



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Miss C Wilton

AND

Respondent

Capstick Brothers Limited
T/A Fireaway Pizza

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD IN CHAMBERS AT Bristol ON 19 June 2023

EMPLOYMENT JUDGE J Bax

JUDGMENT ON APPLICATION FOR RECONSIDERATION

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

REASONS

1. The Respondent has applied for a reconsideration of the Judgment and Written Reasons dated 19 May 2023 which were sent to the parties on 5 June 2023 ("the Judgment"). The grounds are set out in the letter attached to the e-mail dated 16 June 2023. That letter was received at the Tribunal office on 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 these:
 - a. It was found Mr Capstick thought a friend was calling him on 24 May 2022 or that it was a cold call.
 - b. The evidence tended to suggest that text messages from the Claimant were blocked in the evening of 27 May 2022 and it was not put to Mr Capstick that he blocked her on 26 May 2022 and the message of 27 May was not relied upon as a protected act.
 - c. It was not put to Mr Capstick that he read the subject access request before messaging the Claimant on 27 May 2022 and it was accepted that he did not know who was calling on 24 May 2022.
 - d. The Claimant made the assertion that previous WhatsApp messages were deleted and that assertion was not put to Mr Capstick. Mr Capstick gave evidence that WhatsApp would show message deleted and not weight had been given to it. as such he would have been unaware it was the claimant who was messaging him on 27 May 2022.
6. The matters raised by the Respondent 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'*.
10. In Phipps v Priory Education Services Limited [2023] EWCA Civ 652, a case in which there had been a failing to comply with an order by a legal representative, the principles to be applied were distilled and in particular that, " The interests of justice test is broad-textured and should not be so encrusted with case law that decisions are made by resort to phrases or labels drawn from the authorities rather than on a careful assessment of what justice requires. The ET has a wide discretion in such cases. But dealing with cases justly requires that they be dealt with in accordance with recognised principles."

Conclusions

11. I address the final point first. It was Mr Capstick's evidence that he thought he deleted the Claimant's messages from February 2022 shortly after he had told her not to contact him again and that this was why he did not know it was the Claimant who had sent the subject access request on 27 May 2022 via WhatsApp. In submissions the Respondent submitted those messages had been deleted. Page 105 of the bundle was a screen shot of the Claimant's WhatsApp messages with Mr Capstick in February 2022 and on 27 May 2022. We accepted that evidence of the Respondent. Whether or not a WhatsApp message shows as being deleted was immaterial and there was no evidence that it would remove it from the recipient, after it had been read at the relevant time. If it is now suggested that the February messages were not deleted there would be other correspondence on Mr

Capstick's telephone, in the same message chain as the subject access request, which identified the Claimant.

12. We found, as set out in paragraph 28, that when Relay UK called Mr Capstick he did not know it was the Claimant calling via their services. He had not been given her name at that time and still had not by the time the call had ended.
13. In terms of when the Claimant's text messages were blocked, they were blocked after the text conversation. The finding was that after the text conversation Mr Capstick blocked the Claimant for text messages. The last message was at 0050 on 27 May 2022. The Claimant asked how to raise a grievance. Prior to that Mr Capstick had said "You are barking up the Wrong tree. Please don't message me again". The Claimant was not challenged that Mr Capstick had blocked her text messages and the case was put to her that there was not a detriment because she could still use WhatsApp. The Claimant's evidence was that she had sent the subject access request on 27 May 2022, via WhatsApp because Mr Capstick had blocked her text messages. We considered it likely that if messages had been deleted in the past that it was more likely that the Claimant's text messages were blocked.
14. In relation to when Mr Capstick was aware that it was the Claimant who had messaged him with the subject Access Request, all of the evidence was taken into account. Mr Capstick messaged Mr Mackett at 1719 saying he had just had a very strange message from the Claimant. The message sent by the Claimant had been sent at 1712 by the Claimant and the subject access request contained her name and that she was Mr Mackett's girlfriend. It could be seen on the top of the PDF on WhatsApp that the subject access request was written on behalf of Caprice Wilton, see page 105. Ms Wilton had identified herself in the text conversation between 24 May and 27 May 2022, see page 83. Further Mr Capstick had identified Mr Mackett as being involved with the Claimant, see page 82. We did not accept his evidence that he had not opened the message before responding. What Mr Capstick asserted was inconsistent with the documentary evidence and the Claimant was not present when he opened the message and therefore was unable to gainsay what he said. The Respondent was aware of the allegation which was being made because it was clearly set out in the list issues.
15. It was not found that the subject access request on 27 May 2022 was a protected act.
16. The matters raised do not cause the Tribunal to consider that its conclusions should be altered. 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
Date: 19 June 2023

Judgment sent to Parties: 04 July 2023

FOR THE TRIBUNAL OFFICE