EMPLOYMENT TRIBUNALS

Claimant: Mrs G A Shute

Respondent: 2 Agriculture Ltd

JUDGMENT

The claimant's application dated 2 January 2023 for reconsideration of the judgment sent to the parties on 15 December 2022 is refused.

REASONS

Background and Introduction

1. On 2 January 2023 the claimant applied for reconsideration of the judgment striking out her claim sent to the parties on 15 December 2022. This was sent to the respondent for comments on 27 January 2023. The parties were asked to confirm if the application could be determined without a hearing within 14 days. The respondent has made written submissions opposing the application and did not ask for a hearing. The claimant has made further written representations in an email dated 13 February 2023. On 16 February 2023 a letter was sent to advise that Judge Moore had decided a hearing was not in the interests of justice and the parties were given a further 14 days to make further written representations. On 2 March 2023 the claimant submitted further representations and additional documents

The Law

2. The Tribunal's power to reconsider judgments are contained within Rules 70 to 73 of the Employment Tribunal Rules of Procedure 2013. Rule 70 provides it may confirm, vary or revoke the judgment where it is necessary in the interest of justice. The process is contained with Rule 72. Rule 73 deals with the tribunal's ability to reconsider a decision of their own initiative. Where the tribunal proposes to do so, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72 (2) as if an application had been made and not refused.

3. The Tribunal must follow Rule 72 in the order provided for within that rule **(TW White & Sons Ltd v White UKEAT 0022/21).** In exercising the power the Tribunal must do so in accordance with the overriding objective.

4. In **Ministry of Justice v Burton and another [2016] ICR 1128,** Elias LJ approved the comments of Underhill J in **Newcastle upon Tyne City Council v Marsden [2010] ICR 743,** that the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. Further, that the courts have emphasised the importance of finality **(Flint v Eastern Electricity Board [1975] ICR 395)** which militates against the discretion being exercised too readily.

5. In **Liddington v 2Gether NHS Foundation Trust UKEAT/0002/16** Simler P held:

"..a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered. Tribunals have a wide discretion whether or not to order reconsideration, and the opportunity for appellate intervention in relation to a refusal to order reconsideration is accordingly limited.

[35] Where, as here, a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application. It seems to me that the Judge was entitled to conclude that reconsideration would not result in a variation or revocation of the decision in this case and that the Judge did not make any error of law in refusing."

6. In **Ladd v Marshall 1954 3 All ER 745, CA t**he Court of Appeal established that, in order to justify the reception of fresh evidence, it is necessary to show:

- that the evidence could not have been obtained with reasonable diligence for use at the trial:

- the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive:

- the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

7. **Outasight VB Limited v Brown UKEAT/0253/14** is a case about reconsiderations where a party wishes to adduce fresh evidence. In this case the EAT held that the approach in **Ladd v Marshall** would in most cases encapsulate what is meant by "the interests of justice". There might be cases where the interest of justice would permit fresh evidence to be adduced notwithstanding that the principles laid down in **Ladd v Marshall** were not strictly met.

Application – grounds

8. The application appears to have been made on medical grounds and new evidence. The claimant submitted she had been unable to attend the preliminary hearing on 12 December 2022 and had been unable to get proof from her doctor. Since then the claimant had sent a letter from her GP and from her oncologist. The claimant stated "I was not in the right mental state to be able to attend the tribunal on 12 December 2022 and will not be in the very near future (but hopefully will be as soon as possible).

9. The letter from the GP was dated 20 December 2022. It stated as follows:

"Unable to attend court

(claimant) is suffering from depression and has been referred to the psychological team./ anxious and stressed and cant cope with going to Tribunal at the moment. She suffers from depression and is on anti depressants, in the past she has suffered from breast cancer. She will not be able to go to court in her present mental state."

10. The letter from the oncologist to the Consultant Psychologist was dated 26 October 2022. It described the claimant's breast cancer history and requested contact was made as the claimant was clearly struggling.

11. In the first email dated 2 March 2023 the claimant attached a 6 page witness statement and a number of attachments. These included emails and documents dating back to 2015 – 2017 which the claimant submitted supported her claims.

12. In the second email dated 2 March 2023 the claimant as follows:

"Apologies-I forgot to mention that when I first went of sick I paid for a private neurologist as myself and my husband was so worried about my migraines I went to Nuffield in Chester for consultation which cost me £250. I also went for 10 x sessions of acupuncture in Mold at £30 per hour session. These were done to trains if they helped but they didn't make any difference."

Conclusions

13. In my judgment at paragraphs 35 I made it clear that I did not consider there had been any deliberate or wilful conduct on the part of the claimant in her failures to comply with orders and actively pursue her claim and that I had taken into account the information regarding her health and personal

circumstances.

14. There are no new grounds or evidence in the application for reconsideration that evidence that the judgment should be revoked. There is still no information before the Tribunal as to when a fair trial would be possible. Indeed, the claimant herself states in her application that she would still not "in the right mental state" to attend a Tribunal "and will not be in the very near future (but hopefully will be as soon as possible). "

15. The GP letter also gives no prognosis or indication as to when the claimant might be able to progress her claim.

16. I do not consider the provision of a witness statement or documents dating back to 2015 as grounds to revoke the judgment. This is all evidence that could have been adduced had the claimant complied with the orders. It is not new evidence that has become available since the judgment was made. It would not be in the interests of justice to do so for reasons set out in the judgment at paragraph 46. The claimant has not complied with the outstanding orders and the respondent still does not know the case they are facing. Nothing in the statement or documents change that situation. Indeed in my judgment they compound my earlier decision that a fair trial is no longer possible.

17. For these reasons the claimant's application is refused.

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Employment Judge S Moore

Date: 4 April 2023

JUDGMENT SENT TO THE PARTIES ON 11 April 2023

FOR THE TRIBUNAL OFFICE Mr N Roche