EMPLOYMENT TRIBUNALS

Claimant: **Ms J Davies**

Respondent: **The Regard Partnership Ltd**

Heard at: **Cardiff (by CVP)** **On: 16 November 2022**

Before: **Employment Judge Vernon**
Members: **Ms D Hebb**
Ms P Humphreys

Representation:
Claimant: Mr P Morris (Counsel)
Respondent: Ms S Garner (Counsel)

JUDGMENT having been sent to the parties on 17 November 2022 and reasons having been requested by the respondent in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Introduction

1. The claim comes back before the Tribunal today to deal with the Respondent's Application for a Reconsideration of part of the Judgment of the Tribunal following the Final Merits Hearing which was heard over a period of 4 days between 15 and 18 November 2021. That is, of course, almost exactly 1 year ago to the day today.

2. Following that hearing the Tribunal reserved its Judgment and a Reserved Judgment was subsequently sent out to the parties in writing. The procedural history of the substantive claim was set out in paragraphs 2 and 3 of the Reserved Judgment. The ET1 Claim Form was presented to the Tribunal on 11 September 2019. The ET3 Response Form was presented towards the end of October 2019. The events that were material to the claim

occurred as set out in the Reserved Judgment during the period between January and September 2019.

3. The Claimant's claim comprised complaints of constructive unfair dismissal and disability discrimination in all of the forms prohibited by The Equality Act 2010.

4. After hearing the evidence of the parties and submissions at the Final Merits Hearing the Tribunal came to the decision set out in the Reserved Judgment. That decision can be summarised for today's purposes in the following way:

   4.1 The Claimant's claim of constructive unfair dismissal was found to be well founded; and

   4.2 All of the Claimant's complaints of discrimination were dismissed save for the complaint of discrimination arising from disability which succeeded in part, specifically as set out in paragraphs 161 – 172 of the Reserved Judgment. The Tribunal found that an advertisement placed by the Respondent advertising the Claimant's role on a full-time basis during a period when the Claimant was absent from work due to ill health following a diagnosis of stage 3 breast cancer amounted to discrimination arising from disability.

5. The Reserved Judgment was dated 17 December 2021 and was sent to the parties on 11 January 2022.

The Respondent's application

6. The Application for Reconsideration is dated 25 January 2022 and seeks reconsideration of the Tribunal's decision insofar as it relates to the Section 15 Equality Act complaint. In summary, the Respondent's Application raises an issue about the jurisdiction of the Tribunal to reach that conclusion in respect of that complaint.

7. The Application observes that only one allegation of the allegations that were pursued by the Claimant has been found by the Tribunal to be well founded, and that allegation relates to an event which occurred on 14 February 2019 in circumstances where the Claim Form was presented to the Tribunal on 11 September 2019. The Respondent says that on the face of it, as regards that single act of discrimination, the claim appears to be out of time and therefore the Respondent invites the Tribunal to reconsider its decision to find in the Claimant's favour on the Section 15 Equality Act complaint on the basis that the Tribunal has no jurisdiction to reach such a conclusion.

8. Allied to that submission, the Respondent also says that the Tribunal should, if it is minded to reconsider its decision, conclude that no extension of time should be granted to the Claimant on a just and equitable basis to allow the finding to remain.

9. The Respondent in making that Application concedes, both in the Application itself and in the submissions that have been received from Ms Garner both in writing and orally, that this is an issue that has been raised for the first time as part of this Reconsideration Application and further that it is an issue that could and should have been raised by the Respondent at an earlier stage in the proceedings and before the Tribunal gave its Judgment.

10. Following receipt of the Application, and in accordance with the relevant parts of the Employment Tribunal Rules of Procedure, the Tribunal directed that the issue should be subject to a Reconsideration Hearing and accordingly invited the Claimant's response to the Application. A Response was received from the Claimant in writing dated 3 March 2022 making clear that the Application is opposed. The Application was then listed for hearing originally in June of this year. That hearing was adjourned administratively due to the unavailability of Counsel for the Claimant. It has then not been possible to re-list the matter before the Tribunal who dealt with the Final Hearing until now, approximately 12 months on from the Final Merits Hearing.

Applicable principles

11. In considering an Application for Reconsideration there are a number of principles which the Tribunal has to have in mind. The starting point is Rule 70 of the Employment Tribunal Rules of Procedure. That Rule reads as follows:

    "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. The parties are in agreement that that Rule provides a wide discretion to the Tribunal. The issue for the Tribunal is whether it is necessary in the interests of justice to reconsider the Tribunal's Judgment. In coming to that decision, the Tribunal must also have in mind the overriding objective, the terms of which are set out in paragraph 4 of the written submissions of Ms Garner for the purposes of today's hearing.

13. There are also other factors which are of relevance which can be derived from the case law. I pause at this stage to note that those factors do not change the legal test which is to be applied on a Reconsideration Application, but they are of relevance because they can help to identify factors which are to be taken into account when deciding whether the Tribunal should exercise its discretion under Rule 70. The following factors are, in the Tribunals view, relevant to this Application for Reconsideration.

14. Firstly, the power of the Tribunal to reconsider its own decisions is a wide power but is not boundless.

15. Secondly, finality in litigation is an important issue for the Tribunal, and indeed for the parties and also for the wider public who might also use the Employment Tribunal to determine disputes. The Employment Tribunal should not exercise the power to reconsider too readily.

16. The next factor that can be identified is this: where an issue could and should have been raised by a party but either a choice was made not to raise it, or the issue was not raised as a result of an error or failing on the part of that party or its representative, that is not generally a good ground for a review or a reconsideration of any decision. That principle derives from the case of ***Lindsay -v- Ironsides Ray & Vials*** **[1994] ICR 384**.

17. A further factor is that it can be highly material to such a request that an argument now advanced was not advanced before the Tribunal which heard the case at the Final Merits Hearing. That much appears to be clear from the Judgment given in the case of ***Ministry of Justice -v- Burton*** **[2016] ICR 1128**, a copy of the Judgment of which has been provided by Ms Garner. It is worth bearing in mind, in particular, paragraph 24 of the Judgment from that case, which reads as follows:

    "*Quite apart from these considerations, in my view it is highly material, as Employment Judge MacMillan thought, that this argument was not addressed before the Judge. Nobody suggested that there should be tapering or a cap.*"

    That of course is a reference to the particular nature of the claim being considered in that case. The Court went on:

    "*If the point was an obvious one for the Judge to consider, it must have been obvious for counsel to raise it at the material time. Given the observations of Mummery J in* ***Lindsay -v- Ironsides Ray and Vials [1994] ICR 384****, the refusal of the judge to reconsider the point in these circumstances was wholly apt. The principle that it will not in general be in the interests of justice to reopen a case on the basis that counsel had not raised a certain point*

should not be circumvented by suggesting that the point should have been taken by the judge of his or her own motion."

18. There is also a factor to be borne in mind, as is common ground between the parties, that there is no obligation on an Employment Tribunal to consider the issue of jurisdiction in cases involving discrimination, as opposed to the contrary position (for example) in cases where there is a complaint of unfair dismissal.

19. Finally, as was explored during the Respondent's oral submissions, there are no authorities which express any clear principle as to whether the Tribunal either should or should not reconsider a Judgment in circumstances such as have arisen in this case. It is therefore very much a question for the exercise of the Tribunals discretion in accordance with Rule 70 and in accordance with the other factors which I have just outlined.

Discussion and analysis

20. Having set out those principles the Tribunal will now set out the matters which the Tribunal considers relevant to the question to be determined and also the conclusion which we have reached.

21. The Claim relates, as I have already said, to events which occurred during the year 2019. The Claim Form was presented in September of 2019 and the Final Hearing was heard 12 months ago. The basis of the Claimant's complaint of discrimination, together with her other complaints, was set out clearly and in clear terms in the ET1 Claim Form and the document attached to it. That Claim included a number of factual allegations being relied upon by the Claimant which were said to amount to discrimination in one or more of the forms prohibited by The Equality Act 2010. The factual matters relied upon made clear when the acts or omissions being complained of had occurred. Notwithstanding that some of those events occurred more than 3 months prior to the date on which the Claim was presented to the Tribunal (or a longer period allowing for the ACAS Early Conciliation process to be completed) no point was raised by the Respondent at any stage as to applicable time limits until this Application was made after receipt of the Reserved Judgment of the Tribunal.

22. The Tribunal accepts the point made by the Claimant that there were several opportunities for the Respondent to have raised the point earlier in proceedings:

    22.1 The first opportunity came in the ET3 Response; it was not raised there.

22.2 The second opportunity appears to us to have come at the Preliminary Hearing that was conducted by Employment Judge Ryan. His summary of that Preliminary Hearing recorded the nature of the complaint being pursued and also set out a List of Issues for determination. Time limits were not included in that List of Issues or that Summary.

22.3 An amended set of Grounds of Resistance were subsequently filed by the Respondent. Again, no issue about time limits was raised.

22.4 Furthermore, at the Final Merits Hearing, issues of time limits were not raised either in the opening submissions received from the Respondent or during oral submissions, during the hearing or indeed in any further written submissions at any stage prior to the Reserved Judgment.

As I indicated earlier, all of that is conceded by the Respondent.

23. The Tribunal does accept a point made by Ms Garner in her submissions today, that in discrimination complaints where some allegations are in time on the face of it, and others on the face of it are out of time, parties tend not to focus on time limit issues until the Final Merits Hearing and that probably reflects the fact that it is normally very difficult in discrimination complaints to persuade a Tribunal to do anything about incidents which appear on the face of it to be out of time in such circumstances pending a resolution of any argument as to whether there was conduct extending over a period.

24. The force of that submission, however, has to be seen in this context and in our view is tempered by the following issues:

24.1 Firstly, this is not a case, as I have just outlined, where the issue of time limits was in fact raised or even flagged up at any time before Judgment was given.

24.2 Secondly, it is common, in the Tribunals experience, for issues of time limits to be raised by a Respondent in such circumstances but noting that the issue should be considered subject to the findings made by the Tribunal. That approach has not been taken here and in our Judgment is entirely as a result of the Respondent failing to raise the point at any earlier time.

25. The Tribunal also should say that one part of the Respondent's submissions in writing for this Application appears to suggest that it is regrettable that the issue was not raised by the Tribunal itself at any stage. To the extent that that point is pursued or pursued with any force, it seems to us to be answered by the authorities that we referred to earlier to this extent: the

failure of a party to raise an issue is generally not a good ground for a review or a reconsideration and such an argument should not be used to circumvent that general position.

26. It must further be noted, as was conceded by Ms Garner, that the only party standing to benefit from this point being raised is the Respondent and that simply serves to reinforce the observation that it is and was for the Respondent to raise and pursue it if the Respondent wished to do so.

27. Allied to all of those factors is the very long period that has elapsed since both the events in question, the presentation of the ET1 Claim Form and the Reserved Judgment.

28. Taking all of those matters into account the Tribunal's primary decision on this Application is that we consider that it is not necessary in the interests of justice to reconsider the decision that has been reached, bearing in mind all of those matters.

29. For the sake of completeness, and although it is not strictly necessary for the Tribunal to do so given our conclusion, the Tribunal has also considered whether, if the Tribunal were minded to reconsider its decision, the Tribunal would have extended time on the basis of it being just and equitable to do so. The Tribunal has gone on to consider that for two reasons. Firstly, it appears to us that is may be partially a factor to be considered relevant to the decision as to whether it would be necessary in the interests of justice to reconsider. Secondly, if our decision had been different as to whether it is necessary in the interests of justice to reconsider, it would be important for all to understand what the Tribunal would have decided as to whether it would be just and equitable to extend time.

30. The Tribunal has considered the submissions on this point carefully and has concluded that, if the Tribunal had been required to decide this issue, the Tribunal would have extended time on the basis that it was just and equitable to do so. In coming to that decision, we have taken into account the following matters:

    30.1 A time limit set out in the Equality Act for the presentation of a Claim is three months, together with any extended period to allow compliance with the requirement of ACAS Early Conciliation.

    30.2 The general principle is that time limits in any statutory provisions are there to be and must be complied with.

    30.3 It is for the party seeking an extension of time to show that it would be just and equitable to extend time. Of course, in this case, as any other case, it would be for the Claimant to show that.

30.4 There is no presumption in favour of an extension and the Tribunal has to be persuaded that such an extension should be granted.

30.5 The primary factors in deciding whether to extend time are the length of, and reasons for, the delay in presentation of the Claim and any prejudice that would be suffered by each party if the extension were granted or if it were not.

31. As to the length of delay in this case, the length of delay appears to the Tribunal to be a reasonably significant one. Even allowing for the maximum period of ACAS Early Conciliation it would mean that this Claim was presented approximately 2½ months out of time. That period must be seen against the primary time limit period of 3 months and in that context is a reasonably significant delay.

32. As to the reasons for the delay, the Tribunal considers the following matters to be material. The Claimant was exhausting the internal grievance procedures within the procedures adopted by the Respondent. We should say that all of these matters appear from the detailed chronology of events set out in the Reserved Judgment as has been summarised in the written Response to the Application from the Claimant. Further, the Claimant was also exploring other information available which was relevant to her issues by way of a Subject Access Request and by that request was seeking to obtain and collate information which may be relevant both to her grievance, but also to any subsequent Employment Tribunal Claim.

33. On the chronology of events set out in the Judgment there were significant delays in a number of respects in the Respondent dealing with both of those processes, that is the grievance and the Subject Access Request.

34. There are various occasions referred to in the Judgment when the Claimant informed the Respondent that she was unwell and was not able physically or mentally to deal with either the grievance or the Subject Access Request and on each occasion that observation was accepted by the Respondent and it did not seek either to press ahead with the process or to rush the Claimant in trying to press ahead with it. We should say that the Tribunal finds it difficult to reconcile the apparent inconsistency between that approach and the Respondent now saying that it would not be just and equitable to extend time where those delays were partly based on the same issues.

35. We accept that the Respondent is correct to point out that during the period between February 2019 and September 2019 the Claimant was taking some active steps to pursue both her grievance and the Subject Access Request. We have taken that point into account fully. However, in our view,

the majority of the actions taken by the Claimant during that period were actions in fact which placed an onus upon the Respondent to then take action. For example, the initial grievance was filed firstly to start the process but really nothing more, the Claimant requesting the matter to remain on the back burner effectively thereafter until her health improved, but was at least enough to commence a grievance investigation at an appropriate time. The same can be said of the filing of the Claimant's appeal against the initial grievance outcome and, further, the request made for documents by way of a Subject Access Request is also a matter which really placed the onus upon the Respondent to carry out a procedure rather than any creating any ongoing obligation on the part of the Claimant herself. Those matters really required little further action from the Claimant and, on the whole, were combined with (on numerous occasions) the Claimant saying that matters would have to await either her improvement in health or her recovery following treatment.

36. The second factor that I outlined earlier is the prejudice to either party that may arise depending on the decision reached on an extension of time. It is quite fairly and properly conceded by Ms Garner that there is no prejudice to the Respondent that can be identified if an extension of time were granted. I note in passing here that the case of course was fully responded to by the Respondent and was fully answered in evidence and submissions at the 4-day Final Merits Hearing which took place. The only conceivable prejudice which might be spoken of therefore is having to meet a Claim which is otherwise out of time.

37. The Claimant by contrast would suffer stark prejudice if a just and equitable extension of time were not granted. The reason for that is obvious. The Claim would stand dismissed as being out of time and the Claimant would be deprived of a remedy in respect of a Claim which (in the circumstances of this case) the Tribunal has found to be otherwise well founded finding that the Claimant has been discriminated against unlawfully.

38. The balance of prejudice therefore is also a factor in our Judgment which clearly tends to weigh in support of an extension of time being granted.

39. The Tribunal notes that a number of authorities were referred to as to the approach which should be taken by the Tribunal in considering whether a just and equitable extension of time should be granted. In coming to our decision, we have considered all of those Authorities. They all, of course, simply provide guidance to the Tribunal as to how the Tribunal should exercise its discretion, the discretion being relatively wide applying the just and equitable test.

40. Finally, the Tribunal did consider the Respondent's suggestion that the issue should be held in abeyance and be considered further at any Remedy

Hearing that is listed in respect of the Claim. The Tribunal concluded that that approach would not be an appropriate approach to take in this case for the following reasons:

40.1 Firstly, the parties agree that this issue can be resolved today on the evidence that is available to the Tribunal and on the basis of the findings that the Tribunal has already made. It therefore seems to us that it would be contrary to the overriding objective to further delay the resolution of this issue until any subsequent hearing where the Tribunal is fully able to grapple with it today.

40.2 Secondly, the Tribunal also accepts the force of the point made by Mr Morris that, in reality, the parties need to know the outcome in respect of all matters relevant to liability in advance of any Remedy Hearing because those issues can have an impact upon the parties preparation for, and presentation of their case at, any subsequent Remedy Hearing.

40.3 Finally, we also accept the force in the point that without a resolution of this issue today, that may hamper any ongoing discussions that the parties may be engaging in (or plan to engage in) as to a possible resolution of these proceedings without the need for a Remedy Hearing.

Conclusions

41. For all of those reasons, the Tribunal's decision is that the Respondent's Reconsideration Application is refused.

42. The Tribunal should also note that the Tribunal has now provided some clarification (as requested by the Respondent) in respect of paragraph 193 of its Reserved Judgment. That is a separate issue that does not need to form part of this Judgment.

Employment Judge R Vernon
Dated: 13 December 2022

REASONS SENT TO THE PARTIES ON

14 December 2022

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS