EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs E Brinzica	v	Primark Stores Ltd

JUDGMENT ON AN APPLICATION FOR RECONSIDERATION OF A JUDGMENT UNDER RULE 71 OF THE EMPLOYMENT TRIBUNAL RULES OF PROCEDURE 2013

1. The claimant has applied for a reconsideration of the judgment sent to the parties on 28 September 2023 under r.71 of the Employment Tribunal Rules of Procedure 2013. Having considered the application under r.72(1) Employment Judge George considers that there is no reasonable prospect of the judgment being varied or revoked on those grounds. The application for a reconsideration is rejected.

2. The procedure for an application for a reconsideration is set out in rule 72 of the Rules of Procedure 2013. It is a two stage process. If the Employment Judge who chaired the Tribunal panel which made the judgement considers that there is no reasonable prospect of the original decision being varied or revoked the application shall be refused under rule 72(1) 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 and seeking the views of the parties on whether the application can be determined without a hearing. That notice may set out the Judge's provisional views on the application. Unless the Judge considers that a hearing is not necessary in the interests of justice, if the application is not rejected under rule 72(1), then the original decision shall be reconsidered by the full Tribunal who made the original decision.

3. The power to reconsider a judgement under rule 70 can only be used if it is necessary to do so in the interests of justice. That is apparent from the wording of the rule itself and, as it was held by HH Judge Shanks in Ebury Partners UK Limited v Acton Davies [2023] IRLR 486 EAT, 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. In general, while it may be appropriate to reconsider a decision where there has been some procedural mishap such that a party has been denied a fair and proper opportunity to present his case, the jurisdiction should not be invoked to correct a supposed error made by the ET after the parties have had a fair opportunity to present their cases on the relevant issue. This is particularly the case where the error is said to be one of law which is more appropriately corrected by the EAT." (Para 24 of the judgement of HHJ Shanks).

4. On 2 and 3 October 2023 the claimant applied for an extension of time for making a reconsideration application on the basis of her health, the difficulty of managing the extensive file and the difficulty of translating documents into Romanian so that she could fully understand them. She says in paragraph 1 of her extension of time application that she doesn't

"want to repeat my mistake which I make before the hearing which take place between 26 – 30 June 2023 when I didn't inform the Tribunal that before the hearing, 15 June 2023 I have very hard period of time and I didn't know that I can inform the Tribunal, maybe to cancel the hearing, and have another hearing …"

5. This application was not forwarded to me until the claimant had already submitted an in time application for reconsideration of 59 pages on 12 October 2023 (reconsideration letter 1) and an additional second reconsideration letter of 19 pages on 16 October 2023 (reconsideration letter 2). The deadline for the reconsideration application was 12 October 2023.

6. In paragraph 7 to 9 of the reserved judgement we set out the adjustments which were made for the claimant and the arrangements for interpretation in the Romanian language. Despite her description of a hard period of time a week or two before the hearing started, she appeared to be able to participate effectively, was able to pace herself, and reassured the tribunal that she was able to continue when she was asked if she needed a break.

7. I extend time for making the reconsideration application to 16 October 2023 and take into account all three of the documents sent by the claimant in relation to this application. The reason I think it is in the interests of justice to take into account the second letter is that she will have needed time to translate the reserved judgement into a language she was fully able to understand.

8. Overall, the claimant repeats arguments and statements of the reasons she disagrees with the respondent's witnesses explanations or doesn't accept their conclusions. For the most part, the points she makes were argued and rejected at the final hearing or could reasonably have been argued at the final hearing. It is not necessary in the interests of justice to reconsider a judgment to take into account arguments which a party has already had a fair opportunity to make.

9. By way of example:

9.1. The reconsideration letters 1 and 2 analyse the reserved judgement paragraph by paragraph but do not, for the most part say anything new. For example, at the final hearing Ms Brinzica questioned why she had not been required to undergo a capability review hearing when returning from earlier periods of sickness absence. She repeats this on page 10 of reconsideration letter 1. In her comments on paragraph 53 of the reserved judgement she compares being referred for a capability review meeting with nondisabled colleagues who were not disciplined for (as she alleges) not working and not performing their duties. This was an argument which was considered at the final hearing and there is no reason to change our conclusions.

9.2. To the extent that the letters say something new there is no explanation for failing to make the argument at the final hearing. For example, to the best of my recollection, the claimant did not argue that the capability procedure available to the Tribunal was not the one applicable to her employment as she appears to suggest in her comments on paragraph 59 of the reserved judgement. If so, there is no explanation for the earlier failure.

9.3. In reconsideration letter 1 in the introduction section the claimant makes a number of observations on the documentary evidence which could and should have been made at the final hearing. Although the claimant refers in paragraph 4.1 to the respondent's argument that they did not know she was disabled at the material time, this is a point she succeeded on. We accepted her argument that they had known throughout the period of the time relevant to the claim that she was disabled by reason of the back condition.

9.4. When addressing Point 2 on page 8 of reconsideration letter 1 the claimant appears to ask for an allegation of racism to be taken into consideration. As we explain in para: 2 and 3 of the reserved judgement, the claimant had originally given no details of the race discrimination claim and it had been dismissed. She confirmed that she was not intending to apply for a reconsideration of the dismissal judgement as long ago as 7 February 2023. She would need to apply now for a reconsideration of the judgement dismissing her race discrimination claim and, potentially, to amend the claim to add particulars of it if she was to have such a claim considered. In the light of the circumstances set out in paras.2 and 3 of the reserved judgement there are no reasonable prospects of her succeeding in such applications and therefore this is not a reason to reconsider the reserved judgement disposing of her claims.

9.5. Indeed she appears to suggest on page 9 of reconsideration letter 1 that there was race discrimination in respect of the allocation of duties

(for example lifting boxes) by the supervisor as a result of which she began to suffer back pain and subsequently became disabled by reason of the back condition. In reconsideration letter 1 at page 9 she appeared to make this allegation against Aisha who was the subject of unsuccessful disability related harassment allegations. It is not therefore merely a question of the claimant adding an allegation of race discrimination when she appears to have made a decision during the course of the litigation that she would not pursue that. She appears to base it on historic matters which she alleges caused her disability. This would greatly expand the factual enquiry of the litigation and past events.

9.6. The claimant includes in reconsideration letter 2 section B) comments which make clear she is extremely sensitive to references made by her employer to English not being her first language and she returns to issues of race in section G). Similar points made in her comments on paragraph 61 in reconsideration letter 1. We understand that she feels disadvantaged by that. However, race discrimination was dismissed as a complaint at an early stage and the claimant appears to accept that. It is not in the interests of justice that the reserved judgement be reconsidered to permit her to attempt to argue that complaint now, in all the circumstances.

9.7. The claimant's criticisms of the capability letter were carefully considered by the panel and rejected in our majority decision.

9.8. The claimant appears to argue that the final occupational health report was unnecessary. We conclude that the respondent was right to refer to occupational health and there is no reason to interfere with our findings on that.

9.9. The claimant appeared to say that she respects our decision rejecting her application for specific discovery but then in her comments on paragraph 10 of the reserved judgement goes on to say why was wrong that the respondent did not give her the CCTV footage.

9.10. In her comments on paragraph 81 of the reserved judgement the claimant now says that she had discussed reducing her hours so that they ended at 5 PM and the managers had said this was not possible. That is not what is recorded on the meeting notes (see paragraph 81) and our conclusions were open to us on the evidence.

9.11. On page 8 of reconsideration letter 2, point J), the claimant refers to the email from EL on page 370 of the final hearing file. The panel gave careful consideration to this email which was taken into consideration

but the respondent persuaded us that the fact of the grievance had nothing to do with the invitation for the capability review meeting (see para 174 to 179 of the reserved judgement).

9.12. On page 11 of reconsideration judgement 2 at points A), B) and C) the claimant appears to argue that questions asked in the OH referral were acts of harassment. Following case management by Employment Judge Hawksworth the act alleged to be harassment with the scope of the claim were those set out at LOI para 5.1 on page 102 of the hearing file. They did not include alleged intrusive questioning about the claimant's capabilities through the OH referral. The claimant had the opportunity to challenge the LOI and did not do so. There are no reasonable prospects that she would successfully be able to reopen this point now and amend the LOI.

9.13. Similarly at point F) on page 14 of the reconsideration letter 2 the complaint about Ms Oliver Turnham's question to the occupational health and the claimant's need to drink a lot of water was not in the list of issues as an allegation of harassment and there is no reasonable prospect of that being varied now. In any event the OH referral was considered as part of the victimisation claim and the reasons why the respondent said they made the referral at that time were accepted (see the reserved judgement at paras.174 to 179 and the findings of fact referred to in those paragraphs).

10. In reaching this decision on the reconsideration application I have read carefully and weighed up the arguments advanced in all of the documentation. As I said at the outset, for the most part, the arguments were raised and rejected at the final hearing or could have been. No adequate explanation for them not been raised has beenset out in the application.

11. In her comments at Point 21 in reconsideration letter 2, the claimant appears to challenge our conclusions on her entitlement to SSP and CSP. To the extent that she does so, she does not say anything which was not raised at the hearing, or which she could not reasonably have raised at that time. We made careful findings of fact about the dates of her absences.

12. However, I have taken the opportunity to look again at paragraphs 185 to 189 of the reserved judgement. We referred in that paragraph to the case of Bear Scotland Ltd v Fulton [2015) ICR 221 EAT which had been relied on by the respondent's representative for the principle that a gap of more than three months between underpayments was too long for those to be connected and therefore amount to a series of deductions.

13. Since the reserved judgement was sent to the parties that particular holding in Bear Scotland has been overturned by the Supreme Court in the Chief Constable of Northern Ireland v Agnew [2023] UKSC 33. The Court held that

there was no such presumption and it was all a question of fact in all the circumstances of the case. Nevertheless, if one reads paragraph 186 and 187 of the reserved judgment, the reference to Bear Scotland was clearly only a secondary point. Our findings on the dates of the claimant's absences and the dates on which any payment would have been made in respect of those absences mean that an unauthorised deduction of wages claim was first notified to the tribunal more than three months after the last alleged deduction. It is therefore immaterial whether or not there was a series of deductions because the most recent alleged deduction would not in any event have been in time when the amendment application was made. The reference in the reserved judgment to an EAT authority which has been overturned in part does not undermine the judgement on this point as a whole.

14. The claimant is very courteous in the way she expresses her request for reconsideration (in particular in the conclusions of page 17 and following of the reconsideration letter to). We understood that the claimant was representing herself and made allowances for the disadvantage of not having legal representation or advice and managing legal proceedings in her second language, albeit with the assistance of an interpreter. However reading through the arguments she has raised in the reconsideration letters makes clear that we did understand in full the points that she was making at the final hearing. We did not uphold her claims. This is not meant to take anything away from her as a person: she was respectful and courteous. The respondent did not criticise the work she did on the tills. We hope that she succeeds in her aim to recover good health. However her arguments on reconsideration have already considered or which could have been raised before at a hearing when she had a fair opportunity to present her case.

15. I apologise for the delay in completing this reconsideration judgment which is due to a combination of some periods of leave and a heavy judicial workload.

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Employment Judge George

Date: 27 February 2024

Sent to the parties on: 28 February 2024

For the Tribunal Office