EMPLOYMENT TRIBUNALS

Claimant: Mrs B Knight

Respondent: Havant & South Downs College

Heard at: **Southampton (by CVP)** **On:** **6th July 2022**

Before: **Employment Judge Dawson, Dr Thornback, Mr Spry-Shute**

Appearances

For the claimant: Mr Davies, solicitor
For the respondent: Mr Griffiths, Counsel

UPON APPLICATION made by email dated 6th January 2022 to reconsider the judgment dated 7 December 2021 under rule 71 of the Employment Tribunals Rules of Procedure 2013

JUDGMENT

1. Paragraph 3 of the judgment is varied so that it reads as follows:

    a. The claim of harassment based on the email sent by Ms Scott to Ms Richardson dated 5 December 2019 succeeds.

    b. The constructive dismissal of the claimant was an act of harassment.

    c. All other claims of the claimant are dismissed.

REASONS

Introduction

1. By an application sent to the tribunal on 6 January 2022 the claimant applied for reconsideration of the tribunal's judgment dated 7 December 2021.

2. The application was considered by Employment Judge Dawson. On 21 January 2022, he directed that whilst most of the application for reconsideration gave rise to no reasonable prospect of the original decision being varied or revoked, the application in respect of whether the E & D remark could have been grounds for resignation and so give rise to a discrimination claim, had a reasonable prospect of success if the tribunal had misunderstood the date on which the claimant became aware of the remark.

3. The reference to the E & D remark is a reference to an email dated 5 December 2019 in which Ms Scott wrote to Ms Richardson stating "unfortunately, she [the claimant] is now throwing the E & D Black comment at me too. I have spoken with People Services and they have advised that you now take this up with them. There are issues here with capability and compliance." (Hearing Bundle page 242).

4. The tribunal had found that the claimant only became aware of that email after disclosure had taken place in the employment tribunal proceedings and therefore could not have been a reason for the claimant's resignation. It had also found that if the claimant only became aware of the email at that stage, she had not brought a claim of harassment in respect of it.

5. Employment Judge Dawson did not consider that there was no reasonable prospect of the original decision being varied or revoked and therefore did not refuse the application at that stage, but instead listed it for a hearing. Directions were sent on 21 January 2022 which stated that, given that the application was being listed, the claimant would be permitted to present her full reconsideration application.

6. The application was originally listed for hearing on 2 March 2022 but was adjourned on that day to allow the respondent to set out its response to the application, in writing. The application was adjourned to 6th and 7 July 2022.

7. The respondent provided a written response to the application on 16 March 2022 which focused on the harassment claim which the claimant alleged arose out of the E & D remark.

8. The claimant's application runs to 12 pages and seeks reconsideration of a number of decisions of the tribunal. However, at the outset of this hearing the claimant's solicitor provided opening submissions in which he stated that he was only proceeding with the matters that Employment Judge Dawson had identified as having a reasonable prospect of success.

9. In the event both parties made submissions which focused on;

    a. paragraph 147 of the tribunal's judgment, which held that the claim of harassment based on the email of 5 December 2019 could not succeed because the claimant had not brought a claim in respect of how she felt once she became aware of the accusation when disclosure took place in these proceedings and;

    b. paragraph 240b of the tribunal's judgment, which held that because the claimant was unaware of the email of 5 December 2019 when she resigned, Ms Scott's comment could not have been part of the reason for her resignation.

10. The claimant's case, at the reconsideration hearing, was that she had become aware of the email between 16 March 2022 and 26 May 2022. She submitted that in those circumstances there was an act of harassment when she read the email and that she had presented a claim to the tribunal in that respect. She further submitted that if she was aware of the email at the point of her resignation, then the constructive dismissal was an act of discrimination or harassment in any event.

11. The respondent submitted that the claimant had not presented her claim in that way at the final hearing, that the tribunal had determined the case as presented and it was inappropriate to reopen the case upon reconsideration. Moreover, it did not accept that there was any evidence that the email of 5 December 2019 was a reason for the claimant's resignation.

The Law on Reconsideration

12. The relevant tribunal rules are rules 70 – 72 Employment Tribunals Rules of Procedure

13. In approaching the application for reconsideration we have considered the cases of *Flint v Eastern Electricity Board [1975] ICR 395* and *Outasight VB v Brown [2015] ICR D11*. The principles set out in those judgments are helpfully summarised in the more recent case of *Ministry of Justice v Burton [2016] ICR 1128,* where at paragraph 21 the Court of Appeal stated "An employment tribunal has a power to review a decision "where it is necessary in the interests of justice": see rule 70 of the Employment Tribunals Rules of Procedure 2013. This was one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, as Underhill J pointed out in *Newcastle upon Tyne City Council v Marsden [2010] ICR 743*, para 17 the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (*Flint v Eastern Electricity Board* [1975] ICR 395) which militates against the discretion being exercised too readily; and in *Lindsay v Ironsides Ray & Vials* [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will

not generally justify granting a review. In my judgment, these principles are particularly relevant here"

14. The parties were in agreement that the tribunal must engage in a two-stage test in considering an application under rule 70, firstly to consider whether it is necessary in the interests of justice to reconsider the judgment and, if so, to confirm, vary or revoke (and re-take) the original decision. Both parties were aware that tribunal would make those decisions at the same time and stated that they had made all the submissions they wanted to.

Should the original decision be reconsidered?

15. It is necessary to set out in a little detail how the situation which currently exists was arrived at.

16. It is not in dispute that Ms Scott had sent an email to Ms Richardson on 5 December 2019. As stated above, the email read “Unfortunately, she is also throwing the E&D Black comment at me too. I have spoken with People Services and they have advised that you now take this up with them. There are issues here with capability and compliance”

17. At paragraph 144 of the judgment, the tribunal recorded that it had not been suggested that the claimant became aware of the accusation contained in that email before disclosure in these proceedings took place. The tribunal then proceeded on the basis that it was at the disclosure stage that the claimant became aware of the email. On that basis it reached the conclusions we have referred to above.

18. The respondent argues that nowhere did the claimant actually address when she became aware of the email, she did not address it in her witness statement and it did not form part of the claimant’s submissions and therefore the tribunal’s approach was correct..

19. However, in her application for reconsideration, the claimant shows that she was, in fact, aware of the email substantially before disclosure took place and that information was before the tribunal, as set out below.

20. On 26 May 2020, at an early stage of the proceedings, the claimant sent a document to the tribunal described as “further clarification of the race discrimination claim as requested by the respondent”. The document was 19 pages long and somewhat dense. That document was in the hearing bundle starting at page 121. Nine pages into the document, at paragraph 25, the claimant refers to the email of 5 December 2019 and goes on to state “The comments by CS (HSDC’s Teaching, Learning and Quality manager), weren’t only unprofessional but very discriminatory by dismissing my complaint as ‘throwing the E&D Black comment,’ insinuating that I am playing the race card. I find her comment quite offensive, very unprofessional and further evidence of victimisation and discrimination”(paragraph 26 of the document).

21. At this hearing the respondent accepted that we could take account of paragraph 25 and 26 of that document for the purposes of making our decision and that those paragraphs went to the evidential mix before the tribunal.

22. That document had then been considered at a Case Management hearing on 27th October 2020. The judge had recorded, at paragraph 42 of his Summary, "On 26 May 2020 the claimant emailed a very lengthy 19-page document, said to comprise her further and better particulars of claim. This was somewhat convoluted and unclear, again in a narrative form, but did clarify that the claimant sought to bring claims of direct race discrimination, harassment related to race and victimisation, also relying on matters either not referred to in the original claim form" (sic.)

23. Today, the claimant says that she became aware of the email after the grievance bundle was sent to her and points out that the email is listed in the index to the grievance bundle at document 4b on page 303 of the hearing bundle. The claimant tells us that was on 2 March 2020. The respondent, , submits that the claimant cannot adduce new evidence which could have been available at the hearing and we agree with it on that point. However, we find that it does not make much difference when, precisely, the claimant became aware of the email. It must have been after the 5 December 2019 (when the email was written) and it must have been before 26 May 2020 (when the further information was sent to the tribunal).

24. The list of issues created for the hearing did list as an act of harassment the email of 5 December 2019 and asserted that the email amounted to a repudiatory breach of the contract of employment.

25. At this hearing both parties agreed that the correct legal position is that if the email did amount to an act of harassment, it did not do so until the claimant became aware of it. That is the position that the tribunal had proceeded on at the original hearing, but did so on the basis that the claimant had not become aware of the email until proceedings were well underway. It concluded that in the absence of any application to amend her claim form, the claimant had not made a claim of harassment based upon her becoming aware of the email.

26. At this hearing the respondent urges upon the tribunal the argument that its decision was correct. As we have said, in particular it points out that nowhere has the claimant described finding the email or becoming aware of it or how she felt.

27. Notwithstanding the force of the respondent's submissions, we have concluded that as a tribunal, we made a mistake. We failed to spot the reference to the email of 5 December 2019 in the claimant's further information that she sent to the tribunal on 26 May 2020. That information was in the bundle and had we been aware of it, we would not have proceeded on the basis that the claimant did not become aware of the email until disclosure in the proceedings had taken place. Whilst it might be said that the way the claimant presented her case did not assist the Tribunal to find that date, the fact remains that the tribunal proceeded on an inaccurate basis and may, therefore, have reached conclusions which we would not otherwise have reached.

28. Whilst we are deeply conscious of the importance of finality of litigation, this is not a case where the claimant is seeking to have a 2nd bite of the cherry or put her case on a different basis to that on which was put before the tribunal. It is not a case where there were conflicting versions of events and the tribunal had to decide which one it preferred. It is a case where the claimant's case was properly before the tribunal. Whilst the respondent can, properly, say that the claimant's case did not address when she became aware of the email, the case which she presented to the tribunal was that she was aware of it and that she found the comments "quite offensive, very unprofessional and further evidence of victimisation and discrimination."

29. We consider that the claimant is entitled to have her claim determined on the basis that it was put to the tribunal and it is in the interests of justice for the decision to be reconsidered in those circumstances.

30. We therefore move to the next stage of the reconsideration application.

Confirming, Varying or Revoking the Decisions

31. As indicated, there are 2 ways in which the claimant seeks to persuade us that we should vary our decision.

32. The first is that we should find that there was an act of harassment when she became aware of the email of 5 December 2019.

33. The second is that we should find that the claimant was aware of the email of 5 December 2019 when she resigned (on 2 February 2021) and that it formed part of the reason for her resignation. If so, the claimant argues, the dismissal was an act of harassment. She relies upon the case of *Driscoll v & P Global EA-2020-000876-LA.*

An Act of Harassment

34. As already indicated, both parties accept that the act of harassment would only occur when the claimant became aware of the email.

35. We found, at paragraphs 144 to 145 of our judgment, that the email amounted to conduct which was unwanted and that it related to the claimant's race. It has not been suggested that our findings were wrong in that respect and we remain of those views. At paragraph 147 we concluded that had the claimant been aware of the comments it would have had the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

36. We now conclude that by 26 May 2020, at the latest, the claimant was aware of the comments in the email. We consider that reading that email and realising that a senior colleague had described her, to another colleague, as "throwing the E & D Black comment at me too" would have, reasonably, had the effect of creating an intimidating, hostile and offensive environment for her. The email suggests that colleagues were talking about the claimant and suggesting that, rather than believing she was advancing arguments in good faith, they were

asserting that she was simply "throwing" comments based on her own race at her colleagues.

37. A claim based on those facts was before the tribunal. It appeared in the further information provided by the claimant, it was referred to in the case management order we have referred to and it appeared in the list of issues. Whilst the claimant did not give evidence about when she read the email or about how she felt when she read the email, it is clear that she had read the email by 26 May 2020. In paragraph 26 of the further information document, a paragraph which the respondent accepts that we can take into account in reaching our decision, the claimant said that she found the email quite offensive and that it insinuated that she was playing the race card. That was a reasonable view for her to take.

38. We note that although the claim form had been issued by 26 May 2020, the respondent has not suggested that for the tribunal to consider a claim on this basis any amendment to the claim form is needed. The claim based on the email (albeit incorrectly dated as 4 December 2019) had been set out in the agreed list of issues which had been drafted by the respondent and was approved by EJ Emerton as long ago as 27 October 2020. In any event, it would have been difficult for the respondent to resist an application to amend given the length of time which it has been aware of the allegation for, the fact that it has appeared in the list of issues since October 2020 and the fact that both parties were able to present their cases in respect of it.

39. Thus we consider that our original decision should be revoked and be re-taken. In re-taking the decision, we find that there was unwanted conduct (the sending of the email), the unwanted conduct related to race and it reasonably had the effect of violating the claimant's dignity and creating an intimidating hostile and offensive environment for her. The claim in this respect should therefore succeed and we order accordingly.

Claim of Constructive Dismissal

40. The claimant argues that it follows from paragraph 240b of our judgment that if the claimant knew about the 5th December 2019 email at the point she resigned, the harassment must have been a reason for the resignation and therefore the dismissal must be considered discriminatory.

41. We do not read our judgment in quite that way. We had proceeded on the basis that the claimant did not know of the email of the date of her resignation. We did not consider the alternative question of whether, if she had known of it, it would have been a reason for her resignation.

42. For the respondent, it is pointed out that there is a significant time lapse between the claimant becoming aware of the email and her resignation. The respondent argues that the awareness of the email cannot be assumed to be part of the reason for her resignation.

43. Because the claimant was, in fact, aware of the email at the point of her resignation, it is necessary for us to revoke our decision and take it again.

44. We do not accept the analysis is as straightforward as that contended for by the claimant. We must decide whether the email was a reason for her resignation. The evidence in this respect is somewhat thin. The claimant does not address in any detail the reasons for her resignation in her witness statement. Some assistance is found in the section where she talks about the last straw but not much. The claimant states [143]…"It was clear that the race equality week was merely ticking a box without any real desire, by the respondent, to challenge any racist stereotyping or fight discrimination. It was the last straw. [144] The respondent had continued to refuse to investigate and act against alleged discriminators but chose instead to punish me for standing up against inequality and injustice. This is an organisation whose claims for supporting race equality are completely out of sync with its actions".

45. Given the lack of evidence in the claimant's statement, it is tempting simply to find that the claimant has not proved that a reason for her resignation was the email of 5th December 2019.

46. However, the tribunal must reach its findings of fact on the basis of all the evidence before it and the respondent has accepted that we should take into account what the claimant said in the further information which she provided to the tribunal.

47. Our findings were that a number of things had happened to the claimant over a lengthy period prior to her resignation and that those things had been the reason for her resignation. They were

    a. the method of giving feedback following the drop-in session on 3 December 2019,

    b. the fact that Ms Richardson had given misleading information to the internal investigation in 2020 and

    c. the fact that the respondent had failed to keep in touch with the claimant when was she was off sick, in accordance with the managing absence policy.

48. We find that if the claimant had been aware of the email of 5 December 2019 since May 2020 (which she was), she would not have ignored it or written it off as unimportant. It would have been upsetting to her and would have weighed on her mind to at least the same extent as the other factors which we have referred to above. That is consistent with the further information which she sent to the tribunal in 2020.

49. In further support of that conclusion we note that once the claimant had resigned and applied to amend her claim form to add a claim of constructive dismissal a further case management hearing took place. The hearing took place on 22 September 2021 and a list of issues had been prepared for that hearing. At paragraph 5.1.1 the list set out the breaches of contract relied upon for the constructive dismissal claim and included at 5.1.11 "4 December 2019, ignoring the claimant's complaints in relation to being placed on an IIP and accusing the claimant of "throwing the E & D black comment"". Thus from an

early stage the claimant was saying that the email was a reason for her resignation.

50. We also note that finding is consistent with paragraph 242 of our judgment where we stated "We find that all of the matters that the claimant knew about (apart from those in 2017) played a substantial role in her decision to resign".

51. We are satisfied, on the balance of probabilities, that in circumstances where the claimant was aware of the email of 5 December 2019 and had been aware of it since May 2020 at the latest, that email would have been a contributing factor to her resignation which would have had, at least, equal weight to the other reasons which caused her to resign.

52. We raised with the parties the appropriate test to apply in these circumstances and, in particular, the guidance of the Employment Appeal Tribunal in Lauren De Lacey v Wechseln UKEAT/0038/20/VP. In that case it was held:

> [68]…in *Williams v Governing Body of Alderman Davies Church in Wales Primary School* [2020] IRLR 589, at paragraph 89, HHJ Auerbach said that a constructive dismissal should be held to be discriminatory "if it is found that discriminatory conduct materially influenced the conduct that amounted to a repudiatory breach." At paragraph 90, HHJ Auerbach said that the question was whether "the discrimination thus far found sufficiently influenced the overall repudiatory breach, such that the constructive dismissal should be found to be discriminatory." (my emphasis)
>
> [69]. I respectfully agree with the test as it is set out in paragraph 90 of the Williams judgment. Where there is a range of matters that, taken together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory. In other words, it is a matter of degree whether discriminatory contributing factors render the constructive dismissal discriminatory. Like so many legal tests which are a matter of fact and degree, this test may well be easier to set out than to apply. There will be cases in which the discriminatory events or incidents are so central to the overall repudiatory conduct as to make it obvious that the dismissal is discriminatory. On the other hand, there will no doubt be cases in which the discriminatory events or incidents, though contributing to the sequence of events that culminates in constructive dismissal, are so minor or peripheral as to make it obvious that the overall dismissal is not discriminatory. However, there will be other cases, not falling at either end of the spectrum, in which it is more difficult for an ET to decide whether, overall, the dismissal was discriminatory. It is a matter for the judgment of the ET on the facts of each case, and I do not think that it would be helpful, or even possible, for the EAT to give general prescriptive guidance for ETs on this issue."

53. The claimant also referred us to the case of *Driscoll v V & P Global EA-2020-000876-LA* where it was held that "as a matter of law, where an employee (as defined by the EqA) resigns in response to repudiatory conduct which constitutes or includes unlawful harassment, his or her constructive dismissal is itself capable of constituting 'unwanted conduct' and, hence, an act of harassment, contrary to ss 26 and 40 of the EqA" (paragraph 73)

54. It was not suggested by the respondent that any issues of affirmation arose in this context.

55. We must decide whether we find that the discriminatory conduct (the act of harassment) did sufficiently influence the conduct that amounted to a repudiatory breach to say that the constructive dismissal was an act of harassment. We find that it did because whilst it was one of a number of reasons for her resignation it materially influenced the claimant in making her decision. Whilst the other repudiatory breaches were not acts of discrimination, the email was, we find, one of 4 main reasons why the claimant resigned. We find that the comments did have a significant influence on the claimant who, reasonably, felt that she was being accused of playing the race card. In those circumstances we find that the constructive dismissal was itself an act of harassment.

An observation on the reasons sent to the parties

56. During the reconsideration hearing, we raised with the parties we had noted that some of the paragraphs of the judgment which we had prepared and read to the parties at the end of the final hearing did not appear in the written reasons sent to the parties.

57. The paragraphs set out findings of fact in relation to the failure by the respondent to advertise the 2017 role and are summarised in paragraph 65 of the judgment. Paragraph 65 summarises the facts we found in respect of that issue, but the preceding paragraphs do not deal with all of the facts summarised. The missing paragraphs dealt with those facts which are summarised but not fully explained.

58. Given that the claimant has told the tribunal that if she succeeds on this application (which she has) she will no longer pursue the appeal to the Employment Appeal Tribunal and given that point was decided in the respondent's favour (because of the time issue) it would be redundant to issue further reasons which would include those paragraphs. They can, however, be provided if the Employment Appeal Tribunal or another court seeks further clarification of the tribunal's reasoning.

Employment Judge Dawson
Date: 11 July 2022

JUDGMENT SENT TO THE PARTIES ON
18 July 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP
The hearing was conducted by the parties attending by Cloud Video Platform. It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not appropriate in light of the restrictions required by the coronavirus pandemic and it was in accordance with the overriding objective to do so.