EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000219/2023

Employment Judge J Young

Mr D Duployen	**Claimant**
Connect Appointments Limited	**First Respondent**
Whyte & Mackay Ltd	**Second Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that on reconsideration, the original decision is confirmed.

REASONS

Introduction

1. In this case, the first respondent seeks reconsideration of a judgment issued 13 October 2023 which refused an application for strikeout failing which a deposit order.

2. The application was intimated timeously and on 1 November 2023, the claimant and second respondent were asked to provide any response to the application by 13 November 2023 and also to express a view as to whether the application could be determined without a hearing. The first and second respondent advised that they were content for the matter to be determined without the need for a further hearing. No response was received from the claimant. In terms of Rule 72, I considered that from those responses and in the interests of justice, no hearing was necessary and in terms of that rule, invited any or further written representations to be made in respect of the application made by the first respondent for reconsideration. No further response was made.

3. The application for reconsideration was restricted to that part of the Judgment which related to the claim for discrimination arising from disability under section 15 of the Equality Act 2010 against the first respondent.

4. A reconsideration requires to be made in *"in the interests of the justice"(*Rule 70). While that gives a Tribunal a wide discretion, the discretion needs to be exercised in accordance with recognised principles. In Ebury Partners UK Limited v Acton Davis **[2023] EAT 40**, it was indicated that reconsideration which effectively sought *"a second bite at the cherry"* would offend those recognised principles.

5. In this case, it is stated that the interests of justice are satisfied because the respondent would suffer *"considerable injustice"* in being required to answer a claim which, as far as it is concerned, has no (or at best, little) reasonable prospects of success. There were then various contentions made as to why that would be the case.

6. The contentions made do not rely in any flaw or mistake in the procedure which was adopted; that there is new evidence which has come to light; or that in some respects no fair hearing had been afforded.

7. The reconsideration sought essentially sets out arguments as to why the decision made was wrong and should be reconsidered and is essentially a "*second bite of the cherry*".

8. The interests of justice requires taking into account all parties' interests. While the first respondent may consider it would be put to unnecessary expense in defending a claim, striking out a claim would equally disadvantage the claimant in not allowing that claim to be determined.

9. This element of the discrimination claim is not one which in my view would take a deal of time in preparation before or to have determined at any hearing. The matter is to proceed to a hearing on the ground of direct discrimination under section 13 of the Equality Act and /or victimisation under section 27 of that Act. The first respondent's position is that they deny that their actings had any discriminatory feature and I do not see that a claim of discrimination

arising from disability under section 15 (in this particular case) prolongs or adds any greater expense than that associated with the claims under section 13 and section 27.

10. Additionally, the hearing would proceed against the second respondent in respect of claims under sections 13, 15 and 27 of the Equality Act 2010 and the length of the proceedings and any expense of the first respondent will not be materially affected by inclusion of the section 15 claim. Thus, I do not think that the stated ground for reconsideration in the interests of justice is made out..

11. In any event, the higher Courts have stated that it would only be very exceptionally that a discrimination case would be struck out without evidence being led. In this case, there is the curious sequence of events of the first respondent at 10.47am on 27 February 2023 seeking information from the second respondent as to whether or not the claimant should be booked for induction for the bottling hall; an email being sent by the claimant to the first respondent at 11.15am advising that he had been successful in a constructive dismissal and disability discrimination claim and referring to *"my disability"* at 11.15am and the first respondent recalling their earlier email at 11.18am that day.

12. Any inquiry will relate to what, if anything, took place regarding those emails what was in the mind of the first respondent in seeking to recall the email to the second respondent asking if the claimant should proceed to be listed for induction or not.

13. In a section 15 claim the first issue is whether the unfavourable treatment was because of an identified something (in this case likely absence). That requires an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was a reason for any unfavourable treatment found. That requires evidence.

14. For those reasons, I would confirm the original judgment.

Employment Judge: J Young

Date of Judgment: **6 December 2023**
Entered in register: **11 December 2023**
and copied to parties

5