



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103719/2020

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Held in Glasgow on 9 May 2022

**Employment Judge Shona MacLean
Tribunal Member Ijaz Ashraf
Tribunal Member Martha McAllister**

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Ms Margaret Johnston

**Claimant
In Person**

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Energy Agency

**Respondent
Represented by:
Mr E Mowat -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the application for reconsideration is refused and the original decision dated 23 November 2021 and issued to the parties on 13 December 2021 is confirmed.

REASONS

30 **Introduction**

1. A final hearing on liability took place between 11 and 15 October 2021, followed by a members' meeting on 9 November 2021. The Tribunal reserved its judgment.
2. The Tribunal's judgment dated 23 November 2021 was sent to the parties on 19 December 2021 (the original decision). It stated, "The judgment of the
35 Employment Tribunal is that the claimant's claims are dismissed."

3. The claimant made an application under rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Tribunal's Rules) for reconsideration of the original decision as "she believed that it was in the interests of justice to have the case reconsidered". The application included 24 "grounds and examples" of the Tribunal showing misunderstandings and bias in favour of the respondent.
4. A copy of the application was sent to the respondent. Mr Mowat, the respondent's representative responded to each of the "grounds and examples" stating that it was not necessary in the interests of the justice for the original decision to be reconsidered and that the application should be refused. A reconsideration hearing was fixed to consider the claimant's application.

The reconsideration hearing

5. The Employment Judge explained that under rule 70, the original decision will only be reconsidered where it is "necessary in the interests of justice to do so". This gave the Tribunal wide discretion. However, it did not mean that in every case where a litigant is not successful, they are automatically entitled to reconsider the original decision. The ground only applies where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order. The Judge also explained that the interests of justice as a ground for reconsideration relates to the interests of justice to both sides.
6. The claimant who appeared in person advised the Tribunal that the previous week she had seen a job advertisement for her job. She knew that this would happen. The claimant considered that this showed a pattern of behaviour by the respondent where employees were shoved out of their jobs and sometime later the job was readvertised with a change of job title, job description and salary. It was obvious to everyone that the restructure was never going to work. The claimant expected Mr Mowat to say that this was a different job and was to cover maternity leave. The claimant however believed that it was her job and she knew that this was going to happen.

7. Mr Mowat appeared for the respondent. He advised that he was unaware of the job advertisement to which the claimant referred until the claimant addressed the Tribunal. He took instructions then advised that a Project Coordinator was going on maternity leave. The advertised post was not relevant to the issue that the Tribunal had to determine. The Tribunal did not have any evidence about the advertisement and the circumstances behind it. It had no bearing on the claimant's application for reconsideration. It should not be taken into consideration.
8. Given that the advertisement for the post was placed in early May 2022 the Tribunal accepted that the evidence was not available at the final hearing. However the Tribunal did not consider the advertisement for a post almost a year after the claimant's dismissal was likely to have an important bearing on the result of the case. From the limited information available the job advertisement related to the role of Project Coordinator. During the redundancy process that post only became available if one of the existing three Project Coordinators was appointed to the role of Project Manager which is what happened. The claimant and Mr Turnbull applied for the then vacant role of Project Coordinator. The claimant was unsuccessful. At the final hearing there was no evidence to suggest that during the redundancy process the respondent knew or could have been expected to know that there would be a need to advertise for cover for the post of Project Coordinator. The Tribunal therefore did not take this information into consideration.
9. The claimant made oral submissions and referred to her written application. Mr Mowat then referred to his written response and made supplementary comments. The following is a summary of the parties positions.

The claimants position

10. From the claimant's written application and oral submissions the Tribunal understood that the claimant considered that the Tribunal had not given due weight on certain evidence which she considered was relevant to the issues to be determined and the Tribunal had not fully understood the effect of the stress and anxiety which she was under during the redundancy process and

in particular during the interviews for Project Coordinator and Project Assistant

11. The claimant maintained that she was not trying to re-argue or re-litigate the case but she considered that she was disadvantaged in comparison to her comparator because she was starting from a lower point with her medical condition at the time. The claimant felt that the respondent had not taken account of her illness during the process. The respondent showed no duty of care. The Tribunal also ignored the fact that the claimant was suffering from stress and anxiety during the whole restructuring and interview process.
12. The claimant also considered that the respondent's position with regard to policy was to cherry-pick which part of the policy they intended to apply. The respondent did not hold an individual consultation meeting. She was unaware that the meeting on 27 February 2020 was an at risk of redundancy meeting. She was not offered the right to be accompanied. The Tribunal was making excuses for the respondent by saying that they should have done things which they did not do. The claimant said that she had been working for the respondent for a long time. She therefore had more of an idea than most as to what is happening, that the respondent was a government funded organisation and were using taxpayers money.
13. The Tribunal ignored the evidence about the difference in pay; Mr Turnbull's role in the EES Pilot Post; the failure to follow policy and from the beginning the respondent knowing that there was no one in the ABS team suitable for the role of Quality Inspection Assistant. The Tribunal was wrong to prefer the evidence of the respondent's witnesses.

The respondent's position

14. Mr Mowat reminded the Tribunal of the types of matters that may be considered in reconsideration and referred the Tribunal to a EAT decision in *Liddington v 2Gether EAT/2002/1 6* at paragraph 34.

15. The respondent considered that the basis of the claimant's reconsideration application is that in its findings of fact and law the Tribunal showed a bias

5 towards the respondent. In support, the claimant refers to 24 separate points which she maintains establishes bias. Mr Mowat said that the points raised by her were primarily an attempt to relitigate the case by disputing the findings in fact made by the Tribunal; raising matters that were not directly relevant to the issues to be determined by the Tribunal; and rearguing the case.

16. Mr Mowat invited the Tribunal to refuse the application for reconsideration and confirm the original decision.

Deliberations

10 17. The Tribunal started deliberations by considering the original decision. The claims were direct age and sex discrimination and unfair dismissal. The less favourable treatment was the failure to select the claimant for the posts of Project Coordinator or Project Assistant and her selection for redundancy. The Tribunal reminded itself of the issues that it required to determine which were set out in paragraph 8 of the original decision.

15 18. The Tribunal set out in paragraph 7 of the original decision that not every fact that could be found in the documents or all the evidence was set out. The Tribunal set out the facts as found that were essential to its reasons and to find an understanding of the important parts of the evidence.

20 19. The Tribunal did not ignore evidence about the claimant's health. The Tribunal made findings about the claimant's discussions in October 2019 with Mr McGonigle about her illness; her period of sick absence in late 2019; and the effect on her of Mr McCann's behaviour. The Tribunal stated that it had no doubt that the claimant found the restructuring process and subsequent dismissal distressing. The claimant's evidence was that she had a very good
25 interview for the Project Coordinator post and had another good interview for the Project Assistant post. Ms Marquis' feedback on 3 March 2020 was that the claimant had a good interview for the Project Assistant post. The Tribunal was not considering a claim of disability discrimination.

30 20. The Tribunal made findings about Mr McCann's behaviour towards the claimant and the manner in which the respondent dealt with the claimant's

concerns. The claimant says that the Tribunal did not acknowledge that what Mr McCann was subjecting her to was unlawful under the Equality Act 2010. The Tribunal was not considering a claim of harassment related to a protected characteristic.

5 21. The Tribunal appreciated that the claimant had made contemporaneous notes throughout the redundancy process. Given that they were contemporaneous, the Tribunal placed significant weight on them. However, they were notes of the claimant's recollection and perception of the events. The Tribunal heard
10 evidence from other witnesses who had different recollection of events. The Tribunal acknowledged that at times there were discrepancies with the respondent's evidence. However, the Tribunal would have been more concerned that if after all the absence of time, there were not inconsistencies as that may have pointed to some sort of collusion on the respondent's
15 witnesses part. The Tribunal had to carefully weigh up the evidence before it and in paragraphs 100 to 111 of the original decision, the Tribunal set out its observations on the witnesses and where there was conflicting evidence, why the Tribunal reached the finding that it did.

22. The Tribunal appreciated that the claimant was disappointed in its findings but when there is conflicting evidence, the Tribunal's role is to assess of the
20 evidence which is presented. The Tribunal made findings in fact in relation to consultation; the meetings on 27 February 2020 and the meeting on 3 March 2020. Having made those findings the Tribunal set out its reasoning for having reached the conclusion that it did.

23. The Tribunal did not ignore the EES Pilot post. The Tribunal made findings in
25 fact about this post: there was funding for two years and the anticipation was that Mr Turnbull would revert to the Project Officer role on a full time basis when the pilot came to an end on 31 March 2020. The claimant was not pursuing an equal pay claim. The Tribunal did however consider the issue of the differential in pay in the context of direct sex discrimination and viewed
30 that there was insufficient evidence to draw any inference.

24. The Tribunal made findings about the policy and procedure adopted by the respondent. The Tribunal made critical comments, not excuses about the suitability of the respondent's framework for managing workforce and change of procedure. The Tribunal took this into consideration when deciding whether the respondent acted reasonably in terms of section 98(4) of the Employment Rights Act 1996.
25. The Tribunal made findings about the Quality Inspection Assistant post. The Tribunal did not ignore the comments made by Mr McGonigal about the suitability of the employees in the ABS team for this role. At the outset of the restructuring process Mr McGonigal's evidence was that he did not know who would apply for what roles and whether they would be successful. The claimant was the only member of the ABS team who applied for the Quality Inspection Assistance post. Mr McGonigal's evidence was that neither the claimant nor Mr McCann (who did not apply for that role) had the required knowledge or skills or experience for that role. At that point Mr Turnbull had already been appointed to the Project Coordinator role.
26. The Tribunal considered the issue of suitable alternative employment. The claimant did not consider that the HRA post constituted alternative employment. In any event, she was given the opportunity to express an interest in it and did not do so within the time limits set nor she did raise the failure to be interviewed as an issue at appeal. The Tribunal considered the advisors roles and concluded that they were not suitable alternative employment and in any event had been filled by 3 March 2020.
27. The Tribunal made findings in fact about the interview notes. It did consider the claimant's submission that the interview notes were fabricated and set out the reasons why it made the conclusions that it.
28. The Tribunal considered the background to the restructuring process, the way in which the restructuring process was handled and the outcome.
29. The claimant was told that she had been unsuccessful at interview. The Tribunal considered the "busier" comment made by Ms Marquis and concluded that there was no evidence to infer that the claimant's age had any

- 5 impact on her ability to undertake her existing role or any more challenging one. The Tribunal considered the claimant not being interviewed for the HRA role and concluded that the claimant's age and sex had no bearing on that. The Tribunal also considered Ms Marquis raising the claimant's membership of the pension scheme and concluded that it was understandable in the context.
- 10 30. The Tribunal made findings in relation to the appeal process. The Tribunal took account of the appeal process when reaching its decision in the case. The Tribunal commented about the appropriateness of Councillor Cochrane hearing the appeal as chair of the respondent's board of management.
31. The Tribunal considered the issue of alternative employment and concluded there were no opportunities at the time the claimant's notice period expired. The Tribunal accepts that circumstances change. However it was considering the issue at the date the claimant's employment ended.
- 15 32. In reaching its conclusion that the decision to dismiss fell within the band of reasonable responses, the Tribunal made detailed findings in fact and then applied the legal tests to those findings. While the Tribunal had sympathy towards the claimant and her situation it was not for the Tribunal to substitute how it would have conducted the restructuring process.
- 20 33. The claimant argued that the Tribunal was biased in favour of the respondent. The Tribunal has set out reasons why it made the various findings in fact. The Tribunal considered the claimant's position and in certain aspects criticised the respondent. The Tribunal accepted that the claimant has a different view of the evidence and the respondent's witnesses. However reconsideration is not an opportunity to reargue the case.
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34. The Tribunal concluded that in its view, it was not necessary in the interests of justice for the judgment to be reconsidered. The Tribunal confirmed the original decision.

Employment Judge: Shona MacLean
Date of Judgment: 23 May 2022
Entered in register: 25 May 2022
and copied to parties

