Case No: 1404812/2021

EMPLOYMENT TRIBUNALS

Claimant: Mrs J Whittingham-Reid
Respondent: Avon and Wiltshire Mental Health Partnership NHS Trust

UPON the Claimant's application for a reconsideration of the judgment dated 12th July 2023 under rule 71 of the Employment Tribunals Rules of Procedure 2013

RECONSIDERATION JUDGMENT

The application for reconsideration is refused under Rule 72 because there is no reasonable prospect of the original decision being varied or revoked.

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REASONS

The Application

1. By way of a letter that was emailed to the Tribunal on 22nd July 2023 the Claimant applied for reconsideration of the judgment in her case by the Tribunal sitting as EJ Frazer, Mrs Von Maydel-Koch and Mrs Fellows dated 12th July 2023 on seven separate grounds and requested the Tribunal to have regard to the case of **Ms A Cox v NHS Commissioning Board Case nos: 2415350 and 2401365/ 2021**.

Grounds for the Application

2. The grounds for application are as follows:

2.1 The Claimant was not clear about why the Tribunal had said to her that she would need to make an amendment application at the start of the hearing as she had no idea either what a protected disclosure was or what an amendment application was. She says that this was not explained to her or the reasons given as to why she should not do this. The Claimant says that she feels that she ought to have been informed of this before she turned up at the Tribunal. She says that owing to the fact that only two out of twelve disclosures were upheld, the race discrimination case was not adequately considered.

2.2 The key witness, Amy Ceesay-Sowe was not present. It was unfair that a judgment was made about her when there was no option to cross-examine her. She was the only person who initially presented as a witness for the investigation and yet she changed her account.

2.3 Since the Claimant was informed by the Respondent that she was unable to talk to other staff while suspended she was unaware that she would be able to call witnesses to the Tribunal hearing. She says that she was not fully prepared and did not understand her rights or the processes going into the hearing and there were many witnesses that she could have called to support her case and attest to her good character had she known that this was permitted.

2.4 The statement from the Matron-in-Charge, Jim Kamara, stated that in his opinion, the allegation for which the Claimant was dismissed was not a suspendable or disciplinary offence but this was not mentioned in the written reasons.

2.5 The Judge did not give sufficient weight to the statements made by K Chard when she was cross-examined as she claimed that she was watching the Claimant closely on 28th February because they were planning to bring charges against the Claimant on 3rd March. This was a breach of recommended procedures and possibly legal obligations to plan to bring allegations against a member of staff at some specific date in the future.

2.6 When cross-examined, Hannah Ray, Operations Manager, stated that she was aware of racism in the ward and that service users had sometimes been used to plant false allegations against staff. The impact of this was not adequately taken into account in the judgment.

2.7 The Claimant says that she questioned why the service user's psychologist, Dr Nash, and the Nurse in Charge, Shanna Heavens were not present at the hearing as they had both confirmed in their written statements that the incident of the service user being pulled out of the bathroom and being made to walk out of the room naked did not happen. The Claimant says that she was told that these people did not have to be present at the hearing. She says that she did not have enough knowledge of legal processes to know how to request a witness so was at a disadvantage in comparison with the Respondent. The Claimant says that she did ask for an appointment with Avon and Bristol Law Centre but could not get an appointment until after the hearing so had to represent herself. The Claimant says that she should have insisted on an adjournment to receive legal advice. She says that she initially requested an adjournment but followed the judge's advice and agreed for the hearing to proceed that day.

2.8 The judgment should be reviewed because the case has similarities to **Ms A Cox v NHS Commissioning Board (Operating as NHS England/ NHS Improvement) 2415350 and 2401365/2021**.

The Law

3. The Tribunal's power to reconsider judgments are contained within Rules

70 to 73 of the Employment Tribunal Rules of Procedure 2013. Under Rule 71 a party may apply for a reconsideration within 14 days of the judgment and reasons being sent to the parties. Rule 70 provides that the Judge may confirm, vary or revoke the judgment where it is necessary in the interest of justice. The process is contained with Rule 72.

4. 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."
   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."

Conclusions

5. I will deal with each point in turn.

Amendment application

6. The Claimant's case came before EJ Livesey on 5th October 2022 at a case management preliminary hearing by telephone. EJ Livesey made a number of case management directions including a direction for exchange of witness statements to be carried out on 18th January 2023. The case then came before EJ Roper on 7th February 2023. The deadline for exchange of witness statements was extended to 21st April 2023. The Claimant was unable to attend that hearing but EJ Roper proceeded in her absence and set some case management directions. At paragraph 36 EJ Roper recaps that the Claimant says that she made verbal allegations of unlawful discrimination between 2018 and 2020 and EJ Livesey had directed her to provide further information of these. At paragraph 37 EJ Roper stated (my emphasis in bold):

> *'Unfortunately this order has prompted a further document running to 10 pages headed: 'Race Discrimination in 2018 to 2021' which goes way beyond the order for further information relating only to alleged disclosures between 2018 and 2019.* ***To the extent that the document goes beyond the further information ordered to be provided, the allegations therein are not permitted to be included unless and until the claimant makes a formal application to amend her claim, and the respondent has had the opportunity to address that application.'***

7. EJ Roper then continued at paragraph 38 *'In the meantime I have expanded upon sub-paragraphs 2.1.1.2 and 2.1.1.3 of the previous List of Issues to include more detail of these complaints, and more particularly, the disclosures that the Claimant says that she made between 2018 and 2020'.* The list of protected disclosures that was within the List of Issues which EJ Roper produced and which was for the Tribunal to consider at the final hearing now contained 12 alleged protected disclosures. The List of Issues is the document that ultimately guides the decision making of the Tribunal.

8. The Claimant did not make any amendment application to include additional protected disclosures before the final hearing. I recorded at paragraph 2 that I asked the Claimant if she wanted to make an amendment application but she decided to proceed. The Claimant had not included any reference to the protected disclosures in her witness statement and so was permitted to adduce them in evidence-in-chief as per the List of Issues by agreement with the Respondent's Counsel.

9. The List of Issues was sent to the parties on 11th February 2023. This contained the 12 protected disclosures. It was also apparent from what EJ Roper had said at paragraph 37 that the additional disclosures that had been contained in the Claimant's 10 page document were not permitted to be included unless the Claimant made an amendment application. The Claimant did not make any such application, either immediately after the hearing with EJ Roper or before the final hearing.

10. I recall that I said to the Claimant that if she decided to make an amendment application on the day of the final hearing if the amendment was allowed, which was unlikely, the case would have to be adjourned necessarily as the Respondent would need to take instructions and call evidence on any additional disclosures. The Claimant was represented by Ms Chacon at the time and there was nothing which led me to believe that either she or the Claimant did not understand what I was saying. The Claimant and her representative decided to proceed with the hearing. If the Claimant had applied to amend her claim to include the additional disclosures it would have been unlikely to have been granted because of the timing and manner of the application. The balance of hardship would most likely have favoured the Respondent as there would have had to have been an adjournment and the Claimant already had twelve disclosures in play (**Vaughan v Modality Partnership UKEAT/0147/20/BA**).

11. It was open to the Claimant to take advice on the case management order in advance of the hearing and while I do appreciate that she is a litigant in person, I consider that it would have been incumbent on her to either take that advice or request an adjournment to seek advice on the case management order and/ or list of issues *before* the final hearing.

12. Therefore I do not see any basis for reconsidering the decision on this ground.

Amy Ceesay-Sowe

13. The Respondent advised the parties that Amy Evans would not be able to give evidence as she was off on sick leave. Both parties were content to proceed anyway. There was no application from the Claimant at any stage to call Amy Ceesay-Sowe. By the time of witness statement exchange it would have been clear which witnesses the Respondent was intending to call and so it would have been open to the Claimant to request the attendance of that witness by way of an application for a witness order if she so chose. The relevance of that witness would then have been explored by the Tribunal. I appreciate that the Claimant regrets that this witness was not present but there was no application to call that witness at the final hearing or before that point in time.

14. The remit of the panel was guided by the relevant law on unfair dismissal which as set out at paragraphs 7 and 8 of the judgment, in particular that it is not for the Tribunal to say what it would have done had it had to decide whether the Claimant should be dismissed or not. The remit of the Tribunal was to decide whether the decision that was made by the decision makers was one which was reasonably open to them. Our core findings on this were set out at paragraph 71. We were to have regard to what was available to the decision maker at the time of the hearing so whatever Amy Ceesay-Sowe would have said to us in evidence, in all likelihood, would not have been relevant to our considerations as to the decision to dismiss.

15. There is no basis for reconsideration on this ground.

Witnesses

16. The Claimant says that she would have wanted to call other witnesses. We received no application for an adjournment on the basis of a requirement for any additional witness to be called. It is not for the Tribunal to advise the Claimant as to which witnesses she wishes to call to a hearing. That is a matter for a party. It is acknowledged that the Claimant was unable to talk to other staff when suspended. During the proceedings had she wanted to call additional witnesses she could have done so by contacting them or requesting a witness order from the Tribunal but this would have needed to be done before the final hearing.

17. There is no basis for reconsideration on this ground.

Jim Kamara statement

18. The Claimant says that the Tribunal did not accord sufficient weight to the statement of Jim Kamara that in his opinion the allegation was not a suspendable or disciplinary offence. I have not been provided with the page number for the document and so I have reviewed the bundle of documents to try and look for where he made this statement. I am not clear which document the Claimant is referring to but I have noted an interview between Daniel Walker, Sophie Hannah and Jim Kamara dated 17th May 2021 (page 321 of the hearing bundle). In this interview Mr Kamara was asked whether he had any concerns about the Claimant's practice or conduct. He replied; *'I was concerned enough to have a word, but not concerned enough for a disciplinary path, nothing was put forward formally. Just for her to be aware from a perception point of view.'* This was most likely not mentioned in the reasons because our focus was on the fairness of the dismissal and the Claimant's conduct as concerned her alleged behaviour towards colleagues was not what she was dismissed for. She was dismissed for the service user incident. I have checked the rest of the interview but this does not contain any opinion that the incident was not a suspendable or disciplinary offence. I have checked my notes of the evidence of Mr Kamara but there was nothing noted that in his opinion the service user incident was not a suspendable or disciplinary offence.

19. Nonetheless, I considered whether, if he had said that, it would have made any difference to our decision. I found that it would not have done.

20. In this case we were required to have regard to the decision maker's decision and for the reasons given, we found that it fell within the band of reasonable responses. That is, the decision was open to the employer for the reasons we gave. The band of reasonable responses means that there is a range of responses which would be available to an employer faced with an employee who was being disciplined. It is perfectly possible for two employers to reach different decisions but for both of those decisions to fall within the band. We accepted the rationale of Mr Arruda Bunker for upholding the decision to dismiss and found that it was on reasonable grounds and after a reasonable investigation having regard to the test in **BHS Ltd v Burchell [1976] ICR 303**.

21. There is no basis for reconsideration on this ground.

Kate Chard

22. The Claimant says that the Tribunal ought to have placed weight on the statement of Kate Chard that she was watching the Claimant closely on 28th February because she was planning to bring charges against the Claimant on 3rd March and the Claimant says that this evidence shows that she was in breach of a legal obligation. It is not clear how this assertion would have affected our decision. The relevance of Kate Chard's evidence was that she had been concerned about the Claimant's behaviour and so she reported what she had observed to management. We found that the reason why this was taken forward was because there was some concern that there was a continuation of conduct towards the

same service user. In any event, the dismissal was for the one incident with regard to the service user so any malign motive on the part of Kate Chard, if that had been the finding, would not have affected our decision.

23. There is no basis for reconsideration on this ground.

Hannah Ray

24. The Claimant expressed concern that the Tribunal had not adequately taken into account what Hannah Ray had said in terms of racism on the ward and that service users had been used to plant false allegations against staff.

25. My note of the questioning of Hannah Ray on this point is as follows:

C: What did you do about toxic atmosphere on Teign?

HR: I started in post on 1st February 2021 so was new into post when this was happening. I was informed about things in unit. I met with the EDR lead, attended the BAME support group, attended events with senior management team about culture at work. We have run a how to raise concerns training, I ran a freedom to speak to up training. It was not related to your case but I was aware of the wider issues on the ward.

C: Did you ever introduce yourself to staff so we could reach out?

HR: I have run drop ins, attended drop ins, I have continued to attend team meetings and try and make myself available to staff when I can but there are 500 staff.

C: During the appeal hearing you weren't aware then of my experience

HR: I only knew about documents presented in investigation pack.

C: You were aware that there was a lot going on in Teign. Did you not think that a lot of the investigations were strange?

HR: I only looked at those 4 allegations. I looked at the evidence for those 4 allegations. Culture played a part in that which is why in the report that I wrote allegations 2 and 3 were considered against a stressful and busy environment. There was evidence of strained relationships. (Page 409). I didn't therefore uphold those allegations.

C: Were you aware of white staff making fraudulent claims against black staff?

HR: Never heard of that.

26. We did not take from Hannah Ray's evidence that there was any finding that service users had been use to plant false allegations against staff. She found that there was a background of a toxic culture within the Teign ward and her evidence was that she took steps to remedy it. She did not uphold allegations 2 and 3 because of the context of a stressful and busy environment and we had regard to that because those allegations were not the reasons why the Claimant was dismissed. We took into account the background of racism in the context of the Claimant's report to Mr Kamara at the BAME meeting as this was upheld to be a protected disclosure. However, our findings were that the Respondent had been proactive in stamping out racism and had garnered a number of initiatives including holding the meeting in 2018 (paragraph 66).

27. There is no basis for reconsideration on this ground.

Presence of Dr Nash and Ms Heavens at the hearing

28. The Respondent did not call these witnesses. Their statements from interviews were contained in the bundle and so we were able to see what they said and how their accounts were considered by the decision makers. It is not for the Tribunal to compel the attendance of witnesses of its own accord. Had the Claimant wished to seek a witness order for one or either of those witnesses she could have done so in advance of the hearing and then it would have been for a Judge to assess whether to order those witnesses depending on how important they were to the issues in the case. In this case it was not necessary for the Tribunal to 're-hear' the disciplinary case. It was for us to assess whether the Respondent's decision to dismiss fell within the band of reasonable responses based on the information that it had to hand at the time – including the statements of those individuals for the investigation.

29. I acknowledge the Claimant's regret that she did not seek advice before the hearing and I empathise with this. She came with a representative whom we understood was not a legal representative but who we understood from our clerk, had some experience of employment matters. The Claimant did not make an application to us to adjourn the hearing to obtain legal advice.

30. I sympathise with the Claimant in terms of the challenge presented by the law and the Tribunal's process, especially if it is unfamiliar. The Tribunal can explain its steps and actions but since it is independent of the parties, cannot provide advice to a party as such. I am sorry that the Claimant feels on this occasion that she did not have the advice or support that she required in advance of the hearing.

The Decision in <u>Cox v NHS Commissioning Board 2415350/20 and 2401365/21</u>

31. I am grateful for the Claimant to have referred me to this decision, which was before a full panel led by Employment Judge Batten in the employment tribunal sitting in Manchester on 12th to 16th September and on 20th and 21st September 2022. This case involved entirely different facts than the Claimant's case and the Tribunal made the decision based on those facts. It is neither binding on this Tribunal nor persuasive as it does not appear to contain any point of legal principle that would be relevant to the decision in this case.

Conclusion

32. For the above reasons, there is no reasonable prospect of the Tribunal varying or revoking the judgment and reasons dated 12th July 2023 further to Rule 72(1) of the Employment Tribunal's Rules of Procedure and the application for reconsideration is refused.

Employment Judge A Frazer
Dated: 21st August 2023

Reconsideration Judgment sent to the parties on 07 September 2023

For the Tribunal Office