



EMPLOYMENT TRIBUNALS

Claimant: Ms M Moore

Respondent: Ecoscape UK Limited

UPON APPLICATION made by letter dated 6 September 2021, to reconsider the judgment dated 17 August 2021 under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing,

JUDGMENT

1. The judgment is varied as follows:
 - a) Paragraph 10 of the judgment will be corrected to ensure that order in which the witnesses gave evidence during the hearing is correctly recorded.
2. In all other respects, the claimant's application for reconsideration is refused.

REASONS

Introduction

1. This application was made by the claimant on 6 September 2021 and where she requested that I reconsider my judgment dated 17 August 2021.
2. I accepted that the application would be heard and both parties agreed in writing that reconsideration could take place without a hearing being required, with me considering the claimant's application and the respondent's reply in chambers.

3. I considered the application on 17 February 2022 and was able to reach a decision which is provided in this judgment and with reasons provided below.

Nature of the application

4. The claimant provided a lengthy list of submissions within her application, but they can be summarised under the following broad headings which are considered in turn below.
5. Although the claimant referred to the Tribunal failing to apply the correct law, it actually appeared to the Tribunal that the claimant was essentially making a number of submissions concerning his belief that specific matters were recorded incorrectly or that there was a failure to properly apply the overriding objective under Rule 2 of the Tribunals Rules of Procedure.
6. In this respect, the Tribunal found the application for reconsideration somewhat confusing and it was felt that it would be in the interests of justice to describe them under these broad headings to provide greater clarity.

Staggered shifts

7. The claimant asserts it was not correct that she was offered staggered shifts and that the respondent would only allow her to 'resume normal working hours' and that it was only first mentioned by the respondent within the grievance decision email on 4 June 2020. However, she also explained in her application that due to the ease with which Covid could be transmitted, she would still have to come into work when others were working and she would have to walk through a crowded main office. She referred to government guidance advising employers to reduce staffing levels to operate staggered and rotating shifts.

8. She also argued that if she could have worked staggered shifts, this undermined the respondent's argument that she could not work at home as she would not be passing work to and communicating with her team when in work and this was a part of how she did her job

Additional worker

9. The claimant argued that it was incorrect for me to find the additional office worker engaged during her absence would have been dismissed. She states that under cross examination, Mr Farrell could not answer questions regarding this matter. She accepts he said he would have 'let him go' and that he had not thought about what he would have done if I had returned to the office.

Queries over measures in place

10. However, she says that he failed to respond to her email dated 12 May 2020 which asked '*how many office workers are/will be sharing the office simultaneously?*' She says that he should have informed her then of his intentions with the additional office worker – but says she received no direct response to this question.

Separate office/room

11. The claimant argued that while my judgment found that the respondent had offered to allocate her a separate office/room, it was located at the back of the main office, was unventilated and with its only air came from the small, fully occupied small main office which she would have to walk through. She says that the respondent never informed her that she would be given the use of an office in a new large building. She therefore argues that it would be unfair to judge my case based on an office I had no knowledge of until the night before the first hearing.
12. She says that she also mentioned in her grievance appeal statement, that the office offered has no ventilation only a door to the main office and raised this at her appeal meeting with Face2Face.

Claimant's concern regarding Covid/local cases

13. The claimant argued that while my judgment referred to the claimant expressing concern about 'local cases' and that this was not a general fear, it was the high infection levels in the local community that affected her concerns regarding the level of risk in a small enclosed working environment and that she would have been sharing with people who lived in the same local area.

Office staff

14. The claimant also argued that I was incorrect to find that she shared the office with Miss Sikora and '*occasionally other office-based employees*', because in addition to Miss Sikora and her, there were 2 other full-time members of staff with various other members of staff frequenting throughout the day performing their roles.

Answering calls from home

15. The claimant explained that when she was requested not to attend the office by the respondent, she could not have known Miss Sikora was 'tying up loose ends' when she informed the claimant in a message conversation in March she was 'working as usual answering calls, doing quotes and emails'.

16. The point that she appears to make is that it was therefore a reasonable step to suggest working from home, taking into account government guidance and Miss Sikora giving her the impression that working from home was entirely possible.

Timings of witnesses' evidence

17. The claimant asserts that I was incorrect in recording that the claimant gave her evidence on the first day of the hearing and the respondent's witnesses gave their evidence on the second day. She said that supplemental evidence was introduced following Ms Sikora's evidence that it was possible for the claimant to work from home.

Evidence regarding working from home

18. The claimant also disputed my findings of fact concerning the feasibility of working from home. She identified a number of matters in her application

for reconsideration which explained why working from home would have been feasible and reminded me of The Government and HSE (*Health and Safety Executive*) guidance stated that every reasonable effort must be made to allow employees to work from home, either in their current role or an alternative role.

Risk assessment not sent to the claimant

19. The claimant reminded me that she was never sent the risk assessment despite requesting it and was never sent the Covid company policy which in it states that it will be sent prior to returning to work. There also appears to have been no efforts to identify staff members who may be/have been at increased risk.

Asthma

20. The claimant argued that I referred to her making '*a half-hearted reference to my asthma*' in my judgment. She reminded me that she uses a steroid inhaler twice two times a day and that asthma is a condition which placed her at increased risk. She explained that the 'advice' at the time was to stringently social distance even if your asthma was only mild. The claimant added that she was '*called early for my Covid vaccinations because of this condition as the government were prioritising people at increased risk*'. I am also requested by the NHS to have the flu vaccination each year because I have asthma. I believe that the only option I had was to remove myself from the workplace.

Communications in writing

21. The claimant noted that she asked for communications to be in writing so as to avoid any further confrontation as she was '*not comfortable calling in for the same reason*'.

Prevalence of Covid

22. The claimant noted that while my judgment referred to the government was reporting falling cases at the time she was asked to return to work, the Covid threat level remained at level 4 which meant the threat was severe and that cases were rising exponentially. She added that the

government only moved from threat level 4 to 3 on the 19th June 2020 and local cases in the North West remained very high. She also mentioned that there is now some evidence to suggest that the unlocking came to early in the North West.

The respondent's reply

23. Ms Beer on behalf of the respondent dated 11 January 2022, felt that there was nothing within the claimant's application that would justify a reconsideration of the substance of the judgment and that the only matters that required attention were typographical errors. She did however, take the time to respond to each of the grounds of complaint made by the claimant in her application seeking reconsideration and these are summarized below:

Staggered shifts

24. The respondent argued that these were supported by the witness evidence in that the respondent's risk assessment and the witness evidence of Ms Sikora and Mr Farrell indicated their availability and that in her application for reconsideration, the claimant conceded that they were made available to her on 18 June 2020 in her application before me today.

25. The respondent's primary submission in relation to this matter is that the claimant was actually not interested in staggered shifts and they referred to paragraph 72 of my judgment which found that the claimant sought '*homeworking or nothing*'. They noted that her resignation took place almost two months following the offer of these shifts and had not attempted to return to the workplace.

26. They added that paragraph 45 of my judgment found that the respondent had also offered flexible hours covering evenings and weekends and this was not challenged by the claimant in cross examination.

The additional worker

27. The respondent submits that my findings concerning this matter were consistent with the evidence. This worker had been taken on by the respondent to cover the work which had to be carried out during the claimant's absence and that Mr Farrell had confirmed that if the claimant had returned and insufficient space was available, he would have been laid off. But again, the respondent questions the relevance of this submission given that the claimant refused to return to work.

Queries over measures in place

28. The respondent was unclear as to the email that the claimant refers to in respect of this matter, but nonetheless, they assert that by the time of the claimant's resignation, they had informed her repeatedly of the measures taken to ensure her safety in the office. They specifically refer to various messages and emails within the available documentary evidence and additionally, to the grievance meeting. They argue that they asked the claimant to explain what measures would assist her in returning to work on 15 May 2020 and 20 May 2020.

29. They also referred to paragraphs 41 and 64 of my judgment which found that she had been invited to a meeting at work to see what measures had already been put in place, but that she declined to attend.

Separate office/room

30. The respondent also noted that paragraph 44 of my judgment, reference was made to her being permitted to use an office restricted to herself if she returned to work.

Claimant's concern regarding Covid and cases locally

31. The respondent simply submitted that I had concluded correctly that the claimant was concerned about returning to work because of her fear of Covid.

Office staff

32. The respondent simply submits that the claimant misread the judgment and that paragraph 14 correctly refers to '*other office based employees*'

and *'the office staff'* as being the location where they worked and the description of the workplace identifies the claimant working with Ms Sikora and the occasional other member of staff.

Answering calls from home

33. The respondent asserts that this matter involves an attempt by the claimant to make further submissions in relation to her case concerning the feasibility of her being allowed to work from home. It is argued by the respondent that I dealt with this matter in my judgment as the purpose of the application is to seek a reconsideration of the judgment and not to rehear and reargue the case.

Timings of witnesses' evidence

34. The respondent has referred to counsel's notes of the hearing and the timings for each witness in terms of the evidence that they gave and notes that my judgment contained an error as to when Ms Sikora gave her witness evidence, (saying day 2 rather than day 1), but that this is not material consideration in terms of the merits of the reconsideration application.

35. The respondent does go on however, to assert that both of their witnesses provided clear evidence as to why the claimant's job could not be carried out at home and this was reflected within the judgment.

Evidence regarding working from home

36. The respondent again argues that the claimant in making this submission, is simply seeking to reargue her case concerning the feasibility of working from home and that the purpose of reconsideration cannot be for a party to have a *'second bite of the cherry'* in relation to their evidence or submissions.

37. In addition to this basic, but fundamental point, the respondent does go on to assert that Ms Sikora was clear in her evidence concerning the feasibility of the claimant being allowed to work from home. In particular, they seek to remind the Tribunal that she had expressed concern about

the practical reality of such a step being taken in terms of IT security and the limited amount of the claimant's job that could be carried out from home.

Risk assessment not sent to the claimant

38. The respondent refers to paragraphs 46, 49 and 50 of judgment and notes that I referred to the risk assessment not being sent to the claimant and therefore, there is no need for this ground to be considered by the Tribunal. They acknowledge other points are raised, but assert that the claimant is again seeking to reargue her case.

Asthma

39. The respondent submits that my reference to the claimant's asthma in paragraph 63 of my judgment reflected the evidence given and that while the claimant may have been called in early by her GP for vaccination because of her asthma, this was not a material consideration for the times relevant in this case.

Communication in writing

40. The respondent simply argues that this amounts to nothing more than a comment by the claimant and does not constitute a matter to be subject to reconsideration.

Prevalence of Covid

41. The respondent argues that this does not amount to a ground for reconsideration and reference is made to paragraph 62 of my judgment which acknowledges the claimant's genuine fear of this virus. They also note that the judgment reflects the serious context of this case in terms of the Covid pandemic being a significant feature in this case.

Discussion

42. In considering this application, I have considered Rule 70 of the Tribunal's Rules of Procedure and note that the claimant only has to show that it is '*in the interests of justice*' for the Tribunal to reconsider its decision.

43. I am satisfied that it is in the interests of justice for the claimant's application to be allowed and have therefore agreed to reconsider her application. However, this simply allows her to have me give a detailed consideration to the matters that she has raised. It does not mean that her application is likely to be successful and consideration must be given to the grounds of application and the reply from the respondent and of course my re-reading of the judgment. .

44. I also took into account the provisions of Rule 2 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, namely the 'Overriding objective' and which provides:

'The overriding objective of these Rules is to enable the Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes so far as practicable –

(a) ensuring that parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and the Tribunal.

45. I did have some concerns that there were questions of proportionality in terms of time being spent reconsidering the grounds raised by the claimant, but was also mindful that this case arose from matters existing during the Covid pandemic and where there was heightened anxiety and fear from both employees and employers concerning the impact of the virus upon them personally, their wider family and of course upon their

businesses a livelihoods. I noted that the claimant had made the application for reconsideration without representation and felt that overall, it was in the interests of justice to proceed with the reconsideration as there would be greater prejudice to the claimant, than the respondent if the application was refused. However, it was entirely appropriate for the matter to be dealt with on papers by me in chambers and I am grateful to the parties in agreeing to this approach.

46. I reviewed the list of issues which were agreed by the parties at the beginning of the hearing and which formed the 'agenda' of items that I had to consider within my judgment once I had heard the witness evidence and final submissions from the parties. They were not particularly lengthy and focused upon the claimant's resignation and whether she satisfied the elements for constructive unfair dismissal and whether it could amount to an automatic unfair dismissal contrary to section 100 of the Employment Rights Act 1996 because of concerns regarding her imminent danger.

47. I noted that the findings of fact section of the judgment was sub-divided into a number of sub-paragraphs each dealing with a particular theme of the case and which broadly followed a chronology of events.

Staggered shift

48. My judgment explained the impact of Covid upon the respondent at paragraphs 16 to 21, including the introduction of furlough with the respondent taking advantage of the Coronavirus Job Retention Scheme ('CJRS'). I then went on to explain the general reopening of businesses involved in aspects of construction and that it was reasonable for the respondent to reopen. There was no evidence advanced that the respondent had behaved inappropriately and/or been subject to intervention by the HSE, local authority or other regulatory body.

49. Paragraphs 25 to 31 of the judgment made findings of fact which explained the claimant's reaction to the reopening of the respondent's business and then went on to consider how it sought to return the claimant to work at paragraphs 32 to 39. At paragraph 30, I found that the claimant

made clear her discomfort about returning to work, even with the proposed protective measures being put in place. What was clear from these findings, was that the claimant was unwilling to propose any solutions to ameliorate her concerns about returning to work and adopted an approach that the only acceptable solution was homeworking. This was summarized within paragraph 39 of the judgment.

50. I acknowledge that the findings of fact did not specifically discuss the question of the staggered shifts, but it was not necessary to do so for the purposes of my consideration of the list of issues. As the respondent notes within its reply to the reconsideration application, paragraph 71 of the judgment where I discussed the case, identified variations to shifts and staggered working and this is sufficient to indicate to the parties that these matters had been heard in evidence and were matters which I could consider as part of my judgment.

51. Ultimately, however, as my judgment makes clear in paragraph 72, the only adjustment which was relevant to the claimant was home working and my findings were that any adjustment which accommodated a return to work at that time, would have been acceptable to the claimant.

Additional worker

52. I noted that paragraph 32 of the findings of fact in the judgement made findings concerning the additional worker whom the respondent required to work in the office during the claimant's absence. I explained within that paragraph that I understood Mr Farrell's comments to the claimant in May 2020 that she should provide 1 to 2 weeks notice before returning to work, was to allow him to properly give notice to the additional worker. While this assumed that additional work would not be available for him to do, I am nonetheless content with my findings concerning this matter, that it reflects the evidence that was heard and that it is not really a key matter in relation to the list of issues to be considered.

53. This was not a case where the claimant was seeking to argue that a sham redundancy existed and instead involved her resignation because of her

concerns regarding health and safety in being asked to return to work during the Covid pandemic.

Queries over measures in place

54. Like the respondent, I was somewhat puzzled about the nature of this particular ground of the claimant's application for reconsideration. My findings of fact within the judgment gave a clear narrative of the measures adopted by the respondent once it became clear that the claimant did not want to return to work when the business reopened in the Spring of 2020. The respondent's discussions with the claimant concerning the measures in place primarily take place within paragraphs 32 to 39, but continue into the subsequent section concerning the grievance. I discussed the matter further in paragraph 64, in relation to how the respondent reacted to the claimant's concerns.

55. I remain of the view that my findings concerning this matter were correct and reflect the genuine attempts made by the respondent to return the claimant to work in such a way as to minimize reasonable anxieties that might exist.

Separate office/room

56. I heard evidence that allowed me to make findings of fact within paragraph 44 of the judgment that the claimant was offered a separate office and even a separate printer. This was in addition to the other protective measures provided and/or offered by the respondent. This would enable social distancing to take place and to keep contact with work colleagues to a minimum, while allowing the claimant to do her job.

57. It may not have been raised until the grievance, but it formed part of the dynamic and flexible way in which the respondent tried to return her to the workplace. She remained employed at this point and I am satisfied that this matter was sufficiently dealt with in the judgment.

Claimant's concern regarding Covid/local cases

58. My judgment identified the background concerning Covid within a separate section of the findings of fact in paragraphs 16 to 18 and then the

claimant's reaction within paragraphs 25 to 31 once the respondent reopened its business. Paragraph 31 summarised my recognition of her concerns regarding Covid in her local area and her developing concerns were referred to subsequently in (for example), paragraphs 37 and 39. It was clear that she was anxious about Covid locally and how that impacted upon her return to work. But the judgment correctly identifies those concerns and the discussion section at paragraphs 61 to 65 considers a necessary part of the list of issues, namely '*Did the claimant believe there were circumstances of serious and imminent danger?*' This section considered the subjective element of the relevant test in a complaint of automatic unfair dismissal on health and safety grounds. The subsequent section at paragraphs 66 to 69 considers the objective element of the test, namely '*Was the belief objectively reasonable?*' Accordingly, this particular matter was properly dealt with in the judgment.

Office staff

59. I would simply note in relation to this matter that I agree with the respondent's submission in its reply that paragraph 14 of the judgment within the findings of fact correctly identifies my understanding of the office staffing based upon the evidence that I heard.

Answering calls from home

60. This matter (and the matter of '*Evident regarding working from home?*' below), were adequately dealt with in my judgment at paragraphs 28, 30, 34, 38 to 39, 40 to 43 and 45 to 46 in relation to findings of fact concerning home working and the claimant's ongoing request. In the discussion section of the judgment, paragraphs 65, 72 and 77 to 78.

Timings of witnesses' evidence

61. I acknowledge that there was an error within the 'Evidence Used' section of my judgment and that on day one, the Tribunal only heard evidence from the claimant and Ms Sikora. On day 2, (which took place a month later because insufficient time was available to hear the evidence on initially listed 1 day hearing), I heard the further witness evidence of the claimant and concluded by hearing the remaining respondent witness

evidence of Mr Farrell. The claimant's additional witness evidence arose following the agreement by the claimant that the respondent could introduce an additional statement from Mr Farrell, providing that the claimant could be recalled to give additional evidence dealing with the matters covered by Mr Farrell in his second statement.

62. However, this error was not material to the evidence that I heard and from which I made a handwritten note as each witness was called in turn. In fact, the claimant was able to give additional evidence on day 2. I remain of the view that all witnesses were able to give full and detailed evidence and I felt it was in the interests of justice to adjourn the hearing so that a second hearing day could be provided. This was far more preferable a solution than either restricting the time during which oral evidence could be given so that the hearing could be concluded on day 1, or to postpone the hearing for many months so that a 2 day hearing could listed on consecutive days. As it happened the month gap between day 1 and day 2 did not prejudice either party in terms of the relative 'value' and 'weight' of each witness's evidence. In any event, both parties' representatives provided excellent final submissions and ensured that all of the relevant evidence was drawn to my attention before I commenced my deliberation.

Evidence regarding working from home

63. These matters were adequately dealt with as part of my judgment and I refer to my comments at paragraph 60 above.

Risk assessment not sent to the claimant

64. As the respondent confirmed in its reply, I dealt with this matter in paragraphs 46, 49 and 50 of the findings of fact in my judgment as well as paragraph 68 as part of my discussion. While I acknowledged, the late disclosure of the risk assessment by Mr Farrell was '*unfortunate*', I remain of the view that it was not material to the claimant's failure to return to work and I see no reason to change my decision concerning this particular matter.

Asthma

65. The claimant had asthma and this was acknowledged within the judgment at paragraph 44 in the findings of fact and paragraphs 63 and 73 of the discussion parts of my judgment.

66. I am able to take judicial notice from my general experience of asthma given its prevalence in society. Asthma is a condition which can result in significant impairments to those who suffer from this condition and can amount to a disability. This is not a case where disability discrimination was brought as a complaint by the claimant. It is potentially a relevant issue nonetheless in cases such as this one which deal with matters of health and safety where the risk involves a virus that can have a significant impact upon the respiratory tract of those who become 'infected'.

67. Many people who suffer from asthma are able to manage their condition using preventative inhalers on a daily basis and 'reliever' inhalers when an asthma attack arises. Some people however, can be particularly vulnerable despite the use of these inhalers but the condition involves a very broad 'spectrum' of sufferers and the degree of impairment can vary significantly.

68. In this case, it was clear to me that the claimant had asthma that it contributed to her general anxiety concerning Covid, but based upon my hearing of the evidence before me, there was no evidence that the claimant was required to 'shield' during the material time and no medical evidence was available to suggest that her GP did not want her to return to work and the respondent was not aware of a medical condition preventing the claimant's return to work during May to August 2020.

69. The claimant may well have been 'fast-tracked' to receive vaccinations once they became available, but this was a matter for 2021 and not at the material time which formed the consideration of findings of fact in this case. At the material time, my findings of fact and discussion correctly identify that this was not a significant or specific factor in the claimant's concerns regarding a return to work.

Communications in writing

70. While I note that this was raised as a ground of complaint in relation to the application for reconsideration, I do not accept that this matter was not considered properly within the judgment and in particular at paragraph 37 of the findings of fact.

Prevalence of Covid

71. This was discussed generally within the judgment and specifically within the discussion when I considered the issues and the extent to which the respondent behaved reasonably in relation to the risks arising from Covid at the material time.

Conclusion

72. I have therefore considered those grounds of complaint raised by the claimant as part of the application for reconsideration. While the claimant is unhappy with the overall outcome of the original judgment, she has not raised anything within the application which persuaded me to vary its decision, other than in relation to the minor slip concerning the order of witness evidence heard.

Employment Judge Johnson

17 February 2022

JUDGMENT SENT TO THE PARTIES ON

21 February 2022

FOR THE TRIBUNAL OFFICE