EMPLOYMENT TRIBUNALS

Claimant: Ms J Patel

Respondent: Mr J Joshi R1
Citygate Automotive Ltd R2

JUDGMENT

The claimant's application dated **15 February 2024** for reconsideration of the liability judgment, that was given orally and sent to the parties on **5 February 2024**, is refused as it has no reasonable prospects of success.

The claimant's application dated **15 February 2024** for reconsideration of the reserved judgment on re-employment, sent to the parties on **5 February 2024** is refused as it has no reasonable prospects of success.

REASONS

1. Rules 70-72 of the Tribunal Rules provide as follows:

> **70. Principles**
> 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**
> 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**
> (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.
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> (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.

2. The Tribunal has discretion to reconsider a judgment if it considers it in the interests of justice to do so. Rule 72(1) requires the judge to dismiss the application if the judge decides that there is no reasonable prospect of the original decision being varied or revoked. Otherwise, the application is dealt with under the remainder of Rule 72.

3. In deciding whether or not to reconsider the judgment, the tribunal has a broad discretion, which must be exercised judicially, having 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.

4. The reconsideration rules and procedure are not intended to provide an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way. They are not intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed (with or without different emphasis). Nor do they provide an opportunity to seek to present new evidence that could have been presented prior to judgment.

5. Under the current version of the rules, there is a single ground for reconsideration — namely, *"*where it is necessary in the interests of justice*"*. This contrasts with the position under the 2004 rules, which listed specific grounds upon which a tribunal could review a judgment.

6. When deciding what is "necessary in the interests of justice", it is important to have regard to the overriding objective to deal with cases fairly and justly, which includes: ensuring that the parties are on an equal footing; dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense.

7. In Outasight VB Ltd v Brown 2015 ICR D11, the EAT explained that the revision to the rules had not been intended to make it more easy or more difficult to succeed in a reconsideration application. In the new version of the rules, it had not been necessary to repeat the other specific grounds for an application because an application relying on any of those other arguments can still be made in reliance on the "interests of justice" ground.

8. The situation remains, as it had been prior to the 2013 rules, that it is not necessary for the applicant to go as far as demonstrating that there were *exceptional* circumstances justifying reconsideration. There does, however, have to be a good enough justification to overcome the fact that, when issued, judgments are intended to be final (subject to appeal) and that there is therefore a significant difference between asking for a particular matter to be taken into account before judgment (even very late in the day) and after judgment. As was stated in Ebury Partners Uk Limited v Mr M Acton Davis Neutral Citation Number: [2023] EAT 40

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.

The Claimant's application

9. The Claimant, via her friend and representative Mr Naresh Gathani, submitted an email, within the relevant time limit, with an attachment, seeking reconsideration.

10. It itemises "Request 1" to "Request 11" and I will address each of those.

11. **Request 1** seeks a change in the liability decisions for the of the Equality Act 2010 complaints. Reasons A to H are mentioned.

12. Paragraph A expresses an opinion about the reasons for paragraph 10 of Mr Joshi's statement. It is not accurate that Mr Joshi said that timekeeping was the main issue in all 5 cases.

13. Paragraphs G and H were expressly addressed in the liability reasons. While the Claimant is entitled to regard the relevant paragraph of Mr Joshi's written statement as untrue, the panel's decision was that it was potentially misleading, rather than untrue. As written, it was not inconsistent with his oral evidence, but, in the panel's opinion, should have been written more clearly. In any event, we already fully considered whether the contents of the paragraph should cause the burden of proof to shift, and decided that it should not. His oral evidence was that he did subject those individuals to disciplinary action and that, in some cases, the employee left some time after a warning. Both the potential for the paragraph to mislead, and the actuality that he had warned (not dismissed) those men are points that were already fully considered by the panel, and paragraphs G and H contain no new arguments that we failed to think about. The same applies to paragraph E.

14. Paragraph D is effectively disagreeing with our finding of fact, without putting forward any new argument or evidence. Similarly, paragraph F is irrelevant given that we found that he did take disciplinary action against some men, and the Claimant did not present specific evidence of specific lateness by colleagues.

15. Paragraphs B and C allege a difference in treatment, but without an assertion that, as required by section 23 EQA, there was no material difference between the circumstances relating to each case. Our finding was that the Claimant was specifically told that her (alleged) lateness would be recorded on the ADP system. It was not alleged by the Respondent that everyone's arrival time was recorded in that manner. Our finding was that (i) it was done because the Respondent was informing the Claimant that her punctuality was a problem and (ii) that the contemporaneous documents clearly explained that. We considered, and rejected, the argument that the Claimant's sex had anything to do with this decision.

16. **Requests 2 and 3 and 10 and 11** ask for written reasons, rather than

reconsideration. Those written reasons have been prepared and should be received by the parties at a similar time to this reconsideration judgment.

17. **Request 4** relates to the decision to decline to order either reinstatement or re-engagement. It quotes in full paragraph 48 of the reserved judgment. It then cites extracts from the bundle to assert that there was, in the bundle, evidence of the Claimant disputing her lateness. It is worth mentioning, in passing (though it is more relevant to the other "requests" rather than to "Request 4"), that some of those extracts refer to the Claimant's seeking to explain lateness rather than to deny it, and that most of the others are commenting on frequency or duration of lateness, rather than denying that there was any lateness.

18. However, and in any event, the extracts cited by the Claimant are not relevant to the point being made in paragraph 48 of the judgment. That paragraph was specifically addressing the issue of whether the fact that the Claimant had made EQA allegations (which the Tribunal had dismissed) meant that it was not practicable for her to be re-employed (and, in particular, whether the Respondent could/should trust her if she was re-employed). The comment about "the underlying facts of the matter were not really in dispute" is simply making an observation that is favourable to the Claimant on that particular issue. We are recording our decision that this is not a case in which a claimant made some factual assertion that EITHER (i) the Respondent argued was factually untrue, in the sense that it did not happen OR (ii) the Tribunal had decided that the claimant had made a false assertion of fact. What was not in dispute was that Mr Joshi had repeatedly spoken to the Claimant and written to the Claimant about (alleged) lateness, and eventually dismissed her for (alleged) lateness. Those were the acts that formed the basis of her allegations of direct discrimination and of harassment, as opposed to acts which the Respondent alleged had not occurred. Put another way, the Respondent's case was that the acts did in fact occur, but were nothing to do with the fact that the Claimant is a woman.

19. For completeness, there was also an allegation about subjecting her performance to more scrutiny than that of others. We did not uphold that on the facts. However, again, this was not a case were the Claimant alleged that something specific had been said or done, and we found that it was a false assertion. Rather the dispute was about how certain comments/emails should be characterised, and what motivated them.

20. The Claimant also alleges that the evidence of lateness is so unreliable that that would be a reason that she should be reinstated. That is an argument that was already considered. Our reasons for not ordering re-employment are set out in the reserved judgment, which in turn partly relied on our decisions in the liability judgment. There was unfairness in the dismissal. There was also evidence that the Claimant was frequently late, and had been frequently and seriously late over a long period of time. There was evidence that this was despite many attempts by the Respondent to alert her to the fact that this was considered unacceptable and required improvement.

21. **Request 5** is an attempt to re-argue the findings of fact. It was clear to the Tribunal panel, and it was the Respondent's case, that the Claimant was

inconsistent with her responses. It was not our finding that she specifically accepted being late on each of the specific occasions mentioned in the evidence prepared by Mr Joshi for the 13 January 2022 hearing, either in that hearing, or in the appeal hearing. On the contrary, the lack of specificity in the evidence sent to her prior to the hearing was something we considered, and addressed in our decisions and reasons.

22. It was, however, our finding that the Claimant had admitted some lateness. Furthermore, while we decided that there was unfairness in the way the evidence of specific lateness on specific dates in the period from the final written warning to the date of dismissal was collated, and presented to the Claimant, this was not the first time there had been exchanges of correspondence about alleged lateness, as set out in the findings of fact. The evidence showed that, during her employment: (i) the Claimant often ignored correspondence about lateness, without denying the accusation and (ii) when she did reply, she often stated or implied that it was unfair to bring up lateness, without denying the fact that she had been late. For example, the 19 May 2021 email [Bundle 244-246], relied on by the Claimant in support of the application, did not head on address the assertion (by Mr Willis, not Mr Joshi) that there were 29 recorded instances of lateness since February 2021. Mr Willis had referred back to the agreement he and she had reached which allow her to start at 10am (rather than 9.30am) without her pay being affected. He said she was not sticking to that agreement, and this might affect remuneration. The Claimant replied by saying that her salary and bonus was important to her and that, since Mr Joshi had not sent her emails about every instance (and because she had had some Covid absence) she did not "completely" agree. So the Claimant used (to Mr Willis) the fact that Mr Joshi had, at that point, stopped sending emails as a reason that she could not "completely" agree with the specific number of alleged latenesses. This email immediately preceded the "reset" meeting and subsequent emails which are dealt with in the liability reasons. One of the arguments raised in the tribunal hearing was that Mr Joshi too often sent emails about lateness (and was harassing or discriminating against her). However, the email cited in the reconsideration application as an example of the Claimant not accepting that she was late is an example of her commenting that Mr Joshi had not sent her an email to back up each one of the 29 alleged instances of lateness in the preceding three and a half months.

23. **Requests 6 and 7** again set out the Claimant's position that there was no satisfactory evidence of lateness. The points made in response to Request 5 deal with that argument. Similarly, **Request 8** argues that the contract could be successfully performed if there was reinstatement or re-engagement. It essentially relies on the same argument again, that the Claimant's timekeeping was (at most) a minor issue. We already considered the argument that if the Claimant was re-employed she would adhere to a 10am start time, and to the Respondent's timekeeping requirements. We addressed that in our reserved judgment.

24. **Request 9** seeks to take issue with the comments in the judgment about re-employment and about the relevance of contributory fault. There is nothing new here. It says the fault was with the Respondent, not the Claimant. The panel was already aware of each of these arguments by the Claimant when

we made the decisions that we have made so far. The specific decision about whether to make a deduction for contributory fault, and, if so, what the size of the deduction will be, will be made at the remedy hearing. However, nothing said in Request 9 has any reasonable prospect of changing the panel's mind about whether to order re-employment.

25. For the reasons stated above, having considered the Claimant's application, I am satisfied that there is no reasonable prospect of either of the original judgments being varied or revoked, and the application is refused.

Employment Judge Quill

Date: 25 February 2024

JUDGMENT SENT TO THE PARTIES ON

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…….26 February 2024.....

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FOR THE TRIBUNAL OFFICE