EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms N Hinds	**v**	Mitie Limited

Heard at: Cambridge

On: 23 February 2024

Before: Employment Judge Tynan

Members: Mr D Hart and Mr M Brewis

Appearances
For the Claimant: In person
For the Respondent: Mr N Bidnell-Edwards, Counsel

UPON THE RESPONDENT'S APPLICATION dated 22 February 2024 pursuant to rule 71 of the Employment Tribunals Rules of Procedure 2013 for reconsideration of the Judgment delivered orally on 5 January 2024 and sent to the parties on 14 February 2024.

JUDGMENT on RECONSIDERATION APPLICATION

1. The Respondents' reconsideration application is refused.

REASONS

There is no reasonable prospect of the original decision being varied or revoked for the following reasons:

1. The Tribunal gave an oral Judgment on 5 January 2024 following a multi-day hearing in two parts in 2023. The Claimant's complaints were partly upheld. The Respondent has applied for reconsideration of the Judgment.

2. Rule 70 of the Employment Tribunal Rules of Procedure 2013 empowers the Tribunal, either on its own initiative or on the application of a party, to reconsider any Judgment where it is necessary in the interests of justice to do so. Rule 71 requires that any application for reconsideration must be presented in writing within 14 days of the date on which the written record, or other written communication, of the original decision is sent to the parties, or within 14 days of the date that the written reasons are sent (if later). Written Reasons were sent to the parties on 14 February 2024. In the circumstances, the Respondent's application has plainly been made in time.

3. Although the reconsideration application was submitted and served the day before the Tribunal was due to determine remedy, the Claimant was able to produce a detailed written response to the application within less than 24 hours and confirmed at the outset of the remedy hearing on 23 February 2024 that she was content, indeed wished for the Tribunal to deal with the application notwithstanding she had had limited notice of the application and little time to prepare to deal with it.

4. The starting point clearly has to be the decision the Tribunal reached after the hearings in 2023. We have re-read our Reasons. We are satisfied that the Tribunal set out in detail the reasons for its Judgment. Should these matters be examined on appeal, it would be for the Employment Appeal Tribunal or other appellate court to say whether those reasons and our decision can stand. Any suggestion that our findings were perverse (which seems to us to be the thrust of the submissions at paragraph 6 of the reconsideration application) or that we erred in Law is generally a matter for appeal - Ebury Partners UK Ltd v Acton Davis [2023] EAT 40.

5. In Outasight VB Ltd. v Brown UK EAT/0253/14, the Employment Appeal Tribunal considered the Tribunals' powers under Rule 70 of the Employment Tribunal Rules of Procedure 2013. At paragraphs 27 – 38 of her Judgment Her Honour Judge Eady QC, as she then was, set out the legal principles which govern reconsideration applications, and observed,

> *"The interests of justice have thus long allowed for broad discretion, albeit one that must be exercised judicially, which means having regard not only to the interests of the party seeking the review or 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."*

These principles were affirmed by His Honour Judge Shanks in Ebury Partners.

6. In Outasight, the Employment Appeal Tribunal was referred to the EAT's Judgment in Redding v EMI Leisure Ltd. EAT/262/81 in which the EAT had observed:

> *"…When you boil down what is said on* [the Claimant's] *behalf, it really comes to this: that she did not do herself justice at the hearing so justice requires that there should be a second hearing so that she may. Now, "justice" means justice to both parties. It is not said, and, as we see, cannot be said that any conduct of the case by the employers here caused [the Claimant] not to do herself justice. It was, we are afraid, her own experience in the situation…"*

7. The Respondent seeks to rely upon new evidence that has come to light since the Tribunal gave Judgment, specifically an email Mr Kalley sent to the Claimant 15 minutes after she had emailed him and Ms Harper on 16 October 2020 requesting their support. He responded to her as follows:

> *"Hi Nicola,*
> *Please leave this with me as I need to give this some thought and will come back to you as soon as I can."*

Mr Kalley discovered the email on 20 February 20024. There is no suggestion that any conduct of the Claimant caused the email to be overlooked by the Respondent.

8. We dealt with the Claimant's 16 October 2020 email at paragraphs 81 to 86 of our Reasons. It appeared as Issue 3(r) in the List of Issues, namely whether the Claimant's email of 16th October 2020 had been ignored by Mr Kalley and / or not dealt with by the Respondent in line with policy, and, if so, whether the Claimant had been discriminated against in contravention of s.18 of the Equality Act 2010. Linked to this was whether the Respondent had failed to carry out a risk assessment in respect of the Claimant and, if so, the reasons for this – Issue 3(j).

9. We found that Mr Kalley had not responded to the Claimant's email of 16 October 2020, an omission which we referred to as "particularly telling". We went on to identify that his "attitude and approach" was reflected in an insensitively expressed email he sent to Ms Young 26 minutes after he had received the Claimant's email of 16 October 2020. In paragraph 83 of our Reasons we set out various observations on the email, including what we inferred from Mr Kalley's various comments to Ms Young. Whilst the apparent lack of response on Mr Kalley's part to the Claimant was evidently a factor in our thinking, it is clear on the face of the Reasons that we primarily focused upon Mr Kalley's email to Ms Young, including what, if any, inferences it was appropriate to draw from his comments in the email.

10. In paragraph 84 of our Reasons we described as "unconvincing", Mr Kalley's assertion in his witness statement that he had been very sympathetic to the Claimant's plight. His email to Ms Young evidenced to us that he was not sympathetic to her plight but instead frustrated by or even irritated with the Claimant, and we concluded that he perceived her as a problem, pregnant employee. In setting out the Law earlier in our Reasons, we had noted that unconvincing denials of discriminatory intent

coupled with unconvincing assertions of an innocent explanation for allegedly discriminatory treatment of a claimant can potentially support an adverse inference. We considered that this was such a case, albeit the unconvincing denial and explanation in question merely reinforced the adverse inferences that were to be drawn from Mr Kalley's email to Ms Young. For these same reasons, we inferred that Mr Kalley's failure to ensure that a risk assessment was undertaken in relation to the Claimant following receipt of the 16 October 2020 email was because the Claimant was pregnant and seeking to exercise her right to maternity leave.

11. In her response to the reconsideration application, the Claimant has referred the Tribunal to the well-known and long established authority of Ladd v Marshall 1954 3 All ER 745, CA. We agree with the Claimant that it is appropriate to have regard to the principles in that case in coming to a decision as to whether it is necessary in the interests of justice to reconsider the Judgment. In Borden (UK) Ltd v Potter 1986 ICR 647, the EAT said that the first limb of the Ladd 'test' (namely, whether the evidence sought to be introduced could not with reasonable diligence have been obtained for use before the court) broadly equated to the Tribunals' Rules then in force regarding reviews of judgments. Those Rules have since been replaced with Rule 70, which confers a broad discretion on Tribunals to reconsider a judgment where it is necessary in the interests of justice to do so. In that regard, we take on board Mr Bidnell-Edwards' submission that a finding that a person has discriminated against a work colleague is a serious matter and that reconsideration provides a potential means by which the stain of such a finding or conclusion can be addressed. However, balanced against that, in our judgment there is no satisfactory explanation for Mr Kalley's failure to identify at an earlier stage in the proceedings that he had indeed replied to the Claimant's email of 16 October 2020. In his discovery witness statement, Mr Kalley does not suggest that his email to the Claimant had been deleted or that there were other technical issues that impacted its retrieval. He refers to unspecified difficulties in finding documents because of the way information is stored by the Respondent, though does not relate these difficulties to the specific email in question, which was discovered on 20 February 2024 seemingly without difficulty. He also makes reference to a "hectic period of time". However, by the time the final hearing commenced in July 2023, these proceedings had been afoot for over 18 months, allowing sufficient time for Mr Kalley and others to focus on disclosure even if there may have been periods when they were under pressures of work. Finally, Mr Kalley refers to specific difficulties that arose because the Respondent no longer had access to many of Ms Young's emails. However, the email in question was sent by him rather than Ms Young. On Mr Kalley's own account, in light of the Tribunal's findings and judgement, he "*trawled through all my sent emails from 16 October 2020 and came across my response sent to Nicola 15 minutes after receiving her e-mail …*" His reference to trawling through his sent items seems to us to be putting something of a gloss on what was involved. He is referring to an email which he sent to the Claimant within 15 minutes of receiving an email from her, in circumstances where it had clearly been identified within these

proceedings that his alleged failure to respond to the email was an act of pregnancy and maternity discrimination. There is no further substantial explanation as to how or why the email might have been overlooked. Regrettably, the impression is that this is a further matter to which Mr Kalley failed to give his full attention. In our judgment, a reasonable and proportionate search, indeed even a cursory examination of Mr Kalley's sent items from 16 October 2020, would have revealed the existence of his email to the Claimant. The Respondent has been legally advised throughout these proceedings. It is not suggested that the Respondent was other than appropriately advised in terms of its disclosure obligations. In our judgement, with even basic diligence the email might have been identified and disclosed in good time for the liability hearing. In our judgement it is not necessary in the interests of justice that we should reconsider our Judgment notwithstanding the specific findings and conclusions affecting Mr Kalley.

12. For completeness, even had we been minded to reconsider our Judgement, on reconsideration we would not have varied or revoked it. We accept that the Claimant had not previously seen Mr Kalley's email. Having now been provided with a copy, the Claimant describes it as akin to an 'out-of-office' response. It certainly amounts to no more than a holding response on Mr Kalley's part. We consider that the email would not have had an important influence on the outcome of the case. As we have observed already, our conclusions in relation to Issues 3(r) and 3(j) were rooted in adverse inferences drawn from the various comments in Mr Kalley's email to Ms Young. Whilst it now seems that Mr Kalley did not ignore the Claimant, he did no more than issue a holding response. In so far as it might be suggested that issuing even a holding response within a matter of 15 minutes evidences concern for the Claimant (even if such concern was not necessarily evident from how Mr Kalley expressed himself in the email), it remains the case that Mr Kalley's attitude and approach were revealed by what he said to Ms Young a few minutes after he send the holding response.

13. Likewise, the fact that Mr Kalley may have issued a holding response has no, or no material bearing upon our observation that the denial and explanation in paragraph 34 of his witness statement was unconvincing. We said at paragraph 85 of our Reasons that, in responding to the situation, Mr Kalley had failed to engage in any meaningful way with the events or issues as described by the Claimant. That observation holds true notwithstanding Mr Kalley's holding email. The email certainly does not evidence that he was "very sympathetic to the Claimant's plight" as he claimed in his evidence.

14. The Respondent submits that it is also in the interests of justice for the Tribunal to revoke or vary its conclusions in respect of the constructive unfair dismissal claim. We identified various breaches by the Respondent of the implied term of trust and confidence. And we observed at paragraph 130 of our Reasons that the Respondent's treatment of the Claimant over the period following her return from maternity leave was of

itself sufficiently serious to be destructive of trust and confidence, entitling her to resign her employment. The fact that Mr Kalley sent a holding repose to the Claimant on 16 October 2020 can have no bearing whatever on that observation or our decision that the Claimant was constructively unfairly dismissed.

15. For all these reasons the application for reconsideration is refused.

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Employment Judge Tynan

Date: 7 March 2024

Sent to the parties on: 12 March 2024

For the Tribunal Office.

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