EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr B Kamanga	AND	Driskal Limited (In Administration)

HELD AT Bristol **ON** **6 August 2021**

EMPLOYMENT JUDGE J Bax

Representation:
For the Claimant: Mr Kamanga (in person
For the Respondent: Mrs Jones (lay representative)

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The judgment of the tribunal is that the claimant's application for reconsideration is refused, and the original Judgment is confirmed.

REASONS

Background

1. This is the Judgment following the hearing of the Claimant's reconsideration application of the Judgment given at the end of the final hearing of the claim, which was heard over two days on 28 and 29 January 2021. The final hearing was before a Judge sitting alone, for which the parties had given their written consent. An extempore judgment was given. The Claimant's claims of direct race discrimination were dismissed.

2. Written reasons dated 16 February 2021 were sent to the parties on 25 February 2021.

3. The Claimant sought a reconsideration of the decision in e-mails dated 7 February 2020 and confirmed by e-mail dated 12 March 2021.

4. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). Under Rule 71 an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the

written reasons) were sent to the parties. The application was therefore received within the relevant time limit.

5. The grounds relied upon by the Claimant are these: (1) the claim was heard by a Judge sitting alone, rather than a full panel, (2) the bundle was created by the Respondent and evidence was missing, (3) in making a decision evidence in the bundle was not used, (4) correspondence from the RCN and NMC was missing from the bundle, (5) he was not presented with a bundle in court and had to use his telephone.

6. On 31 March 2021, I considered the application for reconsideration. It was concluded that following matters raised had no real prospects of success of the Judgment being varied or revoked: 1) the claim was heard by a Judge sitting alone, rather than a full panel, (2) the bundle was created by the Respondent and evidence was missing, (4) correspondence from the RCN and NMC was missing from the bundle, (5) he was not presented with a bundle in court and had to use his telephone.

7. It was not possible to conclude that there was no reasonable prospect of the original decision being varied or revoked in relation to, (3) in making a decision evidence in the bundle was not used. Therefore, a hearing was listed to hear the application on this ground for reconsideration.

8. Prior to the hearing I read my original judgment, my notes of the evidence and submissions and the bundle of documents provided at the final hearing. I also considered the submissions and documents provided by the parties for the reconsideration hearing.

9. The Claimant provided a written submission dated 28 July 2021 and had also supplied copies of documents. At the start of the hearing the Claimant confirmed that the written submission contained points that he had not raised at the final hearing and that he was seeking to draw them to my attention. It was explained that the purpose of hearing was not to hear new evidence or make submissions that had not been given/made at the final hearing and its purpose was not to allow a second bite of the cherry.

10. There was no suggestion that evidence could not have been obtained without reasonable diligence prior to the final hearing or that the submissions similarly could not have been made at the time. The purpose of the hearing was not to rehear the evidence or for the parties to advance new submissions not made at the final hearing. The Claimant was asked to make his submissions on the basis of his grounds for reconsideration and application was considered on that basis.

Claimant's submissions

11. The Claimant submitted that evidence in the bundle was not used, and assumptions were made which were not factual. He made the following submissions based on his grounds set out in his application for a reconsideration, which for ease of reference are set out at (a) to (e) below.

(a) 'That the Company was right to assume that I had ITU training hence am the only one who can rub a client chest and therefore it was ok to suspend me and not even question the other staff or even call suspend them till investigation done. I never had ITU training in my life and I can prove that.'

12. The Claimant submitted that there was no evidence of this. He said that because it had been assumed he had ITU experience he was targeted.

(b) 'That the other person who was suspended who was black, I told even stressed to tribunal that he was part of management and did not do personal care and for him to be classified as working with us even on the very night he was in the lounge he statement says he did not do care, but the tribunal did not put that in. What about him as witness or a statement to prove he was suspended. There was no evidence even 1% but judged included that on decision making.'

13. The Claimant said that he was not disputing the suspension finding, but that Mr Okoro was not doing personal care. It was raised with the Claimant that there was no finding in the Judgment that Mr Okoro had been involved in personal care.

(c)'The description of the other colleague I worked with, well its hard description of different people in this day and age, I said Filipino, and in some other statement I said black and he was not white, I that is no point to base your decision the fact remains the same I am black African who was working that night in question and I was singled out even on photo parade I was the only one that night on the photo ID, so the judge to use that to make his decision is unacceptable and questionable.'

14. The Claimant said that he did not think this element of his application was relevant to the decision making and was out of context. He said he had been targeted. He said that he would 'take it out of his application'.

(d) 'Company statement not in the bundle used to make decision. Example given: we were called to improve the care and we manage to suspended 7 and got 2 struck off, this is so evident that the company was trying to build a reputation and did not regards they employees.'

15. The Claimant confirmed that he was referring to paragraphs 17 to 19 of the Judgment. He was concerned that the Respondent had referred to striking off of staff. It was raised with him that no such finding of fact was made, which was accepted. He said that he was being targeted because of his skin colour.

(e) 'This is evident been accused on 30 December then the 31 December 2019 referral done to NMC, Safeguarding and DBS, no proper investigation as stated about company was more focus on reputation having secured that woodland manor nursing home less than 2 month, they wanted to show their reputation even discrimination employees will not stand in their way.'

16. The Claimant's complaint was that there had to be an investigation before a referral, next of kin had to be informed and no police report had been done. The Claimant was suggesting that the referral was made the day after the allegation.

Respondent's submissions

17. In relation to ITU experience it was suggested the finding could have been made, but in any event it was a moot point because the Claimant had been identified. On receipt of the allegation the Respondent had to suspend. It was said that there was no need to inform next of kin unless the resident lacked capacity. He had not adduced any evidence to show that the treatment occurred because of his race.

The law

18. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.

19. The earlier case law suggests that the interests of justice ground should be construed restrictively. The Employment Appeal Tribunal ("the EAT") in Trimble v Supertravel Ltd [1982] ICR 440 decided that if a matter has been ventilated and argued then any error of law falls to be corrected on appeal and not by review. In addition, in Fforde v Black EAT 68/80 (where the applicant was seeking a review in the interests of justice under the former Rules which is analogous to a reconsideration under the current Rules) the EAT decided that the interests of justice ground of review does not mean "that in every case where a litigant is unsuccessful he is automatically entitled to have the tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in the even more exceptional case where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order".

20. More recent case law suggests that the "interests of justice" ground should not be construed as restrictively as it was prior to the introduction of the "overriding objective" (which is now set out in Rule 2). This requires the tribunal to give effect to the overriding objective to deal with cases fairly and justly. As confirmed in Williams v Ferrosan Ltd [2004] IRLR 607 EAT, it is no longer the case that the "interests of justice" ground was only appropriate in exceptional circumstances. However, in Newcastle Upon Tyne City Council v Marsden [2010] IRLR 743, the EAT confirmed that it is incorrect to assert that the interests of justice ground need not necessarily be construed so restrictively, since the overriding objective to deal with cases justly required the application of recognised principles. These include that there should be finality in litigation, which is in the interest of both parties.

21. When a party is seeking to rely on new evidence which has become available the principles in Ladd v Marshall [1954] 3 All ER 745 apply. The Court of Appeal established that to justify the receipt of fresh evidence it is necessary to show:

(i) that the evidence could not have been obtained with reasonable diligence for use at the original hearing;
(ii) that the evidence is relevant and would probably have had an important influence on the hearing; and
(iii) the evidence is apparently credible.

Conclusions

22. The matters raised by the claimant were considered in the light of all of the evidence and submissions presented to the tribunal before the decision was reached at the final hearing. The specific grounds are addressed below:

(a) 'That the Company was right to assume that I had ITU training hence am the only one who can rub a client chest and therefore it was ok to suspend me and not even question the other staff or even call suspend them till investigation done.'

23. No finding of fact was made that the Claimant had ITU training. It was found that the Claimant had intensive care experience. On reflection this was not something that the Claimant said in evidence, it had been raised in the Respondent's closing submissions. I accepted the Claimant's case that it was not given in evidence, and I varied my findings of fact to remove the reference. However, whether or not the Claimant had ITU experience did not from part of my reasoning when reaching my conclusions. The Claimant had been identified by the resident concerned. In any event the suggestion that the Respondent assumed he had been trained and therefore could have rubbed the chest of the resident tended to suggest, on the Claimant's submission, that the decision to investigate and suspend him was for a reason other than race. This element of the Claimant's submissions did not alter my original conclusions.

(b) 'That the other person who was suspended who was black, I told even stressed to tribunal that he was part of management and did not do personal care and for him to be classified as working with us even on the very night he was in the lounge he statement says he did not do care, but the tribunal did not put that in. What about him as witness or a statement to prove he was suspended. There was no evidence even 1% but judged included that on decision making.'

24. Mr Okoro's suspension was referred to in the Response and within the bundle in the appeal notes and the appeal outcome letter dated 1 March 2019. The conclusion was reached after considering the evidence heard at the final hearing.

(c)'The description of the other colleague I worked with, well its hard description of different people in this day and age, I said Filipino, and in some other statement I said black and he was not white, I that is no point to base your decision the fact remains the same I am black African who was working that night in question and I was singled out even on photo parade I was the only one that night on the photo ID, so the judge to use that to make his decision is unacceptable and questionable.'

25. After hearing the evidence, at the final hearing, it was concluded that the Claimant had been inconsistent in his evidence. However, the Claimant did not seek to pursue this argument as part of his application.

(d) 'Company statement not in the bundle used to make decision. Example given: we were called to improve the care and we manage to suspended 7 and got 2 struck off, this is so evident that the company was trying to build a reputation and did not regards they employees.'

26. In the response, the Respondent had set out that BKR Care Consultancy had been brought in by the administrators to manage the care home and work towards a sale as a going concern. The witness statement of Ms Williams, which was contained in the bundle, said, that the purpose of BKR Care consultancy being appointed was to provide crisis management and improve the care to the residents and improve the rating of the home with the CQC. Further it was to improve the viability of the home with a view of selling it as a going concern. She also set out that the CQC had previously rated the home as inadequate. No findings of fact were made in relation to the numbers of people suspended or struck off, because evidence was not called on this point and it formed no part of the decision.

(e) 'This is evident been accused on 30 December then the 31 December 2019 referral done to NMC, Safeguarding and DBS, no proper investigation as stated about company was more focus on reputation having secured that woodland manor nursing home less than 2 month, they wanted to show their reputation even discrimination employees will not stand in their way.'

27. Findings of fact were made on the basis of the evidence presented at the hearing. It was concluded that it was appropriate to make referrals to regulatory bodies when allegations of abuse are made against an employee. The Claimant's argument that the Respondent was more concerned about its reputation, was not advanced at the final hearing. The Claimant had misremembered when the allegations were raised, and it was noted that 28 days had passed before the referral was made. This element of the Claimant's submissions did not alter my original conclusions.

Conclusion

28. I took into account the Claimant's written submission. When the Judgment at the final hearing was made, consideration was given to the evidence heard and the submissions made The Claimant sought to introduce fresh arguments which he could have made at the time. On considering the application, I accepted the Claimant's submission that the finding of fact in relation to ITU experience was not referred to in evidence and that he did not have that experience. However, it did not form part of my conclusions on the issues to be determined and it did not change my original conclusions. The other points raised by the Claimant were part of the evidence within the bundle and formed part of the final hearing and I reached my conclusions after considering that evidence and the submissions made at the time. The purpose of a reconsideration is not for a second bite of the cherry in terms of presenting evidence or submissions. Something had not gone radically wrong at the final

hearing. After considering the matters raised, my original conclusions were unaltered, and the original judgment was confirmed.

Employment Judge J Bax
Date: 06 August 2021

Sent to the Parties: 16 August 2021

FOR THE TRIBUNAL OFFICE