EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss A Sharp	AND	Noah's Ark Pre-School (Southampton) Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD BY VIDEO (CVP) **ON** 26 August 2021

EMPLOYMENT JUDGE GRAY

Representation

For the Claimant: Mr Piddington (Counsel)
For the Respondent: Mr Reymes-Cole (Solicitor)

JUDGMENT

The judgment of the tribunal is that the Respondent's application for reconsideration of the Judgment delivered orally on the 24 March 2021 (with written reasons having been sent to the parties on the 21 May 2021) is refused.

The Claimant's application for costs is refused.

JUDGMENT having been delivered orally on the 26 August 2021, written reasons from the reconsideration hearing then having been requested on the 27 August 2021 by the Respondent, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The original Judgment on this matter was delivered orally on the 24 March 2021 (and then having been sent to the parties on the 25 March 2021) and written reasons having been requested by email dated 24 March 2021 (this request having been referred to the Employment Judge on the 11 May 2021), in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, written reasons were provided dated 14 May 2021 and sent to the parties on the 21 May 2021.

2. The Respondent then confirmed on the 3 June 2021 it applied for a reconsideration of the Judgment (resubmitting what it had previously submitted on the 8 April 2021).

3. The Claimant's mother (acting as her representative) had submitted written comments to the Respondent's original application on the 13 April 2021 and resubmitted those on the 14 June 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 for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.

6. At the commencement of this hearing it was confirmed that the chronology as to the production of an agreed bundle for use at the original hearing was not in dispute. Details of the process to agree the bundle for the original hearing were the focus of the Claimant's written comments about the Respondent's application.

7. From this it can be noted that the bundle does appear to be agreed the day before the original hearing. This process is concluded by an email from Mr Henry (the Respondent's representative at that time) dated 23 March 2021 which thanks the Claimant's then representative (DC Employment Solicitors) for the bundle saying … "Thank you for doing that I have been completely swamped with almost back to back hearings". The conduct of Mr Henry at the start of the original hearing on the 24 March 2021 suggested that the bundle relied upon was agreed, he confirmed it was and didn't apply for an adjournment of the hearing.

8. The grounds relied upon by the Respondent for its reconsideration application were articulated orally at this hearing by Mr Reymes-Cole. They were (in summary) as follows:

    a. The first ACAS certificate should be found to be valid as there is evidence to suggest that without prejudice correspondence did take place at that time and that the Claimant's then solicitors were actively involved.

    b. The Respondent asserts that the Claimant would therefore have had more advice than was asserted in evidence at the original hearing, although the Respondent accepts it has no evidence that such advice was provided and if so, what form it took.

    c. If the first ACAS certificate was valid then it would have been reasonably practicable for the Claimant to have submitted her claim in time based on that, and that she did not do so, it is asserted, due to mis-advice at that time from the Claimant's then solicitors. Or if she were advised that the first ACAS certificate was valid by her solicitors at the time, that would challenge that her belief at the time was genuine or reasonably held.

9. In response Mr Piddington on behalf of the Claimant submitted (in summary):

    a. That the starting point for the Tribunal is it needs to be satisfied as to any explanation provided as to why the evidence now sought to be relied upon was not available before, and not something that could have been put before, otherwise it is allowing the losing party to have another go, which is not in the interests of justice.

    b. The Respondent, through its representative at that time, Mr Henry was able to cross examine the Claimant and did do so in respect of the involvement of her then solicitors.

    c. Facts relied upon to reach the original Judgment, as set out in paragraphs 10 and 12 of the written reasons, were not challenged:

    "10. The Claimant's uncontested evidence is that on the 18 March 2020 the insurer told the Claimant that the Acas certificate was not against the correct legal entity. She says that she was told to go back into Acas Early Conciliation "TODAY" as otherwise her claim may not be accepted because the certificate was incorrect….

    12. The Claimant says she instructed DC Employment Solicitors, through her mother, to initiate Acas Early Conciliation against

"Noah's Ark Pre-School (Southampton) Ltd on 18 March 2020. This certificate was issued on 2 April 2020 (page 2 of the bundle). The address of the Respondent is:

20 Mosaic Close
Southampton
SO19 6RR

This is the same address as given by the Claimant in her claim form submitted on the 30 April 2020 as the address of the Respondent (answer to question 2.2) – see page 3 of the bundle."

d. Taken at its highest it is speculation that the Claimant was advised by her then solicitors (DC Employment Solicitors) that the first ACAS certificate was valid, and they didn't then follow their own advice as they were involved in the issuing of the second ACAS certificate.

10. Relevant case law:

11. 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".

12. 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.

13. The authority of ***Ministry of Justice v Burton [2016] EWCA Civ 714, [2016] ICR 1128*** was also considered where it is expressly noted with reference to *Outasight VB Ltd v Brown*, it will only be in the interests of justice to allow fresh evidence to be introduced on review if the well-known principles in *Ladd v Marshall* have been satisfied. The first of these is that the evidence could not have been obtained for the original hearing.

14. I have also noted ***Lindsay v Ironsides Ray & Vials [1994] ICR 384***, where Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review.

15. In my judgment, these principles are all particularly relevant here and when applying them to the grounds of reconsideration I find as follows:

    a. The agreed chronology as to the preparation of the bundle for the original hearing (in particular the email from Mr Henry dated 23 March 2021) and the conduct of Mr Henry at the start of the original hearing on the 24 March 2021 support that the bundle relied upon was agreed.

    b. With reference to *Ladd v Marshall* principles the first being that the evidence could not have been obtained for the original hearing. That is not the case here.

    c. An assertion by the Respondent that the Claimant may have been advised by her then solicitors at the time of the second ACAS certificate about the validity of the first and second ACAS certificates appears to be mere speculation. It is an argument that could have been raised at the preliminary hearing on the 24 March 2021 and challenged in cross examination. The Respondent acknowledges that the without prejudice documents they would seek to rely upon relate to the first ACAS period and not the second or as to what advice the Claimant received, if any at the time of the second.

    d. There is no reason to find that the factual findings as to the name and address of the Respondent entity as it is referred to in the first and second ACAS certificates, are not what they were found to be.

    e. There is no reason to find that the factual findings as to what the Claimant believed at the time in respect of the validity of the first and second ACAS certificates was not genuine or reasonably held.

16. Accordingly, I refuse the application for reconsideration.

Employment Judge Gray
Date: 06 September 2021

Reasons sent to Parties: 06 October 2021

FOR THE TRIBUNAL OFFICE