EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4102215/2019

Held in Glasgow on 11 September 2020

Employment Judge: R Gall
Tribunal Members: Mr E Borowski
Mr P O'Hagan

Miss L Boyle — **Claimant**
Represented by:
Mr M Allison – Solicitor
Written Submissions

Ministry of Justice — **Respondent**
Represented by:
Dr A Gibson – Solicitor
Written Submissions

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that the application for reconsideration is refused.

REASONS

1. The respondents applied to the Employment Tribunal seeking that it reconsidered its Judgment. That Judgment was dated 3 February 2020 and was sent to parties on 4 February 2020.

2. Unfortunately, in circumstances where judgment could not be reached and finalised, for reasons detailed in the Judgment, until sometime after the hearing, consideration of the reconsideration application has also taken more time than is ideal. This has been due to the coronavirus pandemic and the consequent need for written submissions, with opportunities being given for responses to submissions from each party. It had been the preference of the respondents to address the Tribunal in support of the submissions. The Tribunal regarded it as

proportionate, however, to deal with the application on the basis of the written submissions it received. The submissions were full and arranging a hearing, even by way of video conferencing, CVP, would have added to the delay in a decision being reached.

3. The respondents sought to add further grounds to their application for reconsideration outwith the period permitted for a reconsideration application. The reconsideration application was made on 17 February 2020. The proposed additional grounds were submitted to the Tribunal by the respondents on 3 June 2020. Written arguments were submitted in support of and in opposition to these new grounds being added. The application to add the new grounds was ultimately refused by the Tribunal. Reasons were given. There was time taken whilst that aspect was dealt with by the Tribunal.

4. The Tribunal required to meet to consider the reconsideration application. It ultimately did that by video conference on 11 September 2020. It concluded its deliberations that day.

5. In its deliberations the Tribunal bore in mind the terms of Rule 70 of the Employment Tribunals (Rules of Constitution & Procedure) Regulations 2013.That rule provides that a Judgment (referred to in Rule 70 as "the original decision") may be reconsidered if it is in the interests of justice to do so. The Tribunal also kept in mind the decision in *Outasight v VB Brown* 2015 ICR D 11. In that case it was confirmed that Employment Tribunals have, under Rule 70, a broad discretion in determination of reconsideration applications. It was stated that discretion must be exercised judicially, *"which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation".*

6. The desirability of finality of litigation was highlighted in *Flint v Eastern Electricity Board* 1975 ICR 395. If something has been aired at Tribunal and argued there, then any error of law falls to be corrected on appeal and not by review, that process now being known as reconsideration. That is confirmed in the case *of Trimble v Supertravel Ltd* 1982 ICR 440, EAT

7. It is also relevant for the Tribunal in this situation to have regard to the fact that it has seen and heard the witnesses and has assessed the evidence from various witnesses in coming to the view it did on any disputed facts.

8. An application for reconsideration is not therefore an opportunity for the party seeking it to have what might be regarded as being "a second bite at the cherry". Reconsideration was, under the Tribunal Rules in place before those of 2013 now in place, a process known as review. Specific grounds of potential review were detailed in those former rules. Those included the interests of justice. The provision now permits reconsideration where it is in the interests of justice, without any other grounds being mentioned, whether by way of example of circumstances where it might be in the interests of justice to reconsider, or as a specific potential basis for reconsideration.

9. The case of *Fforde v Black* UKEAT/68/80 contained the following comment from Lord McDonald:-

"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 suchlike."

10. Having reminded itself of the relevant principles applicable, the Tribunal considered the application made by the respondents, reading carefully the submissions of both parties. Each member of the Tribunal applied his mind to the application and response to it. The points made by both parties were discussed fully by the Tribunal. The Tribunal unanimously decided that the application was unsuccessful. The original decision is confirmed. The reasons the Tribunal reached that decision are set out in this Note.

All Reasonable Steps Defence

11. Section 109 of the Equality Act 2010 ("the 2010 Act") provides that if something said to have discriminatory is done in course of employment by A, the employer being B, it is a defence for B to show that it took all reasonable steps to prevent

A from doing that thing or doing anything of that description. The onus is on the employer to show that all reasonable steps were taken.

12. The respondents led evidence at the hearing which fell into this area. They maintained in their written submissions in one sentence (on page 13 of the submissions for ease of reference) that the terms of Section 109 of the 2010 Act applied and that the defence had been made out.

13. In their application for reconsideration, the respondents said that the Tribunal in its Judgment had not "addressed the reasonable steps defence". The respondents in those circumstances took the view that the Judgment was not "Meek compliant", referring to the case of *Meek v City of Birmingham District Council* 1987 IRLR 250. They cautioned against the Tribunal providing reasons now or in the future as it might construct reasons that had not existed at the time. It might tailor its response so as to cast it in the best light. Those were risks the respondents said were highlighted in *Barke v SEETEC Business Technology Centre* Ltd 2005 ICR 1373. The Tribunal should revoke the Judgment. It should not add to its decision. It was referring back to evidence heard 9 months ago, that period now in fact being one year.

14. The claimant's solicitors in their submissions conceded that the Judgment did not record express reasons for rejection of this defence. They disagreed with the respondents' view as to what should happen. It was their view that, if this aspect of the decision was to be reconsidered, the Tribunal should consider the evidence and reject the Section 109 defence, giving further reasoning.

15. The Tribunal considered this point. It is true that there is no specific explicit finding in the Judgment on this point. In its members' meetings prior to the original decision being finalised the Tribunal did however consider this aspect of the evidence. It discussed whether there were reasonable steps which could have been taken by the respondents to prevent the discriminatory act. It was the view of the Tribunal that there were such steps, that is, steps which were reasonable, and which could have been taken by the respondents.

16. Policies did exist. Steps were taken to train staff. Steps were also taken if breaches of policy occurred. The discriminatory act in this regard which had

occurred, the Tribunal found on the evidence it heard, was the making of an announcement that fixed term employees were being confirmed in post, apart from those whose probationary period had not been completed. The claimant was in the latter category. The announcement was made in a group meeting when the claimant was present. It is appreciated that the respondents do not accept that the facts were as just stated. Those were, however, the findings of the Tribunal on the evidence it heard.

17. The discussion amongst the Tribunal members prior to Judgment being issued explored this area. The view of the Tribunal was that there were reasonable steps which could have been taken by the respondents to prevent their employees taking what the Tribunal found to have been discriminatory conduct. Such reasonable steps, the Tribunal thought, would have extended to there being a policy in place, and/or training given by the respondents as to how news of this type might be appropriately conveyed to those who were becoming permanent staff members and to those who were not. That would have avoided, or certainly minimised, the potential risk of upset or discriminatory conduct occurring. The Tribunal considered that there could have been guidelines issued as a reasonable step. Those might have stated that speaking individually to staff members was appropriate. The guidelines or policy might have gone on to say that those becoming permanent staff members should be spoken to as a group. In terms of such a policy or such guidelines, it would have been a reasonable step in the view of the Tribunal to state that those in the category in which the claimant found herself be spoken to, as a group, with the decision being explained to them and with arrangements being made to avoid their attendance at any group session or part thereof where this topic was to be dealt with and any announcement was to be made. Those were reasonable steps which might have been taken by the respondents. Had they been taken, the respondents would have been far better placed to maintain that they had taken all reasonable steps to prevent the discriminator from doing the discriminatory act.

18. Having reached the view that the conduct was discriminatory, the Tribunal was therefore not persuaded at time of the Judgment issued by it that all reasonable

steps had been taken by the respondents. It regarded there as being other options which were open to the respondents, which were reasonable as it saw it, but which had not been taken by the respondents.

19. Unfortunately, the Judgment did not specifically, in terms, reflect that part of the discussion at the members' meetings. This is regarded as having occurred as there was no particular emphasis on this area in evidence and very little reference to it in submission. The defence was implicitly rejected, however, in that liability on the part of the respondents was found to exist. Nevertheless, it is recognised that the Tribunal ought to have set out in the Judgment that this defence was being advanced. It ought then to have gone on to explain why it found that the defence was not established. It was, however, able to recall the point being discussed and its reaction by way of possible steps being mentioned by Tribunal members as ones which the respondents could have taken but had not taken, those steps being ones which in its opinion were reasonable.

20. At reconsideration the Tribunal was not therefore looking at this area for the first time. It was not providing reasons which did not exist at the time. It was not tailoring its response so as to cast it in the best light. The concerns of the respondents in relation to those possible issues were understood, however there was no foundation for them.

21. On that basis the Tribunal regarded itself as able to deal with this point by setting out the reasons which led it to find liability existed on the part of the respondents, the Section 109 "all reasonable steps defence" not having been established by them.

Harassment

22. The Tribunal considered carefully the other points made by the respondents in relation to harassment in their application for reconsideration.

23. The Tribunal regarded the Judgment as specifying the conclusions it had come to after its deliberations. The conduct was the announcement made in general meeting. Paragraph 57 of the Judgment contained the finding in fact by the

Tribunal that the claimant was in the general meeting at time the announcement was made.

24. In reaching its decision as set out in the Judgment, the Tribunal had assessed and come to a view on the evidence it preferred. The impact was as found by the Tribunal. The Judgment records that the claimant felt humiliated and degraded. This occurred due to the announcement being made in the general meeting and its effect, that being the environment it created for the claimant. The Tribunal confirmed in its Judgment that it had considered the subjective and objective aspects as specified in Section 26 of the 2010 Act.

25. On consideration of the points in this area raised by the respondents in their application for reconsideration, the Tribunal concluded that the Judgment, the original decision as referred to in rule 70, was to be confirmed.

26. It is therefore the case that harassment had occurred. Points made in the application for reconsideration which were predicated on harassment not having occurred, inclusion of absence in consideration of dismissal for example, therefore fall from reconsideration.

Compensation

27. The view of the Tribunal just expressed in relation to harassment, namely that the Judgment is confirmed, was also the one reached by the Tribunal in relation to the part of the reconsideration application dealing with compensation.

28. The Tribunal read very carefully the submissions of both parties upon that matter. It reminded itself that it had, at time of the original decision, come to its conclusion on compensation after a full discussion. It had considered, as part of that discussion, the overall total of compensation awarded. Notwithstanding the submission made in support of the application for reconsideration, the Tribunal was not persuaded that it was in the interests of justice to reconsider its approach to assessing compensation as detailed in the Judgment. That was so whether that involved the individual amounts in respect of injury to feelings, the suggestion of “double counting” or the overall level of compensation awarded.

29. In relation to harassment, the Tribunal recognised that the GP's letter was some time after the incident and that the GP did not comment upon that. The GP referred, however, to a severe depressive illness affecting the claimant, to the fact that she continued to work during the early stages of that illness and to her managing despite the difficulty. This information was regarded by the Tribunal as supporting the evidence in relation to the ability of the claimant to attend work and to manage at earlier times. The impact of what the Tribunal found to have been harassment was therefore underlined by this limited comment.

30. In relation to the awards in respect of injury to feelings in general, including therefore the failure to make reasonable adjustments, the Tribunal did not regard it as being necessary in the interests of justice to vary or revoke the original decision. In its view it had awarded the sums it did applying the appropriate principles. It kept in mind that there had been discriminatory conduct. The sums awarded were assessed by it as being compensatory, not punitive. The sums were regarded by the Tribunal as being at a level, both individually and cumulatively, which were not so low as to diminish public respect for the provisions governing discrimination and awards made where discrimination has been found to have occurred. Equally they were not considered to be so high as to amount to a windfall or untaxed riches for the claimant.

31. The Tribunal was also satisfied that it had correctly understood and applied the applicable principles applying to the facts found in this case. There were different instances of discriminatory conduct. Each had an impact upon the claimant.

32. The Tribunal did not therefore regard the application by the respondent for reconsideration requiring it, in the interests of justice, to vary or revoke the original decision in relation to the levels of compensation awarded. That was so in respect of the individual elements awarded, the overall total of compensation awarded and also looking to the argument the respondents made on the basis of there having been double counting.

33. The Tribunal recognised the outcome of the case was not as the respondents would have wished. Elements of the application challenged findings in fact made by the Tribunal, in its view. Other parts of the application addressed areas where the Tribunal had exercised its discretion.

34. The Tribunal appreciated the full and reasoned submissions from both parties on reconsideration. It applied the principles involved in reconsideration. It considered fully whether variation or revocation was necessary in the interests of justice. The conclusion reached unanimously was that variation or revocation was not in the interests of justice. The original decision is therefore confirmed.

Employment Judge: Robert Gall
Date of Judgment: 23 September 2020
Entered in register: 01 October 2020
and copied to parties