EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Morgan	**v**	DHL Services Limited

Before: Employment Judge KJ Palmer (On the papers)

On: 12 January 2022

RECONSIDERATION OF A JUDGMENT

Under Rule 72 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1

Pursuant to an application dated 24 November 2021 for a reconsideration of part of a Judgment dated 10 November 2021 there is no reasonable prospect of the original decision being varied or revoked and accordingly the application is refused.

REASONS

History

1. The application for a reconsideration relates to a Judgment given by me pursuant to a hearing on 20 August 2021 which Judgment was dated 10 November 2021. An application for reconsideration was made to the tribunal in writing by the solicitors representing the respondent.

The Subject of the Application

2. The Judgment dated 10 November 2021 was essentially a re-hearing of an Open Preliminary Hearing pursuant to a decision of the EAT dated 18 December 2020. That re-hearing consisted of a consideration of an application by the respondent to strike out the claimant's claims in this matter under rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 and/or an application for a deposit order under rule 39 of Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 on the grounds that the claimant's claims have little reasonable prospect of success.

3. The application for reconsideration relates only to the second part of the Judgment in that preliminary hearing namely that relating to the deposit order.

4. The respondent's solicitors reconsideration application is broken down into four paragraphs in a letter extending to some two and a half pages. The application cites that reliance on the rationale in terms of the application for strike out on the grounds of no reasonable prospects of success negates to account for the nuance between the applicable tests for rule 37 strike out and rule 39 deposit order.

5. The respondent accepts my Judgment in respect of the rule 37 strike out application but seek reconsideration in respect of the deposit order and the lesser test of little reasonable prospect of success.

6. The reconsideration application ventures that the Judgment dated 10 November 2021 makes no express findings in respect of the reasons for the tribunal's refusal of the application for the deposit order and cites my finding as being limited to confirmation that the lower has been met for the same reasons as set out in the strike out decision. It also refers specifically to certain paragraphs of the Judgment which I will deal with later. It is therefore worth me considering that point and it may be sensible for me to go through each of the claimant's ten points of claim in turn and apply separately the test under rule 39. I confirm that in reaching my decision on 10 November I did in fact do this.

Rule 39 of Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1

7. Rule 39 states as follows:

> "(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument."

The Application of the Little Reasonable Prospect Test

8. It is worth remembering that just because a Tribunal concludes that a claim or allegation has little reasonable prospect of success it does not automatically follow that a deposit order must be made. The tribunal retains a discretion in the matter and the power to make such an order under rule 39 has to be exercised in accordance with the overriding objective to deal with cases fairly and justly having regard to all the circumstances of the particular case.

9. The test is a lower threshold test than the test in rule 37 relating to strike out but it should be remembered that there is authority, Anyanwu & Another v South Bank Student Union & Another [2001] ICR 391 HL, where the House of Lords said that discrimination issues should as a general rule be decided

only after hearing the evidence. So that case is authority for the proposition that it would be illogical to require an Employment Judge to take different approaches depending on whether he or she was considering striking out or making an order for a deposit as either order was on any view a serious and a potentially fatal course of action. The making of a deposit order often results in a Claimant not proceeding with his or her claim and that should not be forgotten.

Applying the Little Reasonable Prospect Test to the claimant's claims

10. The claimant's claims have been condensed to ten points which form the basis of my deliberations in the Judgment dated the 12 November 2021. These are:

(i) On 3 January 2017 Kevin Morris and Harry Hodson (individual respondents) followed the claimant to his car and later provided statements alleging that the claimant tried to hit Kevin Morris with his car.

11. I explained my reasoning on the strike out application at paragraphs 29, 30 and 31 of the Judgment and the key here is that the allegation that the claimant tried to hit Kevin Morris with his car is on the claimant's claim a false accusation which forms a significant plank of his claim. It is worth remembering that the respondent did not pursue that allegation against the claimant. The claim is in direct race discrimination and harassment on the grounds of race. On proper consideration it will be for a tribunal to determine whether the claimant's claim amounts to a claim capable of being discriminatory. A tribunal must hear evidence to be able to determine that. The test is the same as applied to a strike out consideration. It is not clear that what is currently before the tribunal definitively bridges the "Madarassy" authority that there must be "something more" than just a difference in status and a difference in treatment and it may be upon hearing evidence that the tribunal concludes that it does not. In my reasoning in the Judgment however the necessity to hear evidence to ascertain that does not constitute a reasonable platform to conclude that there was no reasonable prospect of the gap being bridged. I further conclude the same applies to the lower test. It is necessary for a tribunal to hear the evidence and the fact that clear evidence is not available at this stage on that which is before the tribunal does not mean that the claim has little reasonable prospect of success. For that reason no deposit order is appropriate.

(ii) On 4 January 2017 Manesh Chhanya suspended the claimant;
(iii) On 12 January 2017 Paul Nixon the investigating officer deciding that a matter in relation to alleged swearing should proceed to a disciplinary hearing.

12. Both (ii) and (iii) above relate specifically to the "car park incident" and cannot be separated from it as I have set out in paragraph 32 of my Judgment. They must be tested alongside the facts and matters relating to the car park incident and issues that flow from it. The same reasoning applied to allegation number (i) and the Madarassy principal must apply to

these two allegations. It is not possible to conclude that either have little reasonable prospect of success on the basis of that which is currently before the tribunal. The evidence must be tested. It is not appropriate to make a deposit order in respect of these two allegations.

(iv) That on 13 February 2017 the claimant not being referred to Occupational Health by his employer having returned from sick leave because of stress and requesting to see Occupational Health.

13. As set out in paragraph 33 of my Judgment this is all part of the factual matrix inevitably linked from the chain of events which kicked off on the 3 January 2017. It would be wrong to conclude and separate out this allegation and come to a different conclusion than that which I have drawn with respect to the first three allegations. It must therefore follow that the little reasonable prospect of success test has not been passed in respect of this allegation. Evidence must be heard and tested.

(v) On 5 April 2017 the claimant being suspended by David Churchill for an altercation he allegedly had with a Jaguar Landrover on site security supervisor.

14. This I have referred to pursuant to His Honour Judge Auerbach's decision in the EAT as "the security gate incident". Once again there is simply insufficient before the tribunal without the hearing and testing of evidence to draw a conclusion that there is little reasonable prospect of this aspect of the claimant's claims succeeding. We know that a colleague of the claimant who does not have the protected characteristic the claimant is relying upon was also suspended but as I have indicated in my Judgment that does not amount to sufficient for me to make a deposit order. Those acting for the respondent argue in this application that it is wrong to apply that logic to an incident separated in time from the original "car park incident" and base their assertion that there is little reasonable prospect of success in respect of allegation (v) on the lack of causal connection between the two. That reasoning is flawed. The incident in January on the face of the claimant's claims and the documentation set in process a chain of events amongst which includes allegation (v). Only on hearing evidence from those involved will a tribunal be able to determine whether a decision taken by David Churchill was untainted by those earlier events. It cannot therefore be concluded that this claim has little reasonable prospect of success.

(vi) On 26 April 2017 the investigation meeting held by Greyson Nyakema taking place in the claimant's absence;
(vii) On 19 May 2017 the claimant being given a sanction of a Final Written Warning following a hearing in his absence;
(viii) On 6 June 2017, the claimant being sent the written outcome, namely a sanction of Final Written Warning;
(ix) On 30 October 2017 the claimant not being seen by Occupational Health despite having returned from work and asking to see them;

(x) On 26 February 2018 the claimant's request for referral to Occupational Health not being actioned.

15. All of these incidents form part of the factual matrix which will be before the tribunal in due course. It will be for the tribunal to determine whether there is any causal connection between each incident and the chain of events that was set in process at the car park incident. Those conclusions cannot be drawn now and they cannot be drawn without evidence being heard and that evidence being properly tested and then sifted and considered in the usual way at a full merits hearing. None of these incidents on their face can be said at this stage to have little reasonable prospect of success. There are no features of the respondent's case at this stage which can be reasonably viewed as tending to undermine the claimant's case which can lead me to this conclusion.

16. I applied precisely this reasoning in the Judgment of the 10 November 2021.

17. I am therefore wholly satisfied that the test under rule 39 of little reasonable prospect of success has not been shown to be satisfied.

18. Accordingly, on considering the application for a reconsideration of my Judgment of the 12 November 2021 and applying the reasoning set out above there is no reasonable prospect of the original decision being varied or revoked and the application must be refused.

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Employment Judge KJ Palmer

Date: 26 January 2022

Sent to the parties on:

11 February 2022

For the Tribunal Office