EMPLOYMENT TRIBUNALS

Claimant: Dr S E Middleton

Respondent: York Teaching Hospital NHS Foundation Trust

Employment Judge Shepherd

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The application for reconsideration is refused as there is no reasonable prospect of the original decision being varied or revoked.

REASONS

1. A reserved judgment and reasons was sent to the parties on 18 June 2021. That judgment followed a hearing on 24**,**25,26,27,28 May and 1,2,3,4, and 7 June 2021. I concluded that the claim that the claimant was unfairly dismissed was well-founded and succeeded. The claim that the claimant was dismissed by reason of making a protected disclosure was not well-founded and was dismissed.

2. The claimant's representative wrote to the Tribunal on 30 June 2021 indicating that the claimant requested that the decision be reconsidered. The enclosure was a request for a review. Upon consideration, I indicated that there was no application for reconsideration of the judgment but a request to review some of the details of the reasons. On 29 July 2021 the claimant's representative provide a letter from the claimant dated 27 July 2021. In that letter the claimant indicated that she wanted a review of the judgment.

3. I have considered the contents of the claimant's application carefully. A number of issues are included but it appears that the central point raised by the claimant is that I found that the claimant had withdrawn herself from the RAFT project and this was one of the reasons for not finding in her favour in the automatic unfair dismissal claim pursuant to section 103A of the Employment Rights Act 1996 by reason of making a protected disclosure.

4. I considered a substantial amount of evidence over a lengthy hearing. The claimant had indicated to the respondent that, unless the project was put on hold and

progressed through the relevant approval/scrutiny process, she would not be able to involve herself in it further.

5. This was a claim of constructive dismissal and I was satisfied that there was a repudiatory breach of contract by the respondent. The repudiatory breach is set out within the reasons for the judgment. This was by reason of a number of issues, mainly in respect of the appointment of Ruth Dixon to an 8c Lead consultant role. I indicated that I was not satisfied that the respondent's treatment of the RAFT initiative or the treatment of the claimant in respect of that initiative was a breach of the implied term of mutual trust and confidence.

6. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, provides as follows:

> "70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ('the original decision') may be confirmed, varied or revoked. If it is revoked it may be taken again.
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> 71. Except where it is made in the course of a hearing, 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 is necessary.
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> 72 (1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.
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> (2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations."

7. The previous Employment Tribunal Rules (2004) provided a number of grounds on which a Judgment could be reviewed The only ground in the 2013 Rules is that a Judgment can be reconsidered where it is necessary in the interests of justice to do

so. I consider that the guidance given by the Employment Appeal Tribunal in respect of the previous Rules is still relevant guidance in respect of the 2013 Rules. It was confirmed by Eady J **in Outasight VB Ltd v Brown UKEAT/0253/14/LA** that the basic principles still apply.

8. There is a public policy principle that there must be finality in litigation and reviews are a limited exception to that principle. In the case of **Stevenson v Golden Wonder Limited [1977] IRLR 474** makes it clear that a review (now a reconsideration) is not a method by which a disappointed litigant gets a "second bite of the cherry". Lord McDonald said that the review (now reconsideration) provisions were

> "Not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before".

In the case of **Fforde v Black EAT68/80** where it was said that this ground does not mean:

> "That in every case where a litigant is unsuccessful 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 even more exceptional cases where something has gone radically wrong with the procedure involving the denial of natural justice or something of that order".

9. In the interest of justice means the interest of justice to both sides. The Employment Appeal Tribunal provided guidance in **Reading v EMI Leisure Limited EAT262/81** where it was stated:

> "When you boil down what is said on (the claimant's) 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".

10. I considered a substantial amount of evidence with regard to all the circumstances during the hearing. There was no finding that the claimant had withdrawn herself from that project. I found that the claimant had indicated that she would not be able to involve herself further unless the project was put on hold and progressed through the relevant approval/scrutiny process and the initiative had moved forward without the claimant's oversight. if I had found that the claimant had withdrawn from the project it would not have altered my decision that the claimant's resignation and constructive dismissal was not by reason, or the principal reason, of the protected disclosure.

12. I have spent a considerable amount of time going through the application for a reconsideration. In this case, the application for a reconsideration appears to be with regard to the claim of automatic unfair dismissal by reason of making a protected disclosure. I am of the view that the reasons for the judgment in this regard are clear and paragraph 40 of the reasons for the judgment sets out the essence of the position succinctly.

13. I have considered this application carefully. I have reached the view that a hearing is not necessary in the interests of justice. There is no reasonable prospect of the judgment being varied or revoked and the application for a reconsideration is refused.

Employment Judge Shepherd
23 August 2021.