EMPLOYMENT TRIBUNALS

Claimant	**Respondents**
v	
Miss G France	**Muhammad Ziaullah Zaki Khan and others**

PRELIMINARY HEARING

Heard at: **London South Employment Tribunal via CVP**

On: **22 June 2022**

Before: **EJ Webster**

Appearances
For the Claimant: **Mr O France (lay representative, Claimant's son)**

For the Respondent: **Mr Heard (Counsel)**

RESERVED DECISION

1. The Claimant's applications dated 22 March 2018, 20 June 2019 and 6 August 2019 are refused.

REASONS

The Hearing

2. The parties attended by way of CVP. Initially there were connection difficulties for the claimant and her representative however these were resolved and the hearing continued largely without difficulty thereafter.

3. I was provided with the following:

(i) An indexed bundle numbering 163 pages (the first 121 pages had been agreed previously, the remaining pages were included by the respondent. The claimant did not object to their inclusion at the outset of the hearing).
(ii) The Claimant's full written submissions as given to the tribunal who determined the original liability Judgment.
(iii) Copies of the cases of Ladd v Marshall [1964] 3 All ER 745, Outasight VB limited v Brown UKEAT/0253/14/LA Virgin Atlantic Airways Ltd [2014] A.C.160.
(iv) The Respondent's skeleton argument

4. During the hearing I was also provided with several case references by Mr France. Jemaldeen Hadi v A to Z law 2012 EWCA CIV 143, Alpha Rocks Solicitors v Alade EWCA civ 685, Dombo Beheer B.V. -v- Netherlands (1994) 18 E.H.R.R. 213 ., Fairclough Homes Limited v Summers [2012] UKSC 26 – paragraph 65, Peach Grey & Co v Sommers [1995] IRLR 363, Masood v Zahoor [2010] 1 WLR 746; [2009] EWCA Civ 650, Arrow Nominees Inc v Blackledge [2001] BCC 591. He addressed me on the relevance of them when they were referred to.

5. I have read in full the EAT Judgment (24 May 2022) and the ET liability (3 October 2015) and costs (25 April 2016) judgments.

6. Where I have set out summaries of the parties' positions, I do not pretend that my summaries are verbatim notes of what was said nor that they encompass each and every aspect of either party's case. A failure to reference a point made or evidence/case law referred to does not mean that I have not considered it.

Background

7. This case has a long history. That history is accurately summarized in the EAT Judgment dated 24 May 2022 in paragraphs 4-29 which I shall not repeat here but have considered.

8. Following the EAT hearing and Judgment, the claimant's applications were remitted to the Tribunal for determination. My role is therefore to determine the claimant's three applications dated 22 March 2018, 20 June 2018 and 6 August 2019 before the matter can proceed to a reconsideration hearing. The reconsideration hearing will proceed regardless of my decision and has already been listed.

9. The purpose of the reconsideration hearing is relevant to my determination of these applications. The claimant says that her applications before me today are to enable her to properly prepare for the reconsideration hearing.

10. The reconsideration hearing is to determine the claimant's application for reconsideration of the costs decision that was reached on 25 April 2016. In summary, the basis for the claimant's reconsideration application (insofar as it is relevant to my decision today), is that the claimant asserts that the Tribunal heard evidence regarding her alleged 'bad conduct' in the course of conducting the initial costs hearing and reached a conclusion effectively 'tainted' by that

information or evidence. The claimant states that the Tribunal had expressly said that evidence and argument would only be heard about whether the claimant's claims were misconceived for the purposes of the costs determination. The claimant states that she was at a disadvantage at the costs hearing because she had come to that hearing unprepared for arguments about her conduct. Had she been prepared she would have provided information concerning the alleged poor behaviour of the respondent during the proceedings.

11. In summary, the claimant's applications are as follows:

    (i) 22 March 2018 – An application for the claimant's 'Information Request' dated 20 January 2016 to be answered by the respondent, for witness orders for the first respondent and Ms V Kapila to be granted for the purposes of the reconsideration hearing and for the claimant to be allowed to inspect her former email address because of allegedly falsified emails.

    (ii) 20 June 2018 – A reiteration of the above applications along with an application for third party disclosure from the Metropolitan police.

    (iii) 6 August 2019 – A reiteration of all of the above applications along with an application for an unless order for the respondent to provide their response or indicate whether they were willing to respond to the Information Request dated 20 January 2016.

12. In essence, these applications all purport to seek to adduce further evidence whether it be written evidence or witness evidence. The claimant's contention is that the evidence will enable her to show the Tribunal at the reconsideration hearing, that the respondent has committed various bad acts ranging from perjury to the destruction or forgery of documents. She considers that if she had been in a position to put this evidence to the Tribunal at the costs hearing, they would not have awarded costs against her. She says that it will demonstrate that her alleged vexatious, abusive or disruptive behaviour that the respondent relied upon at the original costs hearing, was contributed to or caused by the respondent's behaviour. She says that this evidence and information will go to the heart of the behaviour referenced in Rule 76 and thus is essential for the fair determination of the reconsideration and the costs hearing. She says that she would have put it all to the Tribunal at the costs hearing had she known that this her alleged vexatious, abusive or disruptive behaviour was going to be considered.

13. Mr France made lengthy and detailed submissions over the course of the whole morning which I do not seek to repeat here. He relied on the wording of Rule 76 and stated that under this rule, the Tribunal was able to consider the vexatious, abusive or disruptive behaviour of the parties. He asserted that the respondent was wrong to say that these were issues that had been considered and determined at the original hearing because they were not referenced or

considered in the liability or costs Judgments. This was not therefore the claimant attempting to get a second bite of the cherry and relitigate matters because the matters had not in fact yet been determined. To deny the claimant access to the information and evidence she sought, was to deny her a fair trial on the basis that she had been put in an unequal position regarding evidence at the costs hearing and this had then been compounded by the Tribunal's decision to award costs against her.

14. When it was put to him that the claimant had not appealed the original liability decision and was therefore 'stuck' with its findings and conclusions, Mr France stated that the reason these points had not been appealed was that an individual could only appeal if there was an error of law. He said that the lack of an error of law was the reason they had not appealed as opposed to their agreement that the factual conclusions were correct or reached based on the correct evidence.

15. Mr France also pointed out that it was possible that if the Tribunal reconsidered the original costs decision at the next hearing, then they could go straight on to determining whether to vary or revoke the original costs decision at the same hearing. Were they to go straight on to do that within the course of the same hearing then the evidence sought in the applications would be necessary to enable the claimant to refute the allegations against her of her alleged misconduct in the proceedings.

16. Mr Heard provided written submissions which I shall not repeat here. He briefly expounded on his written submissions. In specific response to the submissions made by Mr France, he made several points:

    (i) He accepted that the Tribunal had heard evidence about the claimant's behaviour and that is application for costs had been based on two 'planks'. The first plank was that the claims were misconceived and the second was the claimant's behaviour. Nevertheless, the Tribunal had reached its conclusion to award costs against the claimant based on the fact that the claimant's claims were misconceived – not because of her behaviour. As the respondent had not appealed or applied for a reconsideration of that decision, the respondent was in effect stuck with that finding. He therefore submitted that even if the claimant were successful in her application for reconsideration, the respondent would not then be able to advance any arguments about the claimant's conduct because any reconsideration by the Tribunal would only be of whether it was appropriate for it to find that the claimant's claims were misconceived. He put that the Respondent was in effect estopped by running an argument about the claimant's conduct because it had not appealed the basis for the tribunal's conclusions.
    (ii) All of the evidence that the claimant was seeking to obtain with her applications were matters that were before the original Tribunal. The fact that they were not referenced in the written Judgment did not mean that they had not been considered or decided.
    (iii) The claimant had not appealed against the liability judgment and therefore she could not challenge or 'go behind' or re-litigate any

conclusions made regarding either party's honesty, plausibility, evidence or behaviour under cover of Rule 76.

The Law

17. Rule 2. Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

18. Rule 29. Case management orders

The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. Subject to rule 30A(2) and (3) the]1 particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

19. Rule 31. Disclosure of documents and information

The Tribunal may order any person in Great Britain to disclose documents or information to a party (by providing copies or otherwise) or to allow a party to inspect such material as might be ordered by a county court or, in Scotland, by a sheriff.

20. Rule 76.— When a costs order or a preparation time order may or shall be made

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; [...]1

(b) any claim or response had no reasonable prospect of success [; or]1

[

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

]1

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—
(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and
(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.
(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.
(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

21. Ladd v Marshall [1954] All ER 754, has established three principles when considering the use of new post Judgment evidence:

a. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

b. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;

c. The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

22. Outasight Ltd v Brown UKEAT/0253/14/LA

The case summary to the EAT Judgment helpfully encapsulates the principles and the case law and confirms that Ladd and Marshall applies to the Employment Tribunal.

"The Employment Tribunal had erred in taking the view that the position had changed under the 2013 Rules. The approach laid down in Ladd v Marshall would in most cases encapsulate what is meant by "the interests of justice". It provided a consistent approach across the civil courts and laid down the test applied in the Employment Appeal Tribunal. Simply because those principles are no longer expressly set out within the Employment Tribunal Rules did not mean that they no longer had relevance when determining "the interests of justice".

There might be cases where the interests of justice would permit fresh evidence to be adduced notwithstanding that the principles laid down in Ladd v Marshall were not strictly met. Employment Tribunals had, however, always had the ability to review Judgments where it was in the interests of justice to do so (see Rule 34(3)(e) ET Rules 2004). That power was recognised as allowing for a residual category of case, see Flint v Eastern Electricity Board [1975] ICR 395, and could permit fresh evidence to be adduced in circumstances where the requirements of paragraph (d) were not strictly met (Flint; General Council of British Shipping v Deria [1985] ICR 198, EAT). Such cases might include those where there was some additional factor or mitigating

circumstances which meant that the evidence in question could not be obtained with reason able diligence at an earlier stage (Deria). That might arise where there were issues as to fair hearing: where a party was genuinely ambushed by what had taken place or - as in Newcastle City Council v Marsden [2010] ICR 743, EAT - where circumstances meant that an adjournment was not allowed to a party when otherwise it might have been (there apparently because of error on the part of Counsel)."

Conclusions

23. Although I have assessed each application separately, I make the following over arching observations. These conclusions apply to all of the applications made.

24. The claimant has lost sight of, or appears to have lost sight of the purposes of the reconsideration hearing. The reconsideration hearing will determine whether it is in the interests of justice to confirm, vary or revoke the Tribunal's original decision regarding costs. It will not be a re-hearing of either the liability hearing or the costs hearing. It is possible that if the decision is varied or revoked then a re-hearing of the Costs hearing could proceed immediately afterwards - but that is not a certainty.

25. All of the 'new' evidence that the claimant has sought under each application was either already in existence at the original liability and costs hearings or could reasonably have been known to be relevant at the original liability and costs hearings. In many ways much of the claimant's case is, in some respects similar with the facts of the Outasight case in that she is seeking to raise questions regarding the respondents' credibility and conduct. However all of the allegations that she seeks to evidence with these applications, were known to her at the time of the original liability hearing and were for the most part put the respondent in cross examination or put to the Tribunal in submissions.

26. The claimant has not established before me, on balance of probabilities, that the original costs decision was made on any basis save for the fact that her claims were misconceived. All of the evidence she seeks relates to the respondent's alleged misconduct both during her employment and during the litigation of her claims. Whilst I am not deciding the application for reconsideration, I do need to consider the relevance of the information sought, to the reconsideration hearing. I cannot see the relevance of the information sought in any of the applications when the Costs Judgment states that the decision was made on different grounds to those that the claimant now seeks to challenge. It is therefore, in my view, far from certain that the claimant is going to get to the position where she might raise the respondent's behaviour in any event.

27. The matters which the claimant seeks to 'evidence' to the Tribunal are matters that have been considered and determined at the liability hearing and in the liability judgment. The fact that the liability Judgment does not specifically reference each and every point, does not mean that the Tribunal did not consider it. Judgments rarely record every single point of evidence or dispute

put before the Tribunal. The Tribunal specifically stated at the outset of its liability Judgment (para 21):

"The Tribunal's findings are made on the balance of probabilities having heard the evidence, considered the documentation taken to by the parties and the submissions. There was a considerable amount of evidence heard and these reasons are limited to those matters that are relevant to the issues and necessary to explain this judgment. Even though not all the evidence heard is recorded here, all evidence that we were taken to was considered when coming to this decision."

28. The claimant accepted that all of the issues regarding the respondent's behaviour either were or could have been put forward to the Tribunal during the liability hearing. Therefore I consider that to a large extent her applications are all in effect an attempt to have a second hearing of those points. This is not a case, as Mr France submitted, that the Tribunal has overlooked misconduct and needs to look at it properly. That exercise has already taken place. That the Tribunal did not agree with the claimant's interpretation of the evidence during the liability hearing and Judgment is not cause for the evidence to be reconsidered. Contrary to Mr France's assertions, that is not the purposes of a costs hearing under Rule 76.

29. Taking each application in turn. The 22 March 2018 application sought an order for the claimant's Information Request to be answered. The claimant is in effect setting out 'Yes or No' questions on numerous points regarding evidence or assertions that she says are relevant to the behaviour of the respondent and the efforts she made to produce or gain evidence for the liability hearing. When I pointed out that it appears that the claimant knows or thinks she knows the answers to all the questions, Mr France agreed that she did. He said that it was an effort to streamline the process for the Tribunal because otherwise there would be numerous arguments about the questions/evidence at the reconsideration (or any subsequent redetermination of the costs hearing if the original decision is revoked). That may be the case, but at this stage of the proceedings I do not consider that the Claimant has established any of the following:
    (i) That the information or evidence was not already available at the liability hearing
    (ii) That having the respondent's answers would in any way streamline things for the Tribunal as the questions asked (and the premise of those questions) are not straightforward and many are unlikely to be capable of being answered in a straightforward yes or no way as sought.
    (iii) That the evidence or behaviour relied upon in the questions has not already been considered by the Tribunal at the original liability hearing
    (iv) That the information sought is relevant to the Tribunal's decision at the reconsideration hearing
    (v) That it is in the interests of the Overriding Objective to order the production of this evidence at this stage of the proceedings.

30. Further, the Claimant states that she knows the answers to all of the questions she puts. It is therefore for her to decide whether she wants to put forward the

information she says she has as part of her submissions for the reconsideration hearing. It is not for the Tribunal to order the respondent to provide or confirm the basis for the claimant's assertions in these circumstances. I do not accept that this would place the parties on an equal footing or save time at the hearing

31. With regard to the for the first respondent and Ms V Kapila being ordered to be witnesses, the same points apply. it is not clear what it is the claimant believes they may say to the Tribunal. The claimant states that they need cross examining because of the perjury committed at the original hearing which in turn will demonstrate the respondent's vexatious conduct. Mr France said that the original Tribunal was misled by false testimony.

32. The original Tribunal heard that original evidence and considered written submissions by the claimant regarding the First Respondent's plausibility and the evidence put before the Tribunal. The claimant made an application for a witness order for Ms Kapilla on the final day of the original hearing and that was refused. The claimant therefore had an opportunity to challenge the evidence and the Tribunal reached its liability decision in full knowledge of those challenges.

33. The claimant has, for the purposes of this application failed to persuade me of the following:

    (i) That the evidence or behaviour relied upon in the questions has not already been considered by the Tribunal at the original liability hearing
    (ii) That the information sought is relevant to the Tribunal's decision at the reconsideration hearing in an event
    (iii) That it is likely to assist the Tribunal in reaching its decision in the interests of the Overriding Objective to order the witnesses to give evidence at the reconsideration hearing.

34. Finally this application included an application for the examination of the claimant's old email account. It is the claimant's case that several documents were doctored and in particular an email sent to her was manufactured. To prove this she needs access to her old account. I note that this has been the claimant's case throughout these proceedings. This issue was in the claimant's written submissions to the liability tribunal. It is not a new issue, nor does it represent new facts or evidence that could affect the reconsideration decision.

35. The claimant has therefore not persuaded me that:
    (i) The issue has not been considered and already determined at the liability hearing.
    (ii) That the information sought is relevant to the Tribunal's decision at the reconsideration hearing
    (iii) That it is in the interests of justice to allow access to an entire email account which the respondent has in any event says ceased to exist several years ago. The claimant has asserted that the email was manufactured at the original hearing and the original Tribunal will have

taken a view on this point regardless of whether that is set out in the Judgment.

36. The claimant's second application dated 20 June 2018 insofar as it is different from the previous one, includes an application for third party disclosure from the Metropolitan police. The basis for this application is that the it would demonstrate the First Respondent's '*grave conduct in misleading a Tribunal …. Whilst under oath – and hence interfering in the administration of justice." (pg 34)*. The premise is that the police would be able to confirm a different version of the evidence the First Respondent gave.

37. The claimant has failed to persuade me that

    (i) That this matter was not fully considered by the Tribunal at the time as the claimant made written submissions regarding the police report and was able to cross examine the first respondent and other respondent witnesses about it.
    (ii) The evidence sought from the police is sufficiently relevant to the reconsideration hearing given the basis of the tribunal's original decision.
    (iii) That it is in the interests of the overriding objective to order a third party to provide evidence at this stage of the proceedings.

38. The Claimant's final application dated 6 August reiterates the requests I have already considered and seeks an Unless order. For the reasons given as to why I do not grant the claimant's first application, I do not consider it appropriate to make an Unless Order for the respondent to provide an answer to the Information Request or to indicate whether it is willing to answer that Information Request.

39. In summary, the claimant has not established the three conditions set out in Ladd v Marshall and confirmed in Outasight CB Limited v Brown when new post judgment evidence is sought.

40. In none of the claimant's applications has she established that the evidence could not have been obtained with reasonable diligence for use at the trial. In fact, in most cases she accepts that the evidential issues and applications for the evidence were live matters during the original Tribunal proceedings.

41. Secondly she has not established that the evidence would probably have an important influence on the result of the reconsideration application. This is because the original costs decision appears, on the face of it, to have been made on the basis that the claimant's claims were misconceived – not her litigation conduct.

42. Finally the evidence is not such as is presumably to be believed or in other words it must be apparently credible. I reach this conclusion on the basis that the claimant accepts that this evidence was all at the very least discussed or touched upon as an issue at the original hearing. This suggests that the original Tribunal either did not consider it to be credible, or did not consider it to be relevant.

43. The claimant does appear intent on relitigating points of credibility and behaviour before the Tribunal at the reconsideration hearing. That is not the purpose of the reconsideration hearing nor would it be the purpose of any 'new' costs hearing were one to be considered necessary as a result of the reconsideration hearing. As was set out by EJ Ferguson (pg78) and endorsed by the EAT
(15) In order for the Claimant's application for reconsideration to succeed she will need to persuade the Tribunal of the following:

(i) That the Respondents' alleged "malfeasance" was relevant to the decision whether to make a costs order.

(ii) That she was denied the opportunity to adduce evidence or make submissions as to the Respondents' conduct because of the Tribunal's letter of 27 January 2016.

(iii) That the submissions or evidence on which the Claimant now seeks to rely would have led to a different result."

44. If the Reconsideration Tribunal decides that the costs decision ought to be revoked or varied, then it is still possible for that Tribunal to then determine that some or all of the evidence sought in these three applications ought to be produced. It seems to me that fresh consideration of these applications would only be appropriate if the Tribunal was going to reconsider the respondent's application for costs based on both the claimant's litigation conduct as well as any misconception of the claims. The basis for any 'fresh' decision would be for that Tribunal to determine. However, until the reconsideration has taken place, I consider that it is not in the interests of justice to uphold any of the claimant's applications as the evidence sought does not, on the face of it go to the determination of the reconsideration application.

45. The claimant has jumped a long way ahead and is suggesting that she needs this evidence to prepare for a situation where a tribunal considers the claimant's litigation conduct and in so doing also has to consider the respondent's conduct. We are not at that stage yet. The Claimant has numerous hurdles to overcome before any such evidence could be considered even remotely relevant and even then, it is clear that most of the issues in question have already been considered and determined at the original liability hearing. It is therefore not in the interests of the Overriding Objective for any of the orders sought to be made at this stage.

46. For all of the above reasons the claimant's applications are refused.

Employment Judge Webster

Date: **15 July 2022**

JUDGMENT and SUMMARY SENT to the PARTIES ON
Date: **24 August 2022**

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FOR THE TRIBUNAL OFFICE