claimant had not done a protected act.

11. Thirdly, the claimant says that the tribunal misinterpreted allegation 7.1.22 (u). I am satisfied that the tribunal relied on the way that this allegation was put by the claimant and having given her every reasonable opportunity via her counsel to amplify or explain the allegation being advanced. On the facts which were not in dispute, Mr

Toll did not know that the reason for the claimant's absence was ill-health at the time when he made the decision to proceed with the review meeting on 20 May 2019 in her absence.

12. Fourthly, the claimant says that the tribunal applied pressure on her to withdraw allegation 7.1.18. I am satisfied that this allegation was withdrawn by the claimant via her counsel on the basis that it was accepted by the claimant that Ms Chisholm's probation was reviewed after the claimant's employment had ended (not a week before the claimant's review). This allegation was therefore premised on a sequence of events which did not apply to the facts which the claimant accepted.

13. Fifthly, the claimant has sought to rely on seven items of new evidence which she says she did not disclose because she had not anticipated that the matters to which they are said to relate would be disputed. She also says that it is now necessary for her to rely on this material because "the Respondent's [sic] evidence is being believed over mine". She was therefore in possession of these documents during the hearing. As noted, she was represented by counsel at this hearing. I am satisfied that these issues of dispute would or should have been apparent to the claimant and / or her counsel prior to the final hearing or at the very latest during the course of the respondents' evidence. It was therefore open to the claimant to have applied to introduce this new evidence either before or during the hearing with or without the benefit of an adjournment (which was not requested). The claimant now wishes to rely on this new material because of the tribunal's findings. Mindful of the importance of the importance of finality in litigation, I am satisfied that there are no exceptional circumstances which warrant the introduction of new evidence in this case. For completeness, I have reviewed the new evidence which the claimant seeks to rely on and I am satisfied that it is not probable that this would have had an important influence on the outcome.

14. Sixthly, the claimant has requested 11 items or categories of disclosure which she says she had requested and were outstanding since March 2020. The claimant who was represented by counsel did not make an application for specific disclosure in relation to these items during the hearing. I am satisfied that she had every opportunity to do so. I am also satisfied that given the importance of finality in litigation it would not be proportionate or in the interests of justice to grant this application.

15. Seventhly, the claimant refers to connectivity issues. It is recalled that during the hearing, when necessary, the tribunal stopped to enable the claimant's counsel in particular, and also the respondents' representative on at least one occasion, and also some of the witnesses to reconnect to the hearing and neither of the representatives complained that they nor any of their witnesses were unable to participate fully. We were also satisfied that both representatives were able to fully participate in this remote hearing and each of the witnesses were able to give their complete evidence.

16. Eighthly, the claimant also says, correctly, that the tribunal misquoted Mr Toll at paragraph 97 of its judgment as having written “you should not therefore attend work tomorrow” instead of “therefore you should not attend work tomorrow”. I am satisfied that this was an accidental error of transposition and the misquoted text and syntax had no effect on the findings of fact in paragraph 97 nor to any other consequential findings of fact or conclusions which the tribunal made.

17. For these reasons, the claimant’s application for reconsideration has no reasonable prospects of success and it is refused under rule 72(1).

Employment Judge Khan

03.08.2021

JUDGMENT SENT TO THE PARTIES ON

04/08/2021.

FOR THE TRIBUNAL OFFICE