Case Nos: 2601914/2020
2600301/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr M Jarosinski

Respondent: Nestle UK Ltd

Hearing: In Nottingham, before Employment Judge Ayre in chambers

On: 13 May 2022

JUDGMENT

1. The claimant's application dated 18 January 2022 for reconsideration of the judgment sent to the parties on 5 January 2022 fails. The original judgment of the Tribunal is confirmed.

2. The claimant's application for costs fails and is dismissed.

REASONS

Background

1. In a judgment dated 22 December 2021 and sent to the parties on 5 January 2022, following a 9 day hearing from 15 to 25 November 2021, the Tribunal dismissed the claimant's claims for wrongful dismissal, direct race discrimination, harassment and victimisation. The complaint of unfair dismissal was upheld, but the Tribunal found that the claimant contributed 100% to his dismissal and that, accordingly, no basic or compensatory awards should be made.

2. On 18 January 2022 the claimant applied for reconsideration of the judgment and for a costs order against the respondent. In an application running to 298 pages, the claimant asserted that there were errors in most of the 325 paragraphs of the judgment.

3. The case was originally listed for a one day reconsideration hearing to take place on 27 April 2022. On 16 March 2022 the claimant applied

for additional time to be allocated to reconsideration of the judgment, and for permission to call new witnesses.

4. On 17 March the respondent's representative objected to the listing of the case for a reconsideration hearing, and asked for the hearing on 27 April 2022 to be vacated and to be given the opportunity to respond to the claimant's application before listing the case for a reconsideration hearing. The parties were directed to set out their views on whether the applications for reconsideration and costs could be determined without a hearing, and the respondent was given time to set out its comments on the claimant's applications for reconsideration and for costs.

5. In an email dated 30 March 2022 the claimant provided details of the witnesses that he wanted to call to give evidence. One was a former colleague who the claimant said he had been "aiming to avoid calling" as a witness. The other was also a former colleague who the claimant said had not wanted to give evidence earlier on the advice of his solicitor, as he was also involved in litigation against the respondent. The claimant also referred to calling unnamed 'Environmental Health Officer evidences' to give evidence on "Food Safety Critical aspect of allergen contamination risk in food manufacturing".

6. On 5 April 2022 the claimant wrote to the Tribunal objecting to his reconsideration and costs applications being dealt with without a hearing. In summary, he said that he was, as a litigant in person, at a disadvantage when preparing written submissions in comparison with the respondent who is represented by a global law firm. He also accused the respondent of an "abuse of position of power", "potentially fraudulent conduct" and misleading the Tribunal. These are extremely serious allegations to make against professional representatives and are unsupported by any evidence.

7. The respondent's representative also wrote to the Tribunal on 5th April 2022 setting out its response to the claimant's applications for costs and for reconsideration of the judgment and its views on whether those applications could be dealt with without a hearing. The respondent's representative submitted that the applications could be dealt with without a hearing on the basis that the written representations of both parties are detailed and provide sufficient information to enable the Tribunal to make a decision without the cost and time associated with a hearing.

8. Having considered carefully the representations from both parties, I formed the view that a hearing was not necessary in the interests of justice and that the applications for reconsideration and costs would be dealt with on the papers. The claimant is not, in my view, disadvantaged at all by this course of action. It is clear from the communications that he has sent to the Tribunal that he is able to make detailed written submissions, and to refer to relevant points of law and case law in those submissions.

9. The parties were given a further opportunity to make written representations in relation to both the reconsideration and costs applications should they wish to do so. The claimant sent in further representations, the respondent did not.

10. The reconsideration and costs applications were therefore determined on the papers in chambers on 13 May 2022. In dealing with each application I have considered carefully all of the written representations made by both parties.

Application for reconsideration of the judgment

11. The claimant has made a very detailed and lengthy application for reconsideration of the judgment which he has followed up with further communications to the Tribunal. In summary, the basis for his application for reconsideration of the judgment appears to be as follows:

    a. The judgment was biased and included "often emotional opinions";

    b. The respondent had misled the Tribunal;

    c. The Tribunal made a number of fundamental mistakes and errors in the judgment;

    d. The Tribunal made the wrong findings of fact and reached the wrong conclusions on the evidence before it;

    e. The claimant wants to introduce new evidence;

    f. The Tribunal had failed to allow 'key evidence' in the form of covert recordings made by the claimant of conversations he had with his trade union representatives;

    g. The Tribunal failed to draw an adverse inference against the respondent;

    h. The Tribunal failed to consider whether the dismissal was automatically unfair because the claimant was dismissed for making protected disclosures.;

    i. The Tribunal failed to establish the facts or record critical facts;

    j. False statements were made by the respondent's witnesses;

    k. The Tribunal failed to consider the claimant's submissions;

    l. The Tribunal, and the Judge in particular, were prejudiced against the claimant.

12. The respondent resists the claimant's application on the following grounds:

a. The essence of the application is that the claimant disagrees with the Tribunal's findings of fact and its interpretation and assessment of the evidence;

b. The claimant has previously made serious allegations about the conduct of the respondent and its representatives, and these were considered as part of his application for strike out of the response which was thoroughly considered and rejected by the Tribunal;

c. There was a long and detailed discussion of the issues at the start of the hearing. The claim did not include one of automatic unfair dismissal on the grounds of protected disclosures;

d. The evidence (which included detailed witness statements and a bundle running to 1087 pages) was very thoroughly tested at the hearing;

e. The question of whether to allow the introduction into evidence of the covert recordings of conversations between the claimant and his trade union representatives was thoroughly considered at the final hearing;

f. The claimant made extensive submissions during the hearing. The Tribunal is not required to address each and every factual or legal submission in its judgment. The judgment is thorough and it's clear that the claimant's submissions were properly considered;

g. The evidence of the new potential witnesses is of tenuous relevance at best, and the claimant had taken the conscious decision not to call the two named witnesses.

Application for costs

13. The claimant applied for a costs order to be made against the respondent in the sum of £7,166.09. The sum was made up of fees paid to a firm of solicitors, to a barristers' chambers, to Mr Neal Williams, and to a 'transcribing service'. The basis for the claimant's application, in summary, is:

    a. It is beyond reasonable doubt that the respondent's defence of the unfair dismissal claim was misconceived from the start;

    b. The respondent has considerable administrative and legal support available to it and was, or should have been, aware that the dismissal was procedurally unfair; and

    c. Despite this, the respondent knowingly continued to defend the unfair dismissal claim, causing the claimant to incur legal fees as a result.

14. The respondent opposes the application for costs, in summary, for the following reasons:

    a. The claimant's allegation that the respondent's defence to the claim was misconceived and without any reasonable prospect of success was considered at the start of the hearing when the Tribunal dealt with the claimant's application to strike out the response and concluded, as set out in the judgment, that "it cannot be said in our view that the response to the claims has no reasonable prospect of success. There are clearly substantial disputes of fact in the claim and the Tribunal needs to hear the evidence in order to resolve them…We can find no evidence that the respondent's behaviour in conducting the litigation has been scandalous, vexatious or unreasonable. The respondent has defended the claims as it is entitled to do in the face of numerous and at times emotive allegations." The question has therefore already been considered by the Tribunal;

    b. The respondent successfully defended the vast majority of claims. Although the claimant was successful in his complaint of unfair dismissal the Tribunal found that he contributed 100% to his dismissal.

The Law

Reconsideration

15. Rule 70 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("**the Rules**") provides that a Tribunal may reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the original judgment may be confirmed, varied or revoked.

16. Rule 71 provides that applications for reconsideration shall be made either in the hearing itself or, in writing, within 14 days of the date on which the judgment is sent to the parties. Rule 72 contains the process that must be followed when an application for reconsideration is made. The first stage is for the Employment Judge to consider the application and decide whether there are reasonable prospects of the judgment being varied or revoked. If the Employment Judge considers that there are no reasonable prospects of the judgment being varied or revoked, then the application shall be refused.

17. If the application is not refused at the first stage, there may be a reconsideration hearing and the parties will be asked for their views on whether the application can be determined without a hearing. The other party will also be given the opportunity to comment on the application for reconsideration.

18. When dealing with applications for reconsideration, the Employment Judge should take into account the following principles laid down by the higher courts:

a. There is an underlying public policy interest in the finality of litigation, and reconsiderations should therefore be the exception to the general rule that Employment Tribunal decisions should not be reopened and relitigated;

b. The reconsideration process is not designed to give a disappointed party a 'second bite at the cherry'. It is "not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before" (Lord McDonald in ***Stevenson v Golden Wonder Ltd 1977 IRLR 474***);

c. The Tribunal must seek to give effect to the overriding objective of dealing with cases fairly and justly, which includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding delay, so far as compatible with proper consideration of the issues, and saving expense;

d. The Tribunal must be guided by the common law principles of natural justice and fairness;

e. The Tribunal's broad discretion to decide whether reconsideration of a judgment is appropriate must be exercised judicially "which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation" (Her Honour Judge Eady QC in ***Outasight VB Ltd v Brown 2015 ICR D11***); and

f. The interests of both parties should be taken into account when deciding whether it is in the interests of justice to reconsider the judgment.

19. The overriding consideration when dealing with applications for reconsideration is 'is it necessary in the interests of justice' to reconsider the judgment. It may be in the interests of justice to reconsider a judgment if there is new evidence, but only if that evidence was not available at the time the Tribunal made its judgment. In ***Ladd v Marshall 1954 All ER 745***, the Court of Appeal held that, in order to justify the admission of new evidence, a party must establish that the evidence:

    a. Could not have been obtained with reasonable diligence for use at the original hearing;
    b. Is relevant and would probably have had an important influence on the outcome of the original hearing; and
    c. Appears credible.

<u>Costs</u>

20. Rules 74 to 79 of the Rules set out the rules that apply to applications for cost orders and preparation time orders.

21. Rule 76 ("When a costs order or a preparation time order may or shall be made") provides that:

    "*(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –*

    (a) A party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
    (b) Any claim or response has no reasonable prospect of success…"

22. Rule 77 sets out the procedure to be followed in relation to costs orders and preparation time orders:

    "*A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."*

Conclusions

Application for reconsideration

23. It appears from the claimant's email of 30 March 2022 that he had previously considered calling both of the named additional witnesses to give evidence at the final hearing but made a decision not to do so. If one or both witnesses were reluctant to attend, he could have applied for a witness order forcing them to do so. The reconsideration process is not designed to be the opportunity for a party to present additional evidence that he chose not to present at the original hearing, as Lord McDonald said in ***Stevenson v Golden Wonder Ltd 1977 IRLR 474.*** In addition, the evidence of these witnesses would appear to be of little if any relevance to the issues that the Tribunal had to decide.

24. In relation to the potential evidence of the Environmental Health Officers, it is not at all clear from the claimant's email of 30 March 2022 what possible relevance their evidence could have to the issues that the Tribunal had to determine in this case or whether the evidence could have been obtained by the claimant prior to the original hearing of the claim.

25. For these reasons it would not in my view be in the interests of justice to reconsider the judgment to allow the claimant to call the additional witnesses.

26. Much of the claimant's application for reconsideration is based on the fact that he disagrees with the findings of fact made by the Tribunal and also with the conclusions it reached. He is seeking, in effect, to have a 'second bite at the cherry' and the chance to re-argue points that have already been considered by the Tribunal. That is not the purpose of the reconsideration process.

27. There has already been a lengthy hearing in this case, before a full Tribunal panel which reached all of its conclusions unanimously. The claimant was able to cross-examine the respondent's witnesses at length and to make detailed submissions. His case has been fully litigated and carefully considered.

28. The Tribunal has to take account of the interests of both parties when dealing with applications for reconsideration. The respondent has already faced a lengthy trial dealing with allegations going back as far as 2012.

29. The Tribunal also has to consider the public policy interest in the finality of litigation, and particularly so in this case where the allegations go back many years, and where there has already been a detailed and lengthy consideration of those allegations. It would not, in my view, be proportionate or in accordance with the overriding objective, for the judgment to be varied or revoked.

30. It is not the purpose of the reconsideration process to deal with allegations of bias, prejudice or errors of law.

31. For all of the above reasons, I am satisfied that it would not be in the interests of justice to vary or revoke the original judgment, and that judgment is confirmed. The claimant's application therefore fails.

<u>Application for costs</u>

32. Both parties have had the opportunity to make written representations in relation to the claimant's application for costs and I have considered these representations carefully.

33. The Tribunal has already considered and made findings in relation both to the respondent's conduct of the proceedings and the prospects of the respondent's defence of the claim when considering the claimant's application for strike out at the start of the final hearing.

34. The Tribunal concluded that "it cannot be said…that the response to the claims has no reasonable prospect of success" and that there was "no evidence that the respondent's behaviour in conducting the litigation has been scandalous, vexatious or unreasonable".

35. There is, in my view, no reason to depart from the conclusions reached in the judgment. The respondent has acted entirely reasonably in its defence of the claim. The vast majority of the allegations against the respondent were rejected by the Tribunal, and the Tribunal found that the claimant contributed 100% to his own dismissal.

36. The respondent will undoubtedly have occurred its own legal costs in defending the numerous and historic allegations made by the claimant, and could have made its own costs application, but chose not to. In circumstances where a respondent has successfully defended the bulk of a claim, and no compensation has been awarded to a claimant, it cannot be said that the respondent is unreasonable in defending a claim.

37. If any party has been unreasonable in the conduct of these proceedings, it is the claimant who has made repeated and very serious allegations of professional misconduct against the respondent's representatives and accused the respondent's witnesses of lying, in both cases without any evidence to support his allegations.

38. The claimant's application for costs is therefore refused.

13 May 2022

_____

Employment Judge Ayre

_____

JUDGMENT SENT TO THE PARTIES ON

24 May 2022

FOR THE TRIBUNAL OFFICE