EMPLOYMENT TRIBUNALS

Claimant: **Miss P Sullivan**

Respondents: **Isle of Wight Council**

Heard at: **Bristol (decision on papers in Chambers)**

Before: Employment Judge Midgley
Mr E Beese
Mrs C Lloyd-Jennings

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The claimant's application for reconsideration is refused because there is no reasonable prospect of the claimant demonstrating that it is in the interests of justice for the Judgment to be varied or revoked.

REASONS

The application

1. The claimant has applied for a reconsideration of the Judgment dated 16 December 2022 which was sent to the parties the same day ("the Judgment"). The grounds of the application are contained in a letter attached to an email of the same date.

2. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). Under Rule 71 an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The application was therefore received within the relevant time.

Grounds of the application

3. The claimant further applied on 19 December 2022 for the Judgment to be "set aside", resubmitting that application with amendments on 31 December 2022. The only provision with the Tribunal Rules to challenge a Judgment are the right to apply for reconsideration pursuant to Rule 70, and separately by appeal to the Employment Appeal Tribunal.

4. In the event the grounds the claimant relies upon for setting aside the Judgment are that the Judgment was procured by fraud by the respondent. The claimant relies upon the same ground in her application for reconsideration. We have therefore reviewed the applications to set aside Judgment to identify arguments which may be relevant to the application for reconsideration.

5. The permissible grounds for reconsideration are only those set out in Rule 70, namely that it is in the interests of justice to vary or revoke the Judgment. That a Judgment was procured by fraud could well have the effect that it would be in the interests of justice to vary or revoke it.

6. The grounds identified in the claimant's application may be summarised as follows:

    a. The Judgment was procured by a fraudulent representation made by the respondent that the claimant made false Police reports;

    b. The Judge pretended not to have been referred to documents that showed that the representation was false and/or

    c. The Judge refused to include in the Judgment references to the documents which showed that the representation was false;

    d. The respondent did not include its complaints procedure within the bundle

    e. The Tribunal's conclusion on the issue of causation for victimisation was wrong;

    f. The Tribunal's decision upon reconsideration of the Judgment of EJ Goraj dated 4 January 2022 that the proper construction of s 39(3) EQA 2010 did not extend to a decision not to offer a stage 2 review under the respondent's complaint's was wrong as (a) the Tribunal did not have the benefit of the complaints procedure, (b) the Tribunal had failed to have regard to the need to construe the Equality Act in a

manner compatible with the European Convention of Human Rights ("ECHR")

g. The Tribunal erred in preferred the evidence of Mr Porter to the claimant's evidence, notwithstanding Mr Porter did not give evidence or produce a statement;

h. The Tribunal erred and breached the claimant's Article 6 right to a fair trial because it refused the claimant's application to rely on social media posts.

Conclusions

Fraud (Grounds a – c)

7. The basis of the fraud relied upon by the claimant is as follows:

> *On the first day (12 December 2022), the Respondent's legal counsel defended my application to include social media posts created by an employee of the Respondent. The Respondent's legal counsel started his (the Respondent's) argument with "The Claimant is known by Police to be a maker of false Police reports"[SIC}.*

8. The claimant argues that that statement was known by the respondent to be false as the claimant had not made unsubstantiated Police reports. The claimant must therefore show she has a reasonable prospect of establishing that the Tribunal made a finding that the claimant had made false Police reports and that that had a material influence on a conclusion that Tribunal reached in reaching its Judgment.

9. In the claimant's first application to set aside the Judgment she suggests that the Tribunal concluded that (a) she made false Police reports, (b) the Police reports were unfounded and vexatious.

10. A strange feature of this application is that it was made before the written reasons were provided to the claimant, in circumstances where the claimant was told that the written reasons take precedence over the oral reasons. Had the claimant waited for the written reasons, she would have had opportunity to consider them with care and time, as we encouraged her to do, and would have noted that we did not make the findings she suggests. For the avoidance of doubt, when handing down judgment verbally we did not make those findings either. As the Written Reasons show, we recorded as part of the background facts what the respondent had been told by PC Massey. Moreover, whether or not the claimant made false Police reports had no affect at all on our conclusion; it was a matter that was entirely irrelevant to our decisions.

11. In so far as the claimant argues that the Judge pretended not to have been referred to documents which showed that the representation was false, she is mistaken. The claimant stated that there were such documents in the bundle, we were not referred to them in evidence or closing arguments, but in any event, they would have been irrelevant to our decision.

12. After Judgment was handed down, the claimant raised that she wished the Judgment to reference certain documents to that end. The Judge explained to her that the Tribunal's reasons were those that we had just handed down and the claimant could not seek, after the event, to alter what those reasons were or what should be referred to in them.

13. This ground is misconceived in fact, and there is no reasonable prospect of our Judgment being varied or revoked on this basis.

The respondent failed to include the complaints procedure within the bundle and the Tribunal's decision to reconsider the Judgment of EJ Goraj and the conclusion reached was wrong (Grounds d and f)

14. It is right that the complaint's procedure was not included in the bundle. In relation to the claims before the Tribunal, the procedure was irrelevant because the respondent conceded (a) that the procedure permitted a stage 2 review and (b) that the claimant had not been permitted that review. The issue for the Tribunal was why that decision was made. It is worthy of note that the claimant did not apply at any stage during the hearing to adduce procedure in evidence.

15. There is no reasonable prospect of the Judgment being varied or revoked because it was not included.

16. In so far as the claimant argues that the decision to reconsider the Judgment or EJ Goraj and the conclusion of that reconsideration was wrong because the Tribunal did not have the procedure before it, again it formed no part of the claimant's submissions that it was necessary to see the procedure to decide whether to reconsider or to determine the outcome of that reconsideration. In any event, the procedure was largely if not entirely irrelevant to the issue we had to decide. The agreed facts were that the procedure did not permit the selection decision to be revisited, and that the claimant's complaint did not request that it should. Critically, our task was one of statutory construction; our focus was on s.39(3) EQA 2010 and the jurisprudence, not the procedure itself.

17. Secondly, addressing the alleged failure to construe that section in a matter that was compatible with the ECHR, we make two simple points. First that was not an argument which the claimant made before us: despite being

invited to address the substantive issue of whether we should reconsider the Judgment and being invited to address the European Jurisprudence, the claimant did not do so, as detailed in the Reasons. Secondly, as the Reasons manifest clearly, we had extensive regard to the nature of the interpretative obligation. The claimant has not identified how we erred in our approach or how the ECHR would have altered the outcome.

18. This ground is misconceived in fact and law and there is no reasonable prospect of the Judgment being varied or revoked on this basis.

The Tribunal's conclusion on the issue of causation for victimisation was wrong (Ground e)

The Tribunal erred in preferred the evidence of Mr Porter to the claimant's evidence, notwithstanding Mr Porter did not give evidence or produce a statement (Ground h)

The Tribunal erred and breached the claimant's Article 6 right to a fair trial because it refused the claimant's application to rely on social media posts. (Ground i)

19. We address these three allegations together, given they give rise to the same issue of law. All three matters were raised to a greater or lesser extent in the claimant's arguments which were considered before handing down the Judgment. We say 'arguments'; the claimant did not make any closing submissions, but we understood her case to be that the protected acts had caused Mrs Shand to refuse her a stage 2 review. The claimant did not, however, expressly argue or suggest to any witness that her evidence had to be preferred over that of Mr Porter, nor for the avoidance of doubt did she make any application for a witness order for Mr Porter. Nevertheless, we understood her case to be that we should accept her account of what had occurred, and where it differed from Mr Porter's denial in the complaints investigation, to prefer it to his. We did not accept the claimant's account for the reasons detailed in the Reasons.

20. The claimant did apply to rely on the social media posts, and we rejected that application for the reasons given in the Reasons.

21. These grounds of the application therefore entreat us to reconsider and review our decision on matters of fact or arguments which we have previously determined. The Employment Appeal Tribunal ("the EAT") in Trimble v Supertravel Ltd [1982] ICR 440 decided that if a matter has been ventilated and argued then any error of law falls to be corrected on appeal and not by review. In addition, in Fforde v Black EAT 68/60 the EAT decided that the interests of justice ground of review does not mean "that in every case where a litigant is unsuccessful, he is automatically entitled to have the tribunal

review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in the even more exceptional case where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order".

22. There was no denial of natural justice in this case; rather we considered the evidence and the claimant's arguments and determined that not only had she had not proved matters from which we could conclude that the burden of proof in relation to the allegations passed to the respondent, but further the respondent had shown Mr Porter had not acted as alleged and that Mrs Shand was not influenced by the protected Acts.

23. Accordingly, we dismiss the application for reconsideration pursuant to Rule 72(1) because there is no reasonable prospect of the claimant demonstrating that it is in the interest of justice for the Judgment to be varied or revoked.

Employment Judge Midgley

Dated 3 February 2023

JUDGMENT SENT TO THE PARTIES ON

8 February 2023

FOR THE TRIBUNAL OFFICE