EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Ms K Treacher	v	Tydd St Mary Parish Council

On the papers before: Employment Judge Fredericks-Bowyer

JUDGMENT ON RECONSIDERATION

1. The claimant's application for reconsideration of the judgment delivered on 30 June 2023 is refused under *Rule 72(1) Employment Tribunal Rules of Procedure 2013* because there is no reasonable prospect of the decision being varied or revoked.

2. The judgment dismissing the claimant's claim dated 30 June 2023 remains in full.

REASONS

Introduction

1. This is the claimant's application for the reconsideration of the judgment dated 30 June 2023, where a Tribunal comprising of Mr Green, Mr Connor and I dismissed both of the claimant's claims for the reasons given in the hearing. The claimant brought claims for detriment following public interest disclosure and constructive dismissal. We heard the case over five days from 26 to 30 June 2023.

2. I have decided to provide these fuller reasons for my refusal in order to make it clear to the claimant that we did all we could to assist her during the trial window, save for granting a postponement which we would not do unless asked to. Also, none of the issues raised by the claimant in this reconsideration application would have changed the outcome of her case. They are not relevant to the legal issues in her claim, and it is important that that is appreciated to its fullest extent.

The decision of 30 June 2023

3. The claimant relied on four instances of what she said were public interest disclosures. The first was a statement she said she made in a meeting on 31 July 2020. She was not successful in this claim because we did not find that she disclosed information due to her presenting no evidence about the words she used. The second was an e-mail which we considered was a warning given only to lever the information being requested in other parts of correspondence. The third was only a request from the claimant for information. The fourth was not correspondence coming from the claimant at all. Therefore we found the claimant made no protected disclosures during the course of her employment.

4. The claimant's constructive dismissal claim was founded upon the respondent not following her advice as the parish clerk, being excluded from decision making processes, and the respondent talking in a negative way about her and to her. In her evidence, the claimant agreed that the respondent's councillors, as elected officials, were under no obligation to accept her advice. She agreed that she was not required to take part in the decision making of the Council; her role was to record the decisions. Although there were instances where the respondent councillors sent emails about the claimant which had derogatory implications, the claimant was not aware of those until disclosure. She could not have resigned in response to them and she presented no persuasive evidence about the feeling or impression she may have perceived about the respondent's view of her from the relevant time. We found no breach of the employment contract.

5. In truth, the claimant was not close to winning any of her claims and they all fell down at the first stage of analysis. Most of the claimant's efforts during the week focused erroneously on either perceived conflicts of interest within the respondent which might have made the decisions of the respondent at the time unlawful, or the safety implications of bringing grass roots football to the village at the lifting of 'lockdown'. These proceedings were not a judicial review. They were about the employment relationship and the claimant was directed many times to the agreed list of issues at pages 88 and 89 of the bundle.

The hearing from 26 to 30 June 2023

6. I had picked up from the file that the claimant had suffered a trans ischaemic attack in 2022. On the first morning of the hearing, the Tribunal clerk told us that the claimant had informed him of her on-going symptoms following health issues which might mean she loses her train of thought or slurs her words. Accordingly, we had a conversation with the parties about what adjustments might need to be made to ensure the proceedings could proceed efficiently and fairly over the course of the week.

7. The claimant indicated that she was usually able to function normally, but that sometimes she loses her train of thought or might have an issue with saying what is in her head. I explained that we would adopt more regular breaks, longer breaks, and that the claimant should say if she needs some more time alone to stop her getting too fatigued. I explained that this would especially be the case when the claimant was under cross examination. When the claimant began asking questions, I explained that she could also ask for a break at any point should she find that difficult.

8. Throughout the week, we added an additional ten minutes to mid-session breaks. We also added additional time to lunch breaks on most days of up to half an hour as the timetable allowed. When evidence finished at midday on Thursday, we finished for the day to allow the claimant to take some time over her written submissions if she wished to make any. When she indicated that she did not know what to do with those, I explained that we could take her claim documents as her submissions and reflect on the evidence.

9. We also made our usual adjustments to reflect that the claimant was representing herself without legal training. The claimant was not cut off immediately upon addressing the Tribunal with her responses to the questions she was asking in cross examination. I also explained the process to her, and helped her to put her questions. I re-directed her when she started to ask irrelevant questions in order to assist her to cover the evidence which was relevant to the legal claims that she had brought before us. When the claimant said that she had finished questioning a witness, she was afforded some more time to reflect on the list of issues to make sure that she had put her case properly to the witnesses. At one point, when the claimant was unable to respond to me when I asked her where she was going with a line of questioning, we all cleared the room to allow twenty minutes for the claimant to gather her thoughts, in line with the instructions she gave to us at the start of the week for how to manage her symptoms.

10. At no point during the week did the claimant raise a deterioration with her health or ask for a further break or even a postponement to the trial being completed during its listed window. I did not perceive a deterioration to the claimant's health, although she did clearly come to realise over the course of the week that she had a difficult task to prove her case and her case was not really about the matters she thought it was. Neither of my Panel colleagues noted any of their concerns with me, either. Ms Rumble, the respondent's counsel, has an obligation to raise concerns if she thinks that a fair trial is not being conducted in furtherance to the overriding objective. She did not raise any concerns either.

11. We heard the claimant's evidence from just before lunch on morning one to the middle of morning two. We heard respondent evidence from morning two to lunchtime on day four. We heard closing submissions at 10:00am on day five, deliberated, and I delivered our decision from 2.15pm on the afternoon of the fifth day.

The claimant's application for reconsideration

12. The claimant sent or copied the Tribunal into around nine e-mails between 00:45 on the morning of Saturday 1 July 2023 and the end of Sunday 2 July 2023. I have no doubt she feels strongly about the matters she raised. The respondent objects to the application. The claimant withdrew the grounds for reconsideration advanced by the e-mail of the early hours of Saturday 1 July 2023. I have seen it, and note only that the claimant acknowledges the adjustments made for her and remarked that the Panel had treated her with kindness throughout the week.

13. The application made in substance on Sunday 2 July 2023 is advanced on the ground that her health deteriorated during the week such that she considers she was unable to have a fair hearing. In the claimant's own words: *"due to the unexpected*

fragility of my mental health and the cumulative negative increase in the symptoms of my cognitive abilities, impairing my ability to process and understand the proceedings as the hearing progressed which the judges [the Panel] were unaware of at the time". She says that this meant that she was: *"unable to deal competently with the complexities of the hearing and as a result of this deterioration the respondent gained an unfair advantage and won the case by default and not due to their defence of the case"*. She says that these issues meant that she missed issues in cross examination such as:

13.1. not asking for an additional protected disclosure to be taken into account related to an e-mail from Councillor Bowser to Councillor Wilson;

13.2. not interrogating alleged issues relating to her freedom of information request; and

13.3. not raising questions relating to her disclosures to the Health and Safety Executive after the end of her employment.

14. In support of these health issues, the claimant provides an account of the trial week. She says that she was unable to sleep, unable to process so much information, found the process to be confusing and upsetting, and felt that she had nowhere to advance her case when I pointed out for her that some of the avenues she was pursuing did not relate to the issues in her case. She says that she has suffered panic attacks over the weekend following the trial due to the stress of it upon her. She considers that she would win her claim if able to re-visit the case now that she is aware of the impact it would have upon her.

15. The claimant advances a second application by letter dated 5 July 2023. In it, she attaches the witness statements of the respondent witnesses with paragraphs highlighted that she would wish to re-visit in evidence. She would wish to re-visit most of the respondent's evidence again. She also raises a second ground, which is that she was in contact with the former Chair of the respondent at the time she worked at the respondent. He did not give evidence in the hearing, although he featured at all of the key points. The claimant discloses call logs with him from throughout the trial week and also some text messages. She says that this advice set her on the wrong path in running her claim, and distracted and confused her. She now considers that this may have been a deliberate tactic to move the piste to the respondent's advantage.

16. It appears that the claimant rang the former Chair on the evening of Monday 26 June 2023 and they spoke for one hour and nine minutes. There is also a text message from the Chair at 4.23pm which appears to be in response to some information from the claimant, and it then gives some advice including the phrase *"remember the basics…"* before reminding the claimant of issues which were not ultimately relevant to the issues in the case. On the morning of Tuesday 27 June 2023, the former Chair texts the claimant to say: *"Good luck today. Keep it as simple as you can, and relax into it once you get going!"*. I note these matters because the claimant was part heard on her evidence overnight on the 26th to 27th June and was under instruction not to speak to anyone about the evidence she had given or the evidence she may give because she remained under oath.

17. The former Chair then attempted to assist the claimant with her written submission, but the claimant says it distracted her from points she would have raised. She says that, as a result, her written submission did not speak to the protected disclosures, whistleblowing, or health and safety executive investigation. In summary, the claimant says: *"I believe he used my loyalty and naivety and it inadvertently gave great advantage to the respondent's case"*.

Respondent's position

18. The respondent's solicitor opposes the application for reconsideration, and notes all of the steps taken during the hearing to assist in levelling the playing field for the claimant and to support her with the health condition she described on the first morning. He stresses that there should be finality in litigation and submits that reconsideration *"is not a method by which a disappointed party to proceedings can get a 'second bite of the cherry'* (a reference to the words of Mr Justice Phillips as outlined below).

Principles of reconsideration

19. When approaching any application, and during the course of proceedings, the tribunal must give effect to the overriding objective found at *Rule 2 Employment Tribunals Rules of Procedure 2013*. This says:

> *"2 - The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
>
> > *(a) ensuring that the parties are on an equal footing;*
> > *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
> > *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
> > *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
> > *(e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."*

20. *Rule 71* of the Rules requires that an application for reconsideration is made within 14 days of the written record being sent to the parties. The application for reconsideration is made in time.

21. *Rule 72(1)* of the Rules provides:

> *"An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially*

the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. …"

22. Where an Employment Judge refuses an application following the application of *Rule 72(1)*, then it is not necessary to hear the application at a hearing. *Rule 72(3)* provides that the application for reconsideration should be considered in the first instance, where practicable, by the same Employment Judge who made the original decision or who chaired the Panel which made the original decision. I am the judge who chaired the Panel which made the decision in respect of which the claimant makes her application for reconsideration.

23. The power to confirm, vary or revoke a judgment is found at *Rule 70*. That provides that a judgment can be reconsidered *"if it is necessary in the interests of justice to do so"*. The interests of justice should be measured as a balance between both parties; both the applicant and the respondent to a reconsideration application have interests which much be regarded against the interests of justice (*Outasight VB Limited v Brown [2014] UKEAT/0253/14*).

24. In *Brown*, Her Honour Judge Eady QC (as was) said that the general public also have an interest in such cases because there should be an expectation of the finality of litigation. This was an expectation outlined by Mr Justice Phillips in *Flint v Eastern Electricity Board [1975] ICR936*, who said *"it is very much in the interests of the general public that proceedings of this kind should be as final as possible"*. He also said it was unjust to give the loser in litigation a *"second bite of the cherry"* where, having lost and learnt of the reasons for losing, a litigant seeks to re-argue points and bring additional evidence or information which would overcome the reasons given for the loss.

25. Consequently, it is a very unusual case which will depart from the general position outlined above. In almost all cases, the prejudice to the winning party in ordering reconsideration will outweigh the prejudice to the loser when the real crux of the loser's issue is that they wish to have another run having benefitted from the knowledge of the loss.

Consideration and outcome of application

26. I have carefully reviewed the correspondence received from the parties and my notes from the hearing. I have also consulted with the two non-legal members who formed the Panel with me, although this is a decision I have taken alone in accordance with the Rules. The Panel has confirmed my provisional view that the claimant's description of the deterioration of her health was not obvious or noticeable over the course of the week. I do not deliberately cast doubt on what the claimant now describes was happening to her, only that she did not present to us as she seems to consider that she did.

27. We considered that, as explained in oral judgment, the claimant had misunderstood what her case for detriment following public interest disclosure and constructive dismissal was actually about. As a result, I was required to assist more than I ordinarily would to direct the claimant to the relevant issues and evidence. This may have led to a loss in confidence on the part of the claimant but, as explained, the

Tribunal will only discount evidence not about the issues and there was a risk that we would run out of time without those interventions.

28. To me, the claimant's application on the first ground reads very much as a wish for a second bite of the cherry now that the size of the task is known. That is not the function of reconsideration. There must be an expectation of finality in litigation and there is no second chance because the first did not result in the desired outcome. The claimant says that she did not predict the impact of the week upon her. If so, that is unfortunate, but it is nevertheless a part of the process that she chose to embark upon when she issued and continued her claim. For that reason alone, the application for reconsideration should fail.

29. I have also, though, considered the matters that the claimant says she would have raised after benefitting from some time away from the hearing to think about it:

    29.1. The claimant says that she would have asked us in closing submissions to consider another protected disclosure in an email from Councillor Magnus. The first point is that to rely on an additional disclosure would have required an amendment to her pleaded claim, which is extremely unlikely to be allowed once the trial has started. The second, and most important, point is that for the claimant to succeed the disclosure needs to have come from the claimant as the very first step in the chain. Something written from one of the councillors to another would never be in itself a protected disclosure.

    29.2. The claimant says that she did not ask questions to uncover deficiencies with the freedom of information request response, and implies that this has caused issues with disclosure. I do not consider that, if raised, this could have changed the outcome in the claimant's favour. She did make reference to the request and I noted that the Tribunal does not have jurisdiction to deal with issues arising of that nature, or anything which post-dates the end of the employment. If the claimant had concerns about disclosure, then the time to raise them was before the trial had started.

    29.3. The claimant says that she did not ask about or rely upon her disclosure to the health and safety executive during the hearing. Actually, she did. She mentioned it to each of the respondent witnesses, and on each occasion I observed that the complaint to the HSE was made after her employment had ended. She could not therefore argue that the complaint itself was a public interest disclosure in this claim, or rely on it as part of the constructive dismissal.

    29.4. Even though the claimant observes that she did not cover protected disclosure detriment in her closing submissions, the Panel considered the evidence heard about that claim against the information in the claim form and list of issues. This is in line with my instruction that the claimant could speak to us in closing submissions, write those submissions, or simply say *"you know what my claim is and you have heard the evidence"* and rely on us to fill the gap. The claimant's omission therefore did not affect the outcome because we took the best of her evidence presented to make a decision. The written disclosures were taken as they were written. The claimant's evidence about her oral disclosure was taken at its best and highest as she articulated it on the first day

before we applied the law in our analysis. No protected disclosure was found because the claimant made none.

29.5. I see no reason why the claimant should be able to revisit the respondent's evidence at the points highlighted in their witness statements. That evidence was heard and the claimant was able to put her questions to them over the course of three full days of Tribunal time. The Panel was, in my judgment, able to hear all of the relevant evidence those individuals had to offer – and a good deal of irrelevant evidence, too. I cannot perceive any other evidence could emerge which could change the outcome of the hearing.

30. For all of those reasons, the claimant's application also fails. I wonder if the claimant has still not grasped the reasons why her claim was dismissed. If I have said that a document cannot be relied upon, it is because it is either not related to the protected disclosures, or post-dates either her resignation or the end of her employment. The employment litigation proceedings are fought on narrow ground, and the claimant sought to air every suspicion and grievance about the respondent during the course of the week, reaching back some twenty years and stretching right forward to recent events. Those points did not go to the scope of her claim,

31. Finally, it is unusual for an application for reconsideration to be predicated on the applicant being distracted or led astray by any adviser, never mind that person being associated with the other side to some degree. Who the claimant spoke to or took advice from over the course of the week was a matter for her. If she now regrets the advice she sought or took in relation to her case, then that is not something I consider should be used to place prejudice on to the respondent. The claimant has presented no evidence of a conspiracy or intention to mislead her to the respondent's advantage. As outlined above, the omissions which she says flowed from the advice have been considered and would not have changed the outcome of the hearing in any event.

32. Having considered all of the grounds and information advanced, specifically and in the round, I do not consider that there is any reasonable prospect of the judgment being varied or revoked. In those circumstances, I dispose of the application without a hearing and it is refused. Plainly, it would not be necessary in the interests of justice to grant reconsideration in these circumstances.

Concluding remarks

33. This refusal of the application for reconsideration marks the end of the claimant's claim in the Employment Tribunal. If the claimant considers that she has been subject to an error of law in some way, then that is a matter to be taken up with the Employment Appeal Tribunal. I would urge the claimant to think very carefully before embarking upon that path, given the remarks made in the oral judgment and the contents of this judgment on reconsideration.

34. I also note that the claimant made her application for reconsideration before asking for any written reasons for why her claims were dismissed in the first instance. This might be a deliberate choice given some of the matters in those reasons which would become a part of public record. If the claimant does wish to have those written

reasons because she wishes to take matters up on further appeal, then she should note that there is a deadline for doing so.

Employment Judge Fredericks-Bowyer

Dated: 10 July 2023