EMPLOYMENT TRIBUNALS

Claimants: Ms K Cutlan

Respondent: The Secretary of State for Justice

DECISION ON APPLICATION FOR RECONSIDERATION

1. The application for reconsideration of the judgment dated 9 February 2023 is refused.

REASONS

Background

1. By an email dated 28th March 2023, the claimant applies for reconsideration of the judgment dated 9 February 2023. The application states "I note the previous directions to strike out the whistleblowing claim. I apologise for not writing earlier. I have been attempting to procure affordable legal advice for further direction on this matter. Would it please be possible to reconsider this strike out and for a time extension for me to continue to seek legal advice?"

2. The way in which the judgment came to be made is as follows.

3. A case management hearing took place on 10 January 2023. The claimant did not attend because of stress and anxiety and indicated that she wished the final hearing to be decided on the papers without her being present.

4. On reviewing the case it appeared to me, as the judge dealing with the preliminary hearing, that the claim based on making a public interest disclosure had no reasonable prospect of success because the claimant did not appear to be asserting that she had made a disclosure but, simply, that she had been wrongly perceived as somebody who made a public interest disclosure.

5. By order sent to the parties 13 January 2023, I directed as follows:

STRIKE OUT WARNING

> **The Employment Tribunal is considering striking out the claim based on making a public interest disclosure (whistleblowing) on the basis that it has no reasonable prospects of success.**
>
> The reason the tribunal is considering striking out the claim is because in her agenda prepared for the purposes of this hearing, the claimant states "I now believe my employer wanted me to leave due to their belief that I was the anonymous whistleblower behind a HSE visit whereby the office was fined for breaches". The claimant makes a similar point in the penultimate paragraph of box 8.2 of the claim form. The Employment Rights Act 1996 only gives protection to a worker or employee who has made a public interest disclosure, not to somebody who is wrongly perceived to have made a public interest disclosure. If the claimant did not actually make a protected disclosure then claims of being subjected to a detriment because of making a protected disclosure or being dismissed because of making a protected disclosure have no reasonable prospect of success.
>
> **If you wish to object to this proposal you must give your reasons in writing or request a hearing at which you can make them by 7 February 2023;**

6. The claimant did not make any representations to the tribunal and on 9 February 2023, the respondent applied for the whistleblowing claim to be struck out. The claimant was copied in to the correspondence.

7. A judgment striking out the part of the claim based on the making of a public interest disclosure was made and sent to the parties on 22nd February 2023. The reasons for that judgment were that the claim had no reasonable prospects of success; although it was not expressly stated, the reason that the claim had no reasonable prospects of success was the reason which had been given in the strike out warning, namely, that the Employment Rights Act 1996 only gives protection to a worker or employee who has made a public interest disclosure, not to somebody who is wrongly perceived to have made a public interest disclosure.

8. The claimant then took no action until her email dated 28 March 2023 - over a month from when the judgment was sent to the parties. The claimant does not

suggest that her failure to respond to the tribunal was because of any medical reason but because she was attempting to procure legal advice.

The Law

9. The application for reconsideration is made pursuant to rule 70 of the Employment Tribunal Rules of Procedure, which provides as follows.

   70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again

10. The application for reconsideration is made under rule 71 of the Employment Tribunal Rules of Procedure. The process under rule 72 is for the judge who chaired the full tribunal to consider the application and determine, first of all, whether he or she considers that there is no reasonable prospect of the original decision being varied or revoked. If the judge is of that view, the application must be refused otherwise the views of the other parties to the case must be sought.

11. Under rule 71 except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties.

12. In approaching the application for reconsideration I have considered the cases of of *Flint v Eastern Electricity Board* [1975] ICR 395 and *Outasight VB v Brown* [2015] ICR D11. The principles set out in those judgments are helpfully summarised in the more recent case of *Ministry of Justice v Burton* [2016] ICR 1128, where at paragraph 21 the Court of Appeal stated "*An employment tribunal has a power to review a decision "where it is necessary in the interests of justice": see rule 70 of the Employment Tribunals Rules of Procedure 2013. This was one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, as Underhill J pointed out in Newcastle upon Tyne City Council v Marsden [2010] ICR 743, para 17 the discretion to act in the interests of 6of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, 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; and in Lindsay v Ironsides Ray & Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review. In my judgment, these principles are particularly relevant here*"

Conclusions

13. Whilst the respondent's submission that the application for reconsideration is made out of time is valid, I would have been prepared to extend time if the claimant had a good reason for not making the application within the time limit specified in the rules and/ or if I thought the application for reconsideration had a reasonable prospect of success.

14. The claimant has not, however, given any valid explanation for failing to make the application for reconsideration within 14 days. The seeking of legal advice is not a good reason for failing to comply with deadlines (whether they are set by orders of tribunal or by the tribunal's rules). Many litigants have to act without the benefit of legal advice and are required to comply with the rules. The claimant knew that part of her case was at risk of being struck out from as early as 13 January 2023 but did nothing about contacting the tribunal until 28 March 2023. In those circumstances I do not consider that there is a good reason to exercise my discretion to extend the time for making an application for reconsideration.

15. Further, and in any event, I do not consider that the application has a reasonable prospect of success. The claimant's email does not set out any basis for disputing the provisional view expressed that because she was only perceived to be a whistleblower, rather than an actual whistleblower, a claim could not succeed. If the claimant had suggested that the tribunal had wrongly understood her claim form and that she was, in fact, a whistleblower then there may have been valid grounds for reconsidering the judgment; likewise if the claimant was able to advance a reasonable argument that the legislation protects perceived whistleblowers as well as actual whistleblowers. The claimant has attempted to do neither.

16. In those circumstances the application for reconsideration is refused on the basis that, firstly, it has not been made in the time allowed for the rules and, secondly, in any event it has no reasonable prospect of success.

Employment Judge Dawson
Date: 18 April 2023

Sent to the Parties: 25 April 2023

For the Tribunal Office