EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101290/2023

Held in Chambers on 18 September 2023

Employment Judge B Campbell

Ms N Cross	**Claimant**
Third Sector Hebribes	**Respondent**

JUDGMENT FOLLOWING RECONSIDERATION

The claimant's application for reconsideration of the tribunal's judgment dated 16 August 2023 is refused.

REASONS

Background

1. The claim was originally presented to the employment tribunal on 30 January 2023. Before that, the claimant had initiated ACAS Early Conciliation on 9 January 2023 and an Early Conciliation certificate was issued on 11 January 2023. The claim involved a complaint of unfair dismissal. The claimant had resigned and was seeking a finding that she was constructively unfairly dismissed. The respondent lodged a response form defending the claim on 27 February 2023.

2. The full hearing of the claim took place on 15 and 16 June 2023. The claimant was represented by a Mr Macleod from the Citizens Advice Bureau and the respondent was represented by Mr Silver, the Chair of its Board. Evidence

was heard from the claimant, Mr Silver and Ms McLeod who is the respondent's Chief Officer.

3. A reserved judgment was issued with reasons on 19 July and sent to parties on 24 July 2023 (referred to below as the **'judgment'**). The claim was refused and dismissed.

4. On 16 August 2023 the tribunal received a letter from Arun Smith, a Legal Adviser with the Lewis Citizens Advice Bureau, in effect a more senior colleague of Mr Macleod. It contained a request for reconsideration of the judgment under rule 71 of the Employment Tribunals (Constitution and Rules of Procedure) 2013 (the **'ET rules'**) – the reconsideration request is referred to below as the 'application'.

5. In summary, the grounds were:

   a. Firstly, it was acknowledged that the application was being made outside of the normal 14-day time limit for doing so, but there were good reasons why the tribunal's power to extend time should be used, so the application could be considered on its merits;

   b. As to the substance of the application itself, the claimant wished certain findings and conclusions to be revoked, failing which the judgment should be varied so that some factual errors could be corrected;

   c. More specifically, the tribunal should reconsider the conclusion made that the respondent did not breach the mutual obligation of trust and confidence towards the claimant and that by making erroneous factual findings, by applying the relevant law to them it went on to reach similarly erroneous conclusions.

6. The remainder of the application was a set of more detailed arguments in support of the above principal grounds.

7. On initially reviewing the application I did not consider there to be 'no reasonable prospect of the original decision being varied or revoked' under

rule 72(1). The claimant's representative had submitted a detailed and, on the face of it, potentially well-reasoned case for both hearing the application despite it being late and for granting it. This was my preliminary assessment of those matters.

5 8. I therefore did not refuse the application at that time and asked for the respondent's preliminary view on the application and sought confirmation from both parties of whether they were content for the application to be determined without the need for a hearing.

9. Mr Silver for the respondent provided a note summarising the respondent's
10 reasons for resisting the application on 15 September 2023. In summary, the basis for the respondent's objection to the application were:

a. The claimant's perception of some of the facts and events was erroneous;

b. Some of her arguments were not consistent with the evidence; and

15 c. The tribunal was entitled to make the factual findings that it did, then go on to draw the legal conclusions from those facts which are in the judgment.

The respondent did not argue that the tribunal should decline to decide the application because it had been submitted late. No position was stated on that
20 issue and the respondent's stance was taken to be neutral.

10. The claimant's representative confirmed that they were content that the original application be taken as their full submission, and did not wish to add to it. They confirmed that they were content for the application to be decided on the basis of written submissions and without a hearing. The respondent
25 did not state a preference regarding whether or not there should be a hearing.

11. I agreed to consider the application on the basis of written submissions. I was content that the overriding objective under rule 2 of the ET rules was best served by dispensing with the need for a hearing, taking into account in particular the desire to save expense and further delay, and to deal with

issues proportionately. Although neither party was legally represented, they were each able to set out their positions in writing in a way which made their arguments clear.

Discussion and decision

12. I took note of the judgment of HHJ Tayler in ***T W White & Sons Limited v Ms K White UKEAT/0022/21 and UKEAT/0023/21*** and in particular paragraph 49 which summarised the sequential approach to be taken in dealing with an application for reconsideration.

13. I considered the following to be relevant to the determination of the application:

    a. As it was not made within the time period prescribed by rule 71 of the ET rules, whether it was appropriate to extend time under rule 5 so that it could be considered on its merits;

    b. If the application was to be considered on its merits, was it 'necessary in the interests of justice' per rule 70 that it be granted;

    c. If the application were granted, what further orders or directions should be made for the management of the claim.

14. I noted that, as summarised above, the claimant was seeking reconsideration of the finding that the respondent did not breach the obligation of trust and confidence. I took from this that were I to agree with the claimant, she also wished there to be reconsideration of the remaining aspects of the legal test for constructive unfair dismissal, namely whether she resigned sufficiently promptly in response to the breach and whether, if so, any constructive dismissal which resulted was fair or unfair according to the provisions of section 98 of the Employment Rights Act 1996.

Time bar question

15. The judgment was posted out to the parties on 24 July 2023. The application was received by the tribunal on 16 August 2023. It was out of time by nine days.

16. In relation to the reasons why the application was late, it was said that:

    a. Mr Macleod wished to take external advice in relation to the prospects of seeking reconsideration. He gathered comments from the claimant and sent those to the advisor, but there was a delay in receiving a response;

    b. Mr Smith only began working with the local Citizens Advice Bureau on 1 August 2023. Hie is a qualified legal advisor, and before his arrival there had not been one at that branch. Noting that there had not yet been a response from the external advisors, Mr Macleod asked Mr Smith to help on 4 August. Mr Smith had been in training up until then;

    c. Mr Smith agreed to help, but could only meet with Mr Macleod and the claimant on 10 August, which was already outside of the deadline for lodging a reconsideration request; and

    d. During the 14-day period immediately following issuing of the judgment there were two local holidays on which neither Mr Macleod nor Mr Smith were working.

17. On the question of whether an extension of time should be granted, it was submitted that:

    a. The time limit was only missed by a short period;

    b. Very little of any delay was caused by the claimant herself, but any such delay was contributed to by her dyslexia causing her to take longer to review the judgment and provide comments and instructions; and

    c. The prejudice to the claimant in refusing to consider the application would be significantly greater than the prejudice to the respondent if it were considered.

18. As noted above, the respondent did not object to consideration of the application. It only wished it to be refused on the merits.

19. The decision reached is that the balance of fairness favours extending time. I believed it to be in the interests of justice for the application to be decided on its merits given the potential consequences for both respondents as weighed against the relatively short period of delay, given the sequence of events described. The respondent's lack of opposition was also a factor in this decision.

The substantive application

20. I turned to consider the respondents' application on its merits. There is no onus on either party in terms of whether it is in the interests of justice that a tribunal decision be varied revoked under rule 71.

21. I gave consideration to the parties' submissions as well as the additional facts available from the tribunal file, and I considered the overriding objective of employment tribunals set out in rule 2 of the ET rules. My decision was not to grant the application for the following reasons.

The tribunal's finding that mutual trust and confidence was not breached

22. The claimant's arguments as to why the tribunal erred in finding that the respondent had not breached the implied duty are principally set out in paragraphs 17 to 23 of the application.

23. In paragraph 17(a) it is said that the tribunal relied on findings of fact which did not align with the evidence heard. This is not correct. The tribunal considered evidence from both the claimant and Ms McLeod in relation to the matter in question, namely whether and how the two individuals had interacted on the day that the claimant decided to resign. The tribunal preferred Ms McLeod's evidence that there was little or no interaction, that she was shocked and upset herself as a result of allegations made about her in the claimant's recently submitted grievance, and that she did not 'glare' at the claimant in the way the claimant suggested. In essence the tribunal preferred some evidence over other contradictory evidence on the point, as it was entitled to do. The claimant's argument effectively is that her evidence

should have been preferred instead. This is to challenge the discretion which the tribunal had, and used appropriately.

24. In paragraph 17(b) it is argued that the tribunal erred in deciding that the alleged 'last straw' of Ms McLeod's conduct towards the claimant on the same day was too innocuous to qualify. It was said to be unclear how the conclusion was reached that her conduct was innocuous. This again appears to ignore Ms Macleod's evidence that she barely had contact with the claimant on the day in question. Additionally, it overlooks that each of the earlier events the claimant relied upon to establish a course of conduct amounting to a breach of the duty were evaluated in the judgment, and found to be insufficient – individually and collectively – to establish a breach when taken with the alleged last straw. Therefore, the alleged last straw could not be that, as there was nothing substantial coming before it.

25. In paragraph 18 the claimant maintains that the tribunal erred in finding that the third of three meetings between Ms McLeod and her about her contract was conducted in an amicable way and that all relevant changes had been agreed, when the claimant gave evidence that she only agreed to an important change 'in a moment of panic.' Again this is a challenge to the tribunal's discretion to prefer which evidence to accept when presented with conflicting information. Ms McLeod described the third meeting as amicable and shorter than the one before because many points had been agreed. Whether the claimant was in a 'moment of panic' when she agreed a point (namely when the contractual changes would come into effect) does not prevent an objective assessment being made that she nevertheless did reach agreement with Ms McLeod, who in any event did not detect that the claimant was in that mind state at that moment, if true.

26. As regards paragraph 19, the claimant's emails were considered. Both Ms McLeod and the tribunal read them as the claimant saying, after the third meeting, that there were aspects of the proposed contract variation she now queried, or did not accept. This was, however, considered to be a change in the claimant's position from the meeting. Whether and when the claimant reached 'consensus in idem' over the essential points of a new contract is not

relevant. The legal issue is whether the respondent, through Ms McLeod, breached mutual trust and confidence by a single act or by way of a last straw. The judgment explains adequately why, on the evidence, she did not.

27. Paragraph 20 draws a comparison between a previous role held by the claimant, and the one she was being asked to take by Ms McLeod. The claimant's earlier role was described in the judgment as 'Finance Officer'. This was a general description of her job at the time rather than a formal title – she did not give evidence to say what the precise title was. Leaving aside that this was new evidence, whether she was, as is now suggested, a Finance Manager at that time and that the title would be more senior than the one she would have if she accepted the changes is of no relevance. What is relevant is that she was solely concerned with finance, then took on some non-finance duties including HR, and was then asked to agree to those additional duties being passed to someone else with capacity as she was not coping with her workload. What matters particularly is that, on the evidence, she agreed to the changes.

28. Paragraph 21 makes the point that the claimant's written contract did not contain an express power to demote her. While that may be true it is not relevant. The respondent did not suggest it was using any existing power to change her job. Instead, it sought to effect the change by a process of discussion and negotiation, principally via the three meetings between Ms McLeod and her. That led to agreement. This was the evidence and it was accepted.

29. The terms of paragraph 22 are an extension of paragraph 21. There was not a unilateral change to her contract for any reason. The accepted evidence was that the change was proposed – as an alternative to invoking a formal performance management process – and discussed over three meetings to the point of agreement.

30. Paragraph 23 again amounts to a criticism of the tribunal for preferring the evidence of Ms McLeod over that of the claimant. It was entitled to do so where that occurred, and reasons were given as to why. Again the test of Ms

Macleod's conduct is an objective one and not based solely on the perception or feelings of the claimant in the meeting.

The alleged factual inaccuracies in the judgment

31. I considered the claimant's list of suggested examples of errors in the judgment. I did so in two ways – to see if there was a factual matter which was raised in evidence and not recorded correctly in the judgment, and secondly if so to consider whether that had a bearing on the decision of any of the legal issues in the claim.

32. The claimant's list is set out in paragraph 24 of the application, using sub-paragraphs from (a) to (aa). Those are considered below adopting the same categorisation.

   a. It is accepted that during the process of formatting the judgment, Mr Silver's designation was changed to 'solicitor' when, as the judgment itself makes clear, he was Chair of the respondent's governing board. This will be corrected. It did not affect the determination of the legal issues;

   b. As stated above, there is no record in the evidence of the claimant's original job title being 'Finance Manager'. In any event it is not material to the issues;

   c. The precise job title of a colleague in this context is immaterial;

   d. It is accepted that 'Staran' was a CIC and not a charity. Again this makes no difference to a material issue;

   e. Evidence was given by Ms McLeod that both roles which were merged were originally part-time. There is no record of the claimant giving evidence on the point. Her view may be different but the tribunal can only reach a decision on the facts using the information presented to it during the hearing;

   f. This was a disputed point. It does not in any event change the finding that the respondent reached the view that the clamant had too much

work and too many responsibilities in the combined role, and that it would be better to pass some non-finance duties to a colleague;

g. This appears to be an attempt to lead new evidence not brought up at the hearing. In any event it is not recognised as being relevant to the legal issues in the claim;

h. This is another attempt to challenge the tribunal's power to prefer one of two conflicting pieces of evidence. Even preferring the claimant's evidence it would make no obvious difference to how the relevant legal issues would be decided;

i. This is a new submission not made at the hearing, and no reason to consider it now is identified;

j. This is not relevant. The claimant was not subjected to a sanction for underperformance. She was asked to agree a reduction in the scope of her role and the finding was made that she so agreed;

k. The challenged finding was supported by evidence from Ms McLeod;

l. Again, the finding was supported by evidence;

m. Again, the finding was supported by evidence;

n. the finding was based on the evidence heard, including evidence from Ms Macleod in cross-examination to the effect that it was the claimant's responsibility to ensure the staff handbook was updated, which she could not find the time to do. She said that the external consultants suggested that minor updates could be done in-house. Whether updates would have been by herself or working with an external consultant is not the point; it is not relevant to the determination of the legal issues;

o. this is again an attempt to revisit a decision on the evidence and/or a new submission which was not made in the hearing;

p. The tribunal noted evidence from the claimant that she could not complete her core tasks despite working additional hours, weekends and being unable to use all of her annual leave. Ms Macleod said in evidence that the claimant was still in her training and being 'chased' to finish aspects of it;

q. The reason why the claimant had too much work (a fact she acknowledges) is secondary to the established factual finding that she did have too much work and agreed to a reduction in her role;

r. It was recorded in evidence that ceasing to chair the relevant partnership resulted in a reduction in the work required of the Administrator role, which in turn allowed it to be combined with the finance role which had also reduced. The claimant could not cope with the overall volume of the combined role, contributed to by the errors she made and time spent identifying and correcting them;

s. This is another attempt to introduce new evidence and/or submissions;

t. It was found that Ms McLeod behaved calmly and normally when objectively judged. It is still possible that the claimant felt upset in the meeting, or after it, but that is a subjective view and not proof of conduct tending to support a breach of the duty to preserve mutual trust and confidence;

u. The claimant was noted to say in her evidence that *'she [Ms Mcleod] did shout at me in the meeting, I didn't shout, I told her there was no need for her to shout at me'.*

v. This is noted but was not given in evidence by the claimant. The figure used in the judgment was taken from the tribunal documents. The fact does not have a bearing on the determination of the issues;

w. The claimant was not at work on Friday 11 November 2022. This is the relevant point, unaltered by whether she was working from home or ill;

x. This again is an attempt to introduce new evidence or submissions;

y. As for (w);

z. The point is inconsistent with the oral and documentary evidence before the tribunal at the hearing. It is another late attempt to raise a new matter which in any event does not appear to be relevant to the issues;

aa. The tribunal is satisfied that the statements were considered appropriately given that they were put forward as a substitute for evidence in person.

33. In providing the above responses to the claimant's submissions it is appreciated that she did not make notes of the evidence as it was given throughout the hearing, and so would not be expected to remember every piece of evidence which the tribunal noted at the time.

Finality of litigation

34. Also of relevance to some of the above points is the principle of finality of litigation. This was reinforced as recently as the beginning of this year by the EAT in ***Ebury Partners UK Limited v Mr M Acton David [2023] EAT 40***. Tribunals are urged to make decisions which offer a party a second bite at the cherry 'with caution'. In Ebury it was the tribunal's own decision to reconsider its previous judgment in order to consider arguments not led by the parties that drew criticism. Nevertheless the wider principle was that if parties had a fair opportunity to lead their respective cases, the process should not be reopened after a final judgment had been reached unless there was something akin to a 'procedural mishap'.

35. I did not consider there had been any procedural mishap in this claim, and in any event not one which prevented the claimant from properly presenting her case before a judgment was reached. It would be less fair to the respondent should some new pieces of evidence or submissions be accepted without them having fair notice and the opportunity to answer them.

Conclusion

36. The balance of fairness is therefore in favour of refusing the application as a whole. Accordingly there is no need to make further directions as the original judgment stands.

37. The designation of Mr Silver as a solicitor in the judgment is an obvious error which will be corrected by way of issuing a certificate of correction.

Employment Judge: **B Campbell**
Date of Judgment: **13 October 2023**
Entered in register: **23 October 2023**
and copied to parties