EMPLOYMENT TRIBUNALS

Claimant: **Mr B Drummond**

Respondent: **Lloyds Bank Plc**

Heard at Sheffield (on the papers) **On: 30 November 2021**

Before: **Employment Judge Brain**

JUDGMENT ON RECONSIDERATION

The Judgment of the Employment Tribunal is that there is no reasonable prospect of the Judgment promulgated on 12 November 2021 being varied or revoked. Accordingly, the claimant's application for reconsideration fails and stands dismissed.

REASONS

1. A public preliminary hearing was held in this matter on 21 October 2021. The purpose of the hearing was to decide whether the complaints brought by the claimant were presented to the tribunal within the time limit provided for by section 123 of the Equality Act 2010 and if not whether it is just and equitable to extend time to vest the Tribunal of jurisdiction to consider his complaints.
2. At the conclusion of the hearing, I reserved my judgment. I caused the Reserved Judgment to be promulgated on 12 November 2021. I shall now refer to this as *'the Judgment'.* I ruled that it is not just and equitable to extend time to vest the Tribunal with jurisdiction to consider the claimant's claims.
3. On 16 November 2021, the tribunal received an application for reconsideration of the Judgment. This was submitted on the claimant's behalf by Daniel Hibbert who has had some involvement in the case (as set out in paragraphs 41 to 43 of the reasons for the Judgment).
4. Rule 70 of Schedule 1 to the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* provides an Employment Tribunal with a general power to reconsider any judgment where it is necessary in the interests of justice to do so. This power can be exercised either on the tribunal's own initiative or on the application of a party. Rules 71 to 73 set out the procedure by which the power is to be exercised.

5. Rule 70 provides for a single ground for reconsideration. That ground is where it is necessary to do so in the interests of justice.

6. This does not mean that in every case where a litigant is unsuccessful, they are automatically entitled to reconsideration. Instead, a tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases fairly and justly and the tribunal should be guided by the common law principles of natural justice and fairness. Tribunals have a broad discretion but that must be exercised judicially, which means having regard not only to the interests of the party seeking the reconsideration but also the interests of the other party to the litigation.

7. An application for reconsideration must be presented in writing and copied to all other parties within 14 days of the date upon which the written record of the decision the subject of the reconsideration application was sent to the parties. In this case, the Judgment was promulgated on 12 November 2021. The application for reconsideration is therefore plainly in time. The claimant has also complied with the procedural requirement to copy the application to the respondent's solicitor. Therefore, the tribunal has jurisdiction to consider the reconsideration application made by the claimant.

8. Rule 72 of the 2013 Rules sets out the procedure that an Employment Tribunal must follow upon receipt of an application for reconsideration. Firstly, the application shall be put before the Employment Judge who decided the case (or who chaired the panel hearing the case if the hearing was before a full panel). If the Employment Judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application will be refused and the Tribunal will inform the parties accordingly.

9. If the application is not refused, the tribunal will send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the parties' views on whether the application can be determined without a hearing. That notice may also set out the Judge's provisional views on the application although it does not have to do so. The matter will then proceed to a hearing unless the Employment Judge considers – having regard to any response to the application – 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. It is clear that the policy intention underlying Rule 72 is that reconsideration applications will be dealt with on the papers wherever possible, thereby saving time, expense and resources.

10. The Employment Appeal Tribunal has recently emphasised the importance of following the Rule 72 procedure in the correct order in **T W White & Sons Ltd v White** (UK EAT/0022/21). The EAT said that the procedure does not allow for the Employment Judge to decide that a hearing is necessary before he or she takes the decision under Rule 72(1) as to whether there is no reasonable prospect of the original decision being varied or revoked. This aspect of the procedure provides an important protection to the party opposing the application, in that the other party should not be put to the time and expense involved in responding to the application if the Employment Judge does not consider that there are reasonable prospects of the Judgment being varied or revoked. As I have reached the conclusion that there is no reasonable prospect of the Judgment being varied or revoked, it is my judgment that I am able to consider the application upon the papers without the respondent's input.

11. A number of grounds are raised by the claimant in support of his reconsideration application. I shall deal with each of these in turn.

12. In paragraph 3, the claimant contends that the Judgment "*references verbatim the examples provided by the respondent's counsel Mr Braier which supports the respondent's side of the argument only. The claimant does not have the luxury of an expensive legal team to provide a counter argument – the claimant assumes that there must be many examples where there have been grounds to extend time."*

13. During the course of the hearing, I explained to the claimant that Mr Braier is bound by the Code of Conduct issued by the Bar Standards Board. The overriding core duty under the Code is that owed to the court or tribunal in the administration of justice. The court or tribunal must be able to rely on information provided to it. Counsel therefore has a duty to take reasonable steps to ensure that the court has before it all relevant decisions and legislative provisions. Plainly, this extends to those which are both in favour of and against counsel's client's position.

14. I am satisfied that Mr Braier fully discharged this duty. Amongst the authorities cited by him was **Abertawe Bro Morgannwg University Local Health Board V Morgan** [2018] IRLR 1050. This case is authority for the proposition that there is no justification for reading into the statutory language in section 123 of the 2010 Act any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of any explanation for the delay for the claimant. Plainly, this is an authority in favour of complainants seeking an extension of time where, as here, there is no dispute that the claims have been presented out of time.

15. No further authorities have been cited by or on behalf of the claimant. Nothing further is cited because Mr Braier submitted a comprehensive bundle of authorities upon this issue. The **Azeem Rafiq v Yorkshire County Cricket Club** case referred to in paragraph 11 of the claimant's application is of no assistance to him. As is public knowledge, that case was resolved without judicial determination.

16. In paragraph 4, the claimant complains that I acknowledged that in principle, the merits of a complainant's claim may be a relevant consideration but that *"no effort is made to seek to understand the particulars of the claim."* The basis of this assertion is not understood. The case benefited from a telephone case management hearing which came before Employment Judge Davies on 6 July 2021. She identified the claim as being brought by the claimant which I set out in paragraph 4 of the reasons for the Judgment. In any case, as I said in paragraph 9 of the reasons, I proceeded upon the basis and upon the assumption that the claimant's complaints were meritorious. That being the case, there is simply no reason (upon a consideration of just and equitable extension) to consider the merits of the claimant's case any further. It is enough to find or to assume (without making a finding) that the claims are meritorious.

17. I now turn to paragraph 5(a). Here, the claimant says that the complaint does not relate to isolated events but rather to a *"widespread culture of institutionalised discrimination against white heterosexual males within Lloyds Bank."* He goes on to say that, *"although three specific instances of discrimination are referenced, these have been selected to support the overarching claim because the claimant has tangible evidence to prove beyond reasonable doubt that he was discriminated against on these occasions."*

18. It bears repeating that Employment Judge Davies identified the three complaints brought by the claimant (as set out in paragraph 4 of the reasons). In paragraph 18 of the reasons, I said that I was proceeding upon the assumption that the claimant will be able to establish that the three acts in question were part of a series of acts or continuing acts, notwithstanding that different individuals were involved in each of them. The tribunal is only seised of those matters set out in the claim form. Had the claimant sought to pursue a complaint of institutionalised discrimination one would have expected the claim form to have said so. As far as I am aware, there is no challenge by the claimant to the identification of his claims by Employment Judge Davies. Upon the basis of the claim as pleaded, I made assumptions in the claimant's favour which had the effect of pushing back the date upon which time started to run against him as far as was permissible.

19. I now turn to paragraph 5(b). He says that the claimant raised grievances *"which were frustrated and whitewashed by the respondent and also contacted ACAS to seek arbitration with which the respondent did not engage."* He goes on to say that if he had *"felt that raising a new claim with ACAS would have been anything other than fruitless then he would have repeated the process upon leaving the employment of the bank. The out of time consideration will not have been necessary and we would not be having this debate."*

20. The latter is a bad point. The issuing of a second early conciliation certificate upon a matter will have no impact upon the primary limitation period. A second early conciliation certificate is a nullity. Authority for this proposition may be found in the case of **HMRC v Garau** [UK EAT/0348/16]. The outcome following the claimant's grievance of 6 August 2020 was communicated to him on 24 September 2020. This was long before the expiry of the limitation period upon 19 January 2021 or 11 February 2021 (as set out in paragraphs 19 and 20 of the reasons). There was ample time for the claimant to have then presented his claim form.

21. In paragraph 5(c) the claimant refers to a *"culture of fear and intimidation"* which he says led to the claim being delayed until his employment had been terminated. This is to effectively repeat a failed submission made by the claimant during the course of the hearing and which was dealt with primarily in paragraph 29 of the reasons. Even if the claimant is correct to say that there was a culture of fear and intimidation which forestalled him taking action during his employment, then there was nothing stop him from instituting proceedings in good time after the employment ended on 31 December 2020.

22. The next issue (at paragraph 5(d) is a reference to the claimant being in his probationary period with his new employer when time was running against him to institute proceedings against the respondent. Again, this is simply to repeat a failed submission made upon the last occasion. There is no evidence that the respondent jeopardised or undermined his job seeking efforts. This is an unmeritorious point which I dealt with in paragraph 30 of my reasons.

23. The next point raised by the claimant is that these events took place during the currency of the pandemic. This is a point raised by him in paragraph 5(c). The claimant says that, *"The respondent's discriminatory practices forced the claimant to seek alternative employment at a time when jobs were incredibly scarce."* He goes on to say that he was working remotely in his new role and, *"an inability to forge direct relationships made it even more important that the claimant could not risk provoking incendiary comments from former colleagues."* I have looked back at the claimant's witness statement and checked my notes of the hearing. I have no record

of the claimant praying in aid the impact of the pandemic. This is a new point raised by the claimant which plainly could have been raised by him at the hearing.

24. Reconsideration of a judgment may be necessary in the interests of justice if there is new evidence that was not available to the Tribunal at the time it made its judgment. The underlying principles to be applied by tribunals in such circumstances are the same as those which apply in civil litigation by virtue of the well-known case of **Ladd v Marshall** [1954] 3 All ER 745, CA. There, the Court of Appeal established that, in order to justify the reception of fresh evidence, it is necessary to show:

    - *That the evidence could not have been obtained with reasonable diligence for use at the original hearing;*
    - *That the evidence is relevant and would probably have had an important influence on the hearing; and*
    - *That the evidence is apparently credible.*

25. Plainly, the impact of the pandemic upon the claimant was something of which he was aware and evidence upon this could have been obtained with reasonable diligence for use at the hearing. Upon this basis, the claimant fails the **Ladd v Marshall** test. There is a public interest in the finality of litigation. The interests of justice will not be served if parties are able to effectively have a second bite of the cherry by raising points which occur to them, without good reason, only after the hearing.

26. In any case, even had the claimant adduced evidence to this effect, I would not have been convinced that it aids the claimant in advancing a case that it is just and equitable to extend time. The argument is frankly doomed to fail in the absence of evidence that the respondent acted in any way improperly towards the claimant when the claimant was seeking to forge a career elsewhere. Such evidence as there is points to the contrary as the claimant was able to obtain a role elsewhere and a temporary secondment with the respondent from 1 October 2021. This point appears to be simply another way of putting the same point about an unfounded apprehension about the respondent's likely conduct after the end of employment which I determined to be unmeritorious.

27. I now turn to the point raised by the claimant in paragraph 6. He makes reference to my comment in paragraph 61 of the reasons that his case in reality amounts to no more than this – *"I am significantly out of time, I submitted the claim upon a random date with no rhyme or reason for delay and now wish the Tribunal to extend time to enable me to pursue the matter."* He questions why the date itself should have a particular relevance. This is a difficulty comment to understand. The date upon which the claimant presents the claim to the Tribunal must be the starting point upon any consideration of whether the claim is presented in time or out of time and if out of time the length of the delay. It would be odd indeed upon a consideration of a preliminary issue upon time limits not to make reference to the day upon which the proceedings were presented and to call upon the claimant to explain the rationale for presenting the claim when he did.

28. The explanation proffered by the claimant in the reconsideration application is that he wished to ensure that the claim was submitted *"within three months of leaving the environment where the culture of discrimination existed."* He goes on to say that it would have been the claimant's *"preference to wait until the full probation period had been served but this would have been outside the three month window and therefore could give rise to potential challenge."*

29. This is a point which also relates to that raised by the claimant in paragraph 5(b): that ACAS clarified that any claim *"must be submitted within three months of the issue on which judgment is requested having occurred."* The claimant suggests that it would *"not be unreasonable to assume that this would coincide with the termination of the claimant's employment."* This in fact is contrary to the evidence which the claimant gave before me at the hearing. As recorded in paragraph 44 of the reasons, the claimant was aware of a three months' time limit, thought it related to the final act of discrimination but had the final date of employment "*in his head."* The claimant effectively misinterpreted what ACAS had said and conflated the ending of employment with the ending of the discriminatory conduct.

30. The reality is that the claimant elected to wait before commencing proceedings in circumstances where he knew of the time limits and of the short limitation period provided for by the 2010 Act. He appears to have had his own reasons for choosing to wait. Those reasons are illogical when set against the respondent having found him an alternative role for the last three months of employment, nothing untoward having occurred during those last three months and the respondent having taken no steps to in any way jeopardise or sabotage the claimant's job hunting within the same sector.

31. Further, the claimant's position that he was worried about retaliation from the respondent is difficult to understand in circumstances where he raised a grievance on 6 August 2020, expressing himself in quite trenchant terms. As I observed in paragraph 26, the claimant spoke in terms of preparing the matter for the Employment Tribunal and having engaged legal counsel. The claimant's grievance pre-dated the respondent appointing the claimant (following an application process) into the retail estate credit team for the last three months of his service with them. The trenchant terms of the claimant's grievance of 6 August 2020 having done him no harm both in his employment with the respondent and afterwards, it is an illogical position to take to fear the respondent acting against his interests after 31 December 2020 when he had left the employment. Such an illogical position went nowhere towards satisfying the onus upon the claimant to convince me that time ought to be extended in the circumstances.

32. I now turn to paragraph 7. This concerns the involvement of Mr Hibbert. The claimant says in his reconsideration application that Mr Hibbert only became involved after proceedings had been issued. In fact, I said just this in paragraph 43 of the reasons. I made no finding that Mr Hibbert had been involved in the matter prior to the commencement of proceedings. I also made no finding that Mr Hibbert is in business as an employment law consultant.

33. The fact remains however that it was open to me to find that Mr Hibbert was available to help the claimant. He is a long-standing friend of the claimant.

34. The assertion that Mr Hibbert has no understanding of the Tribunal process is difficult to understand in light of the email chain that was sent by the respondent's solicitor to the Tribunal during the course of the hearing. In an email of 15 September 2021 Mr Hibbert says, *"My preference when presenting evidence <u>in such matters</u> is to stick to the issue in question – in this case whether the claimant can justify why the claim was submitted [over] three months after the ACAS form was presented" [emphasis added by me].* This is suggestive of prior experience of dealing with Tribunal matters. The general tenor of the correspondence is of an individual familiar with the process. Mr Hibbert describes himself as "*consultant"* in the chain of correspondence with the respondent's solicitor.

35. In paragraphs 41 and 42 of the reasons, I said that I need not make no determination upon Mr Hibbert's status. The assertion in the reconsideration application (made by Mr Hibbert on the claimant's behalf) of a lack of familiarity of Employment Tribunal practice and procedure ought not to pass without comment in the circumstances. Whether or not Mr Hibbert is practising as an employment law consultant is a matter which I need not determine. However, I am satisfied from what I have seen from him (both in the email chain forwarded to me by Eversheds and in the reconsideration application) that he does have some familiarity with the process.

36. That he is ready, willing and able to assist the claimant is apparent from the alacrity with which the detailed reconsideration application was submitted. This underscores my finding (in paragraph 46) that the claimant may have availed himself of Mr Hibbert's knowledge and experience much sooner than he did. In my judgment, the finding that I made during the course of the hearing that the claimant's ignorance of time limits was not reasonable ignorance in the circumstances is unassailable.

37. I now turn to paragraph 8 of the reconsideration application. Here, the claimant seeks to introduce evidence of difficult family circumstances which beset him from around August 2020. There is of course no reason to disbelieve what the claimant says. The tribunal has every sympathy for him upon the difficult circumstances which presented.

38. However, the claimant faces a formidable difficulty in seeking to introduce this material now. Plainly, this is evidence which could have been obtained with reasonable diligence for use at the hearing on 21 October 2021. The **Ladd v Marshall** test creates an insuperable difficulty for the claimant. There is no reason why the claimant could not have adduced this evidence at the hearing. It is generally not in the interest of justice that parties in litigation should be given a second bite of the cherry simply because they have failed as a result of oversight or a miscall in their litigation strategy to adduce the evidence available in support of their case.

39. In paragraph 11 of his application, the claimant seeks to challenge the Tribunal's findings upon the issue of forensic prejudice to the respondent. The difficulty for the claimant with this submission is that the ruling upon the issue of forensic prejudice (and the presumption of such) in **Miller and Others v The Ministry of Justice and Others** (UK EAT/0003/15) is binding upon the Employment Tribunal as it is a ruling made by the Employment Appeal Tribunal. It was open for me to find that the respondent would suffer forensic prejudice because of the delay. It cannot be as simple, as the claimant alleges, as asserting that because the matters in question were documented there is an absence of forensic prejudice. There is no mandate for determining this issue simply upon the basis of a dichotomy between paper-based and a non-paper based cases. The nature of the claimant's complaints give rise to an obvious risk of memory fade for the reasons which I give in paragraph 53.

40. Further, even if there is no forensic prejudice to the respondent that is not a decisive factor in favour of an extension. It will still be for the claimant to convince the claimant that time ought to be extended. As I said in my reasons, the claimant advanced nothing to convince me to extend time in circumstances where the case law clearly establishes that an extension of time is the exception rather than the rule.

41. Finally, I turn to paragraph 12 of the claimant's reconsideration application. He says that he is aware of the significant backlog of cases within the Employment Tribunal system and that this *"should not in any way be allowed to prejudice the decision-making process and deny access to the justice system."* It is not clear what point the claimant is trying to make here. However, any suggestion that the decision was

taken for improper motives is plainly inappropriate and inimical to judicial independence.

42. In summary, therefore, nothing said by the claimant in his reconsideration application is persuasive and in my judgment there is no reasonable prospect of the Judgment being varied or revoked. The reconsideration application therefore stands dismissed.

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Employment Judge Brain

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Date: 30 November 2021