



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Rodgers

**Respondent:** Ministry of Defence

**Heard at:** Leeds (in chambers)                      **On:** 27 June 2022

**Before:** Employment Judge Knowles

## JUDGMENT UPON APPLICATION FOR RECONSIDERATION

The Claimant's application dated 24 March 2022 for reconsideration of the Judgment sent to the parties on 10 March 2022 is refused.

## REASONS

### Presenting history

1. References in this Judgment to Rules are to rules contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
2. On 8 March 2022 I heard the Respondent's application to strike out part of the Claimant's claim, specifically the part relating to a failure to make reasonable adjustments under Sections 20 and 21 of the Equality Act 2010.
3. I reserved my Judgment upon the application due to insufficient time.
4. I attended to my determination and reasons the same day, 8 March 2022.
5. My reserved Judgment with reserved Reasons were promulgated in the Respondent's favour on 9 March 2022. That part of the Claimant's claim was struck out because the Claimant had, I concluded, no reasonably arguable case

that those claims were brought in time or that time should be extended under just and equitable principles.

6. The Claimant issued an application for reconsideration of my Judgment on 24 March 2022. The judgment was promulgated and sent to the parties on 10 March 2022. The application was made in time.

7. I did not conclude from reading the application that there was no reasonable prospect of the decision being varied or revoked and on 26 April 2022 invited the comments of the Respondent on the application and of both parties on whether the matter required a hearing or could be dealt with on the papers.

8. On 27 April 2022 the Claimant responded stating that she is content for consideration on the papers because she has recently been diagnosed with PTSD and would benefit from being subjected to as little stress as possible.

9. On 9 May 2022 the Respondent responded stating that the reconsideration application can be dealt with on the papers and to do so would be in accordance with the overriding objective. They noted that is also the Claimant's preference, in view of her health.

10. I conclude that a hearing is not necessary in the interests of justice. I deal with the matter on the basis of the Claimant's application and Respondent's response on the papers.

## **The Application**

11. The Claimant's application for reconsideration is considerable in length and in detail. It runs to 16 pages and the word count provided in the MS Word document is 9,153 words.

12. I summarise the application because I consider that is the appropriate way to understand it as a whole. I do not set out below every point included by the Claimant although I have considered each and every point carefully in order to consider her application.

13. The Claimant's application begins in her numbered paragraphs 1-7 by adding further evidence concerning matters up to March 2020.

14. There are two paragraphs numbered 8. In the first, the Claimant refers to being contacted about a change in line manager in April 2021, but her attachment email is dated April 2020. In the second the Claimant refers to complaints about not working from home in April 2020.

15. In paragraph 9 the Claimant refers to returning to work at the same location after her period of special leave.

16. In paragraph 10 the application the Claimant makes further comments concerning her return to work in December 2020, suggesting that there was cause to make a complaint to the Employment Tribunal at that stage.

17. In paragraph 11 the Claimant refers to being given a laptop and being told that she could work from home in January 2021.

18. In paragraph 12 the Claimant makes incorrectly dated assertions which she suggests span December 2021 to January 2022 but that matters she refers to are those referred to in paragraph 11, occurring in January 2021.

19. In paragraph 13 the Claimant expresses opinion concerning the Respondent's motivation in relation to the suggestion that she work from home made in January 2021. The Claimant's comments are speculative and I do not consider that the Claimant is advancing specific evidence.

20. In paragraph 14 the Claimant explains that she had time to reflect on the situation in December 2021 over Christmas.

21. In paragraph 15 the Claimant refers again to no action being taken between December 2019 and 14 January 2022.

22. In paragraph 16 the Claimant expresses her feelings about the situation and the impact that it had upon her.

23. In paragraph 17 the Claimant expresses that on 14 December 2021 she realised that the Respondent was not going to make any changes and began her ACAS early conciliation process then Tribunal claim.

24. In paragraph 18 the Claimant criticises the Respondent for not serving their skeleton argument until the evening before the preliminary hearing before me. The Claimant advances further factual allegations concerning her request for a compassionate transfer to Northern Ireland and concerning her complaints and the process undertaken in relation to those complaints in 2021.

25. In paragraph 19 the Claimant refers to paragraph 10 of my judgment and appears to criticise this. In that paragraph I merely record that the Claimant had engaged with the application to strike out in her agenda form. The Claimant refers to her naively believing that there was nothing that could be done about the failure to make adjustments because she had now left the Respondent's employment.

26. In paragraph 20 the Claimant refers to Matuzowicz, and refers to conditions in the workplace from 3 December 2019 to 18 March 2020 and from 11 to 15 December 2020 and the absence of communication about the issues up to 14 January 2022.

27. In paragraphs numbered 21 (there are 9 paragraphs numbered 21 each with a separate point of appeal) the Claimant engages with the Respondent's submissions made at the preliminary hearing. However, although more detail is added, there is nothing new raised by the Claimant. These are, in effect, the submissions and points that were raised at the preliminary hearing.

28. In paragraphs numbered 22 (there are 3 paragraphs numbered 22 each with separate points of appeal, the Claimant repeats points that she had made at the previous preliminary hearing concerning there being no changes within her workplace therefore there was no prejudice in allowing time to be extended.

29. In paragraphs numbered 23 (there are 4) the Claimant refers to there being different building on site. There appears to be no dispute between the parties nor any misunderstanding concerning this.

30. In paragraph 24 the Claimant refers to the absence of a decision to relocate her persisting until she was dismissed 14 January 2022.

31. In paragraph 25 the Claimant reiterates the continuation of points concerning her transfer and a failure to resolve this issues by the time she was dismissed.

32. In paragraph 26 the Claimant repeats points concerning her return to work in December 2020 and to the provision of a laptop in January 2021.

33. In paragraph 27 the Claimant repeats a distinction made between buildings operated by the Respondent. Although she does not expressly make the point, I assume that the Claimant is now suggesting that there were alternative premises that would have been suitable to her at which she could have worked. I do not consider that this was ever in contention; she had made comments about post-rotation which I took to mean redeployment within the Respondent to other premises.

34. In paragraph 28 the Claimant repeats her assertion that there was a continuation of affairs concerning adjustments until January 2022 when she was dismissed.

35. In paragraph 29 the Claimant, in effect, repeats the above assertion.

36. In paragraph 30 the Claimant states she would suffer prejudice if her claims were to be struck out.

37. In paragraph 31 the Claimant states that it would be just and equitable to extend time because all of these matters affected her self-esteem and self-confidence and unable to speak up for herself.

38. In paragraph 33 (there is no appeal point in paragraph 32, it is a recital of the relevant paragraph in my judgment) the Claimant refers to her decision to state in her agenda form not to seek remedy and to her comments during the preliminary hearing that there were more important aspects to her case. She seeks to retract those points.

39. In paragraph 34 the Claimant repeats points about the prejudice that she would suffer were time not extended.

40. In paragraphs 35 and 36 the Claimant makes assertions concerning matters about her other claims.

### **The Respondent's response to the application**

41. The Respondent makes the following points in reply to the Claimant's application:

- a. In paragraph 1 the Claimant refers to a workplace assessment not having been undertaken, and what effect this might have had. The suggestion is that this ought to have taken place in or before March 2020. Accordingly, it has no bearing on the timeline referred to in the judgment.

- b. It is respectfully submitted that paragraphs 2 through to 8 add nothing further to the Claimant's position. The EJ clearly took note of the Claimant's mitigating factors as to why she did not proceed with a claim earlier (see paras 25, 63 and 64 of the judgment).
- c. The Claimant's second paragraph 8 relates to conditions in terms of working from home. That was not the subject of the Respondent's application or the judgment.
- d. Paragraphs 9 and 10 allege that there was a continuing state of affairs because the Claimant returned to the workplace in December 2020. The Respondent avers as follows:
  - i. The Claimant's reference to being put in a 'converted storeroom' suggests that she was placed elsewhere to her location in March 2020. This would not be a continuing state of affairs, but a different claim relating to different conditions;
  - ii. The suggestion that the Claimant returned to work in December 2020 and that the conditions were part of a continuing state of affairs does not appear in the Claimant's Particulars of Claim. The EJ recognised that special leave was until December 2020 (para 25e) and that the Claimant alleged that a safe position had not been reached before December 2021 (para 25h). However, he also recognised that the Claimant's response to the continuing state of affairs point was to introduce new facts, without an application to amend (para 52). That is the effect of the Claimant's reference to December 2020;
  - iii. The EJ's conclusion, that the allegations refer to matters that were determined (para 56), is sound (as a quick read of paras 9-11 of the Particulars of Claim demonstrates);
  - iv. It should be noted that, even if the Claimant were correct, the latest date of the Claimant having been in the office would be circa 4 January 2021 (see her paragraph 11). That is still more than 11 months prior to ACAS being notified. The result would likely be the same in any event;
  - v. The suggestion, in paragraph 11, that there was always a prospect of returning to the workplace, does not represent a failure to make reasonable adjustments to the work environment: the Claimant was not working in the office, therefore there was no PCP, no disadvantage and no duty to make adjustments.
- e. It is respectfully submitted that paragraphs 12 to 17 add nothing further to the issues at hand.
- f. Regarding paragraph 18, the Respondent provided the skeleton argument more than 24 hours in advance of the preliminary hearing. There was no order for a skeleton argument to be produced and thus the Respondent was not in breach of any such order. The document was provided in advance in order to assist the Claimant and the

Tribunal; the Respondent was under no obligation to do so. The authorities were all those which the Tribunal would already have been familiar with, and which the Tribunal will have had to have regard to, irrespective of whether the Respondent sent them to the Claimant and/or sought to rely upon them.

- g. It is not clear what point paragraph 19 is making. As noted in the judgment (para 12), considerable time was spent by the EJ discussing the nature of the application. The Claimant was also given time to consider her position (para 13).
- h. As to paragraph 20, Matuszowicz is settled law. The Respondent's understanding of the EJ Knowles' judgment is that the EJ concluded that, in any event, time started to run in March 2020 because matters had actually been decided (rather than there having been a failure to do something, which would have required consideration of when that 'something' ought reasonably to have been done); see paragraph 56 of the judgment.
- i. The various paragraph 21s deal with arguments already discussed or with matters which were taken into account by the EJ. The EJ appropriately took into account the Claimant's arguments, including those in relation to why the claim was not submitted sooner (paragraphs 25, 64 and 65). The Claimant's position was (again, appropriately) balanced with that of the Respondent.
- j. It is submitted that the Claimant's paragraph 22 does not add anything to the issues. As to paragraph 23, it is submitted that it's actually irrelevant whether the buildings were the same; the point is that the Claimant had been told that she could not be moved (i.e. decision made, so not a continuing state of affairs).
- k. Paragraphs 24 to 34 have, broadly, been addressed in relation to other paragraphs. Paragraphs 35 and 36 are not relevant to the issues before the Tribunal.

## **The Law**

42. Rule 70 of Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 sets out the right to apply for reconsideration. Rule 71 deals with the time in which an application should be made and how. Rule 72 deals with procedural matters concerning disposal.

43. There is only one ground for reconsideration in the rules which is where is necessary in the interests of justice.

44. I must seek to give effect to the overriding objective to deal with cases 'fairly and justly' under Rule 2 which includes ensuring that the parties are on an equal footing; dealing with cases in ways which are proportionate to the complexity and importance of the issues avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense.

45. In *Stevenson v Golden Wonder Ltd 1977 IRLR 474, EAT*, Lord McDonald said of the old review provisions that they were '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'.

46. There must be finality in proceedings and the reconsideration process should not generally be used to gain a "second bite at the cherry" (*Todd t/a Hygia Professional Training v Cutter UKEAT/0063/07*).

## **Conclusions**

47. In my conclusion, the Claimant has raised no material new points.

48. I firstly make some generic observations concerning the application.

49. I have no doubt that the application has been made in good faith and that the Claimant genuinely believes that the judgment which I made previously which was not in her favour ought to be changed.

50. However, the Claimant's application for reconsideration is in the vast majority of its content a repetition of the points which were made at the preliminary hearing.

51. Many of those points are made repetitively in the application.

52. There is additional factual evidence provided in some parts of the application. There is simply more detail provided.

53. The last hearing was listed for 3 hours. That included the time to hear from both parties but I had to reserve my judgment.

54. The Claimant has made a written application for reconsideration which can barely be read in that time.

55. But the points made, where additional evidence and detail has been provided are more of the same points which were available to the Claimant at the time of the last preliminary hearing

56. Notably, they are not points made in the claim form.

57. The application is, I regret, an attempt to avoid the time limitation issues presented by the Claim by introducing new matters which were never mentioned in the original claim form. There has never been any application to amend the claim.

58. I now turn to some details concerning the application.

59. Paragraphs 1-7 add additional details about the matters which were considered at the preliminary hearing covering the period to March 2020. There is nothing in the additional information within these paragraphs which advance the Claimant's claims concerning time.

60. None of the matters set out in paragraph 8 concern issues set out in the Claimant's claim.

61. Paragraphs 9 to 11 concern matters which were raised at the previous preliminary hearing; they amount to repetition.
62. Paragraphs 12 to 17 add nothing further other than the Claimant giving further reasons why she waited before bringing her claim. These appear to be additional points having reflected on what she might have said at the hearing having read the judgment. I do not doubt that they are true expressions of how she felt at the time but they do not advance her case concerning there having been a continuing act. They may go towards justice and equity in relation to extending time, but they are not matters which would lead me to conclude that she has a prima facie case that time should be extended. I previously took into account what the Claimant told me about the hardship she suffered during the pandemic and during the period of delay.
63. In relation to paragraph 18, the Respondent sent their skeleton argument on the eve of the hearing but was under no obligation to do so. I appreciate that the Claimant may have said more had she had more time to reflect on the skeleton argument but I take it that the content of her application for reconsideration is the full extent of what she might have said had the skeleton argument been delivered earlier. The impact of the timing of the delivery of the skeleton argument can therefore be accounted for through this reconsideration application.
64. Paragraph 19 appears to be objection to a paragraph in my judgment where I simply record what the Claimant had set out in her agenda form. The Claimant had engaged with the strike out application in her agenda form.
65. Paragraphs 20 to 22 in the application for reconsideration are repetition with some more details added. The additional details do not advance the Claimant's case in answering the Respondent's application to strike out her claim.
66. Paragraph 23 conflates issues concerning premises. It was always understood that the Respondent had other buildings they might have moved the Claimant to. The Claimant made repeated reference to redeployment at the preliminary hearing.
67. Paragraphs 24 to 29 are repetition of points already made in the previous hearing or earlier in the application.
68. Paragraph 30 repeats issues raised at the previous hearing. I took into account prejudice to the Claimant in determining whether or not to strike out the relevant parts of her claim.
69. Paragraph 31 adds nothing material to the claims of hardship during the period of the pandemic and during the delay in pursuing her claims; I took hardship into account.
70. Paragraph 33, specifically the retraction sought by the Claimant, are the very reason I gave the Claimant more time to reflect when she appeared to give up her claims at the outset of the preliminary hearing.
71. Paragraph 34 is repetition.
72. Paragraphs 35 and 36 concern the Claimant's claims which were not struck out, and had no relevance to the preliminary hearing or the claims under



consideration other than to note that the Claimant had other claims which she had indicated to me, whether retracted or not, were more important to her.

73. Looking at the application for reconsideration in the round, in my conclusion the Claimant is seeking both to rehearse points which were considered at the previous hearing and to further adduce evidence which was not set out in her original claim but was available before.

74. The Claimant is, I conclude, seeking a second bite at the cherry.

75. The Claimant's application for reconsideration is not well founded and is refused.

Employment Judge Knowles

27 June 2022