Case No: 2602340/2019

EMPLOYMENT TRIBUNALS

Claimant: Mrs K Xidakis

Respondent: Rolls-Royce PLC

UPON APPLICATION by the Claimant made by an email dated 14 September 2021 to reconsider part of the judgment sent to the parties on 1 September 2021, under rule 71 of the Employment Tribunals Rules of Procedure 2013,

JUDGMENT

The Claimant's application for reconsideration is refused on the basis that there is no reasonable prospect of the original decision being varied or revoked.

REASONS

Background

1. The Claimant's application for reconsideration of part of the Judgment sent to the parties on 1 September 2021 was plainly made within the 14-day time limit set by rule 71 of the Employment Tribunals Rules of Procedure 2013 ("the Rules"). The parties have already been notified of the reasons for the delay in dealing with that application, related to my being on an extended period of leave and, subsequently, the demands of other judicial business.

2. In accordance with rule 72(1) of the Rules, the first step was for me to consider the Claimant's application, to determine whether there is any reasonable prospect of the original decision being varied or revoked. By the time I had opportunity to do so substantively, the Respondent had written to the Tribunal commenting on the application, by email dated 1 October 2021, and the Claimant had sent further comments by email dated 2 October 2021. Whilst those emails were forwarded to me by the Tribunal administration, I have not read them in reaching the decision set out in these Reasons.

3. Again, in accordance with rule 72(1) of the Rules, this decision is mine alone. It would only have been had the application not been refused at this first stage that I would have consulted my colleagues, Mrs Newton and Ms Dean. I should make clear however, that of course the original Judgment to which the Claimant's

application relates was a unanimous judgment of all three Tribunal members, including in relation to the parts of the Judgment the Claimant addresses in her application.

4. As rule 72(1) makes clear therefore, the first task is for me to decide whether there is any reasonable prospect of the original decision being varied or revoked. I have decided that there is not, for the reasons that now follow, taking matters in a different order to that adopted by the Claimant.

Justification – section 15(2) Equality Act 2010

5. This part of the Claimant's application relates to her complaint of discrimination arising from disability as defined by section 15 of the Equality Act 2010, which concerned carry over of annual leave from one annual leave year to the next at a time when the Claimant was on long-term sick leave. Specifically, she seeks reconsideration of that part of our decision relating to whether the unfavourable treatment was a proportionate means of achieving a legitimate aim (justification for shorthand).

6. Clearly there is no reasonable prospect of the original decision to dismiss this complaint being varied or revoked in so far as it relates to carry over of annual leave from holiday year 2018 to holiday year 2019, given our conclusion that the Respondent did not know and could not reasonably have been expected to know that the Claimant was a disabled person at the relevant time. The Claimant has not sought reconsideration of the part of our decision relating to knowledge. That leaves the complaints in relation to carry over of leave from annual leave years 2019 and 2020.

7. The Claimant does not appear to challenge our summary of the relevant law on the question of whether the unfavourable treatment was justified. She refers in her application to the burden being on the Respondent to establish the justification defence and to the need to strike a balance, when assessing proportionality, between the reasonable needs of the Respondent and the impact of the treatment on the Claimant. We noted both of those requirements in our summary of the law and expressly addressed them in our conclusions.

8. At paragraphs 24 to 29 of her application, the Claimant refers to an email from John Golding which was in the bundle at page 625 and to an email from Marcus Dix at page 507. Neither of Mr Golding's email and the request from Mr Dix, nor the fact that the Claimant was not informed until after the 2019 leave year had ended (a fact clearly noted in the original decision at paragraph 82) are anything like sufficient to upset our conclusion that the desire for clarity was a legitimate aim and that the Respondent adopted proportionate means to achieve it. It was not an individual calculation for any particular employee, or the notification of that calculation, that the Respondent was required to justify. It was the policy on carry over with which we were concerned, which whilst dealing with a complex issue, we were satisfied was sufficiently clear. As a footnote, the Claimant has not set out why the evidence she refers to at paragraph 29 of her application could not have been available to the Tribunal at the Final Hearing.

9. The Claimant has not set out why the evidence she refers to in paragraph 33 of her application could not have been available to the Tribunal at the Final Hearing. It is evidence which, on the face of it, most certainly could have been so presented.

10. As for paragraph 34 of the Claimant's application, on the issue of proportionality:

10.1. The Respondent did not "reclassify" bank holidays or statutory holidays, or non-statutory leave taken by the Claimant prior to her sickness, as regulation 13 leave. The policy on annual leave and sickness absence (pages 161 to 162 of the bundle) states that "any days taken in the holiday year before or after the period of absence will be deducted from the 20 days figure [which employees in this situation can carry forward] (these days can be 'floating' holidays, fixed days and Statutory/Public Holidays)". The Respondent therefore expressly set out in its policy, in advance, that leave taken before or after sickness, including leave on a statutory or public holiday, would be deducted from the maximum 20 days that could be carried forward.

10.2. The Respondent's explanation of the general permission for carry over of up to five days in exceptional circumstances and its exercise of its discretion in permitting the Claimant to carry forward 48.8 hours into, eventually, 2019 were expressly noted in the original decision (see paragraphs 80 and 81). Whilst we did not expressly address these points when noting other arguments deployed in the Claimant's favour at paragraph 180, in no sense would they be sufficient to lead to a different decision on the question of whether the Respondent's policy on carry over of annual leave during long-term sickness absence was a proportionate means of achieving the legitimate aims. They are plainly of no more weight than the points expressly considered at paragraph 180, relating in both cases to exceptional circumstances; the 48.8 hours the Claimant was allowed to carry forward reflected a special agreement because of her working hours in 2017 – see paragraph 81 of the Judgment.

10.3. The relevance of the question of whether the Claimant would be permitted to take annual leave whilst absent because of sickness was not addressed by her Counsel in argument, either orally or in paragraphs 48 to 58 of his written submissions, and in any event was a subsidiary factor in our decision on justification as paragraph 178 makes clear.

10.4. The position of employees on maternity leave and sabbatical respectively were expressly considered at paragraph 180. In this respect, the Claimant simply repeats points we have already dealt with.

10.5. To any objection that the Claimant was not able to put her case in response to the Respondent's evidence, as made clear at various points in the Judgment, in particular paragraph 172, the Respondent clearly trailed its justification defence in its written witness evidence. It should be added that it also set out the defence in its Response – see paragraph 42 at page 145 of the bundle.

11. The broader implications of the Respondent's policy for disabled people were clearly taken into account in reaching our decision – see paragraph 177.

12. In summary, in large part the Claimant simply seeks to re-argue her case. For all the reasons set out above, there is no reasonable prospect of the decision in respect of the complaints of discrimination arising from disability being varied or revoked.

Working Time Regulations 1998 ("WTR")

13. The Claimant's first, and principal, argument, is that the Tribunal should not have relied on the comments of Langstaff J in **Bear Scotland v Fulton [2015] ICR 221** regarding the order in which annual leave is taken. I note the following, in no particular order:

13.1. Whilst the Claimant's Counsel argued, in relation to the WTR (paragraph 127 and following of his written submissions) that the Respondent's policy on annual leave and sickness absence was not clear, it was not argued that the policy did not constitute the Respondent's properly notified position to its employees that regulation 13 holiday would be deemed to be taken during any period of sickness absence. Put another way, there was no argument raised before us about the Claimant not being bound by it.

13.2. I have considered the relevant paragraphs (112 to 120) in **Chief Constable of Northern Ireland v Agnew [2019] NICA 32**. That decision is not binding on this Tribunal, though decisions of the Northern Ireland Court of Appeal are regarded as persuasive. In any event, the employment tribunal in **Agnew**, whose decision on this point the Court adopted with no further comment, concluded that the different types of leave in that case (the equivalents of regulation 13 leave, regulation 13A leave and other leave) were indistinguishable, whereas in this case the Respondent's policy sets out its position as to the effect of sickness absence on annual leave in detail. The tribunal's decision in **Agnew** was also focused on rejecting Langstaff J's reliance on the labelling of "additional leave" as being suggestive of an order or sequence of leave; it did not deal with the other grounds on which he made his obiter comments.

13.3. We are not bound by decisions of other employment tribunals, though of course all such decisions (unless overturned) should be afforded due respect. The tribunal in **Omollo v Governors of Oldfield Primary School 3330813/2018** refers extensively to **Agnew**, as to which see above. Moreover, at paragraph 26 of the judgment, EJ Tuck states, "I do not accept that the respondent can retrospectively, having been silent at the time, in tribunal, classify paid leave as being at the beginning of the leave year, so as to frustrate a claim for a series of deductions". That is a different scenario to the present case – see paragraphs 13.1 and 13.2 above and further below. **Law v TEF Transport Ltd 1807579/2019** does not address a scenario equivalent to the Respondent's arrangements for accrual of annual leave during sickness absence. Moreover, whilst the Claimant's Counsel asserted in his written submissions that bank and fixed holidays were separate from leave under WTR regulation 13, he did not cite either case.

14. As to the Claimant's remaining arguments:

14.1. We set out in paragraph 79 of our original decision the relevant reference to the Claimant's contract of employment. It refers expressly to statutory holidays as the Claimant says, but it does not designate them as leave under regulation 13A WTR. I refer to our conclusions in this regard, principally at paragraph 134 of the original decision. Those on maternity leave and taking sabbaticals are not in the same position as those on long-term sick leave (see our conclusions, in the different context of justification, at paragraph 180). These elements of the Claimant's application are essentially an attempt to re-argue points already addressed.

14.2. The Claimant's evidence in relation to the events of 22 July 2021 plainly could not have been brought before the Tribunal at the Final Hearing. That said, alongside what is quoted at paragraph 10.1 above, the Respondent's policy says (page 161) that "employees who are absent due to sickness and cannot take their holiday in a particular holiday year are entitled to carry over up to 20 accrued but untaken days (this figure includes 'floating' holidays, fixed days and Statutory/Public Holidays)". As noted above, the Claimant's contract of employment does not fix bank holidays as regulation 13A days; neither does the policy – it does expressly the opposite. It is one thing to say in a contract what the fixed or bank holidays are (without designating them as regulation 13 or regulation 13A leave). It is another to say how leave under regulation 13 of the WTR is deemed to be used up. This appears to be the arrangement the Respondent has applied in relation to leave during 2021.

15. For the reasons set out above, I see no reasonable prospect of the Tribunal changing the decision it has already reached in relation to the complaint under the WTR either.

16. In summary, the Claimant's application seeks to re-argue points already fully addressed, argue points that she or her Counsel could properly have put before us at the Final Hearing, relies on evidence that could also have been put before us at that Hearing, or puts forward points that very obviously would have made no difference to the decision on these issues. The Claimant's application for reconsideration is therefore refused.

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Employment Judge Faulkner
25 October 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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