EMPLOYMENT TRIBUNALS

Claimant: Dr M Maarabouni
Respondent: The University of Keele

JUDGMENT ON AN APPLICATION FOR RECONSIDERATION

The claimant's application for reconsideration is refused because there is no reasonable prospect of the original decision being varied or revoked.

REASONS

Introduction

1. On 22 December 2022 the tribunal gave judgment at the end of the hearing and provided oral reasons. The written judgment was sent to the parties the same day. The claimant subsequently requested written reasons. These were provided and were dated 3 March 2023. The reasons were sent to the parties on 6 March 2023. On 20 March 2023 the claimant applied for reconsideration.

2. The claimant's reconsideration application is detailed and lengthy. In fact it is longer than the judgment itself. The claimant presented 4 main grounds for her reconsideration application:

   (i) Impartiality concerns.
   (ii) Errors of fact.
   (iii) Procedure of the hearing.
   (iv) Evidence that was not available at the time of the hearing.

3. The claimant also provided 3 emails between herself and Professor Scott from February 2021. I understand this is the evidence which the claimant is referring to that was not available at the hearing.

Law

4. Rule 70 of the Tribunal's rules of procedure provides as follows: *"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."*

5. Rule 71 sets out the procedure for applying for reconsideration. There is a requirement that any reconsideration application shall set out why reconsideration of the original decision is necessary.

6. Rule 72(1) then provides as follows: "*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…"*.

7. When dealing with the question of reconsideration I should try to give effect to the overriding objective to deal with cases 'fairly and justly' (Rule 2). This involves:

   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.

8. I should also be guided by the principles of natural justice and the importance of finality in litigation.

9. In Outasight VB Ltd v Brown 2015 ICR D11, EAT, Her Honour Judge Eady QC explained that the wording 'necessary in the interests of justice' in rule 70 allows employment tribunals 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. Reconsideration of a judgment may be necessary in the interests of justice if there is new evidence that was not available to the tribunal at the time it made its judgment. It is incumbent on the party applying for reconsideration to explain why the new evidence was not produced beforehand and why it is now in the interests of justice to consider that evidence.

11. The principles to be applied in this scenario come from the case of Ladd v Marshall 1954 3 All ER 745, CA. In summary, it is necessary to show:

(i) that the evidence could not have been obtained with reasonable diligence for use at the original hearing,
(ii) that the evidence is relevant and would probably have had an important influence on the hearing; and
(iii) that the evidence is apparently credible.

12. The EAT has confirmed that the tribunal should refuse an application for reconsideration unless the new evidence is likely to have an important bearing on the result of the case (Wileman v Minilec Engineering Ltd 1988 ICR 318, EAT).

13. The EAT in Outasight also held that the interests of justice may allow fresh evidence to be adduced where some additional factor or mitigating circumstance has the effect that the evidence in question could not have been obtained with reasonable diligence at an earlier stage. This might apply where, for example, a party was 'ambushed' by the introduction of evidence at the hearing or was incorrectly refused an adjournment. However, it is not generally in the interests of justice that parties in litigation should be given a second bite of the cherry simply because they have failed as a result of oversight to provide all the evidence available in support of their cases at the original hearing.

Analysis

Impartiality concerns

14. In my judgement this ground is based on a misunderstanding of the tribunal's approach. The claimant asserts at paragraph 2 of her application that her concern about impartiality has arisen because the tribunal's decision was based solely on the basis of the respondent's oral evidence. This is incorrect. The tribunal carefully weighed up all the evidence that we were referred to. This included the statements of both parties, the oral evidence of both parties and the documentary evidence in the bundle that we were referred to. On a fair reading of the tribunal's judgment it is clear that we referred to a number of important documents to support our findings rather than just the oral evidence (for example the email chain that we referred to at paragraph 64 of the judgment). We also referred to the claimant's witness statement and to evidence the claimant gave in cross examination (for example, see paragraph 104.4 of the judgment). On a number of issues we found the respondent's evidence to be credible and we accepted it. This does not demonstrate impartiality. Our conclusions to that effect were only reached after a careful consideration and weighing up of all the relevant evidence.

15. In light of the above there is nothing in this ground which gives rise to a reasonable prospect of the original decision being varied or revoked.

New evidence

16. The claimant's application makes clear that the new evidence is potentially relevant to issue 2.2.7. This was an allegation that in February 2021 the claimant did not receive a reply to an email to Professor Scott updating Professor Scott in relation to the Malaysian University USM. It was understood at the hearing that the relevant email could be seen at page 293 of the trial bundle and was in fact dated 11 March 2021. The email was entitled Malaysia Update. The tribunal found that no response was provided but that no response was required or expected. We therefore found that there was no detriment and the reason why Prof Scott did not reply is because she did not consider that a

response was required or expected. It was not because of or related to race and there was nothing to suggest that this matter might have had something to do with race. Our overall conclusions applied to this allegation as follows. The claimant did not prove any facts from which we could conclude that the failure to reply was an act of direct race discrimination or harassment related to race. This was not unwanted conduct which had the purpose or effect necessary to constitute harassment. The claimant was not treated less favourably than any actual or hypothetical comparator because of race.

17. The 3 emails now provided by the claimant are:

    (i) An email from Professor Scott to the claimant and others dated 3 February 2021 entitled Malaysia Update.
    (ii) An email from Professor Scott dated 10 February 2021 replying to the claimant's email of 4 February 2021 about development and links with the Malaysia university.
    (iii) An email from the claimant to Professor Scott dated 26 February 2021 requesting a meeting to update Professor Scott as to her Malaysia role. The claimant says she did not receive a response to this email.

18. The claimant's application for reconsideration does not include an explanation of why these emails were not provided earlier. The claimant just says that she has since the hearing obtained this additional evidence. There is no reason why the claimant could not access her email account and provide this evidence in time for the hearing, if she considered it relevant. The evidence could therefore have been obtained with reasonable diligence for use at the original hearing. It would have been obvious that if the claimant wished to complain about not receiving a response to an email, then that email should be disclosed and included in the bundle.

19. The claimant has not identified any additional factor or mitigating circumstance that means that the new evidence could not have been obtained with reasonable diligence at an earlier stage. The claimant was not ambushed at the hearing. In fact the claimant is now seeking to provide additional evidence to support her own case rather than respond to something that came out at the hearing. The claimant was not refused an adjournment. In fact the claimant did not apply for an adjournment or attempt to provide this evidence at the hearing and she has not even explained why not. The interests of justice do not allow fresh evidence to be adduced in these circumstances. The claimant is simply seeking a second bite of the cherry because she failed, most likely as a result of oversight, to provide all the evidence available in support of her case at the original hearing.

20. The claimant has not shown that the new evidence would probably have had an important influence on the hearing or the result. The allegation the tribunal had to determine was about the claimant not receiving a reply to an email to Professor Scott updating Professor Scott in relation to the Malaysian University USM. The claimant now seems to wish to complain about not receiving a response to a different email, i.e. the one requesting a meeting to update Professor Scott as to her Malaysia role. This is a different allegation from the

one we had to determine. In her email requesting a meeting the claimant does not provide any update about the Malaysian University and so it is clear that the claimant now wishes to rely on a different email. The list of issues identifying the allegation we had to determine was agreed by both parties at a preliminary hearing held on 23 March 2023 and the claimant did not make any application to vary the list of issues. The claimant had the opportunity to raise any objection to the list of issues at the preliminary hearing or in the 9 months or so between the preliminary hearing and the final hearing. The parties did not prepare any evidence or submissions to deal with the allegation the claimant now seeks to pursue. A further hearing with new evidence would therefore be required to deal with the new allegation and this cannot possibly be in the interests of justice.

21. Furthermore, even if the new email was admitted into evidence and even if the tribunal were to find that Professor Scott had not responded to the claimant's request for a meeting the issue for the tribunal would still be whether the failure to respond was direct discrimination because of race or harassment related to race. The point still remains that the claimant has not proved any facts from which we could conclude that it was. Even on reading the claimant's reconsideration application the strong impression remains that the claimant has presented a diffuse list of complaints but it is wholly unclear why she considers her treatment to have been because of or related to race. In fact there remains no cogent basis for that suggestion. We invited the claimant to identify the matters she relied upon to prove the prima facie case at the hearing but there was little to go off and this problem remains. The tribunal's conclusions as summarised above would therefore still stand.

22. For these reasons there is no reasonable prospect that the tribunal would find that it was necessary in the interests of justice to consider the new evidence and there is no reasonable prospect of the original decision being varied or revoked as a result of this ground.

Procedure of the hearing

23. The claimant alleges that the proceedings were rushed and she was pressured to move quickly. This is incorrect. The claimant was given more than ample time to ask questions and give evidence. The timetabling of the hearing was discussed with the parties throughout the hearing. It was agreed that it would be beneficial for everybody if the tribunal gave an oral decision in the time available rather than a reserved decision. This was because of the length of time since the claim was submitted and since the events complained of, the fact that the claimant was still an employee of the respondent and the fact that there could be a significant delay if judgment was reserved particularly due to the impending Christmas break. The tribunal did not impose any strict deadlines but sought to keep to timetabling which would enable sufficient time to provide a decision to the parties and also keep the evidence proportionate and relevant to the issues that we had to determine. This is standard case management. As far as I can recollect the claimant did not raise any issue about being stressed and anxious at the hearing. The claimant had a very full opportunity to explore her complaints in evidence and in submissions. A number of the matters the claimant wanted to pursue were in fact explored extensively.

24. The claimant states she has concerns about the accuracy of the list of issues. The list of issues for the final hearing was agreed by the parties at the preliminary hearing before EJ Kelly on 23 March 2022. EJ Kelly recorded as follows *"The respondent had drawn up a draft list [of issues] with which the claimant agreed.".* The claimant was professionally represented at that hearing by her solicitor. It appears that EJ Kelly suggested that the list of issues could be elaborated but that was not done and the parties had prepared for the hearing on the basis that the list of issues was final. This was consistent with the order made by EJ Kelly: *"This list should be comprehensive and no other issues will be considered unless with the leave of the Tribunal".* EJ Kelly ordered that final list of issues should be agreed by 20 April 2022. The tribunal worked from the agreed list of issues which was provided to us in the bundle. As far as I am aware neither party made any application to vary the agreed list of issues at any stage since the hearing before EJ Kelly. The evidence and submissions at the hearing were tailored to address the issues as previously agreed. The list of issues was discussed with the parties at the outset of the hearing and this was what led to the claimant withdrawing her indirect sex discrimination claim. It was not apparent that any of the remaining claims or allegations were unworkable. The whole point of agreeing the list of issues at the preliminary hearing stage was so that the parties could prepare and so that the parties and the tribunal knew what the tribunal was required to adjudicate. This importance of the list of issues was clear from EJ Kelly's order which the claimant obviously had.

25. The claimant refers to a change in the list of issues but as far as I am aware the only change was to amend allegation 2.2.13.4 so as to remove reference to Professors Amigoni and Wastling. This was agreed by the claimant. It did not actually change the substance of the allegation, just who was responsible for it. It is not clear to me why the claimant considers this advantages the respondent when she agreed to it and it was just a matter of identifying who was responsible for her allegation. In her reconsideration application the claimant accepts, as she did at the hearing, that Professors Amigoni and Wastling were not involved in this complaint so it is unclear how she could be disadvantaged by them being removed.

26. The claimant now suggests she was not consulted about the list of issues and that she does not agree with certain parts of it. This might be a matter between the claimant and her previous representative, who agreed the list of issues. The claimant has not explained why she did not raise this any earlier and if necessary apply to vary the list of issues.

27. The claimant also says she has concerns about unequal treatment during the hearing. In my judgement this point is also misconceived. As can probably fairly be observed from the reconsideration application itself the claimant does have a tendency to want to explore her complaints in great detail. It was necessary during the hearing to refocus the claimant to ensure that she was answering the question and, when she was cross examining, to ensure that the questions asked were relevant to the issues we had to determine and in particular relevant to the claimant's case that she was treated less favourably because of race

and/or subjected to harassment related to race via the particular allegations in the agreed list of issues. It was necessary for a fair hearing and in the claimant's interests to prompt the claimant to ask questions relevant to the allegations we had to determine. The tribunal mentioned an example of this approach in our judgment at paragraph 101 where we referred to prompting the claimant to ask questions about the support she alleged she should have been provided in relation to HM. The tribunal also had a responsibility to ensure the questioning was proportionate and consistent with the timetable to conclude the case in time. This is all part of ordinary case management and is by no means unusual when parties represent themselves. The claimant was in fact given much greater leeway than would have been afforded to a professional representative in terms of the time taken for cross examination and the amount of tangential questioning that she was permitted to explore.

28. It is not correct that every question the claimant posed of Professor Wastling had to be scrutinised. As we recorded in the judgment the claimant's cross examination of Professor Wastling was robust and lengthy (see paragraphs 61 and 78). The claimant herself refers in her reconsideration application to her extensive cross examination of Professor Wastling. It was necessary to step in to focus the claimant on asking relevant questions only as the cross examination was in danger of running to a disproportionate length and spending much time on irrelevant or at best tangential topics. Again this is part of ordinary case management and was in the claimant's interests as well as necessary for a fair hearing. The claimant was not prevented from asking any questions that were relevant and that Professor Wastling could answer.

29. I do not believe the claimant raised any concerns about the procedure of the hearing during the hearing itself. In my judgement there was nothing in the conduct of the hearing which could possibly warrant the decision being varied or revoked. The claimant had a full and fair opportunity to give evidence, ask questions and make submissions on all the issues which the parties had agreed the tribunal would adjudicate on.

Errors of fact

30. The claimant appears to challenge or at least provide extra commentary on practically every finding which the tribunal made. The points made are detailed and lengthy. I have read all of them but in my judgement it is neither necessary nor proportionate to comment on them individually.

31. It appears to me that this part of the reconsideration application is an attempt by the claimant to reargue the case. It is based upon expanding upon points which were raised and considered at the hearing or raising arguments which could and/or should have been deployed at the hearing. The parties were aware of the issues at the hearing and could address the tribunal on them. We in fact encouraged the claimant to focus on the allegations we had to determine and her case that she was treated less favourably because of race or subjected to harassment related to race on numerous occasions. This part of the application reads as though the claimant has taken the opportunity to make further

submissions following the judgment. It is not in the interests of justice to reconsider a judgment on that basis.

32. I have considered all of the matters raised by the claimant as alleged errors of fact and none of them are such that they would give any reasonable prospect of the original decision being varied or revoked. The claimant had the opportunity to give evidence, ask questions and make submissions on all the issues which she now wishes to expand upon at the hearing. This part of the claimant's application is an attempt to re-argue the issues because she disagrees with the decision. This is not a valid ground for reconsideration.

Conclusion

33. In light of the analysis above my overall conclusion is that there is no reasonable prospect of the original decision being varied or revoked.

Employment Judge Meichen

4 May 2023