EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100892/2022

Application determined on written application on 28 December 2023

Employment Judge A Kemp

Dr Dita Wickins-Drazilova	**Claimant** **In person**
University of Dundee	**Respondent** **Represented by** **Mr P Grant-Hutchison** **Advocate** **Instructed by** **Ms L Rankin** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent's application for reconsideration is refused under Rule 72(1) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

Introduction

1. A Judgment in this case was dated and issued to the parties on 6 December 2023 ("the Judgment").

2. The claimant, who formerly had representation by counsel and solicitors but is now acting for herself as a party litigant, sought reconsideration of the Judgment by email and document attached on 20 December 2023.

The Law

3. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 set out the Rules of Procedure in Schedule 1, and those in relation to the reconsideration of judgments are at Rules 70 – 73. The provisions I consider relevant for the present application are as follows:

> **"70 Principles**
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> 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.
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> **71 Application**
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> Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.
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> **72 Process**
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> (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.
>
> ……
>
> (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;….."

4. In ***Serco Ltd v Wells [2016] ICR 768***, the EAT observed that the Rules of Procedure must be taken to have been drafted in accordance with the principles of finality, certainty and the integrity of judicial orders and decisions. In ***Liddington v 2Gether NHS Trust EAT/0002/16*** the extent to which reconsideration was appropriate was addressed by the EAT in the following terms:

> "a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered."

5. In ***Shaw v Intellectual Property Office UKEAT/0186/20*** the EAT described the first stage in Rule 72 as a 'sift' stage of the reconsideration application, akin to the sift process which is applied to appeals to the EAT. The test is in Rule 72 itself and is whether the Judge considers that there is no reasonable prospect of the original decision being varied or revoked. If so the application may be refused. The discretion to do so in the rule is to be exercised having regard to the overriding objective in Rule 2.

Discussion

6. The claimant has prepared a lengthy document making comments and seeking reconsideration. In my opinion there is no reasonable prospect of the original decision being varied or revoked. I do not in this Judgment set out a response to each of the arguments that the claimant makes individually, but set out my opinion on matters as follows.

7. The claimant asks for reconsideration on the basis of a different provision, criterion or practice (PCP) to that relied on by her in the Final Hearing. The claimant has closed her case on the evidence, and no application was made at the Final Hearing for an amendment of the PCP in the terms now raised. If an amendment application were to be made, that would involve giving the respondent an opportunity to respond, and in the circumstances opposition to it is in all practical senses certain. The respondent opposed an application to amend earlier in relation to an unlawful dismissal. The amendment application would then be considered on the basis of what is normally referred to as the ***Selkent*** factors, from the case of ***Selkent Bus Company v Moore [1996] ICR 836***. In ***Vaughan v Modality Partnership [2021] IRLR 97*** the EAT summarised the authorities and concluded that there was a balance of justice and hardship to be struck between the parties when addressing an application to amend.

8. The nature of what would be an amendment by the claimant is to raise a new PCP which is different to that relied on originally. The claimant had been represented latterly by solicitors and by counsel at the Final Hearing. If allowed, the respondent would require to be given time to respond in its pleadings, and the parties would require to be given the opportunity to lead further evidence on matters of fact would be required. The issue of the PCP arises both in respect of indirect discrimination under section 19 of the 2010 Act (for which a defence of objective justification exists if the proposed PCP was held to have applied) and in relation to reasonable steps under section 20 of that Act.

9. In this context, and others where the claimant seeks to rely on evidence not before the Tribunal, It does not appear to me that any such new evidence has any reasonable prospect of meeting the test for new

evidence under what is general referred to in Scotland as the *res noviter* rule, as there is no suggestion that the new evidence could not have been obtained with reasonable care and diligence. If allowed, there would require to be further evidence at additional cost and delay, contrary to those aspects of the overriding objective. There would be obvious prejudice to the respondent in that regard, and hardship to them for the same reason. In all the circumstances I consider that this argument has no reasonable prospect of success.

10. The claimant makes a number of detailed comments on the evidence. Her views on it are doubtless genuinely held, but are not the view of the Tribunal itself. The Tribunal's views are set out in the Judgment. The Tribunal did not agree with the claimant's views on the evidence as she puts forward in her application for reconsideration. There is one aspect where she is correct in that her email of 17 September 2019 does not contain the word "then" twice, it is only once. The email does however have a form of chronology within it, with the word "then" latterly appearing. I do not consider that that inaccuracy of description in the Judgment has any reasonable prospect of a variation or revocation of it.

11. Some of the matters the claimant seeks to raise were not part of her evidence. Others are not accurately stated in relation to what her evidence had been. Others are explanations given which are expanded from the evidence. For example, the claimant makes the point that her job title at the University of Warwick was not Lecturer, but when asked about her CV she was asked whether the contents of page 94 were her lecturing and teaching posts, which she confirmed they were. The Tribunal took from that evidence that she was a Lecturer. In any event, such a point of detail, and similar points that the claimant makes on detail, would not in my view have any effect on the conclusions reached.

12. The claimant makes a number of what are in some respects new points with regard to the issue of the last straw for her dismissal. A difficulty for the claimant is that her evidence in chief as to what was the last straw was in the view of the Tribunal contradicted by the resignation email sent at the time, as set out in the Judgment, but that was not the only difficulty in

relation to the claimant establishing that there had been a dismissal, as also set out in the Judgment.

13. The claimant's argument on proximity of time between the email from Dr Hothersall and her resignation letter is addressed in the Judgment specifically, and was not accepted. As a point of detail the claimant did not in her oral evidence refer to the timing of an email attaching her resignation letter, and that email was not as I understand it within the documents submitted by the parties.

14. The claimant's evidence before the Tribunal did not include any aspect of her not fully understanding the meaning of the term "last straw" or having a different understanding from a term in the Czech language, as is argued for in the application for reconsideration.

15. The arguments with regard to the message sent by the claimant on 17 September 2019 are also examples of matters not given in evidence by the claimant. The claimant claims that certain matters are not included within the Judgment, for example she stated in her application that she had been investigated in relation to cancer in spring 2021 and that was not addressed, but the matter was referred to at paragraph 181.

16. The comments made by the claimant in her application with regard to what she says are grievances do not address the absence of a formal written grievance, stated as such, until the last day of employment, a matter addressed within the Judgment. The grievance policy is referred to at paragraph 27, and the provision is 2.8.

17. The arguments the claimant makes with regard to the last promotion application and mitigating circumstances do not take account of paragraph 90 of the Judgment which referred to the fact that the written record stated that mitigating circumstances had been taken into account. It is also commented on in the observations regarding the evidence of Ms Strachan at paragraph 395. This is an example of a matter raised by the claimant in her application that I consider is not accurate.

18. The claimant refers to paragraph 489, and refers to evidence of her raising the issue of workload. But paragraph 489 follows paragraphs 487 and 488

where the matter being addressed was the hours worked after the claimant returned to full-time working. It was in that context that the comment was made that the Tribunal did not find evidence of the issue of workload being raised until 2021. In any event, for the reasons given, that was not directly an issue before the Tribunal.

19. Finally the claimant alleges that the respondent's counsel in his submission paraphrased her words in a high pitch falsetto voice, and said it in a "whiney tone". I do not consider that that is accurate, and it is not something that I recall happening to any extent. It was not a matter remarked upon by either of the members during the course of the submission, and I am clear that if there had been any form of inappropriate delivery as alleged one or both of the members would have raised that with me at the time. They did not. Nothing was said by the claimant's counsel at that time to comment on that.

20. There is no reasonable prospect of the Tribunal varying or revoking the Judgment in my opinion.

21. I have therefore refused the application for reconsideration under the "sift" provision of Rule 72(1).

Employment Judge: **A Kemp**
Date of Judgment: **28 December 2023**
Entered in register: **09 January 2024**
and copied to parties