



EMPLOYMENT TRIBUNALS

Claimant: Ms C O'Brien

Respondent: Cheshire and Wirral Partnership NHS Foundation Trust

JUDGMENT

The application of the claimant, dated 14 August 2023, for reconsideration of the Judgment made on 26 July 2023 and sent to the parties on 2 August 2023, is refused.

REASONS

There is no reasonable prospect of the original decision being varied or revoked, because:

1. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70). The Court of Appeal in **Ministry of Justice v Burton** [2016] EWCA Civ 714 has emphasised the importance of finality, which militates against the discretion being exercised too readily. In exercising the discretion, I must have regard not only to the interests of the party seeking the 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.

2. In **Ebury Partners UK v Davis** [2023] IRLR HHJ Shanks said:

“The employment tribunal can therefore only reconsider a decision if it is necessary to do so ‘in the interests of justice.’ A central aspect of the interests of justice is that there should be finality in litigation. It is therefore unusual for a litigant to be allowed a ‘second bite of the cherry’ and the jurisdiction to reconsider should be exercised with caution. In general, while it may be appropriate to reconsider a decision where there has been some procedural mishap such that a party had been denied a fair and proper opportunity to present his case, the jurisdiction should not be invoked to correct a supposed error made by the ET after the parties have had a fair opportunity to present their cases on the relevant issue. This is particularly the case where the error alleged is one of law which is more appropriately corrected by the EAT.”

3. New evidence is generally only admissible where a claimant can satisfy the Tribunal that it would have an important bearing on the result of the case and demonstrate that it is in the interests of justice to consider if it was not produced beforehand when it could have been.

4. Rule 72(1) of the 2013 Rules of Procedure empowers me to refuse the application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked.

5. Preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely to deal with cases fairly and justly. This includes, so far as practicable, saving expense. Achieving finality in litigation is part of a fair and just adjudication.

6. The Judgment in this case was issued after a lengthy hearing. A significant amount of documentation was considered. A large amount of evidence was heard and considered, including the evidence given by the claimant personally. The claimant was able to make submissions.

7. The reconsideration application particularly addresses the finding made that the respondent did fail to comply with its duty to make reasonable adjustments by not using the informal procedure, and the fact that the claim was found to be one which had not been entered in the time required and it was found not to be just and equitable to extend time (point two of the Judgment). The reasons for the Tribunal's decision on that time and jurisdiction issue are set out at paragraphs 146 to 148 of the Judgment and reasons. As the Judgment explained, the Tribunal balanced a number of matters. The matters raised in the reconsideration application were matters about which the Tribunal was aware when it reached its decision. The claimant was able to put forward the points she has now raised, at the hearing. There is nothing in the reconsideration application on this issue which means that it is in the interests of justice to reconsider the decision made.

8. The matters raised in the reconsideration application about the reliance on CCTV were considered by the Tribunal when it was reaching its decision. The Tribunal heard the evidence about CCTV and the impact it had on the claimant. That evidence is particularly considered and addressed at paragraphs 58 and 140 of the Judgment. What the Tribunal found in relation to the knowledge of the HR support to the investigation is stated in paragraph 140. There is nothing in the reconsideration application on this issue which means that it is in the interests of justice to reconsider the decision made.

9. The third substantive paragraph of the reconsideration application appears to be a request to reconsider the remedy Judgment. The claimant was successful in her claim for breach of contract. She was not successful in any of her other claims. The decision regarding remedy was limited to the remedy/damages to be awarded for the breach of contract found. In a claim such as this, where the breach of contract is the failure to give notice, the award made is to place the claimant in the position in which she would have been had the contract not been breached, which is the loss arising from the lack of notice given. The period of notice was twelve weeks. The sum awarded was calculated using the gross week's pay claimed by the claimant in her schedule of loss. Damages for personal injury cannot be recovered as part of a successful breach of contract claim and, in any

event, no argument was made by the claimant for the exceptional recovery of such damages in this case.

10. The claimant is correct that the potential issue of personal injury was discussed earlier in the hearing, because the claimant was contending that the respondent's discrimination had caused or exacerbated her rheumatoid arthritis. Had the claimant succeeded in any of her discrimination claims, the claim for an award for personal injury would have needed to be determined. However, the claimant did not succeed in any of her discrimination claims. As the claimant did not do so, the Tribunal was correct not to go on and consider the personal injury claimed. It is not in the interest of justice for the remedy awarded to be reconsidered.

11. The claimant made an application in advance of the hearing regarding an additional disability impact statement which the claimant sought to rely upon which referred to the claimant's rheumatoid arthritis. At the start of the hearing the statement was discussed, and an application made by the claimant to amend her claim to include an additional reasonable adjustment claim relying upon rheumatoid arthritis. That application was refused. The decision made and the reasons for it were set out in detail in paragraphs 10-12 of the Judgment (which records what the claimant was informed verbally on the second day of the hearing). As recorded at paragraph 10(i), it was explained that the Tribunal's decision on the amendment application did not mean that the claimant could not rely on her rheumatoid arthritis when arguing for remedy (on the basis that she contended that the respondent's discrimination had caused that condition). However, for the claimant to be able to rely on her rheumatoid arthritis as being caused by an unlawful act of discrimination found, she would have needed to succeed in one of her discrimination claims. She did not.

12. The final paragraph of the reconsideration application appears to add nothing further to the application. The claimant had the opportunity to present all the evidence which she wished and to make her submissions in the claims which she pursued. There is nothing in the final paragraph of the reconsideration application which means that it is in the interests of justice to reconsider the decision made

13. I do not find that it is necessary in the interests of justice to reconsider the Judgment, based upon the application made by the claimant. There is no reasonable prospect of the original decision being varied or revoked, based upon the reasons given. The application for reconsideration is refused.

Employment Judge Phil Allen

10 October 2023

Case No. 2408038/2021

JUDGMENT SENT TO THE PARTIES ON

17 October 2023

FOR THE TRIBUNAL OFFICE