



EMPLOYMENT TRIBUNALS

Claimant: Mr A Adu

Respondents: 1. The Department for Work and Pensions
2. Mr D Ireland
3. Mr R Abdul-Khalik

RECONSIDERATION JUDGMENT

The claimant's request for a reconsideration of the Judgment promulgated on 29 November 2022 whereby his claims of race discrimination and victimisation failed is rejected on the basis the judgment has no reasonable prospect of being varied or revoked.

REASONS

Introduction

1. On 12 December 2022 the claimant applied for a reconsideration of the Judgment in his case, and then on 13 March 2023 the claimant also requested that I stand down from considering the case i.e. recuse myself on the basis of bias. The grounds for this were:

- (1) "Defamation and assassination of my character", in particular in relation to an allegation that the claimant was changing the results on the consolidation sheets.
- (2) The claimant also refers to a finding that he was mainly credible but that there was a finding in relation to one thing where we did not believe the claimant because he did not shy away from using language alleging racism.
- (3) Distortion of the List of Issues.
- (4) Misleading him not to cross examine Elaine Ockwell.
- (5) Complaint regarding comparator.

- (6) Re limiting cross examination of Mr Abdul Khalik in relation to the formal PAL
- (7) Not being able to cross examine on bullying and harassment.
- (8) Accepting evidence that Mr Mcloughlin had been on an informal PAL

Response to recusal points

- (1) “Defamation and assassination of my character”, in particular in relation to an allegation that the claimant was changing the results on the consolidation sheets. We noted in the decision that this had never been put to the claimant. The claimant may not understand that by not putting it to him the Tribunal would never be in a position to make a finding on this matter. It was included as it was part of the narrative and explained other actions potentially relevant to the ‘procured agent’ issue. Given that the respondent failed to put this to the claimant and that ultimately we did not rely on it in relation to the ‘procured agents’ point, it would be equitable to remove the relevant paragraph from the judgment. I propose to do this with the parties’ consent and reissue the judgment with that paragraph removed. The parties are requested to confirm within 14 days if they agree. The relevant paragraph is paragraph 35.
- (2) The claimant also refers to a finding that he was mainly credible but that there was a finding in relation to one thing where we did not believe the claimant because he did not shy away from using language alleging racism. This is an accurate observation on the evidence and is clearly one matter within a general finding of credibility. I do not propose to change this as findings on credibility are relevant.
- (3) Distortion of the List of Issues. The List of Issues are taken directly from the Case Management Orders of 21 January 2021.
- (4) Misleading him not to cross examine Elaine Ockwell. The claimant agreed with this at the time . Ms Ockwell simply went through the grievances – we could not see any relevance of her evidence other than to complete a narrative. None of the claimant’s claims related to the grievances. If the claimant had changed his mind and wanted to object to this, he had sufficient time within the hearing to object to this. The tribunal has a duty to deal with cases in the light of the overriding objective i.e. proportionately.
- (5) Complaint regarding comparator. The claimant’s comparator was somebody without performance problems because the claimant’s premise was that he himself did not have performance problems. Once we found that he did have performance problems Mr MacSween was not a relevant comparator.

- (6) Re cross examination of Mr Abdul Khalik in relation to the formal PAL. The documentation showed that once COVID lockdown struck Mr Abdul Khalik was no longer in the office and no longer had any involvement with the claimant's situation. Accordingly, it was unnecessary to question him any further regarding the formal PAL.
- (7) Not being able to cross examine on bullying and harassment. This was because the bullying and harassment was not part of the claimant's claims.
- (8) We accepted the evidence given on this by the respondent's witness and gave reasons for this decision.

2. Accordingly, I refused to recuse myself, firstly on the most compelling ground because as my comments on the claimant's comments above show there is no validity in the claimant's complaints save that the inclusion in the narrative of an issue which was not ultimately relied on by the tribunal to decide the procured agents issue can be removed..

Law on Reconsideration

3. Under rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 schedule 1, it says that:

"A Tribunal may, either on its own initiative 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 may be confirmed, varied or revoked. If it is revoked, it may be taken again."

Rule 71 states:

"Except where is it made in the course of a hearing, any application for reconsideration shall be presented in writing and copied to all the parties within 14 days of the date on which a written record or other written communication of the original decision was sent to the parties, or within 14 days of the date that the written reasons were sent (if later) and shall set out why the reconsideration of the original decision is necessary."

Rule 72 states:

Process

- (1) An Employment Judge shall consider any application made under rule 71. If the Judge considers there is no reasonable prospect of the original decision being varied or revoked the application shall be refused and the Tribunal shall inform the parties of the refusal, otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

- (2) If the application has not been refused under paragraph (1) the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.
- (3) Where practicable the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full Tribunal which made it, and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full Tribunal which made the original decision. Where that is not practicable the President, Vice President or the Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision by a full Tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute, in whole or part.”

4. The Tribunal should also keep in mind the overriding objective of dealing with matters in the Tribunal fairly and justly.

Race Discrimination

5. The claimant relies on a number of points under race discrimination which are summarised as follows:

- (1) The fact that he did not underperform and the documentation showed this;
- (2) The failure of the Tribunal to take into account various policies including the new performance assessment policy, the case studies, the dips in performance policy, team objectives;
- (3) The Tribunal found that LMA applied to him and yet it was clear from the evidence that it did not;
- (4) That DI could not put him on a PAL because he was not his line manager – rejection of this proposition;
- (5) Not using PQM but using consolidation;
- (6) Applicability of the comparator

Response

6. Point 1: We did not accept this on the evidence. The strongest point for the claimant was when he was put on informal PAL. The claimant's accuracy levels did seem better than as described by Mr Ireland. We accepted Mr Ireland's

position that the claimant's mentor in the relevant week had provided him with figures showing the claimant was underperforming ; he had not double checked them, he had properly relied on what was provided to him.

7. Point 2: We have set out our reasons for this in our Judgment. It was our view on the evidence and a finding we were entitled to make.

8. Point 3: If we were wrong on this the claimant was subject to the respondent's general practices which were applied to other white employees.

9. Point 4: We see no reason to alter our view that in the absence of a line manager, it is proper in most organisations that the next person up will take responsibility for management actions.

10. Point 5: We were satisfied that was the department's practice and it was not just applied to the claimant.

11. Point 6: referred to in the recusal comments

Victimisation

12. The claimant relies on:

- (1) The advice not to cross examine the third respondent on the formal PAL
- (2) Finding that the formal PAL was not applied;
- (3) Failure to allow to cross examine on bullying and harassment grievance (see above);
- (4) Finding that the 17 December 2019 grievance was not a protected act .
- (5) Failure to allow him to cross examine Clare Holt.

Response

13. Point 1: referred to under recusal;

14. Point 2: We explained our reasons for this in the Judgment.

15. Point 3: explained above.

16. Point 4: fully explained why we found this was not a protected act. It was accepted that the grievance of 13 February was a protected act, however there were no grounds for establishing any causation between that and the decision on the same day to refer the claimant for a possible formal PAL.

17. Point 5: CH's evidence was not relevant as the claimant did not bring a claim about the grievance outcome and he agreed that she did not need to be called.

Conclusion

18. Accordingly, given the comments I have made on the specific points raised by the claimant, and the more general point that the reasons for our decisions on the evidence have been fully explained in the judgment, the removal of the paragraphs referred to under recusal do not alter the judgment and I find that the claimant's claim has no reasonable prospect of success in varying or revoking the original decision.

Employment Judge Feeney
Date: 6 June 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
13 June 2023

FOR THE TRIBUNAL OFFICE