Case Number: 3312297/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Kotecha	v	London Borough of Hillingdon

JUDGMENT

The claimant's application dated 9 September 2022 for reconsideration of the judgment given orally on 5 August 2022 and sent with reasons to the parties 26 August 2022 is refused.

REASONS

1 The application for reconsideration was made in a letter sent by the claimant's solicitors to the tribunal on 9 September 2022. The basis (i.e. the summary of the reasons) stated in that letter ("the letter of 9 September 2022") for that application is that "the Claimant wishes to adduce new evidence". It is then asserted that the application to adduce new evidence falls within the criteria stated by the Court of Appeal in *Ladd v Marshall* [1954] 1 WLR 1489 for permitting new evidence to be admitted on appeal or at a fresh trial.

2 In that case, Denning LJ, as he then was, said this at page 1491:

> "To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

3 The judgments of Hodson and Parker LJJ were to the same effect.

4 It is asserted in the first part of the application for reconsideration that the new evidence “could not have been obtained with reasonable diligence for use at the original hearing”. The claimed new evidence is “that the Claimant sustained his back injury around Wednesday 5th August 2019”.

5 The only reasons given in the letter of 9 September 2022 for asserting that the new evidence could not reasonably have been obtained with due diligence for use at the original hearing are these:

> “It was not known and could not reasonably have been known that evidence in relation to when the Claimant saw his GP regarding his accident at work was material. This was not something upon which the Claimant had in any way been explicitly challenged by the Respondent either during the Claimant's employment or at the full trial before the Tribunal. The question of dates and the GP records was something brought up by a member of the Tribunal panel rather than something raised by either party.”

6 In fact, the claimant gave “evidence ... in relation to when [he] saw his GP” at the original hearing. It was given because he was asked by one of the non-legal members, Ms Bhatt, about the GP’s entry at page 252 which is set out in paragraph 43 of the tribunal’s written reasons. The claimant was therefore given a full opportunity to give oral evidence about that entry. That is in itself sufficient to justify the conclusion that the test in *Ladd v Marshall* is not satisfied, at least in relation to the oral evidence that the claimant now wishes to adduce.

7 In regard to the second test in *Ladd v Marshall*, it is asserted (in heading (b) at the top of the second page of the letter of 9 September 2022) that “[the new evidence] is relevant and would probably have had an important influence on the hearing”. That is in my view plainly incorrect. That is for the following reasons.

8 The precise date of the claimant’s back injury was immaterial to the claims which the tribunal had to determine, namely of unfair dismissal and unfavourable treatment within the meaning of section 15 of the Equality Act 2010 (“EqA 2010”). That is clear from the conclusions of the tribunal set out in paragraphs 94-109 of the tribunal’s written reasons. In addition, as stated in paragraph 103 of those reasons, even if the tribunal had concluded that the claimant had suffered an accident at work (the precise date of which was, as is clear from that paragraph, immaterial), that would not have led to a finding that the claimant’s dismissal was unfair. Nor would it have led to a finding in favour of the claimant under section 15 of the EqA 2010.

9 In addition, and in any event, the proposed new photographic evidence to which I refer further in paragraph 10 below would be only incidental, as it would be only potentially corroboratory of the claimant’s oral evidence about the date of the back injury.

10 The third test in *Ladd v Marshall* is said in the letter of 9 September 2022 to be satisfied on the basis that the proposed new evidence "is apparently credible". That is asserted for these reasons:

> 'The evidence to be adduced will show that the Claimant sustained his back injury around Wednesday 5th August 2019. Following this the Claimant had two days annual leave to look after his daughter and then it was the weekend and this is why he did not call and report his sickness prior to this. He is looking to adduce photos of his daughter when he was off for childcare with time stamps to match this date. [P]lainly this would be highly reliable evidence. On Monday 12 August 2019 he attended the doctors, which is shown in his medical records at page A57 of the bundle (this is corroborated by the fact that his GP notes show that he mentions an incident "4 days prior" as recorded by the Tribunal). A sick note was issued and then at 11:52am the evidence is that the Claimant sent this into work (see page C428).'

11 The proposed new evidence would be adduced against the background of the facts that (as recorded in paragraphs 25.4 and 33 of the tribunal's written reasons) the claimant had put before the tribunal two written statements, one of which was his witness statement, in both of which he said that he sustained the back injury on 12 August 2019. It would also be adduced against the background of the facts referred to in paragraphs 31, 32, 36 and 40-42 of the tribunal's written reasons, which would not be affected by the proposed new evidence, even assuming it were accepted. Assuming that the claimant were to put before the tribunal "photos of his daughter" which had "time stamps" showing that he was absent from work on annual leave to look after his daughter on Thursday and Friday of the week before Monday 12 August 2019, those "time stamps" would have to have been of 8 and 9 August 2019. The claimant has asserted that the injury took place on "Wednesday 5th August 2019", but 5 August 2019 was a Monday, not a Wednesday. Even ignoring that error, however, the proposed new evidence is not "apparently credible" given (1) the part of the factual matrix shown by paragraphs 31, 32, 36 and 40-42 of the tribunal's written reasons and (2) the factors to which I refer in the first sentence of this paragraph.

12 Thus, none of the three parts of the test in *Ladd v Marshall* for permitting the reception of fresh oral evidence are in my view satisfied here, but even if it could be said that the third part of that test was satisfied, all three parts would need to be satisfied before it could be said to be in the interests of justice to admit the new evidence. I add that the proposed photographic evidence would be of only peripheral relevance and would be capable of doing no more than corroborating the proposed new oral evidence.

13 In the letter of 9 September 2022, the claimant's solicitors say this:

> "Even if the Tribunal is against the Claimant on this point with respect to the application of the above criteria and the approach, Judge Eady QC in *Outasight VB Ltd v Brown* UKEAT/0253/14 (21 November 2014, unreported) acknowledged that there might be cases where the interests of justice would permit fresh evidence to be adduced notwithstanding that the principles were not strictly met."

14 The discussion at paragraphs P[1151.01]-[1151.10] of *Harvey on Industrial Relations and Employment Law* shows that that case does not assist the claimant here.

15 In any event, I have come to the firm conclusion that the application for reconsideration has no reasonable prospect of success because (using the words of rule 72 of the Employment Tribunals Rules of Procedure 2013) "there is no reasonable prospect of the original decision being varied or revoked". That is for the reasons given in paragraph 8 above.

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Employment Judge Hyams

Date: 24 November 2022

SENT TO THE PARTIES ON

29 November 2022

FOR THE TRIBUNAL OFFICE