



EMPLOYMENT TRIBUNALS

Claimant: Ms N Roberts

Respondent: Cardiff County Council

JUDGMENT

The Respondent's applications, dated 6 and 8 February 2023, for reconsideration of the Judgment, sent to the parties on 26 January 2023, are refused.

REASONS

1. The Respondent's emails of 6 and 8 February 2023, set out its applications for reconsideration of a Judgment in this case, sent to the parties on 26 January 2023 ("Judgment"), following a preliminary hearing on 5 January 2023.

Issues and Law

2. Rule 70 of the Employment Tribunals Rules of Procedure ("Rules") provides that reconsideration of a judgment will take place where the Employment Judge considers that it is necessary in the interests of justice to do so.
3. Rule 1(1) provides that a "judgment" is, *"a decision, made at any stage of the proceedings..., which finally determines –*
 - (i) *a claim, or part of a claim, as regards liability, remedy or costs...;*
 - (ii) *any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue);...*
4. Rule 71 provides that applications for reconsiderations of judgments should be presented in writing within 14 days of the date on which the written record was sent to the parties, or within 14 days of the date that the written reasons were sent (if later), and should explain why

reconsideration is necessary. The Respondent's applications satisfied those requirements.

5. Rule 72(1) notes that an Employment Judge shall consider any application for reconsideration made under rule 71, and that if the Judge considers that there is no reasonable prospect of the original decision being varied or revoked then the application shall be refused and the Tribunal shall inform the parties of the refusal. Alternatively, rule 72 sets out the process that is then to be followed for further consideration of the application.
6. Rule 72(3) provides that, where practicable, the consideration under Rule 72(1) shall be by the Employment Judge who made the original decision.

The Applications

7. The Respondent initially made a reconsideration application by email dated 6 February 2023. In that, it requested that paragraph 6 of the Judgment should be reconsidered, specifically the section of that paragraph in which I recorded, "*[The Claimant] has also brought a claim of disability discrimination, the specific detail of which remains to be clarified*".
8. The Respondent contended that the Claimant could not have brought such a claim because she had indicated, at the hearing on 5 January 2023, that she had not understood the legal test for disability when submitting her claim, and, as such, did not believe herself to be disabled at that time. The Respondent contended that it must therefore follow logically that the Claimant cannot have had the intention to bring such a claim, and thus had not brought such a claim.
9. The Respondent then made a second reconsideration application by email dated 8 February 2023. That also related to paragraph 6 of the Judgment, specifically the sentence which preceded the sentence which was the subject of the first application. That was, "*I confirm however that it should be considered that the Claimant has brought claims of protected disclosure detriment, pursuant to section 47B of the Employment Rights Act 1996 ("ERA"), and constructive unfair dismissal by reason of protected disclosure, pursuant to section 103A, ERA, as well as an "ordinary" constructive unfair dismissal claim pursuant to section 94 ERA*". It was submitted that there was no indication in the ET1 of the Claimant's intention to bring those claims.

Background

10. It seemed to me that it was likely, or certainly arguable, that the Respondent's applications were not capable of being reconsidered under Rule 70. That was on the basis that paragraph 6 of the Judgment was only part of the recital of the background to the hearing and my decision, and was not part of the Judgment itself. That dealt with the Respondent's applications to strike out the Claimant's unfair dismissal claim as having been brought out of time, or, in the alternative, to consider applications for strike out or deposit orders on the basis that the Claimant's claims had no, or little, reasonable prospects of success. If that was the case, then the matters on which reconsiderations had been sought were not "judgments"

for the purposes of Rule 1(1). In case that was not the correct interpretation however, I proceeded to consider the reconsideration applications as though they were valid.

11. I explained the background to my comments at paragraph 6 of the Judgment in the paragraphs which preceded it, which I set out below for ease of consideration.

Background

1. *The Claimant submitted her Claim Form on 30 March 2022, ticking only the box relating to a claim of unfair dismissal, which she pursues on a constructive unfair dismissal basis. The details of her claim however, suggested that she may also be pursuing claims relating to protected disclosures and disability. The Claimant was, and remains, a litigant in person.*
2. *Upon the initial vetting of the Claim Form therefore, Employment Judge Ryan questioned, in a letter sent to the Claimant on 27 April 2022, whether she had made protected disclosures and had been subject to detriments, and ultimately constructive unfair dismissal, as a result. He also questioned whether the Claimant asserted that she was disabled and had been subjected to disability discrimination. The Claimant replied in the affirmative to both points on 2 May 2022, albeit without providing any detail, which she had not been requested to provide.*
3. *Confusion appears to have arisen from the Tribunal's subsequent correspondence. On the Tribunal file was a letter dated 19 May 2022 to the Claimant, copied to the Respondent, confirming that a "claim for Public Interest Disclosure" had been accepted. The Claimant however brought to my attention, at the start of the hearing, that she had in her possession a letter from the Tribunal dated 18 May 2022, noting, "Your claim for whistleblowing, due to the discrimination of your disability has been accepted". That letter had not been copied to the Respondent.*
4. *The Respondent therefore understood that it was facing a claim of unfair dismissal, and a claim in relation to protected disclosures, although it would not have been clear whether that was confined to dismissal or detriments, or involved both. The Claimant however, whilst the wording of the 18 May 2022 letter does not really make sense, was under the impression that claims relating to protected disclosures and disability discrimination had been accepted.*
5. *In my view, the Claimant's letter of 2 May 2022 is clear, and it confirms that the Claimant is pursuing claims arising from asserted protected disclosures and in relation to disability discrimination. The Claimant's letter should have led to the scheduling of a preliminary hearing for case management purposes, at which the Claimant's specific claims could have been discussed and clarified. I had hoped that we could do that at the end of this hearing, but there was insufficient time. A further preliminary hearing for case management*

purposes will therefore need to be scheduled.

12. I then went on to sum up what I considered were the claims being advanced by the Claimant in paragraph 6, which I again set out in full for ease of consideration.
 6. *I confirm however that it should be considered that the Claimant has brought claims of protected disclosure detriment, pursuant to section 47B of the Employment Rights Act 1996 ("ERA"), and constructive unfair dismissal by reason of protected disclosure, pursuant to section 103A, ERA, as well as an "ordinary" constructive unfair dismissal claim pursuant to section 94 ERA. She has also brought a claim of disability discrimination, the specific detail of which remains to be clarified.*
13. By way of further background to my comments at paragraph 6 of the Judgment, the Claimant had, in her Claim Form, only ticked the box to state that she was pursuing a claim of unfair dismissal. She had also however completed the section of the Form in which she was asked to set out the background and detail of her claim. In that, the Claimant made a number of references, which are what I presume led Employment Judge Ryan to query whether she was also pursuing claims by reference to having made protected disclosures and claims of disability discrimination. These included:
 - *"raised concerns about management handling of return of colleague after disciplinary (convicted of drink driving leaving a child protection visit)"*
 - *"concerns dismissed"*
 - *"I was also angry as criminal conviction was grounds for change of contracts whereas employer refused me adjustments for physical ill health caused by shift pattern and for caring responsibilities when my husband was terminally ill."*
 - *"went on sick leave due to significant physical symptoms of stress"*
 - *"Despite the employer being aware I had underlying emotional and mental health issues as a result of bereavement I had no sickness management support after May 2021"*
 - *"I suffered a recurrence of stress and anxiety when moved to a new team as I felt threatened and unable to trust my employer"*
14. The Claimant had also ticked the box in the Claim Form which deals with remedy which said, *"If claiming discrimination, a recommendation"*. She had however answered, *"No"* to the question of whether she had a disability.
15. As I noted at paragraph 2 of the Judgment, Judge Ryan directed that the Claimant be asked whether she was alleging that she had made public interest disclosures, and had been subjected to detriments and ultimately

constructive dismissal as a result, and whether she was saying that she was a disabled person and had been subjected to disability discrimination. Those directions were included in a letter to the Claimant dated 27 April 2022, which was copied to the Respondent. On that day, the Claim Form was served on the Respondent, and it was directed to submit its Response by 25 May 2022.

16. The Respondent complied with that direction and submitted its Response on 25 May 2022. In that, it set out the Claimant's recent employment history at some length, including the ways in which a grievance and appeal had been handled. It then expressly responded to the Claimant's constructive unfair dismissal claim. It then, in a section headed "*Claimant's other potential claims*", noted that it was not yet clear precisely what the Claimant's claims were, referencing the Tribunal's letter of 27 April 2022 and noting that it was unaware of any response from the Claimant. As I noted in the Judgment, the Claimant had responded to the Tribunal's letter on 2 May 2022, but that had not been copied to the Respondent.
17. In its Response, the Respondent then addressed possible claims of protected disclosure detriment and disability discrimination.
18. As I noted at paragraph 3 of the Judgment, confusion then arose in relation to the Claimant's letter of 2 May 2022, in that she appears to have been sent a letter on 18 May 2022 which, whilst certainly not making clear grammatical sense, appeared to indicate that claims relating to protected disclosures and disability discrimination had been accepted. The Respondent was however sent a different letter, on 19 May 2022, which noted only that a protected disclosure claim had been accepted.

Conclusions

19. I took into account the guidance provided by Langstaff P, in Chandhok & anor v Tirkey [2015] ICR 527 at paragraph 10(a), that the "*originating application* [in this case the Claimant's Claim Form] *has to be read as a whole*" when considering the claims brought and whether or not any should be struck out. That was in the context of a case where an amendment to a claim had been effected at a preliminary hearing, and where the respondent had not applied for that application to be refused at that hearing, but had subsequently applied to strike it out.
20. Langstaff P went on, at paragraph 16, to say, in the context of the tribunal judge having referred to factual material put before him by the parties, i.e. over and above the claim form and the application to amend,:

"I do not think that the case should have been presented to him in this way or that it should have formed part of his determination. That is because such an approach too easily forgets why there is a formal claim, which must be set out in the ET1. The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so".

21. Bearing that guidance in mind, I then addressed the Respondent's applications, taking them in the reverse order to that in which they were made.

Protected disclosure claims

22. As I have noted, Judge Ryan clearly felt concerned that the Claimant, whilst she had only ticked the box to claim unfair dismissal, may, by virtue of the detail she provided of her claim, have also been advancing a claim related to protected disclosures. That could have been a claim of unfair dismissal by reason of having made a protected disclosure, as the form does not entertain any distinction between such a claim and an "ordinary" unfair dismissal claim, and/or could have been a claim of detrimental treatment by reason of having made a protected disclosure. That caused the Tribunal's letter of 27 April 2022 to be issued, which was copied to both the Claimant and the Respondent.
23. In my view, Judge Ryan was right to be concerned that the specific claim identified by the Claimant, at that time and now a litigant in person, did not accurately or comprehensively set out her concerns about the way she asserted she had been treated by the Respondent. Had I been the judge who vetted the Claimant's Claim Form on its receipt, I would have shared that concern.
24. The Claimant then replied to that letter, on 2 May 2022, noting that she did indeed consider that she had made public interest disclosures and had been subjected to detriments and been constructively dismissed as a result.
25. The Respondent, having been copied in on the Tribunal's letter of 27 April 2022, then advanced a defence to a possible protected disclosure claim. The fact that the Tribunal had accepted the Claimant's clarification of her claim as covering a claim related to protected disclosure was then made clear to the Respondent in the Tribunal's letter of 19 May 2022, which it received before it submitted its Response.
26. That letter could certainly have been better worded, and should have made clear whether that was a claim of dismissal by reason of having made a protected disclosure, detriment on the ground of a protected disclosure, or both. As I noted in the Judgment, a case management preliminary hearing should also then have been scheduled to discuss the claims and issues and make directions for the management of the case up to its final hearing. However, the Respondent made no contrary representations at any point.
27. In my view, reading the Claimant's Claim Form as whole, in the context of her being a litigant in person who is not to be expected to understand the niceties of specific legal claims, it does contain references to claims based on protected disclosures. To the extent therefore that paragraph 6 of the Judgment is to be considered to be a "judgment" on that point, I did not consider that it would be in the interests of justice to reconsider it.

Disability discrimination

28. The position with regard to disability discrimination is in many respects broadly similar to that relating to protected disclosures. Judge Ryan also had a concern that the details the Claimant provided of her claim indicated that she was pursuing a claim of disability discrimination, notwithstanding that she had not ticked the box to say that she was. Again, I considered that Judge Ryan was right to have that concern, and it is one that I would have identified had I vetted the Claim Form on its receipt.
29. The Tribunal's letter of 27 April 2022 therefore, in my view, correctly asked the Claimant whether she was saying that she was a disabled person and had been subjected to disability discrimination. She replied, in her letter of 2 May 2022, confirming that she felt that she was.
30. As I have noted, the Respondent, whilst not having sight of the Claimant's reply, did have sight of the Tribunal's initial letter. It then addressed a possible disability discrimination claim in its Response.
31. To that point therefore, there was little difference between the Claimant's clarification of her disability discrimination claim and her clarification of her protected disclosure claim. The Claimant did not provide any further details about either of those claims, e.g. whether she was pursuing a protected disclosure dismissal claim or detriment claim, and which type of disability discrimination claim she was advancing, but, as I noted in the Judgment, the Tribunal's letter did not ask her to do that.
32. However, the Respondent, in its reconsideration application, advanced an additional point, which was that the Claimant indicated, in the hearing before me, that she had not understood the legal test for disability when submitting the Claim Form and had not believed herself to be disabled at that time.
33. I reviewed my notes of the hearing, and noted that the Claimant did indeed state that she had not considered herself to be someone who was suffering with a disability when she submitted her Claim Form. That was in the context of questioning by the Respondent's representative regarding her state of mind at that time, directed at the principal purpose of that preliminary hearing, which was to assess whether the Claimant's claims should be allowed to proceed notwithstanding that they had been brought outside the specified time limit. The Claimant's mental health was a factor that she contended supported the conclusion that the claim should be accepted.
34. The Claimant noted that it had not occurred to her that she was disabled, but that, when the question was asked by the Tribunal, she looked at the definition in section 6 of the Equality Act 2010, and felt that it clearly applied to her, commenting that she had been minimising the effects of her mental health difficulties over a number of years. She also commented that the Equality Act Code noted that people do not necessarily recognise themselves as disabled.

35. In my view, the Claimant's clarification at the hearing on 5 January 2023, that she had not expressly viewed herself as a disabled person when submitting the Claim Form, did not mean that she was not. More importantly, it did not, in my view, mean that she was, in some way, prevented from being able to advance a claim of disability discrimination. My focus was on the words used in the Claim Form, and, as I have noted, they were, by my interpretation, indicative of a concern that the Claimant had been badly treated by reference to her state of health. Whilst that was not specifically advanced as a claim of disability discrimination, the Claimant was a litigant-in-person, and should not be expected to have expressed her claims with the degree of accuracy that could be expected of a represented party.
36. The Claimant's comments therefore did not alter the view I had reached, and that Judge Ryan also appeared to have formed, that the content of the Claimant's Claim form, read as a whole, and taking account of the Claimant's status as a litigant-in-person, included an assertion of disability discrimination. Her subsequent confirmation of that, in her letter of 2 May 2022, was then sufficient for me to confirm that she was indeed pursuing a claim of disability discrimination.
37. I considered that, even if I had been wrong to reach that conclusion, I would, in any event, have taken the Claimant's subsequent clarification as an application to amend her Claim Form. As that was made promptly in response to the Tribunal's query, I would then have granted the amendment. The balance of prejudice would then have lain in favour of granting the amendment, as the Respondent had already advanced a preliminary defence to a disability discrimination claim, and the evidence it will need to adduce to address that claim will be very much the same as the evidence it will need to adduce to address the Claimant's constructive unfair dismissal claim.
38. Again therefore, to the extent that paragraph 6 of the Judgment is to be considered to be a "judgment" on the disability discrimination point, I did not consider that it would be in the interests of justice to reconsider it.

Employment Judge S Jenkins
Date: 21 February 2023

JUDGMENT SENT TO THE PARTIES ON 23 February 2023

FOR THE TRIBUNAL OFFICE Mr N Roche