



EMPLOYMENT TRIBUNALS

Claimant: Mr A Draper

Respondent: Co-operative Group Limited

Heard at: Manchester **On:** 22 September 2022

Before: Employment Judge Liz Ord

Representation:

Claimant: In person
Respondent: Ms L Amartey (Counsel)

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The decision of the tribunal dated 15 December 2021 to strike out the claimant's complaints of detriment and automatic unfair dismissal in relation to an alleged protected disclosure, and of wrongful dismissal, is confirmed.

REASONS

Law

Rules

1. The tribunal's powers of reconsideration are contained in rules 70 to 73 of the Employment Tribunals Rules of Procedures 2013.
2. The procedure for reconsideration under rule 72 is for the Employment Judge who heard the case to consider any application made and decide whether there are reasonable prospects of the original decision being varied or revoked. If the judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application shall be refused. Otherwise, the application will be considered on notice to the parties.

3. Rule 70 provides a single ground for reconsideration, namely where “it is necessary in the interests of justice to do so”. On reconsideration, the original decision may be confirmed, varied or revoked and if revoked, it may be taken again.
4. The tribunal is also required to give effect to the overriding objective set out in rule 2 of ensuring that it deals with the case justly and fairly.

Caselaw

5. I have taken the following case law into consideration, as well as other case law set out in the claimant’s application and respondent’s response.
6. The “interests of justice” ground relates to the interests of both sides. In ***Outasight VB Ltd v Brown*** 2015 ICR D11, EAT, Her Honour Judge Eady QC referred to exercising the discretion judicially, ‘which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation’.
7. In ***Newcastle upon Tyne City Council v Marsden*** [2010] ICR 743 at [17] Underhill J referred to the injustice of giving the losing party a “second bite of the cherry”.
8. In ***Stevenson v Golden Wonder Ltd*** [1977] IRLR 474, EAT Lord McDonald said of the old review provisions that they were “not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before”.
9. It may be appropriate to reconsider, if a party for some reason has not had a fair opportunity to address the Tribunal on a particular point - ***Trimble v Supertravel Ltd*** [1982] ICR 440.
10. Reconsiderations are therefore best seen as limited exceptions to the general rule that employment tribunal decisions should not be reopened and relitigated. There must be some basis for reconsideration. It is insufficient for an applicant to apply simply because he disagrees with the decision.

Background

11. On 15 December 2021 I struck out the claimant’s complaints of detriment and automatic unfair dismissal concerning an alleged protected disclosure, together with his wrongful dismissal claim, on the basis they had no reasonable prospects of success. I provided written reasons on 20 January 2022, which were sent to the parties on 14 February 2022.
12. The thrust of my conclusions was that:

Detriment

- 12.1. The disclosure was vague, lacked specifics and was based on rumours. It was unlikely that a tribunal would determine that it contained the facts necessary for a protected disclosure to show that information

had been imparted.

12.2. Even if the claimant had made a protected disclosure, the detriment complained of (poor performance review) occurred at the end of 2014, making the claim about 6 years out of time. There was no basis for extending time.

12.3. For these reasons the complaint had no reasonable prospect of success.

Automatic Unfair Dismissal

12.4. The purported disclosure took place in September 2014 and there were no reasonable prospects of demonstrating a causal connection between this and the claimant's dismissal in December 2020, which was said by the respondent to be for reasons of redundancy.

Wrongful Dismissal

12.5. The claimant was paid for his notice period and it was only the tax paid on the PILON, which he claimed, due to not being able to pay a tax free lump sum into pension. There is no basis for such a claim, and even if there was, his dismissal letter offered him the opportunity to make a payment into pension, although he did not do so.

13. On 22 February 2022 the claimant applied for the decision of 15 December to be reconsidered. As I was not able to conclude that there were no reasonable prospects of the original decision being varied or revoked, the parties were put on notice that I would reconsider the matter, and upon receiving their views on this, a hearing was listed for 22 September 2022.

Application for reconsideration

14. In summary, the claimant's lengthy grounds for reconsideration, set out over 20 pages of text, can be reduced to the following main themes:

14.1. A challenge to the reasons for my decision, which he set out in a detailed response. One comment of note was that the tribunal was mistaken in stating that he agreed his whistleblowing was based on rumours, when it was based on a specific conversation.

14.2. The respondent withheld information, against the instructions of the tribunal, that would have supported his claims;

14.3. The respondent misled the tribunal on substantive matters that it knew to be incorrect, and in particular saying his whistleblowing was based on rumours;

14.4. The respondent did not comply with its obligation under rule 2 to assist the tribunal to further the overriding objective of dealing with the case fairly and justly and in particular to co-operate generally with other parties and the tribunal.

14.5. The case is complex and full evidence around it should be heard by a

full tribunal.

14.6. The preliminary hearing was not heard in a fair manner and nor did it take account of the claimant's status as a litigant in person.

Discussion and conclusions

Challenge to written reasons

15. The claimant has challenged aspects of the written reasons, although most of what he says is an attempt to re-argue his case. A re-consideration is not an opportunity to have a second bite of the cherry and it is not a re-hearing. I had taken his submissions fully into account at the original hearing and, consequently, I do not propose to consider them again here.
16. Nonetheless, there is one point that I will address. That is the claimant's contention that he did not agree his whistleblowing was based on rumours.
17. My understanding of his evidence at the original hearing was that he did base his purported disclosure on rumours, which I reflected in my reasons. In fact, the particulars of claim in the ET1 state ".....I immediately heard rumours that Tony had a corrupt relationship with the developer....."
18. It would appear that the claimant pleaded his case on rumours, but changed his stance at the re-consideration hearing. Consequently, the tribunal was not incorrect in its original reference.
19. There is nothing in the claimant's arguments that supports a variation or revocation of my judgment.

Whether the respondent withheld information

20. The purported disclosure was made orally and the respondent denies that documentation was withheld. In any event, I took the claimant's case at his highest, based on the pleaded facts, which were not disputed for the purposes of the application.
21. What the claimant appears to have wanted, is information that might have demonstrated the truth of his corruption allegations. However, that is irrelevant to the tests under consideration, and unnecessary for the purposes of the application.
22. Therefore, whilst the claimant submits that there is documentation that would determine the merits of his case, there is no evidence that relevant documents have been withheld. Consequently, this provides no basis for me to vary or revoke my judgment.

Whether the respondent misled the tribunal

23. The claimant mainly bases this contention on the respondent's submission that his purported protected disclosure was based on rumours. As noted at paragraph 17 above the claimant's pleaded case accords with that submission.

24. Whilst he also says the respondent misled the tribunal as to what was discussed at the case management hearing on 15 September 2021, the Employment Judge at that hearing made a case management order recording the discussion, which he did not question at the time.
25. There is no evidence that the respondent misled the tribunal and, in this regard, there is no basis to vary or revoke my judgment.

Whether the respondent complied with its legal obligations

26. The claimant suggests that the respondent withheld information, misled the tribunal and appeared to have encouraged a witness to provide false evidence. These are serious allegations made without any basis or evidence and, in this respect, they provide me with no reason to vary or revoke my judgment.

Complexity of the case

27. Regardless of any complexities, the tribunal had before it sufficient information relevant to the application, on which to reach an informed decision. There was no need to hear full evidence on the facts, as the claimant's case was taken at it highest. This ground is no basis upon which to vary or revoke my judgment.

Whether the tribunal gave the claimant a fair hearing

28. The claimant alleged that the tribunal did not take account of his status as a litigant in person and made no attempt to put him on an equal footing. However, the tribunal took time to explain the procedure and the issues involved and ensured that he was given an opportunity to deal with each of the matters raised. At the end of his submissions the tribunal asked whether he wished to add anything, and upon him doing so, gave him two further opportunities to speak before he confirmed he had said everything he wished to.
29. Whilst the claimant contends that the tribunal did not make a reasonable attempt to identify the claims and issues, this is untrue. Complaints and issues were discussed and identified at the case management hearing on 15 September 2021 and the claimant did not object to how they were recorded. In fact, in his reconsideration application, he seems to agree with them. These were the issues referred to at the strike out application hearing.
30. The claimant states that the tribunal continually interrupted him and stopped him from giving his evidence, yet the respondent's barrister was allowed as much time as she wanted. The tribunal did not impose any time limits on the claimant and did not rush him. He was only interrupted on those occasions when he was speaking at length on matters totally off point, and was brought back to the issues of relevance that needed to be determined. This was done fairly and sensitively, recognising he was a litigant in person.
31. The respondent's submission was that the tribunal was generous with the claimant in hearing the case in a fair manner.
32. Nonetheless, given that the claimant believed the original hearing was

conducted unfairly, I allowed him to read out his full application for reconsideration, which included submissions on why his claims should not be struck out. However, once more, taking the claimant's case at its highest, for the same reasons I gave previously, I reach the same conclusion.

33. In my view, the claimant has had a fair hearing and has been listened to at length. In this respect, there is no basis for varying or revoking my judgment.

Overall Conclusion

34. It is in the public interest that there be finality of litigation and that means not being too ready to overturn previous decisions on reconsideration. There is nothing in the claimant's application which persuades me that the original decision was incorrect. Therefore, for the reasons given, it is not in the interests of justice to vary or revoke my judgment and consequently it is confirmed.

Employment Judge Liz Ord
Date: 15 December 2022

JUDGMENT SENT TO THE PARTIES ON
22 December 2022

FOR THE TRIBUNAL OFFICE