EMPLOYMENT TRIBUNALS

Claimant	**Respondents**
v	
Ms N Lifac	**Zoyo Capital Ltd (1)**
	Thomas Brennan-Banks (2)
	Ms Wei Wang (3)
	Mr D Powell (4)

Heard at: London South Employment Tribunal via CVP

On: 27 June 2022

Before: **EJ Webster**
Ms Christofi
Ms Smith

Appearances

For the Claimant:	**Mr Heard (Counsel)**
For the Respondent:	**Mr Brennan-Banks (Barrister and in-house counsel for the respondent)**

RECONSIDERATION JUDGMENT

1. The Claimant's application for reconsideration dated 11 January 2021 is allowed.

2. The liability Judgment dated 17 December 2020 is varied so that the upheld claims for discrimination under the Equality Act 2010 are recorded as upheld against all four respondents jointly and severally.

3. The claimant brought claims for direct disability discrimination, discrimination arising out of disability, failure to make reasonable adjustments and unauthorised deduction from wages. The discrimination claims were pursued against all four respondents.

4. The liability Judgment upheld the following claims against the first respondent only:

   (i) unauthorised deduction from wages,
   (ii) a claim for disability discrimination arising out of disability in relation to the requirement for her to go off sick between 22 February 2019 and 23 July 2019,
   (iii) a claim for direct disability discrimination regarding her being placed on sick leave between 22 February and 23 July 2019
   (iv) a claim for direct disability discrimination regarding a comment in a meeting on 14 March 2019 that the claimant transitioned from contractor to employee in orer to set up the 1st respondent and sue them for discrimination since summer 2018.

   The claimant's remaining discrimination claims were not upheld.

5. The factual conclusions made by the Tribunal found that the three individual respondents were all involved in the decision making which led to the claimant's claims yet the Tribunal concluded that they should not be found jointly and severally liable on the basis that it could not determine which individual had driven the behaviour or the decisions.

WRITTEN REASONS

6. A reserved liability Judgment dated 17 December 2020 and sent to the parties on 29 December 2020 upheld some of the Claimant's claims against the First Respondent (R1).

7. By letter dated 11 January 2021 the claimant applied for a reconsideration of the Tribunal's decision solely in respect of the decision to only uphold the claimant's disability discrimination claims against R1 as opposed to the second, third and fourth respondents. An appeal on the same grounds was lodged with the EAT. That has been stayed pending this reconsideration.

8. The respondents' views were sought in relation to the claimant's application. On receipt of these, EJ Webster ordered that the matter be considered at a hearing. That was today's hearing.

9. Oral reasons were given at the hearing and the respondents have asked for written reasons. They stated their intention to appeal.

10. Although Mr Brennan Banks is a barrister he explained that he is not an employment law expert and the Tribunal agreed that in order to place the parties on an equal footing we would consider him as a litigant in person.

Relevant Law

11. Rule 70 of Schedule 1, The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('The Rules') states that a Tribunal can reconsider its own judgment where it is necessary and in the interests of justice to do so.

"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."

12. Rule 72 of the Rules states

(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part."

S110 Equality Act 2010

Liability of employees and agents

(1) A person (A) contravenes this section if—

(a) A is an employee or agent,

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

(2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).

(3) A does not contravene this section if—

(a) A relies on a statement by the employer or principal that doing that thing is not a contravention of this Act, and

(b) it is reasonable for A to do so.

….

(6) Part 9 (enforcement) applies to a contravention of this section by A as if it were the contravention mentioned in subsection (1)(c).

Submissions

13. Mr Heard provided written submissions. In summary, Mr Heard stated that it was in the interests of justice for the tribunal to vary its original decision because it had made a legal error in only finding the first respondent liable for the discrimination. He stated that the Tribunal had not appropriately considered the case of Hackney London Borough Council v Sivanandan [2011] ICR 1374. He quoted the following passages which are most pertinent to the current case though the Tribunal read the entirety of the Judgment and the Court of Appeal's Judgment on the same matter.

On appeal the EAT (Underhill J) summarised the law (§16):

(1) Where the same, 'indivisible', damage is done to a claimant by concurrent tortfeasors – ie either tortfeasors who are liable for the same act (joint tortfeasors) or tortfeasors who separately contribute to the same damage – each is liable for the whole of that damage. As between any particular tortfeasor and the claimant no question of apportionment arises…

(2) It is obviously potentially unjust that a single tortfeasor may find himself responsible to the claimant for the entirety of damage for which others may also be liable or to which they may have contributed. That issue is addressed (in England and Wales) by the provisions of the 1978 Act. [Civil Liability (Contribution) Act 1978] Section 1 of that Act gives any person liable in respect

of any damage the right to claim 'contribution' from concurrent tortfeasors…It is important to emphasise that while this kind of 'apportionment', as it is often described…determines the liability of tortfeasors as between themselves, it has no impact on the liability of any of them to the claimant. The claimant can recover in full against whichever tortfeasor he chooses, and that tortfeasor has the burden of recovery of any contribution from the others, and the risk that they may not be solvent.

(3) The previous two points are concerned with damages which is indivisible. If there is a rational basis for distinguishing the damage caused by tortfeasor A from that caused by tortfeasor B the position is different. (This is the case, for example, where employers contribute at successive stages to the development of a progressive industrial disease, such as deafness.) In such a case the court will hold A and B liable for the claimant for the part only of the damage which is attributable to each of them… "

14. Mr Heard's written submissions went on as follows:

"24. The discrimination claims were brought against all Rs (R1-R4). It is clear that the Tribunal found that the placing of the discriminatory act of placing Claimant on sick leave was done collectively by R2-R4 on behalf of R1.

25. As to the subterfuge allegation, it is clear that the Tribunal found that R2 made the comment in a context where R2-R4 were discussing the situation and C's disability. Clearly, the Tribunal's finding is that R2-R4 were all involved in that finding of discrimination.

26. Given the Tribunal's findings on the discrimination claims it necessarily followed that R2-R4 were personally liable for that discrimination, in addition to R1 who was liable vicariously (R1 did not rely on the reasonable steps defence). There was no legal basis at all on which the Tribunal could find that R2-R4 were not personally liable.

27. It appears that two considerations operated in the Tribunal's reasoning when finding that R2-R4 were nor personally liable:

a. First was the view that R2-R4 were acting on behalf of R1. Whether R2-R4 were acting on behalf of R1 or not, that consideration is irrelevant to the determination of whether R2-R4 were personally liable. An individual respondent's motivation about a discriminatory act – whether they were committing that discrimination for reasons related to themselves or on behalf of another – has no bearing on whether that individual is liable for those acts or not. There is no defence to personal liability if R2-R4 were acting on behalf of R1;

b. Second was the view that it was difficult to ascertain which of the three individual respondents drove the behaviour. There is no legal basis upon which a tribunal can find that individual respondents (i.e., R2-R4) are not liable for acts of discrimination because it is difficult to apportion responsibility between them. In such cases a tribunal is obliged to find that liability is joint and several, applying Sivanandan. Any dispute between those named respondents (in this case, R2-R4) as to their respective

contribution to that joint and several liability can only be had in the civil courts between themselves. "

15. Mr Brennan Banks submitted that the Tribunal was not in a position to reconsider our decision as the basis for the application was an error of law and that ought to be considered by the EAT as opposed to by way of reconsideration.

16. He relied upon the EAT case of Liddington v 2gether NHS Foundation Trust. He relied upon paragraphs 34- 35, as set out below.

    34. As he made clear, a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered. Tribunals have a wide discretion whether or not to order reconsideration, and the opportunity for appellate intervention in relation to a refusal to order reconsideration is accordingly limited.

    35. Where, as here, a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application. It seems to me that the Judge was entitled to conclude that reconsideration would not result in a variation or revocation of the decision in this case and that the Judge did not make any error of law in refusing reconsideration accordingly."

17. Further, Mr Brennan Banks submitted that our decision in the current case could be distinguished from the case of Sivanandan because in that case the Tribunal had already upheld wrong doing against the individual respondents and the question they were considering was joint and several liability not liability per se. In the case before us the Tribunal had made a finding that the individual respondents were not liable and therefore the case did not apply.

18. Having heard these submissions the Tribunal asked for Mr Heard's response in particular to the point that a reconsideration ought not be used to determine an error of law. He stated that this must be wrong in that it was the very essence of the interests of justice for legal errors to be corrected.

Conclusions and Discussion

19. We considered the case law referred to by Mr Brennan Banks in relation to the purpose of a reconsideration hearing. In the case of Trimble v Supertravel Ltd 1982 the EAT found that the tribunal had no jurisdiction to review its decision as the point raised was a major point of law that should be taken on appeal to the EAT. In that case, the EAT agreed that a tribunal's error as to the nature of the duty to mitigate was usually a matter best dealt with by way of appeal but said that it was clear that the tribunal in this case had reached its finding without allowing the claimant's solicitor to make submissions on the point. This amounted to a 'procedural mishap' that the tribunal should have rectified by granting a review. The EAT made the following observations:

(i) it is irrelevant whether a tribunal's alleged error is major or minor
(ii) what is relevant is whether or not a decision has been reached after a procedural mishap
(iii) since, in the instant case, the tribunal had reached its decision on the point in issue without hearing representations, it would have been appropriate for it to hear argument and to grant the review if satisfied that it had gone wrong if a matter has been ventilated and properly argued, then any error of law falls to be corrected on appeal and not by review.

20. We therefore reverted to our notes of the original hearing. The issue of personal responsibility was flagged in the List of Issues. Ms Ismail on behalf of the respondent in her written submissions said:

71. R1 is C's employer and R1 placed C on sick leave. No personal liability should attach to Rs 2 to 4.

We could find nothing further from her on this point.

21. Our note of what claimant's counsel, Mr Moore said was "It doesn't matter if they accept responsibility then it doesn't mean that the Rs should not be liable."

22. There was no reference to the case of Sivanandran nor to the liability provisions under s110 Equality Act 2010.

23. Having considered the point raised by Mr Brennan -Banks and the points made in the case of Liddington and Trimble, we nevertheless think that it is in the interests of justice for us to consider the matter as a reconsideration not simply leave it to the EAT. The case of Trimble was decided under the previous 'Review' regime and rules whereby a review could only be considered on certain limited and prescribed grounds. Rule 70 has disposed with that requirement, yet it is clear that the case of Liddington still refers to similar requirements.

24. Nevertheless, we conclude that it is right for us to reconsider our decision because the claimant has raised a clear point of law that we were not addressed on correctly at the original hearing. The submissions made to us on this point by the representatives were scant and neither party took us to the case of Sivanandran or the legislation despite raising the matter of 'personal liability' in the list of issues. Due to time pressures we had to reserve our decision and reconvene in Chambers to reach our decision. It was only at that point, on reviewing the List of Issues, that it became clear that this was an area of dispute. The evidence and submissions had not suggested that despite the List of Issues being agreed with the parties at the outset.

25. In that instance then, it appears to us that the matter was not ventilated or properly argued by the parties. The Tribunal was not addressed by the parties as to how personal responsibility was to be determined according to the facts of this case. We had no assistance from the parties as to the relevant law despite both being represented throughout. We accept the respondent's point regarding the need for the finality of justice and the need for parties not to get a second bite of the cherry and relitigate a point. Nevertheless, that is not what has happened here. Here the claimant's representatives have drawn our attention to a matter that was not properly advanced before us at the hearing that has in turn led to us not having the opportunity to consider a matter properly in light of the law as it stood at the time.

26. We have therefore considered whether, on reconsideration of our Judgment, we ought to vary it or revoke it. To confirm, our original Judgment in respect of the personal liability was found on the basis that Mr Heard sets out at quoted paragraph 27 b above as opposed to his suggested point 27a. To reiterate, paragraph 27b states as follows:

b. Second was the view that it was difficult to ascertain which of the three individual respondents drove the behaviour. There is no legal basis upon which a tribunal can find that individual respondents (i.e., R2-R4) are not liable for acts of discrimination because it is difficult to apportion responsibility between them. In such cases a tribunal is obliged to find that liability is joint and several, applying Sivanandan. Any dispute between those named respondents (in this case, R2-R4) as to their respective contribution to that joint and several liability can only be had in the civil courts between themselves. "

27. We do not accept the respondents' submissions that the situation is distinguishable from Sivanandran because we had not found the individual respondents personally liable. The respondent relies upon the last 3 paragraphs of our decision which we quote here.

Personal Responsibility
111. We find that the decision to keep the claimant on sick leave after either 30 February or 18 March was an ongoing situation that was not made by any one of the individual respondents. We consider that the placing of the claimant

on sick leave was done collectively on behalf of the first respondent as opposed to being a single decision by any one or all of respondents 2, 3 or 4.

112. We have considered the comment made at the meeting. Whilst it was said by Mr Brennan Banks it was in a context where all 3 individual respondents were discussing the situation and the claimant's disability. They purpose of the meeting was for the three individual respondents to act collectively on behalf of the first respondent and attempt to negotiate on behalf of the First respondent not themselves.

113. We therefore consider that the appropriate liability for the discrimination claims is the first respondent on the basis that it is difficult to ascertain who within the 3 individual respondents drove the behaviour. All actions taken by them were on behalf of the first respondent and the first respondent does not seek to rely upon the statutory defence. The discrimination claims are therefore upheld against the First respondent.

28. It is clear from our earlier findings of fact that we found that all three were involved in the decision to keep the claimant on sick leave (albeit in different ways) and all three were involved in the conversation regarding 'subterfuge' to keep her condition secret in order to sue them. Our findings regarding personal liability in the last 3 paragraphs also make it very clear that we could not distinguish which of the three was driving the discriminatory behaviour rather than because they were not personally involved or had not personally committed the acts of discrimination. In fact we found the opposite. We found that they were all involved and acted collectively thus making separation difficult.

29. Our interpretation at the time was that this meant that as they were acting collectively and for the purposes of the First respondent, it meant that they ought not to be held personally accountable. We did not find that they had not personally carried out the acts or made the discriminatory decisions.

30. Having now heard the parties' submissions on this point and considered the case of Sivanandran, we accept that given that discrimination is a tort and that the starting point, as set out in Sivanandran is that the tortfeasors ought to be held jointly and severally liable for tortious acts, we erred in the conclusion that we reached regarding liability.

31. We reached our conclusions based on incorrect grounds namely that because we could not say which individual tortfeasor was responsible for which particular action it therefore meant that none of the individual respondents could be held responsible because apportionment was impossible. Instead we ought to have concluded that all of them were liable because they were named as individual respondents, we found as a finding of fact that they were all involved in the discrimination and whilst it was difficult to determine who drove the discriminatory behaviour this did not mean that they were not liable and they therefore ought to be found jointly and severally liable with the first respondent for the discrimination.

32. For those reasons we vary our original decision and uphold the successful claims of discrimination against the three individual respondents as well as against the first respondent.

Employment Judge Webster

04 July 2022