EMPLOYMENT TRIBUNALS

Claimant: Miss C Collins

Respondent: Rotherham Metropolitan Borough Council

Heard at: Leeds **On:** 19 April 2022

Before: Employment Judge C H O'Rourke

By way of Written Submissions only

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The Judgment of the Tribunal is that the Claimant's application for reconsideration is refused.

REASONS

1. Introduction. The Claimant has applied for a reconsideration of the preliminary hearing judgment dated 4 February 2022, which was sent to the parties on 8 February 2022 ("the Judgment"). That Judgment dismissed the Claimant's claims of 'ordinary' and automatic unfair dismissal and protected disclosure detriment, for want of jurisdiction, as they were out of time and the Tribunal declined to exercise its discretion to extend time. While the Tribunal found that it was not reasonably practicable for the Claimant to have presented her claims within time, it considered that thereafter she had failed to do so within such further time as was reasonable.

2. The Rules. Subject to Rule 72(1) of the Tribunal's Rules of Procedure 2013, the application was not initially refused as having no reasonable prospects and the Tribunal invited further submissions from the parties and their views as to whether or not the matter could be determined without a hearing. The Respondent did not consider that a hearing was necessary, whereas the Claimant did. In a decision dated 22 March 2022, the Tribunal determined that a hearing was not necessary and that the application would be dealt

with by way of written submissions. The parties were invited to send any final or consolidated submissions. The Claimant advanced five reasons for her application in her solicitor's email of 21 February 2022 and expanded on those in a further email of 5 April 2022, along with a witness statement and various exhibits, of the same date. The Respondent's submissions, submitted by their counsel, are dated 4 April 2022.

3. Rule 70 of the Tribunal's Rules of Procedure 2013 states:

70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

4. Claimant's Application. In summary, the grounds relied upon by the Claimant are as follows:

    a. That the lengthy hearing ended abruptly, with no explanation provided as to why the claim had been dismissed.

    b. That the Respondent's request to have the hearing take place over Microsoft Teams, rather than by way of CVP, having been granted by the Tribunal, lead the Claimant to '*have concerns in relation to the veracity of the process and in particular did not feel that the matter was conducted with sufficient gravitas in the way that a CVP hearing would be'*.

    c. That the Respondent counsel submitted a skeleton argument ten minutes before the hearing, thus providing no time to the Claimant or her representative to properly consider it, thus putting her to a disadvantage. She also considers herself or her representatives to be disadvantaged by the lack of any response from the Respondent to the bundle provided by her representatives and a failure to notify them as to who would be representing the Respondent at the Hearing. She considered that the Tribunal should have at least expressed concerns about such late submissions or exercised its discretion to adjourn the Hearing.

    d. That the Claimant has new evidence in relation to the ACAS Early Conciliation process that she considers relevant, particularly as the Judgment makes reference to that process, in reaching its conclusions. This evidence indicates, she states, the nature of the conflicting advice she was receiving from ACAS, as compared to her solicitors. She also asserts that the Tribunal placed too much

emphasis of the Claimant's own ability to research the time limit point.

e. The ET3 form '*gave the incorrect name of the Claimant and that, together with the haphazard nature of the ET3 and Grounds of Resistance, ought to have been considered at the very outset when it was received by the Employment Tribunal*'.

f. That the impact of COVID-19 on the Claimant's ability, at the time, to communicate with legal advisors, in particular in a 'face to face' meeting, rendered such advice as she did get unclear or incomplete.

g. The application also included the request that it be considered by a different judge, as it would be in the interests of justice and in compliance with the Overriding Objective to do so. (This matter was dealt with in a letter from the Tribunal of 22 February 2022, which stated that '*There is no provision in the Tribunal's Rules of Procedure for a Judge other than Employment Judge O'Rourke to hear this application, unless, subject to Rule 72(3), it was not 'practicable' for him to do so, due perhaps to illness, retirement etc., which does not apply in this case*'. That issue is not therefore considered further.)

5. Respondent's Submissions. In summary, the Respondent's submissions are as follows:

a. None of the Claimant's submissions go to the correctness or otherwise of the Judgment's reasoning, or of the application of the law.

b. At the conclusion of the Hearing, the Employment Judge informed the parties that his decision was that the Claimant had not presented her claim within such further time as was reasonable, but that he had not yet decided as to whether she had complied with the 'reasonably practicable' point and that therefore a reserved judgment on that point would follow, which it did. It is not clear how this issue might render the Judgment subject to revocation.

c. Teams is a similar platform to CVP and was used because the Respondent had experienced technical difficulties with the use of CVP in the past and wished the hearing to proceed without any difficulties. How the 'veracity' or the 'gravitas' of the hearing might be effected by that choice is puzzling to the Respondent and the Claimant's counsel raised no objections at the time. Teams is used in similar hearings by the Courts and Tribunals. The Claimant does not point to anything under this head of complaint that in any way affected her evidence.

d. It is correct that Counsel for the Respondent sent over a skeleton argument shortly before the Hearing, but as noted by the Employment Judge that merely highlighted settled legal principles that were well-known to the Judge and presumably to the Claimant's counsel. The balance of the document was merely a recital of the facts of the case, already known to the Claimant and the Respondent counsel reiterated his arguments in closing submissions, to which the Claimant's counsel had opportunity to respond. No request was made by the Claimant's counsel for an adjournment, or for any additional time. Nor does the application set out any authorities or arguments that might have been raised by the Claimant's counsel, due to the timing of submission of the skeleton argument.

e. The typographical error in the ET3 in relation to the Claimant's name is utterly irrelevant to the issues at the Preliminary Hearing.

f. New evidence becoming available is a potential ground for reconsideration. The test established in **Ladd v Marshall [1954] 3 All ER 745** (and confirmed in subsequent cases) on this issue is threefold. Firstly, it must be shown that the evidence could not have been obtained with due diligence for use at the original hearing. Secondly, any such evidence must be shown to be relevant and that it would have probably had an important influence on the hearing and finally that the evidence is apparently credible. The Claimant's application does not meet that test.

6. Claimant's Evidence. The Claimant's witness statement is summarised as follows (but without repetition of the above submissions and also as considered relevant to her application):

a. She refers to the complaint she has brought, for the Regional Employment Judge's attention, '*regarding the outcome of the Preliminary Hearing'* and which is attached as an exhibit. I make no reference to its contents, as that is not a matter for me.

b. As to the timeline in bringing her claim, she states that '*although I was still not fully recovered from my breakdown in late April 2021, I felt that I had regained a sufficient level of concentration and focus to be able to initiate legal enquiries'*.

c. While she had managed to contact several solicitors, she was unable to meet them face-to-face. She instead communicated by email and by telephone, doing so on 23 April 2021. She referred to speaking to one of those solicitors ('the first firm'), who told her that she '*had significant mitigating circumstances, having regard to my mother's*

recent death and that I should contact ACAS immediately. He did not say any more about what that would involve.

d. On the same day, she spoke to an ACAS representative, by phone, who '*registered my ACAS Early Conciliation claim online. He also acknowledged that it was a late claim and he again told me that the clock stops when the claim is started with ACAS Early Conciliation. On the basis that this gentleman said that and* (the solicitor she had spoken to) *had said that, I was given no cause for concern as they both were advising me that when I started the ACAS Early Conciliation claim the 'clock would stop'*.

e. She wrote to ACAS on 29 April 2021 [Exhibit CC.3] stating the following:

'*I have now taken legal advice from several sources … and am clear about taking this matter forward into early conciliation … I am also clear on time limits* (and went on to refer to the Tribunal's discretion to accept … '*delayed ET1 applications out of time*') and that she'd been advised by the solicitors she had spoken to that she had a strong case in this respect. She went on to say that '*I am advised to take this forward first through ACAS requesting settlement agreement with RMBC and if my employer does not engage with* (the) *process and a certificate is then issue*(d) *through Application to Employment Tribunal (with 1 month period to do that from issuing of ACAS certificate).'*

f. ACAS responded the same day, stating the following:

'The Employment Tribunal would look at the reasons why you did not present it (the claim) *as soon as possible and why it was not practical to lodge you*(r) *ET1 as soon as possible.*
I will contact the representative <u>but need to clarify to you that by not asking for the certificate with immediate effect this will only make your potential claim more out of time, you will not have the one month grace where in effect the clock gets paused for 4 weeks if you lodge your notification with ACAS out of time</u>. I would suggest that you take further legal advice on this matter.' (both mine and in part the Claimant's emphasis).

g. The Claimant replied to that email, almost immediately, informing ACAS that '*I have checked this out thoroughly and the clock stops when ACAS received my form and I received your reference (which was 24th April). I am agreeing to early conciliation, requesting you talk to my ex-employer on if they will engage in trying to settle this matter before expensive costs are involved in making an*

employment claim re-form ET1 by my solicitor. If my employer refuses to engage with your request then you issue the certificate.' She then went on to refer to what she said was CAB advice, which said:

'You must start early conciliation within three months less 1 day from the date of the thing you're complaining about … If you miss this deadline any tribunal claim you then make will also be late and in many cases, you'll lose your right to make a claim …' (my emphasis).

She concluded by stating that '*I believe you will have to state to my ex-employer that application is going to be made with mitigating circumstances to tribunal if they refuse to engage with ACAS at this point.'*

h. She spoke to a solicitor at another firm ('the second firm'), on 28 April 2021, telling him '*that what I was now being told by the ACAS Conciliator … was that the clock did not in fact stop, even though when I had spoken* (to the first firm on 23 April 2021) *that was what I had understood …'*. That second firm's solicitor advised her that she should, via ACAS, seek discussions with the Respondent, ' … *setting out the mitigating circumstances for the claim not being submitted in time and that if the Respondent was prepared to have such discussions, then I should contact* (him) *again and he would assist. However, if the Respondent was not prepared to enter into discussions, then I should obtain an ACAS Early Conciliation Certificate and come back to him to progress the case further.'*

i. As she considered that she was receiving conflicting advice, she consulted with the Citizens Advice Bureau and read the Tribunal's online guidance form T420.

j. On 11 May 2021, ACAS wrote to the Claimant stating that '*the respondent believes your claim is out of time'* and stressing that conciliation was voluntary. The Claimant responded the next day, stating that '*I am not concerned what the respondent believes, they have to say that …* (and going on to set out why she considered they '*are not in a good position to claim out of time'*).

k. ACAS informed her on 3 June 2021 that as the Respondent did not wish to negotiate, the EC Certificate would be issued, which it was. The Claimant responded that she was '*also very disappointed that you did not check with me on my situation prior to issuing the certificate …* (and) *not keeping me adequately informed on RMBC responses … How can I complain to ACAS about this matter?*' She

said that she then immediately thereafter instructed the second firm of solicitors to progress her claim.

l. On 4 June 2021, ACAS responded to her concerns, stating:

'I would also clarify that I did inform you in our first contact about you lodging your Early Conciliation Notification with us was potentially out of time and by continuing to hold back on me issuing the certificate would not pause the time to allow for conciliation/negotiations …'.

m. The Claimant does not consider that at the Preliminary Hearing she was given sufficient opportunity '*to explain the position concerning ACAS and that sufficient weight was not attached to the circumstances in or around April 2021 which included conflicting advice that I was receiving, my health and wellbeing and the ongoing Covid-19 pandemic.'*

7. Conclusions on Claimant's Evidence. I reach the following conclusions on the Claimant's evidence:

a. No explanation is offered as to why this evidence could not have been provided at the Preliminary Hearing, despite its clear relevance.

b. She was told in clear terms by ACAS, on 29 April 2021 that entering into EC would not, in her case, extend time, as her claim was already out of time, but, somewhat surprisingly, she sought to contradict ACAS on this point, while referring to CAB advice which itself clearly stated that '*You must start early conciliation within three months less 1 day from the date of the thing you're complaining about.'* She knew, or should have known, therefore, on 29 April 2021, both that her claim was already out of time (at that point by some two and a half months) and that time would not be extended, but still chose to present her claim over two months after that date. It is difficult to see how, even if there had been no COVID restrictions at the time that any face to face discussion of these matters would have been any clearer.

c. She deliberately chose to delay the issue of the EC Certificate, despite thereby knowingly adding to the delay in bringing her claim, because she hoped to avoid the cost of instructing solicitors to present her claim. Instead, she simply planned to rely on the 'good case' she considered that she had to justify such delay to the Tribunal, in order for it to exercise its discretion in her favour.

d. This evidence not only doesn't indicate why it would be in the interests of justice to revoke the Judgment, but in fact strengthens

the conclusions reached in that Judgment as to why the claims were not brought within such further time as was reasonable.

8. Conclusions on other Application grounds. I reach the following conclusions in respect of the other grounds for this Application:

    a. 'Abrupt Ending' – I indicated at the Preliminary Hearing that my decision was that the Claimant had failed to meet the 'such further time as was reasonable test', but that as I had not yet decided on the 'reasonably practicable' test that I would reserve judgment on that latter point, providing written reasons for both decisions in due course (and which were completed the next day). I see no significance for the 'interests of justice' to this ground of appeal.

    b. Teams/CVP – again, I see no significance or relevance to this ground. In the end, the hearing was heard by video, in exactly the same way as it would have been, if heard on the CVP platform. No complaint was made at the time, in this respect.

    c. Submission of Skeleton Argument – there is no authority or 'rule' as to when a skeleton argument should be submitted (unless specifically previously ordered by a Tribunal, which was not the case here). In preliminary hearings such as this, counsel could simply choose to raise whatever arguments they wished in oral closing submissions, without having signalled them earlier in writing and it would then be for their opponent to deal with such arguments, as presented. So, it could be argued, even the belated submission of such a skeleton provides an advantage to the opposing counsel, rather than a disadvantage. In any event, the law on the matter of time limitation is relatively settled and therefore any skeleton is unlikely to contain any particular novel point, but merely serve as a 'reminder' of the relevant law, which was the case in that hearing, both for the Employment Judge and it must be assumed, the Claimant's counsel. Finally, the Claimant's counsel raised no objection at the time on this point, or asked for further time for consideration. Again, therefore, I see no relevance to this ground.

    d. The typographical error as to the Claimant's name in the ET3 is entirely irrelevant to the issues in the Preliminary Hearing and was not, in any event, raised at the time.

9. Conclusion. I don't consider that any of the grounds raised by the Claimant in support of her application for reconsideration render it in the interests of justice to vary or revoke the original Judgment. In **Fforde v Black EAT 68/60** the EAT decided that the interests of justice ground of review does not mean "*that in every case where a litigant is unsuccessful he is*

automatically entitled to have the tribunal review it. 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 something of that order". This is not the case here. In addition it is in the public interest that there should be finality in litigation, and the interests of justice apply to both sides.

10. Accordingly, I refuse the application for reconsideration pursuant to Rule 72.

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Employment Judge O'Rourke

Dated: 19 April 2022