



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Ms F Thorn

AND

Respondent

Nationwide Building Society

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD IN CHAMBERS AT Bristol ON 22 February 2023

EMPLOYMENT JUDGE J Bax

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The judgment of the tribunal is that the Claimant's application for reconsideration is refused because there is no reasonable prospect of the decision being varied or revoked.

REASONS

1. The Claimant has applied for a reconsideration of the reserved judgment dated 26 January 2023 which was sent to the parties the same day ("the Judgment"). The grounds are set out in her e-mail dated 9 February 2023, which was received by the Tribunal the same day.
2. This has been a remote hearing on the papers.

3. 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 limit.
4. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.
5. The grounds relied upon by the claimant are:
 - a. Due to her breakdown after the second day of the hearing she was not in a mental state to attend until 16 January 2023 she sought to reopen allegations D3, D13, D16, D17, V90, V10, V12 and V13. She sought to do so by giving evidence in writing from evidence she sought to obtain from a specific disclosure application which had been previously refused.
 - b. There was an absence of statistical background information and now that relevance had been established and specific disclosure would be sought. She referred to the ethnicity pay gap report and that she had been rejected for numerous job applications. Reference was also made to information received from Ms Pearce and Mr Stroud.
 - c. New evidence came to light in respect of a grievance against the Claimant, for which she had brought a new claim.
 - d. There was prima facie evidence of discrimination in relation to allegation D3 and that at p894 of the bundle there was chastisement of Ms Hogfress falling short of disciplinary action.
 - e. There had been missing evidence and the Claimant sought to strike out the response.
 - f. There was evidence of perjury by Ms Hogfress and the Claimant relied on new evidence she found in a draft e-mail and that on p841 Ms Hogfress had said in the grievance interview that the Claimant raised constructive dismissal and in oral evidence she had denied it.
6. The matters raised by the claimant were considered in the light of all of the evidence presented to the tribunal before it reached its unanimous decision.
7. The earlier case law suggests that the interests of justice ground should be construed restrictively. 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 68/80 (where the applicant was seeking a review in the interests of justice under the former Rules which is analogous to a reconsideration under the current Rules) 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”.
8. More recent case law suggests that the "interests of justice" ground should not be construed as restrictively as it was prior to the introduction of the "overriding objective" (which is now set out in Rule 2). This requires the tribunal to give effect to the overriding objective to deal with cases fairly and justly. As confirmed in Williams v Ferrosan Ltd [2004] IRLR 607 EAT, it is no longer the case that the "interests of justice" ground was only appropriate in exceptional circumstances. However, in Newcastle Upon Tyne City Council v Marsden [2010] IRLR 743, the EAT confirmed that it is incorrect to assert that the interests of justice ground need not necessarily be construed so restrictively, since the overriding objective to deal with cases justly required the application of recognised principles. These include that there should be finality in litigation, which is in the interest of both parties.
 9. In Outasight VB Ltd v Brown [2015] ICR D11, EAT, HHJ Judge Eady QC accepted that the wording ‘necessary in the interests of justice’ in rule 70 allows the tribunal a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised 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’*.

Ground b: - Absence of statistical information

10. The application on this ground was based on how an absence of statistical information disadvantaged the Claimant’s case. The Claimant had made an application for specific disclosure of statistical information, which was refused by Employment Judge Dawson on 18 July 2022. The Claimant’s representative sought a variation of the order on 1 August 2022, which was refused on 15 August 2022. The orders have not been appealed and a renewed application was not made before or during the final hearing. The Tribunal can only consider the evidence it is presented with and a reconsideration application is not an opportunity to have a second bite at the cherry. There is a need for finality to litigation and a party should not be faced with applications for disclosure once a judgment has been given. The Claimant has been professionally represented and it is not in the interests of justice to order specific disclosure after liability has been determined.

There were not reasonable prospects of success of the Judgement being varied or revoked on this basis.

11. In relation to the Claimant's interpretation of the statistical information before the Tribunal, the Tribunal considered the information and concluded it was of limited assistance. The parties submissions were taken into account when deliberating and when reaching the Tribunal's conclusions. There were not reasonable prospects of success in the Judgment being varied or revoked on this basis.
12. The Claimant also sought to rely on new information which had been provided by Ms Pearce and Mr Stroud in 2020. A reconsideration can be in the interests of justice if there is new evidence which was not available to the Tribunal at the time of Judgment. It is necessary to consider the principles in Ladd v Marshall [1954] 3 All ER 745. To justify the reception of new evidence, it must be shown that: (1) the evidence could not have been obtained without reasonable diligence for use at the original hearing, (2) the evidence is relevant and would probably have had an important influence on the hearing, and (3) the evidence is apparently credible. The documents appear to have been in the Claimant's possession at the time of the final hearing, and were documents that she could have sought to adduce in evidence. It is generally inappropriate that parties should be given a second bite of the cherry because of a failure to adduce evidence in their possession at the original hearing. The witnesses have not been questioned on the documentation and there is a need for a finality to litigation. It is not in the interests of justice for a party to consider a judgment and then produce evidence in their possession and ask for a different conclusion to be reached. There is not a reasonable prospect of success that the Claimant would be given permission to now rely upon the new documents. The findings of fact were made upon the basis of the evidence adduced at the final hearing. There were not reasonable prospects of success in the Judgment being varied or revoked on this basis.

Ground a: - The Claimant's mental health

13. The Claimant was taken ill and whilst she was unable to attend the Tribunal the hearing did not take place. She was professionally represented and was able to give full instructions to her barrister once her evidence had concluded. Further the Claimant was given permission to speak to her barrister whilst giving evidence, as set out in the written reasons, which was a highly unusual step and was done in order to assist her. The Claimant has sought to introduce new evidence from specific disclosure of the documentation subject to the earlier disclosure application which was refused. For the reasons set out above it is not in the interests of justice to make an order for specific disclosure once the Judgment has been given and in any event the Claimant had not sought to appeal the decisions of

Employment Judge Dawson. Further to adduce new evidence would require many of the witnesses to be recalled. There needs to be a finality of litigation and the interests of both parties and other Tribunal users are important. There were not reasonable prospects of success in the Judgment being varied or revoked on this basis.

Ground c:- New evidence

14. This ground refers to the Claimant bringing a further new claim of victimisation. This was not an allegation before the Tribunal and it is not in the interests of justice to consider it as part of the claims on which Judgment has already been given. There were not reasonable prospects of success in the Judgment being varied or revoked on this basis.

Ground d:- Error in relation to allegation D3

15. The Claimant relies on the grievance outcome at p882 which upheld that the Claimant not being interviewed by Jason Thompsons was bad for consistency. This was referred to in paragraph 65 of the written reasons. There was not a finding in the grievance that it was discriminatory. Further the Claimant raised that Ms Hogfress had been chastised. Whether the Claimant could establish that there was prima facie evidence that she was treated differently because of her race was considered and it was concluded she could not. The application only refers to a difference of treatment and not the something more required for a tribunal to be satisfied that the Claimant had discharged the initial burden of proof. The issues were considered when deliberating and were within the written reasons. There were not reasonable prospects of success in the Judgment being varied or revoked on this basis.

Ground e:- Strike out request

16. The Claimant seeks to strike out the response on the basis that there was missing documentation. Judgment has been given dismissing the claim. The Claimant was professionally represented and could have made applications for specific disclosure and applications to strike out before the Judgment was given. The Claimant also seeks to rely on new evidence namely an e-mail dated 20 January 2020 and an original e-mail trail. A reconsideration can be in the interests of justice if there is new evidence which was not available to the Tribunal at the time of Judgment and the principles in Ladd v Marshall [1954] 3 All ER 745 apply. The documents appear to have been in the Claimant's possession at the time of the final hearing, and were documents that she could have sought to adduce in evidence. It is generally inappropriate that parties should be given a second bite of the cherry because of a failure to adduce evidence in their possession at the original hearing. The witnesses have not been questioned

on the documentation and there is a need for a finality to litigation. It is not in the interests of justice for a party to consider a judgment and then produce evidence in their possession and ask for a different conclusion to be reached. There is a not a reasonable prospect of success that the Claimant would be given permission to now rely upon the new documents. The findings of fact were made upon the basis of the evidence adduced at the final hearing.

17. The Claimant also suggests that the new evidence showed that Ms Hogfress was behind all of the claims which were found to be out of time. The reasoning in the above paragraph is repeated.
18. There were not reasonable prospects of success in the Judgment being varied or revoked on this basis.

Ground f:- Evidence of perjury by Ms Hogfress

19. The Claimant relies upon notes in a draft e-mail she has found. This was not evidence which was put before the Tribunal. For the same reasons as in ground e there were not reasonable prospects of success in the Judgment being varied or revoked on this basis.
20. The Claimant also relied on Ms Hogfress having referred to constructive dismissal being mentioned when she was interviewed as part of the Claimant's grievance. The Claimant submits that this was denied by Ms Hogfress in cross-examination. Ms Hogfress's evidence was that she could not recall, which is different to a denial. Further Ms Hogfress was not cross-examined on the document. The Tribunal considered the evidence presented to it and made its findings on the balance of probabilities. There needs to be a finality of litigation. There were not reasonable prospects of success in the Judgment being varied or revoked on this basis.

Conclusion

21. Taking into account the need for finality of litigation, the interests of both parties and that of the public and other Tribunal users it is not necessary in the interests of justice to reconsider the decision.
22. Accordingly I refuse the application for reconsideration pursuant to Rule 72(1) because there is no reasonable prospect of the Judgment being varied or revoked.

Employment Judge J Bax
Dated 22 February 2023

Case No. 1402955/2020
1404843/2020
1404750/2021

Judgment sent to Parties on 08 March 2023

For the Tribunal Office