



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4110531/2021

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Held in Glasgow on 23 November 2022

Employment Judge D Hoey

10 **Mr L Ramos**

Claimant

15 **Lady Coco Ltd t/a**

Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's second application for reconsideration of the judgment issued to the parties on 21 September 2021 is refused, there being no reasonable prospects of the judgment being revoked.

REASONS

25 **Background**

1. This case has a long procedural history, having been raised in 28 July 2021. A hearing took place on 14 and 15 September 2022, with the claim being dismissed. An oral judgment was issued with written reasons being provided upon request. A preparation time order was granted against the claimant, with an oral judgment being given on 15 September 2022 and written reasons provided to the parties upon the claimant's request.
2. The judgment finally determining the proceedings was sent to the parties on 16 September 2022. Written reasons were provided and sent to the claimant on 19 October 2022.

3. The claimant had sent an email to the Tribunal following the oral judgment that was issued which was considered to amount to an application to reconsider the judgment. An oral judgment was issued dealing with the reconsideration application, which was refused, and written reasons were provided on 20 September 2022.
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4. On 10 November 2022 the claimant sent an email to the Tribunal with attachments. One of those attachments includes an application for reconsideration of the judgment issued to the parties.
5. I have undertaken a preliminary consideration of the claimant's application for reconsideration of the judgment dismissing his claim.
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The decision

6. At the final hearing in this case having heard parties' evidence and submissions the Employment Tribunal issued an oral judgment dismissing the claim. The Tribunal had found as a fact that the claimant had no genuine intention of applying for the role in question. The Tribunal concluded that the claimant did not wish to move to Scotland and had made no effort to consider such a move. He had seen the advert, which was discriminatory, and knowing the law, sought to secure money from the respondent via the Tribunal process.
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7. The claimant is an articulate, intelligent and capable individual. He has a masters degree (and certificate in accountancy) and works as a self employed interpreter and has worked in market research. He last worked in hospitality in 1990. He stays in Hounslow. He applied for no other jobs in Scotland (before or after the advert in question). He said he wished to move due to the cost of living being better in Scotland and the advert having referred to there being a beautiful park in Ruchill, and that it was a beautiful place.
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8. The claimant did not in fact apply for the role. He saw the advert and raised a claim for unlawful discrimination given its reference to "female takeaway staff needed" (albeit the advert later refers to "he/she"). The claimant did not contact the respondent prior to raising proceedings. He argued he was
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deterred from doing so because of the advert said “female takeaway staff needed” and he was male. He said he believed the advert was fake in any event. He said he did not want to enter into an argument with the respondent and so did not apply. He had presented research which he said evidenced these issues.

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9. The Tribunal found that the claimant had no intention of applying for the role. He had not worked in hospitality for many years. He had not applied for any other roles in Scotland. He was clearly capable of presenting his position and advancing his rights. His approach in setting out his claim in writing and orally demonstrated that. The Tribunal concluded that the claimant was in no way deterred from applying for the role whatsoever. The claimant chose not to apply as he did not wish to apply. His sole purpose in raising the claim was because he wished to secure money from the respondent having seen that the advert was unlawful.

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10. The Tribunal found that the claimant had carried out the research and reached a view in relation to the explanation for not applying following his decision not to apply for the role. The Tribunal did not accept that the fact the claimant believed the advert to be fake or the fact it had said “female takeaway staff” were to any extent a reason for his decision not to apply. The Tribunal did not accept a reason for his decision not to apply was the fact he did not wish to enter into an argument or discussion. The Tribunal found as a fact from the evidence presented that the claimant made a choice not to apply for the role, having been capable of doing so, if he wished to apply for it.

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11. The Tribunal took into account the full terms of the advert. The advert stated that the location was “near the beautiful area of Ruchill park”. In reaching its decision that the claimant had no genuine desire to move to Scotland the Tribunal took account of the fact that the claimant had made no effort to undertake any research as to the area whatsoever. He stayed in London and had made no effort to look for work in Scotland before or after. He had no connection with Scotland and little funds to allow him to move his life to Scotland. The Tribunal did take into account the difference in cost of living (which was better in Scotland) but found the claimant to be evasive and

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lacking in candour. The better cost of living was not a reason as a fact in this case for the claimant wishing to move to Scotland. He did not wish to do so.

12. Had the claimant wished to apply for the role he was clearly capable of doing so and clearly capable of setting his position out. He did not do so because
5 he had no intention of applying for the role.

13. The Tribunal considered all the documents submitted by the claimant, including his witness statement, background material and submissions, in addition to his oral evidence. The Tribunal did not find the claimant to be credible or reliable. The Tribunal unanimously found that the only purpose of
10 the claimant raising the claims was to seek money from the respondent, him having no genuine desire whatsoever to apply for the role. On that basis the claim was dismissed. The oral judgment that was issued made the Tribunal's findings and reasons clear, including that it had expressly considered each of the claimant's reasons and all his material.

15 **The specific grounds considered**

14. In his application the claimant provides 12 grounds in support of his application which are considered in turn.

15. The **first ground** is that "it is not an automatic right to conduct a hearing outside the jurisdiction and a party can be allowed to do it only when it is
20 located abroad and it has to give evidence. However, the respondent did not give any evidence during the hearing on the 14 and 15 September 2022 so it should not have been allowed to conduct it from China".

16. When there was a prospect of the respondent giving evidence from China, the Presidential Guidance on the taking of oral evidence from abroad was
25 considered by the parties and the relevant consent was sought. The claimant had objected to any evidence being given from China.

17. The respondent decided that no evidence would be led and the sole focus of the Hearing would be on whether the claimant had a genuine desire to apply for the role. This had been a matter canvassed at the earlier preliminary
30 hearing and the parties had understood the position. As the respondent had

chosen not to lead any evidence (and the case would be determined by whatever evidence the claimant led), the difficulties otherwise arising disappeared.

5 18. The issues to be determined in this case were issues arising exclusively from the claimant's evidence. It was the evidence led by the claimant which determined the issues. The matter would have been determined in the same way had the respondent not been in attendance remotely.

10 19. As there was no evidence led from the respondent it was not necessary to have regard to the terms of the Presidential Guidance, which applies to leading evidence from a foreign country. The respondent viewed proceedings from abroad. There is no prohibition on so doing and the approach was entirely in the interests of justice and consistent with law and the overriding objective. There was no prejudice to the claimant whatsoever. The claimant was fully able to conduct his case and present the arguments he wished to
15 advance in full.

20 20. The **second ground** is that "We have to take into account that I am a witness like any other witness and that the evidence that I gave on oath during the hearing on the 14 and 15 September 2022 when I say that I was interested in the position has the same value as the evidence of any other witness. And, as a consequence the tribunal to have the right to accuse me of having lied on oath on this occasion needs to have conclusive objective evidence which
25 prove with certainty that I lied on oath. However, the tribunal does not have such evidence."

30 21. The Tribunal assessed the evidence it heard in the normal way. The Tribunal was satisfied for the reasons set out in the judgment that the claimant had no genuine desire to apply for the role. That was a fact arrived at from an assessment of what the claimant said in evidence together with the contemporaneous and other evidence before it. That was the decision of the Tribunal on the evidence before it. The Tribunal, which was a panel of 3, carefully assessed the full evidence before it and reached a unanimous decision in relation to this point. The points raised by the claimant had been

fully considered and there is no basis to suggest that decision has reasonable prospects of being revoked.

22. The **third ground** is that it is alleged the Tribunal “unfairly has not taken into account that the Respondent did not comply with the UK law i.e. The Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015 “because it did not state in its advert its real name as confirmed”. The Tribunal was aware of that argument, which had been raised by the claimant but it had no material bearing on the key issue in this case, namely, whether or not the claimant had a genuine desire to apply for the role. It was not a matter that required to be determined (or raised) by the Tribunal as it was not relevant to the issue to be determined.
23. The **fourth ground** is that the Tribunal “says that he has considered my documentary evidence which proves that we can be deterred from applying to a position because of the discriminatory contents of an advert and that some people could be deterred but not me without putting forward any conclusive objective evidence which proves with certainty that I could not be deterred like anyone else”.
24. This is an attempt to reargue the point that was fully considered at the Hearing. The claimant asserted that he was deterred from applying and provided evidence. The Tribunal was satisfied that in fact the claimant was not deterred from applying and instead chose to do so. That was the unanimous decision of the Tribunal from its assessment of the evidence before it.
25. The **fifth ground** is that “We have to take into account that one of the five grounds of appeal which are in the list of the possible grounds of appeal in the first page of EAT’s website is that the Employment Judge does not have evidence to support his decision”. It is alleged that there was no “objective conclusive evidence which proves with certainty” the claimant was not interested in this position or that he was not deterred from applying to it by the discriminatory contents of the advert.
26. The Tribunal, as a panel, unanimously reached its decision from the evidence

presented before it having carefully assessed what the claimant said and the documentary evidence. On the facts the Tribunal was satisfied the claimant had no desire to apply for the role for the reasons set out.

27. The **sixth ground** is that “During this hearing, I gave evidence through a witness statement so I should have been cross-examined only concerning its contents as evidenced by paragraph 10.3 Guidance Note 5: timetabling of the Presidential Guidance 2018 “. As explained to the claimant at the Hearing, in Scotland evidence is given orally and written witness statements are only permitted where specifically ordered by the Tribunal. In this case there was no such order and evidence was to be given orally. Notwithstanding the absence of any such order the Tribunal noted it would take into account his witness statement and he was given the opportunity to present further points orally and ask questions the panel had. The questions asked of the claimant were relevant questions in light of the issues to be determined.
28. The **seventh ground** is that “I was right to have refused to reply to any questions about my possible other claims because I have the right to protect myself against victimisation, persecution and breach of privacy.”
29. The claimant criticises the question asked of him with regard to the other claims that the respondent had alleged, in writing, the claimant had raised in other claims. The respondent had produced a list of the other claims which appeared to involve a person in similar if not identical circumstances to the claimant raising the same claims. These were public documents.
30. Such a question was relevant since it went to the key issue as to whether or not the claimant genuinely wished to apply for the role or whether there was another motive. The fact a litigant has raised other claims is not, by itself, material. In this case however the number of claims having been raised, which appear very similar if not identical to the claimant’s, was relevant given the issue that required to be determined. It was not a conclusive matter but it was relevant. There was no basis provided for the claimant’s assertion that disclosing that he was the claimant in the other claims would lead to some detriment or that his confidentiality was being breached by disclosing whether

or not he was the person referred to in the other public judgments. It was open to him to raise such an issue, which would have been considered. The other claims had claimants who were in many respects identical to the claimant and are public judgments. The failure of the claimant to answer the direct question was a relevant consideration but it was not conclusive and the Tribunal did not apply any great weight to his failure to answer the question, reaching its decision from the other facts before it as set out in the judgment.

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31. The **eighth ground** is that “Judge Hoey was wrong to have appointed himself to conduct the fifth preliminary hearing on the 17 August 2022 and also the full merit hearing of the 14 and 15 September 2022”. It is alleged by the claimant that a judge who deals with preliminary matters in a case should not hear the substantive hearing because there is a risk of unfairness and this is “lacking in democracy”. There is no evidence given as to why such a risk arose in this case. It was entirely right and proper that the judge appointed to hear the case proceed to do so. There was no good reason why a judge who dealt with the preliminary matters could not proceed to fairly hear the claim, particularly given the claim was decided by a panel, with 2 independent members who had no prior knowledge of the claim or issues.
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32. The **ninth ground** is that the Tribunal had “not taken into account that I was subject to less favourable treatment because I was excluded from the recruitment process by the discriminatory contents of the advert”. The claimant argues that the advert was fake and that should have been taken into account. Whether or not the advert was fake had no bearing on whether or not the claimant had a genuine desire to apply for the role. It was not necessary to consider the nature of the advert given the issue that had to be determined.
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33. The **tenth and eleventh grounds** develop the argument that the advert was fake. Whether or not the advert was genuine had no bearing on whether the claimant genuinely wished to apply for the role.
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34. The **final ground** was that the Tribunal “should not have rejected my claim without having a copy of the correct advert so without knowing the extent of

the discrimination". This matter was dealt with at the outset of the Hearing where it was agreed that the Hearing would proceed on the basis of the advert produced by the claimant was the relevant advert. The respondent conceded that the discriminatory words were used. On that basis it was not necessary to consider what, if any, advert the respondent had. The respondent had advised the Tribunal that the nature of their social media account was such that they could not obtain a copy of the advert. Given agreement was reached as to the terms of the advert the claimant said he saw, that dealt with the issue.

10 **No reasonable prospects**

35. In terms of rule 72(1) an Employment Judge shall consider the reconsideration application and if it is decided that there are no reasonable prospects of the original decision being varied or revoked, the application shall be refused.

15 36. The Tribunal took full account of the material provided by the claimant, including the issues he argues were overlooked. The Tribunal was unanimous in the view that the claimant had no genuine desire to apply for the role. He saw the unlawful advertisement and sought to use that as a way to seek money from the respondent. The Tribunal reached its unanimous decision from the evidence before it.

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The law

37. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70).

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38. Rule 72(1) of the 2013 Rules of Procedure empowers me to refuse the application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked.

39. The importance of finality was confirmed by the Court of Appeal in **Ministry of Justice v Burton and another [2016] EWCA Civ 714** in July 2016 where Elias LJ said that:

5 “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 and Vials 1994 ICR 384 Mummery J held that the failure
10 of a party's representative to draw attention to a particular argument will not generally justify granting a review.”

40. Similarly, in **Liddington v 2Gether NHS Foundation Trust EAT/0002/16** the Employment Appeal Tribunal chaired by Simler P said in paragraph 34 that:

15 “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 by 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
20 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.”

25 41. In common with all powers under the 2013 Rules, preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay. Achieving
30 finality in litigation is part of a fair and just adjudication. It is also important to

recognise that fairness and justice applies to both parties – the claimant and the respondent.

Conclusion

5 42. I considered the overriding objecting in reaching my decision to ensure the decision taken was fair and just. That applies to both the claimant and the respondent since justice requires to be achieved for both parties. I have done so carefully.

10 43. Having considered all the points made by the claimant I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The points raised were fully considered and addressed in reaching its unanimous decision. It is not in the interests of justice to reconsider the decision the Tribunal reached.

15 44. The application for reconsideration is therefore refused under rule 72(1) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Employment Judge: D Hoey
Date of Judgment: 24 November 2022
Entered in register: 25 November 2022
and copied to parties