Neutral Citation Number: [2023] EAT 157

Case No: EA-2022-000513-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 24 October 2023

Before :

JUDGE KEITH

- -

Between :

MR M JAROSINSKI	**Appellant/Respondent**
- and -	
NESTLE UK LTD	**Respondent/Appellant**

- -
- -

MR L BRONZE (instructed directly**)** for the **Appellant/Respondent**
MS R THOMAS (instructed by Eversheds Sutherland (International) LLP) for the **Respondent/Appellant**

Hearing date: 24 October 2023

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JUDGMENT

SUMMARY

Practice and procedure

The Employment Judge erred in deciding a reconsideration application under Rule 71 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** in respect of a decision of a full Tribunal, sitting as a panel, which amongst other things, had dismissed the Claimant's claims for discrimination. The EJ had erred by considering the application under Rule 72(2), without first considering whether there was no reasonable prospect of the original decision being varied or revoked under Rule 72(1). The EJ had further erred in considering the application under Rule 72(2), as a Judge alone, rather than as part of the full Tribunal which made the original decision. While the EJ did not err in deciding not to hold a hearing, in reaching her decision alone, she deprived the Claimant of the benefit of a decision by the full Tribunal, which may have reached a decision different from the EJ considering the application alone. She also deprived the Respondent of a first stage consideration under Rule 72(1). Consideration under Rule 71(1) was remitted to a different EJ.

JUDGE KEITH:

REASONS

1. These written reasons reflect the full oral decision which I gave to the parties at the end of the hearing. As there is an appeal and a cross-appeal, I refer to the parties as they were before the Employment Tribunal, namely the "Claimant" and the "Respondent".

The litigation history

2. The Claimant challenges a reconsideration judgment, dated 13 May 2022, in which Employment Judge Ayre refused the Claimant's reconsideration application on the papers, and confirmed an earlier judgment of an Employment Tribunal, which she had chaired, sitting in the Midlands (East) Region and sent to the parties on 5 January 2022. In that earlier judgment, the ET had dismissed the Claimant's claims of race discrimination; harassment; victimisation; and wrongful dismissal, but found that the Claimant had been unfairly dismissed. However, the ET concluded that the Claimant had contributed entirely to his dismissal through his conduct, and that there was a 100% chance that he would have been dismissed, had a fair procedure been followed. Accordingly, the ET made no basic or compensatory award for his dismissal.

3. On 18 January 2022, the Claimant applied for reconsideration of the ET's judgment, in correspondence running to some 33 pages, with a detailed commentary on most, if not all, of the ET's reasons. On 14 March 2022, the ET's administration issued a Notice of Reconsideration Hearing, indicating that the application would be considered at a hearing, with a time allocation of one day.

4. In response, on 17 March 2022, the Respondent's wrote to the ET, raising concerns about the proposed hearing, because under Rule 72 of the **Employment Tribunals (Constitution and Rules**

of Procedure) Regulations 2013, (the '**ET Rules'**) the Respondent ought to have been given the benefit of a paper sift, before a hearing was considered. The Respondent also raised concerns about a suggestion in the Notice that if the ET's judgment were set aside, that a rehearing of the appeal would follow on immediately at the same hearing, particularly where the Claimant wished to adduce new evidence, of which the Respondent was unaware, and so would be placed at a disadvantage in preparing for the hearing. The Respondent sought the chance to respond to the reconsideration application in writing, before the ET decided to hold a hearing on the Claimant's reconsideration application.

5. In response to the Respondent's correspondence, on 22 March 2022, the EJ directed that the Respondent should, by 5 April 2022, set out its comments on the Claimant's application, and both parties, by that date, should write to the ET and each other, setting out their views on whether the Claimant's application for reconsideration could be decided without a hearing. The EJ stated that she would then decide whether to vacate the hearing, but that if a hearing took place at which the ET decided to vary or revoke its earlier judgment, the ET would not proceed to remake its decision at the same hearing. The EJ gave separate directions in relation to the Claimant's application to adduce new witness evidence, as to whether that was necessary for a reconsideration hearing, which it is unnecessary for me to repeat.

6. The Claimant replied, on 30 March 2022, setting out the details of the witness evidence on which he wished to rely at the reconsideration hearing, which once again, I do not repeat. He followed this with correspondence on 4 April 2022, requesting that a different Employment Judge conduct the reconsideration review, on the basis that some of the grounds in the reconsideration application were that the EJ had been perverse and was biased.

7. The Claimant sent a further email to the ET on 5 April 2022, asking that his reconsideration application be decided at a hearing, because of its complexity and the importance of deciding his

claims of race discrimination.

8. In a decision of 5 April 2022, Regional Employment Judge Swann refused the request for the reconsideration application to be considered by a different Employment Judge. REJ Swann decided that an allegation of basis was not a reason to make it impracticable for an original EJ or ET to undertake the reconsideration review, and there was no basis within the **ET Rules** to permit an alternative ET/EJ to undertake the review.

9. On 5 April 2022, the Respondent objected to the Claimant's reconsideration application, as it amounted to a disagreement with the ET's decision and a desire to relitigate by introducing new evidence. The Respondent argued that the new evidence on which the Appellant sought to rely was of limited relevance and did not meet the criteria of **Ladd v Marshall** [1954] 3 All ER 745. The Respondent also noted that in his reconsideration application, the Claimant was also making a costs application against the Respondent, which the Respondent contested. I pause to note that the parties did not seek to argue the issue of costs before me.

10. On 21 April 2022, EJ Ayre wrote to the parties, cancelling the hearing, stating that a hearing was not necessary in the interests of justice; stating that she would consider the Claimant's application for reconsideration without a hearing, in accordance with Rule 72(2); and that if the parties wished to make further representations, they should do so by a specified date.

11. The Claimant responded on 5 May. The Judge then reached her decision of 13 May 2022, in which she refused the reconsideration application.

The Claimant's appeals

12. The Claimant has filed other applications for permissions to appeal various reconsideration decisions, made both by the EJ, the Regional Employment Judge, and the EAT Registrar. It is unnecessary to recite those other proceedings, other than to note that they do not impact on the appeal

and cross-appeal before me. In his decision of 5 December 2022, HHJ Auerbach granted permission for the Claimant's appeal to proceed on two grounds, (grounds (2) and (4) of the Notice of Appeal), while HHJ Tayler granted permission on the Respondent's cross-appeal in his decision dated 31 January 2023.

The Claimant's permitted grounds of appeal

13. The first ground (originally, ground (2)) was that the EJ had erred in deciding the reconsideration application as a Judge sitting alone. Rule 72(3) of the **ET Rules** made clear that the decision should have been made by the ET which had reached the original liability judgment, not the EJ alone. I refer to this as the 'procedural ground.'

14. The second ground (originally ground (4)) was that the EJ had erred by taking into account irrelevant factors in reaching the reconsideration decision, specifically the fact that the allegations, which the ET had considered and rejected, dated back to 2012. Instead, the only relevant dates were those of the ET's hearing (November 2021) and liability judgment (22 December 2021) in the context of the Claimant's appeal to this Tribunal being in time. I refer to this as the 'time ground.'

15. I pause to note, as Ms Thomas, for the Respondent urged me to consider, that HHJ Auerbach did not permit three other grounds to proceed: that the EJ had fallen into error by not listing the reconsideration application for a hearing (ground (1)); that the EJ had not dealt with key points in the Claimant's application for reconsideration (ground (3)); and that the ET (rather than the EJ) misdirected itself on the law in relation to contributory fault, in its liability judgment.

The Respondent's permitted cross-appeal

16. The Respondent argues that if the EJ did err on the procedural ground, then it too had been prejudiced. Specifically, the EJ had failed to consider Rule 72(1), namely whether the Claimant's reconsideration had reasonable prospect of success, before reaching a decision under Rule 72(2). The

Respondent had been deprived of chance that the Claimant's reconsideration might have been dismissed on the papers, without the application then having been listed for a hearing.

The parties' submissions

17. I have considered, but not repeat in full, the parties' skeleton arguments and oral submissions, which I do no more than summarise to explain why I have reached my decision.

The Claimant's submissions

18. In relation to the procedural ground, Mr Bronze pointed out that there is a prescribed manner in which a reconsideration application should be considered. The fact that it is mandatory is clear from the wording of Rule 72(1), where it states that an application "shall be refused….Otherwise the Tribunal shall send out a notice, setting a time limit for any response to the application…." Moreover, Mr Bronze relied on the two authorities of **T W White & Sons Ltd v White** UKEAT/0022/21VP and **Shaw v Intellectual Property Office** UKEAT/0186/20/VP, as authority for the proposition that the steps in Rule 72 are mandatory.

19. There were only two explanations for how the EJ had approached the reconsideration application. The first was that she decided that the reconsideration application had no reasonable prospects under Rule 72(1), (what has been referred to as the 'sift stage') although she did not say this in her decision and had merely referred to the interests of justice. Moreover, she had canvassed the views of the parties, which was inappropriate (see paragraph 84 of **Shaw**). The second and more likely explanation was that the EJ had progressed straight to the second stage under Rule 72(2). If she had, she erred because that would require a full ET panel decision, unless special circumstances applied.

20. In relation to the time ground, the fact that the Claimant's allegations went back to 2012 and were the subject of detailed and lengthy consideration was not relevant, when the ET had considered

them in a hearing in November 2021. The only relevance of time, when considering the Claimant's reconsideration application, was how the interests of justice might be affected by the quality of the evidence, or the right to a trial within a reasonable timeframe. Neither featured in the EJ's reasons for refusing the reconsideration application.

21. In response to the Respondent's cross-appeal, the Clamant argued that a hearing to consider the reconsideration application was appropriate, as the ET had been unclear as to the relevance of some of the Claimant's evidence. The Claimant did not address directly the Respondent's complaint that the 'sift' stage under Rule 72(1) had been missed out. Mr Bronze instead argued that it was not appropriate for the EJ to conduct a sift, as she had already reached a very clear decision, which necessitated any sift to be considered by another Judge – see: **Sinclair Roche and Temperley v Heard** [2004] IRLR 763.

The Respondent's submissions

22. The Respondent initially appeared to suggest that it was permissible for a Judge alone to consider a reconsideration application, including at the sift and second stages of Rule 72. It was also permissible, even at the sift stage, for a Judge to ask for the parties' comments or for further information, as confirmed by this Tribunal in **Shaw**. The EJ's requests had to be seen in the context of the complexity of the case.

23. In oral submissions, Ms Russell accepted that it was not permissible for the EJ alone to have decided the reconsideration application at the second stage (Rule 72(2)) but that the EJ had, in reality, made a sift decision. Even if there were a procedural error, it was not one that would have made any difference to the eventual outcome, as the EJ was unarguably entitled to reach the decision to refuse the application. The application contained a paragraph-by-paragraph critique of the ET's liability judgment which amounted to a disagreement with the ET's findings and conclusions, together with an attempt to adduce new evidence, which plainly did not meet the requirements of the principles in

Ladd v Marshall.

24. If I were to decide that there had been no sift stage decision, then the Respondent was entitled to that, and if the EJ had erred in law, the remaking of the reconsideration decision should not proceed straight to the second stage.

25. In relation to the Claimant's time ground, the Respondent argued that this was too was a disagreement with the EJ's reconsideration decision, with an impermissibly isolated and hypercritical focus on particular passages of the EJ's reasons, which the Court of Appeal had cautioned against in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672.

26. The EJ had unarguably considered the various factors in paragraphs 28 and 29 of her reasons, namely the public policy interest in the finality of litigation, and the process was not designed to give the parties a second bite of the cherry, which was what the Claimant's reconsideration application amounted to. The fact that the litigation and allegations had progressed over many years was the context in which the Judge had referred to the finality of litigation, and there was no error of law when the Judge's reasons were considered in that context.

DISCUSSIONS AND CONCLUSIONS

The Claimant's procedural ground and the Respondent's cross-appeal

27. I remind myself of Rules 72(1) to (3) of the **ET Rules**. These state:

> "72.—(1) 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. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.
>
> (2) If the application has not been refused under paragraph (1), the original decision shall be

> reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.
>
> (3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part."

28. The parties accept that it is impermissible for an Employment Judge alone to reconsider, at the second stage under Rule 72(2), a decision of a full Employment Tribunal, unless it is not practicable, in which case unless either the President, Vice President, or Regional Employment Judge shall make directions on the constitution of the ET.

29. I conclude that the EJ's decision was a second stage decision pursuant to Rule 72(2), for two reasons. First, the EJ explicitly stated that she intended to make a decision pursuant to Rule 72(2), in correspondence to the parties dated 21 April 2022. Second, (and more importantly), the substance of the reconsideration decision, specifically at paragraphs 23 to 31, did not deal with reasonable prospects, relevant to Rule 72(1). Instead, the EJ considered the full merits of the reconsideration application.

30. In doing so, the EJ erred in two respects. First, the EJ missed out the sift stage under Rule 72(1) and thereby deprived the Respondent of the possibility that the application may be refused at that stage. The Respondent's cross-appeal therefore succeeds. Second, the EJ erred in making a decision which should have been taken by the full Employment Tribunal. I do not accept Ms Thomas's argument that this error was immaterial, as the reconsideration application was bound to fail. In summary, it was not only the EJ's views alone on the merits of the reconsideration application which mattered, but those of the full Employment Tribunal, which had heard all of the evidence in reaching a collective decision. Put another way, ET panel members do not simply rubber stamp an

Employment Judge's decision. The fact that it was open to the EJ to reach the decision she did on the merits of the reconsideration application does not answer or supplant the need for the ET, as a whole, to have had the opportunity to consider the reconsideration application. Even if there was no error in failing to hold a hearing, it was not argued that it would have been perverse for an ET to have done anything other than to refuse the reconsideration application, and I accept Mr Bronze's submission that there remains a possibility that the ET panel members may disagree, or have disagreed, with the EJ's conclusion. It is that important safeguard which was missed, and, as a consequence, I do not accept the argument that to proceed to reach a decision under Rule 72(2) was not a material error of law. The EJ's decision is unsafe on this ground alone and must be set aside.

The Claimant's procedural ground

31. I next consider whether the EJ erred in having considered the period of the overall litigation and the nature of the Claimant's allegations dating back to 2012, and, as Mr Bronze submitted, the EJ's 'prime focus' on those factors, at paragraph 29 of the reconsideration judgment.

32. I conclude that the EJ did not err in considering the factors, as she did, as having weight in the public interest in the finality of litigation. The reason for this is that the weight attached to the time period of the allegations was expressed as being in the context of the ET's detailed and lengthy consideration of them. In other words, the EJ was expressing the point that the case was lengthy, complex and had been the subject of detailed consideration. That was a permissible consideration in assessing the public interest in the finality of litigation, and its weight was a matter for the ET. This ground fails and is dismissed.

Disposal of this appeal

33. I turn to the question of disposal. On the one hand, I accept Mr Bronze's submission that I may pursuant to Section 35 of the **Employment Tribunals Act 1996**, remake a decision under Rule

72(1) myself. However, I also accept his submission that in doing so, I would deprive the Claimant of an ability to appeal that decision to this Tribunal, by missing out of a stage in the reconsideration process.

34. I do not accept Mr Bronze's submission that the matter should be remitted back to the ET to conduct a second stage reconsideration under Rule 72(2). That would deprive the Respondent of the benefit of a sift stage, under Rule 72(1).

35. I have considered whether it is appropriate to remit the sift stage reconsideration under Rule 72(1) to EJ Ayre. I bear in mind the well-known authority of **Sinclair Roche and Temperley v Heard** and the relevant factors: proportionality; the passage of time; bias or partiality; a totally flawed decision; the issue of a 'second bite', ie. that the EJ would be put in an impossible position of having to retake a decision, about which they had views which were clearly expressed, with the inevitable temptation of reaching the same decision; and the EJ's professionalism.

36. I have no concerns about the passage of time since the EJ's decision, which is relatively recent and could be reconsidered simply on the papers, in the context of proportionality. Although I note there are allegations of bias, partiality, and lack of professionalism, I make it clear that I do not remit it to a Judge, other than EJ Ayre, because of those allegations of bias and partiality, or lack of professionalism, as to which I express no view, nor would it be appropriate for me to do so, where those are grounds in the reconsideration application.

37. I remit it to a Judge, other than Employment Judge Ayre, because of the 'second bite' risk. I agree with Mr Bronze's submission that as the EJ has reached a clear Rule 72(2) decision, it would put her in an impossible position to have to then reconsider that under the first stage under Rule72(1).

38. In the circumstances, whilst I express no view as to the EJ's professionalism, bias, or partiality, particularly where those are grounds for the reconsideration, it is appropriate in these

circumstances for a Judge, other than EJ Ayre, to decide the reconsideration application afresh, first under Rule 72(1), as nominated by the Regional Employment Judge of the Midlands East Region.

39. I emphasise that I do not oblige that Judge, having considered the application under Rule 72(1), to then proceed to a Rule 72(2) hearing. If they choose to do so, while it is entirely a matter for them, they may regard it as appropriate to sit with the same panel members as Employment Judge Ayre sat with, because those members will have relevant knowledge of the original ET hearing.

40. Finally, I note, for information purposes only, that there has been a Rule 3(7) decision in this Tribunal on the substantive decision, which had been refused by the President. Mr Bronze has indicated that there is likely to be an application for a Rule 3(10) hearing. In remitting the reconsideration decision back to the ET, I have no power to delay the ET reconsideration process for the Rule 3(10) process, so any renewed application under Rule 3(10) should be made without delay. If it is made, the Claimant should consider applying for that hearing to be stayed pending the ET's reconsideration decision. Once again, I do not bind any EAT Judge or the Registrar in this Tribunal, as to what they decide to do, bearing in mind that there has not been a renewed Rule 3(10) application at this stage.

