Case No: 2301877/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS: **Ms S Campbell**
Mr S Gooden

BETWEEN:

Dr V Lyfar-Cissé

Claimant

And

Western Sussex Hospitals NHS Foundation Trust (R1)
Brighton and Sussex University Hospitals NHS Trust (R2)
Marianne Griffiths (R3)
Evelyn Barker (R4)

Respondents

ON: **22 & 23 February 2022**

Appearances:

For the Claimant: In Person
For the Respondents: Mr T Kibling, Counsel

JUDGMENT ON RECONSIDERATION APPLICATION

The application for reconsideration is refused. The original decision stands.

REASONS

1. This hearing was to consider the claimant's application, dated 27 May 2021, for reconsideration of the Tribunal's judgment, sent to the parties on 13 March 2019, dismissing her claims of automatic unfair dismissal, ordinary unfair dismissal and victimisation. The matter original proceedings were heard by Employment Judge Baron with Lay Members; Ms S Campbell and Mr S Gooden. The panel for the Reconsideration hearing comprises the same members but the matter was assigned to me in place of Mr Baron, who retired a number of years ago. The liability judgment is subject to an outstanding EAT appeal, which is stayed pending this decision.

2. The ground of the claimant's application is that new evidence has come to light which makes it necessary for the judgment to be reconsidered, in the interests of justice. The claimant is asking for the original decision to be revoked and substituted with a finding that her dismissal amounted to victimisation and was unfair.

3. A small bundle of limited documents was provided in accordance with orders made by me at an earlier case management hearing. One of the key documents was, of course, the original ET decision which we have reviewed carefully. References in the judgment in square brackets are to pages within the bundle.

4. The claimant provided a document which, although titled witness statement, was in reality a written submission setting out the basis of her application and we have treated it as such. Mr Kibling also provided written submissions. Both parties supplemented their submissions orally. We have taken these into account.

5. It is a well-established principle of law that the interests of justice dictate that there be finality in litigation. That means that parties should not be allowed to re-litigate the same issues once they have been determined, except within limited parameters. The case of Ladd v Marshall [1954] EWCA Civ 1 established the criteria for allowing fresh evidence in a case on which a judgment has already been delivered. The court of appeal ruled that in order to justify fresh evidence or a new trial, we must be satisfied that;

    i. the evidence could not have been obtained with reasonable diligence for use at the trial;

    ii. The evidence must be such that, if given, it would probably have an important influence on the result of the case;

    iii. The evidence must be apparently credible, though not incontrovertible

The Issues

6. The issues for us is determine are:

    a. whether there was new evidence and if so;

    b. whether it have could have been obtained with reasonable diligence for use at the liability hearing;

    c. whether the evidence would have had an important influence on the result of the case.

New Evidence

7. The matters relied on as new evidence are:

    a. An article in the Health Service Journal Publication dated 8.7.19
    b. An extract from written submissions of Mr Tom Kibling in other ET proceedings.

8. The article in question related to a round table discussion organised by the Health Service Journal about the most pressing issues facing the NHS at the time. Marianne Griffiths [R3] was one of a number of senior leadership health professionals involved in that discussion [53-54].

9. Under the heading "Difficult Situation" the relevant part of the article records the difficulties faced by R3 on taking over as chief executive at the respondent Trust. There are 3 paragraphs of the article that are the focus of this application. These are set out below:

"But the session started with Marianne Griffiths, chief executive of both Western Sussex Hospitals Foundation Trust and Brighton and Sussex University Hospitals Trust, talking about the very difficult situation she had inherited at BSUH where relations with some of its BME workforce were very poor – she said she had not realised the extent of "the damage done" to the organisation. This had been long-standing and toxic, with what she described as "sticking plaster" solutions in place and had led to a number of employment tribunal cases.

When Ms Griffiths was appointed nearly three years ago, she decided to address the issues and asked Yvonne Coghill, director of implementation for the Workforce Racial Equality Standard, for assistance. She found there were issues which were not being addressed around inequalities but there was almost an "extremist, very anti-organisational" BME structure which excluded anyone who was LGBT and did not really like anyone who was not Christian.

***But there was also a need to lead from the front: the trust had to do some "brave things" which led to employment tribunals but was a signal to the organisation that they were taking the issues seriously. She set up a board-led network structure –* not just for BME staff but also those who were LGBT….."**

10. Our first observation is that this is not a verbatim account from R3, it is the author's account of what she said, an account which may well have been subject to some editorial discretion or control. We therefore have to treat what is written with some caution.

11. Secondly, the article is in very general terms. It does not refer to the claimant specifically or make any reference to her Tribunal claims. The claimant on the other hand contends that it is specifically about her and she relies on the second item of "new evidence" in support of this. That so called new evidence is an extract from the written submissions of Mr Kibling, used in victimisation proceedings brought by another Trust employee, Ms Brown. In that document, in reference to the same article, Mr Kibling submits that the reference to the "*extremist, very anti-organisational BME structure….excluding anyone who was LGBT…."* was a reference to Dr Lyfar Cissé's claim. [68]

12. What we say about that is that written submissions in proceedings are not evidence. Just because Mr Kibling put the argument does not make it fact. It was a legal submission put in order to address a technical argument relating to the application of section 27(4) EqA. It is not new evidence, or indeed evidence at all.

13. Turning back to the article, the claimant accepts, and we so find, that the difficult and poor relations between the BME workforce and the Trust was part of the evidence presented at the original hearing. Indeed, paragraph 41 of the judgment [28] includes extracts from a CQC report which refers to such difficulties. That these difficult relations led to a number of Tribunals is also factual. Those may well have included, but not have been limited to, previous claims brought by the claimant.

14. The claimant also accepts that the matters in the second paragraph of the article are not new. It is clear to us that they relate to historical matters, information about which could have been obtained by the claimant, or those representing her at the original hearing, through cross examination, for example. It is not new evidence.

15. The nub of the claimant's application is the third paragraph. The claimant's case is that this supports her case that the real motivation behind R3's decision to dismiss her was the fact that she had brought previous ET claims. She relies in particular on the use of the term "*brave things*" contending that this was a reference to her dismissal and also says that the reference to employment tribunals was a reference to her claim.

16. The obvious point is that the article does not expressly state any of those things. What the claimant is asking us to do is to infer this from what is written.

17. In our view, the words and phrases should not be construed in isolation but must be looked at in the context of the rest of the article. Looking at the extracts as a whole, the term "*brave things*" in this context is analogous to the taking of difficult, bold or contentious decisions in order to address, and to be seen to be addressing, the inequality issues identified in the preceding paragraphs of the article. That

interpretation is consistent with another reference to being brave that is made by another Chief Executive involved in the discussion, Tom Cahill, who is quoted as saying: "*There is something about quotas and targets as a lever for change. Something radical has to change….I don't think we will change in the next 10 years unless we get brave* (my emphasis" [55]

18. In relation to the use of the term by R3, there are no details given about the brave things referred to save that they led to Employment Tribunals. The article is a number of years after the claimant's dismissal and is not specific about when those brave things were done. It may be focusing on a whole range of brave things within the time that R3 had spent as chief executive, nearly 3 years when the article was written. It is also not in dispute that the Trust has had a number of Tribunals over the years, from different employees. The central point is that there are so many imponderables that it would be dangerous for us to enter into the realms of speculation as to what was in R3's mind when she made that statement.

19. Even if the reference to brave things refers to the claimant's dismissal, it was part of the factual chronology of these proceedings that R3 dismissed the claimant. That R3 may have considered that decision to be a brave thing does not constitute new evidence. Further the reference to the brave thing leading to Employment Tribunals means that it cannot be a reference to the protected acts relied on by the claimant in these proceedings as those pre-dated the dismissal.

20. Our primary finding is that the matters set out in the article do not amount to new evidence.

21. However, in case we are wrong about that, to the extent that anything in the article amounts to new evidence, we find that it would not have had an important influence on the outcome of the proceedings.

22. The reason for the original Tribunal's decision is summarised at paragraphs 125 and 126 of the Reserved judgment [46]. The Tribunal was satisfied that the principal reason in the mind of R3 for the dismissal was her view that it was not appropriate for someone who had been found responsible for acts of victimisation, harassment and discrimination to be the lead person responsible for race equality; and that protected acts did not form a material part of the decision [46] That was a decision reached after the panel had reviewed a "*considerable volume of evidence*" and deliberated over a number of days. In our view, that decision is not in any way undermined by the subsequent article. Rather, the article is more consistent with the reason for dismissal found by the Tribunal than the alternative proposition being put forward by the claimant.

Conclusion

In light of the above, we find that there is no reasonable prospect of the original decision being overturned. The application for reconsideration is therefore dismissed.

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Employment Judge Balogun
Dated: 23 February 2022