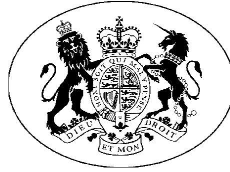
Case No: 2500138/2021



EMPLOYMENT TRIBUNALS

Claimant: **Ms K Blakey**

Respondent: **Newcastle University**

JUDGMENT

The claimant's application dated 8 November 2023 to reconsider the judgment sent to the parties on 25 October 2023 has no reasonable prospects of success and is refused.

Reasons

Introduction

1. On 14 August 2023, the claimant made an application for reconsideration of the Tribunal's judgment. The application included a number of grounds on which she contended that it was in the interests of justice to reconsider the judgment. The claimant's request that her application be considered by an independent judge has been addressed separately.

2. The ET's power to reconsider its judgments is provided by rule 70 of the Employment Tribunals Rules of Procedure 2013 which provides that *'A Tribunal may …on the application of a party reconsider any judgment where it is necessary in the interests of justice to do so…"*

3. However, by rule 72(1), it is provided that an application for reconsideration *'shall be refused'* if *'the Judge considers that there is no reasonable prospect of the original decision being varied or revoked. . .'.*

4. When interpreting or executing its power of reconsideration, the Tribunal will be bound to seek to give effect to the overriding objective is provided at rule 2:

   > *"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable— (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense."*

5. Although the power to reconsider a judgment is a broad discretion, it is one that must be exercised judicially. Simler P said in Liddington v 2Gether NHS Foundation Trust UKEAT/0002/16/DA:

   "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. Tribunals have a wide discretion whether or not to order reconsideration."

6. The relevant legal principles were recently revisited by HHJ Shanks in Ebury Partners UK Ltd v Davies [2023] EAT 40 at para 24:

   "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. In general, while it may be appropriate to reconsider a decision where there has been some procedural mishap such that a party had 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 alleged is one of law which is more appropriately corrected by the EAT".

Discussion

7. The claimant's application consists of numerous comments interspersed between the judgment itself. The points made in the application can be broadly summarised as follows:
   a. The Tribunal failed in its duty to make reasonable adjustments to the procedure to accommodate for the effects of her autism;
   b. There was bias or the appearance of bias in that the Tribunal improperly '*refused to look'* at a one-page diagram which summarised her case
   c. The Tribunal improperly refused to accept her written submissions;
   d. The Tribunal believed the false evidence given by the respondent's witnesses;
   e. Other matters which can be broadly described as: the claimant should have been allowed to question other employees of the respondent / the respondent should have called more witnesses / the claimant provided further information / the claimant's further explanation for facts found / information that the claimant 'now'

knows / her disagreement with evidence received / her agreement with evidence or findings made.

Reasonable Adjustments

8. The claimant informed the tribunal at the outset of the hearing that she had been diagnosed with autism; the Tribunal had no reason to doubt that assertion.

9. The claimant requested at the outset of the final hearing and without prior warning or evidence in support of the expressed need, to record the hearing as a reasonable adjustment to the claimant's autism. That request was refused.

10. I note that the claimant's application for reconsideration does not acknowledge or recognise that her alternative request, namely that her touch typist notetaker, Ms England, who accompanied her, be able to make a note of the proceedings during the hearing. Save for a period between 09.40 and 10.20 on Tuesday 13 June 2023, the claimant was accompanied at all times by Ms England. On the occasion referred to, the claimant refused the offer to wait for her notetaker, expressing to the Tribunal that she was content for her sister to make notes until her notetaker arrived.

11. The claimant was capable of accessing with immediate effect her notes of the evidence during the hearing, and on occasions did so, an example being on 2 August 2023, when a question arose as to whether RM stated in evidence that '*he'* had had a solicitor's letter sent to the claimant or whether he stated that a solicitor's letter '*was sent'* to the claimant.

12. The claimant did not then, and she does not now in her application for reconsideration of the judgment, identify the disadvantage that was alleviated by her request to be accompanied by a typist, but was not alleviated by permitting a recording of the hearing.

Bias or the Appearance of Bias / the Tribunal refused to look at a one-page diagram

13. The claimant is correct to observe that she sought to present to the Tribunal a document she described as a 'timeline' on the first day of the hearing. She was instructed to provide a copy to Counsel for the respondent first, to allow her to see the document and provide comment.

14. The whole of the first day and part of the second was taken up by discussions about and management of the issues that were still not finalised, including the hearing of an application to amend the claim form (which the clamant subsequently withdrew).

15. Contrary to the claimant's suggestion, Counsel for the respondent did not object to the document being adduced by the claimant; had she done so, it would have necessitated further discussion to determine whether the Tribunal should see the document.

16. Instead, the first day and part of the second day was taken up by other, more pressing, case management matters with the claimant – a necessity that the claimant had been forewarned of in correspondence dated 8 June 2023.

17. The Tribunal in fact had ample information before it from the outset of the hearing about the history of events, none of which were in issue:
    a. The respondent had been directed to produce a neutral chronology and send a copy to the claimant in advance of the final hearing. In compliance thereof, it produced a chronology consisting of 4.5 pages (pages 388-392 of the final hearing file);
    b. The claimant voluntarily produced an amended chronology, by adding further information and/or events to the document produced by the respondent. It consisted of 19 pages (pages 393a to 393s of the final hearing file).

18. The document was not raised again by the claimant until her closing submissions, when she again adduced it, accompanied by a 22-page chronological account of events. She supplemented the same with oral submissions lasting 50 minutes.

19. The Tribunal read the document, and it heard the claimant's oral submissions lasting 50 minutes before deliberations.

20. The Tribunal did not '*refuse'* to look at the document and neither the claimant nor Counsel for the respondent suggested in their closing submissions that the Tribunal had earlier refused to look at the document.

21. The claimant's contention that the Judge and/or Tribunal was biased is not a proper basis to order reconsideration.

<u>The Tribunal improperly refused the claimant's written submissions</u>

22. The claimant was given full reasons for the decision to refuse written submissions to the Tribunal after its deliberations and immediately before it was due to give oral judgment: para 24 of the Reasons.

23. The procedure was explained to the claimant at the outset of the hearing and with considerable care and in considerable detail; a matter that is evident from the claimant's own description in her application of the exchanges that took place about closing submissions.

24. The Tribunal explained to the claimant at the outset of the hearing matters including: the parties' ability to make oral and/or written submissions; that a break would be given to the parties after the close of evidence in order for the claimant to receive and read the respondent's written submissions; and that a further break would be provided to the parties after the close of the respondent's oral submissions to allow the claimant to reflect before hearing from her following which the Tribunal would deliberate on its decision.

25. The procedure was repeated in discussions on Monday 19 June 2023, when the case was adjourned, part heard. The claimant confirmed that she intended to make both written and oral submissions. The respondent was directed to provide a document containing the legal principles upon which the respondent intended to rely to the claimant on a date no later than 31 July 2023. The claimant was informed she should liaise with the respondent's solicitor in the interim, insofar as it was necessary to do so, someone the claimant appeared to have a cordial relationship with. The Tribunal informed the claimant that the

resumed hearing was listed with a 3-day time estimate to allow for further evidence and submissions to be received on Wednesday 2 August 2023, deliberations to take place on Thursday 3 August 2023, with a view to providing an oral judgment on Friday 4 August 2024.

26. The procedure was revisited at the outset of the resumed hearing on Wednesday 2 August 2023, and no query made or clarification sought by the claimant about it.

27. At the close of evidence, both parties provided the Tribunal and one another with their written submissions. A break was taken; Counsel for the respondent observed in her oral submissions that the claimant's submissions were akin to a chronology and commented that it was '*of limited assistance'*, inviting the Tribunal to concentrate on the evidence instead.

28. The claimant was given 1 hour to complete her oral submissions; she was informed she had a some 5-10 minutes left, when she finished early. She did not state that there were further written submissions to follow. She did not state that she had commenced writing submissions but had not completed them, being what she informed the Trbunal had happened on 4 August. For the avoidance of doubt, the claimant did not suggest on 4 August 2023 that her failure to provide a complete set of written submissions was, as she now suggests in her reconsideration application, out of concern that Counsel for the respondent would be *'[un]able to consider all of that information in such a short amount of time, so I cut it out'.*

29. At the close of submissions on 2 August 2023, the Tribunal released the parties for the following day whilst it deliberated, asking them to return on 4 August for judgment.

30. At 01:17 on 3 August 2023, the claimant sent to the Tribunal and the respondent's solicitor a further document entitled *'claimant's closing submission'*. It was a document in which the final page is identified as *'page 45 of 89'*. The covering email provided no explanation or comment.

31. The Tribunal deliberated on 3 August and the parties attended Tribunal on 4 August 2023.

32. Upon being asked to explain the document sent to the Tribunal and the respondent at 01:17am on 3 August 2023, the claimant appeared to draw distinctions between whether she had been informed, or understood, or stated that she had submitted a skeleton argument or submissions.

33. The claimant's application to rely on her further written submissions was resisted by the respondent, whose Counsel submitted that she had undertaken other work on 3 August, would require time to read the document properly, take instructions and if necessary make further submissions if admitted, causing the respondent further, avoidable and possibly unnecessary cost.

34. The claimant was able to give no coherent or compelling explanation as to why if she had any doubt about what was required of her, she did not seek clarification with the respondent's solicitor, with Counsel for the respondent or the Tribunal at any stage. The Tribunal noted that, in addition any clarification

she required might have been met by reviewing her typist's notes of the hearing.

35. The Tribunal concluded that to allow the further submissions in circumstances that were unexplained would not be fair to the respondent and that it would add to the delay and costs incurred by the parties, as well as requiring the Tribunal to reconvene again; this was not in accordance with the overriding objective.

The Respondent's witnesses lied / The Respondent should have called more witnesses

36. It is open to the Tribunal to make its own assessment of the credibility of the witness evidence it receives, whether or not it accords with the claimant's view. The claimant is entitled to disagree with the Tribunal's assessment of the evidence. That disagreement is not a proper basis on which to overturn the judgment, however.

Other Matters

37. The decision as to whom to call to give evidence is one that rests with the parties – which includes the claimant, and this was explained to the claimant at the hearing.

38. None of the other matters that the claimant seeks to raise in her reconsideration application are suitable for revisiting a judgment by way of reconsideration; in essence, the claimant seeks an opportunity to rehearse her claim in the manner that Simler P identified as impermissible; there must be finality of litigation.

39. There is nothing in the grounds advanced by the claimant that could lead me to vary or revoke my decision. I consider there is no reasonable prospect of the original decision being varied or revoked. It follows that I must refuse the application.

Conclusion

40. There is nothing in the grounds advanced by the claimant that could lead the Tribunal to vary or revoke its decision. I consider there is no reasonable prospect of the original decision being varied or revoked. It follows that I must refuse the application.

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Employment Judge Jeram

26 March 2024