



EMPLOYMENT TRIBUNALS

Claimant Ms C Taylor

Respondent: Lloyds Pharmacy

JUDGMENT

The claimant's application for reconsideration of the judgment sent to the parties on 13 April 2022 is refused.

REASONS

The Relevant Law

1. Rule 70 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 provides that a Tribunal may reconsider any judgment where it is necessary in the interests of justice to do so.

2. Rule 71 provides that an application for reconsideration shall be presented in writing and copied to all the other parties within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision as necessary.

3. Rule 72 provides that an Employment Judge shall consider any application made under Rule 71. Where practicable the consideration shall be made by the Employment Judge who made the original decision or who chaired the full Tribunal which made it. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked the application shall be refused.

4. A Tribunal dealing with an application for reconsideration must seek to give effect to the overriding objective to deal with cases fairly and justly contained within Rule 2 of the Regulations. This includes ensuring that the parties are 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.

5. Consideration of whether reconsideration is “necessary in the interests of justice” allows the Tribunal a broad discretion which must be exercised judicially which means having regard not only to the interests of the party seeking the reconsideration but also to the interests of the other party to the litigation, and to the public interest requirement that there should be so far as possible finality in litigation.

Background to this application for reconsideration

6. The claimant’s complaints of harassment and victimisation due to race and of unfair dismissal came before a full panel comprising me and non legal members Ms L Heath and Dr H Vahramian and was heard over five days from 28 February until 4 March 2022.

7. Oral judgment was delivered in the presence of the parties on 1 April 2022 and a short form judgment was sent out, recording the decision that the complaints failed, on 13 April 2022. The claimant wrote on 27 April 2022 requesting written reasons and reconsideration.

8. The Reasons were prepared and amounted to 44 pages and 221 paragraphs and were sent out on 15 June 2022. The claimant submitted further grounds in support of her application for reconsideration on 29 June 2022.

Application of law on reconsideration

9. The claimant’s grounds for reconsideration, and my response to each of them as to why there is no reasonable prospect of the original decision being varied or revoked are as follows:

From her 27 April 2022 letter

- a) My claim did not include disability discrimination but my disabilities did have contributing factors...the company did not take this into account...the company did not comply with its own policy...the company did not put reasonable adjustments in place.

10. Paragraphs 10-21 of the Reasons address the point. There was no disability discrimination complaint, the claimant was given an adjournment to consider whether or not she wished to make an amendment application. She did not. The claimant is seeking a “second bite at the cherry” in requesting that the Tribunal make different findings of fact.

- b) My fibromyalgia was not taken into account when I was deemed an unreliable witness.

11. The Tribunal’s appraisal of the claimant’s reliability as a witness on specific points is addressed at paragraph 29 and throughout the application of the law section in the Reasons. No generic assessment of her reliability or otherwise was made.

12. The claimant was asked did she need any reasonable adjustments at the hearing and she did not, beyond the breaks taken and assistance given to her, as to any litigant in person, in accordance with the overriding objective and guidance in the Equal Treatment Bench Book.

- c) As no minutes were taken during the 17 February mediation meeting,..it is difficult to support what was said and I feel this element was not taken into account.

13. This is in effect a suggestion that a factual finding was unsafe because of the lack of minutes of the meeting. The Tribunal heard oral evidence from all three persons present at that meeting, the claimant, Ms Banks and Ms Boachi-Dapaah. Its findings are recorded at paragraphs 66 -74 and its assessment of the relevant witnesses at paragraphs 29,30 and 31 of the Reasons. Its reasoning on those facts and the application of the law to them is in the application of the law section of the Reasons. The Tribunal knew there were no notes of the meeting when it made its findings based on the oral evidence. There is no prospect of those findings being changed.

- d) John Deveaney's comment at p474 of the bundle was not taken into account.

14. It was. The Tribunal heard oral evidence from Mr Deveaney and saw the document referred to. The Tribunal knew that Mr Deveaney felt that Ms Boachie-Dapaah's comment at the mediation was "inflammatory". This was recorded as a finding of fact at paragraph 98 of the Reasons.

- e) Ruby Dinh's comment on p376 was not taken into account...Mr Singh's comment on p412 was not taken into account.

15. They were. We had oral evidence from Mr Deveaney that he had taken the findings of those investigations into account. The Tribunal was taken to those pages of the bundle in evidence. The claimant is seeking an alternate finding of fact and there is no reasonable prospect of the factual findings being changed.

- f) I was told I raised part of my claim in bad faith.

16. The bad faith point in relation to the victimisation complaint was on the agreed List of Issues, was the subject of submission and was determined by the Tribunal at paragraphs 206 -209 of the Reasons where the Tribunal says, "*This is not a conclusion that has been reached lightly. There were two and a half days deliberation time in this case and great care was taken to look at the chronology of events, the actions and statements of the claimant at the relevant times. The Tribunal finds the allegation was made to detract from the claimant's own conduct.*"

- g) Harriet's comments had a negative effect on my health and this was not taken into account.

17. The effect of the "unwanted conduct" in relation to the harassment complaint on the claimant was taken into account; the determination on that point is dealt with at paragraph 193 of the Reasons where the Tribunal says "*Turning then to*

effect, in applying Section 26 (1)(b) the Tribunal must have regard to the perception of the claimant, the other circumstances of the case and whether or not it was reasonable for the conduct to have that effect. Section 26(4) requires the Tribunal to take the claimant's subjective perception into account in considering the effect the unwanted conduct had on her."

- h) In relation to unfair dismissal no further issues were raised regarding time keeping and no complaints had ever been formally raised against me...these points may have been overlooked.

18. The Tribunal's determination on unfair dismissal is set out at paragraphs 157-186 of the Reasons. The claimant was not dismissed for timekeeping or complaint reasons. The reason for dismissal was found to be some other substantial reason. There is no prospect of the decision being varied or revoked.

From her letter of 29 June 2022

- i) Referring to point 3 of the Reasons: the Tribunal identified Ms Boachie-Dapaah as Black African, in her witness statement she identified as Black British.

19. The Tribunal apologises to Ms Boachie-Dapaah. There is no reasonable prospect of this error leading to the judgment being varied or revoked.

- j) I am a single parent...it is my statutory right to be able to arrange work around my parental responsibilities...

20. The claimant's status as single parent and responsibilities for childcare were not part of the complaints before the Tribunal, though the Tribunal was made aware of the claimant's single parent status and responsibility for getting her daughter to school during the hearing. The respondent's consideration of her timekeeping and requests for flexible working was part of the background chronology recited in the facts section of the Reasons at paragraphs 36-43.

- k) Friction due to lateness / being deemed late due to using toilet / my grievance.

21. These matters formed part of the context that led to the claimant's grievance and the mediation meeting on 20 February 2020 at which the remark was made by Ms Boachie-Dapaah that led to these proceedings. These matters have been considered by the respondent and the Tribunal.

- l) The claimant cites instances from the documents that show she was being discussed amongst the staff and being given contradictory instructions by her managers.

22. These matters formed part of the context and were in the claimant's own witness evidence. These matters have been considered.

- m) Point 35 of the Reasons: the claimant says that the hours offered to her when she started work are disputed and were not taken into account.

23. The claimant says *I covered this point in my statement in paragraph 3 but this point has not been taken into account.* It has been. This is part of the background context and not directly relevant to the application of the law in the case.

- n) Point 39 of the Reasons: no mention of knowledge of my Irritable Bowel Syndrome / no mention that I was last to take my break so my break times did not impact on anyone else...these two points have not been taken into account.

24. This was not a disability discrimination complaint. The claimant was given an adjournment to consider whether or not she wished to make an amendment application. She did not. The facts around her arrival at work time, use of toilet, health issues are detailed in the facts section of the Reasons.

- o) Point 40 of the Reasons: friction between the claimant and Ms Boachie-Dapaah, Marie Morris' witness statement on p265 says she told the claimant to keep a diary of when Harriet is not speaking to her...another example of inconsistencies and a point that was not taken into account

25. The Tribunal was taken to the witness statement of MM and heard oral evidence from Mr Deveaney who had read it and taken its content into account. The Tribunal heard oral evidence from the dismissing officer and appeal officer who had read all of the investigation paperwork including MM statement. This was taken into account.

- p) Point 45 the Safer Care Champion role is not a voluntary role but was taken from the supervisor and given to the claimant....this I feel again was not considered

26. Whether the role was agreed to voluntarily by the claimant or imposed on her against her will, she later renounced the role, is immaterial to the determination of her complaints. It was part of the background to her relationship with Ms Boachie-Dapaah and is set out in the facts section of the Reasons.

- q) Point 56 and Point 57: the Reasons state the first Ms Boachie-Dapaah knew of the investigation was when Mr Carter attended on 2 January 2020...another inconsistency ...in Ms Boachie-Dapaah's evidence that has not been taken into account.

27. The Tribunal accepted that oral evidence of Ms Boachie-Dapaah that the first she knew *of the content* (my emphasis) of the grievance was at her meeting with Mr Carter on 2 January 2020. In any event the date of Ms Boachie-Dapaah's state of knowledge as to the claimant having brought a grievance or the content of that grievance is not relevant to the application of the law in the claimant's complaints and did not feature on the list of issues.

- r) Point 68 in the Reasons: the Tribunal has recorded that the claimant treated Ms Boachie-Dapaah very differently than other colleagues..this word has been added, also you have added *might* be because of the colour of her

skin...it is a misrepresentation of the comments and events on 17 February 2020 which also needs to be reconsidered.

28. Those are the Tribunal's findings of fact having heard oral evidence from Ms Boachie-Dapaah, the claimant and Ms Banks. There is no prospect of them being varied or revoked because the claimant points out that the particular language used by the Tribunal to express its findings was different from the claimant's version of events or the language used by the witnesses in their witness statements or bundle.

s) Point 69 is a misrepresentation of the comments and events that occurred on 17 February 2020

29. Those are the Tribunal's findings of fact having heard oral evidence from Ms Boachie-Dapaah, the claimant and Ms Banks. There is no prospect of them being varied or revoked because the claimant does not agree with them. Her evidence was heard.

t) Points 74 and 77 of the Reasons: misrepresentation of events and inconsistency around the 17 February 2020 meeting

30. Those are the Tribunal's findings of fact having heard oral evidence from Ms Boachie-Dapaah, the claimant and Ms Banks. There is no prospect of them being varied or revoked because the claimant does not agree with them. Her evidence was heard.

u) Point 84 the Tribunal has not noted in the Reasons a comment that was in the bundle at Page 369 made by Ms Boachie-Dapaah "I didn't call you that, that's how you made me feel"

31. The Tribunal recorded in its Reasons those findings of fact that were central to its application of the law and those background matters that made sense of the chronology and made its reasoning clear. If that comment was not included then that does not mean it was not taken into account. The Tribunal was taken to that page and heard oral evidence from Ms Boachie-Dapaah. There is no prospect of the judgment being varied or revoked because a comment was not included.

v) Point 87 of the Reasons: this paragraph is not referenced correctly...it was not taken into account that the internal investigation found there was not enough evidence to suggest you had an issue with Harriet because of the colour of her skin.

32. The finding of the internal investigation was taken into account and is recorded at paragraphs 85, 86 and 87 of the Reasons. They record that a sanction was imposed on Ms Boachie-Dapaah and that the claimant was now to be investigated under the disciplinary procedure for the following allegations "*that the claimant had treated Ms Boachie-Dapaah differently in that she (i) would not follow instructions (ii) was disrespectful to her (iii) bullied her and (iv) was not told off by Ms Boachie-Dapaah who would not have tolerated this disrespectful behaviour from others*" There is no prospect of the judgment being varied or revoked

because the Reasons in their findings of fact on the internal investigation outcomes do not fully reproduce all of the correspondence in that investigation.

- w) Point 92 of the Reasons: The Reasons describe the second grievance appeal hearing as a “broad discussion”. This is a misrepresentation as ...all I did throughout was answer questions...and Mr Singh’s opinion that what Harriet said to me was a racial comment has not been considered or recorded

33. There is no prospect of the judgment being varied or revoked because the claimant challenges the language used by the Tribunal in describing the second grievance appeal hearing as a “broad discussion”. The Tribunal was taken to the documentation at pages 403-419 being the notes of the appeal hearing and was able, for itself, to form a view as to the flow of conversation in those transcript style handwritten notes. Its findings are at paragraphs 92 – 95 of the Reasons. Mr Singh’s comment was considered and his view of the nature of the remark made by Ms Boachie-Dapaah was not central to the determination of the list of issues. There is no prospect of the judgment being varied or revoked because it does not record Mr Singh’s view.

- x) Point 96 of the Reasons: Why has the Tribunal not taken into account the fact that all of the issues raised before mediation had been resolved...and no minutes were taken during the mediation so how can the notes referred to be deemed to be accurate

34. The Tribunal heard oral evidence from Mr Deaveney. It took into account the issues raised before mediation and the issues that arose out of the Ruby Dinh investigation and Mr Deaveney’s evidence on that point and on his scrutiny of Mr Singh’s investigation. There is no prospect of the judgment being varied or revoked on the basis that the pre mediation issues should not have become the subject of disciplinary investigation. That matter was put to witnesses and formed part of the claimant’s case. It has been considered. The lack of contemporaneous notes of the mediation meeting has no reasonable prospect of leading to the judgment being varied or revoked because the Tribunal heard oral evidence from the three people present at the meeting, the claimant, Ms Boachie-Dapaah and Ms Banks.

- y) The Reasons did not state that the OH report had said that the claimant’s fibromyalgia and IBS were likely to be covered by the Equality Act 2010.

35. This was not a disability discrimination complaint. The claimant was offered the opportunity to amend and chose not to do so. This was dealt with in the Reasons as stated above.

- z) Point 107 in the Reasons: The claimant challenges the reasonableness of Mr Deaveney’s instruction to attend a Teams meeting and says her earache was not taken into account by the Tribunal.

36. The Reasons address Mr Deaveney’s involvement from paragraphs 95 - 112. The Tribunal was taken to p497 of the bundle which was the email in which

the claimant tells the respondent she has been suffering with earache. These matters have been considered and determined.

- aa) Point 120 the claimant refusing to move to another store. The claimant says that it was not taken into account that she had to think of her daughter.

37. The Tribunal heard oral evidence of Ms Battersby and Ms Turner, the dismissing and appeal officers both of whom had sought to avoid dismissal and to get the claimant back to work. Paragraph 170 – 181 of the Reasons consider the efforts made by the respondent to get the claimant back to work. The respondent knew that the claimant was a single mother with responsibility for getting her daughter to school. The claimant cross-examined the respondent's witnesses. There is no prospect of the judgment being varied or revoked.

- bb) At no point was I given another store to move to.

38. This point is accepted, and is not new information. It was addressed at paragraph 172 of the Reasons which record "*Ms Banks had in mind a possible opportunity at Huyton branch but thought it futile to raise it as the claimant was so insistent she would not leave Speke. Ms Battersby did not raise a specific alternative and the Tribunal make no criticism of her either on the redeployment point because she was faced with a claimant who was adamant that she would not move branch.*"

- cc) No consideration was given to the fact that stress contributes to health and the time the company took to deal with my complaint contributed to my stress in relation to an incapability dismissal.

39. Although delay was not included on the list of issues it was considered in the round as part of the determination of the fairness of the dismissal and the timeline of events was also part of the context for consideration of the harassment and victimisation complaints. At paragraph 186 and 187 the Tribunal address the likelihood of an incapability related dismissal even if the claimant had not been dismissed for some other substantial reason.

- dd) I agreed to participate in the disciplinary process as I had no other option...failing to participate in an investigation having been part of the allegations against her before.....another point that wasn't taken into consideration

40. The timeline of events in the disciplinary process is set out in the facts at paragraphs 112 to 122 of the Reasons. The Tribunal found "*The claimant did not accept that she should be subjected to disciplinary process at all but wanted matters resolving so agreed it could proceed on the basis that she would not be dismissed for ill health until it was resolved*". The point was taken into consideration. There is no prospect of the judgment being varied or revoked on this point.

Conclusion

40. The claimant's grounds relate to matters that were before the Tribunal and have been determined. There is nothing new here that would affect or have affected the outcome. The law is clear that matters that have been determined cannot be reopened in this way for further discussion or persuasion.

41. The requests were copied to the respondent but no representations have been made.

42. In reaching the decision not to reconsider I have had regard to the importance of finality in litigation for both parties and I have considered the impact of a reconsideration determination either on paper or in person for the parties and the cost to which that would put both parties.

43. I have had regard to the overriding objective to deal fairly and justly with this case. I have also considered that reconsideration should not be used to seek to obtain "a second bite at the cherry".

44. I reject the request for reconsideration on the ground that it is not necessary in the interests of justice as there is no reasonable prospect that any one of the grounds set out above or, all of them taken together, could lead to the original decision being varied or revoked.

Employment Judge Aspinall
Date: 12 August 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
18 August 2022

FOR THE TRIBUNAL OFFICE

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