EMPLOYMENT TRIBUNALS
London South Employment Tribunal

Claimant: Michelle Gumayagay

Respondent: Little Stepping Stone Day Nursery

Decision

Rules 70-72 of The Employment Tribunals Rules of Procedure 2013 (as amended)

The application for reconsideration - of my judgment, issued on 23 April 2024 - made by the Claimant is refused as there is no reasonable prospect of the original judgment being varied or revoked.

Background

1. The claimant, Mrs Michelle Gumayagay, was employed by the respondent, Little Stepping Stone Day Nursery, as a nursery nurse from January 2010. The respondent operates a private day nursery in London.

2. In January 2022, the claimant was off work for several weeks due to experiencing symptoms of long Covid. Upon her return in February 2022, issues arose between her and her line manager regarding the respondent's Covid protocols and risk assessments. The claimant raised grievances with the respondent over these issues.

3. Further issues emerged in March and April 2022 concerning the claimant's working hours and rota arrangements. The claimant states that unreasonable demands were made regarding her shifts and duties. She raised additional grievances over these matters with the respondent's management.

4. In May and June 2022, the claimant lodged grievances alleging discrimination and harassment by colleagues due to her Filipino nationality and Catholic religion. An internal investigation was conducted by the respondent into these allegations during this period. The claimant remained off work for medical reasons related to sciatica pain from April to July 2022.

5. The claimant claims she was dismissed unfairly and discriminated against. She submitted a claim to the Tribunal in May 2023 alleging unfair dismissal and discrimination on grounds of disability, race, religion and sex.

6. In summary, the background involves an employment relationship spanning over 10 years, with the claimant raising both formal and informal grievances regarding terms and conditions, health issues, and allegations of harassment during 2022 before bringing tribunal proceedings in 2023.

Application for reconsideration

7. The claimant's email dated 24 April 2024, though not expressly seeking reconsideration, has been treated by me as an application for reconsideration of the judgment. It was received the day after the judgment was issued on 23 April 2024.

8. Rule 71 of the Employment Tribunals Rules of Procedure 2013 provides that an application for

reconsideration shall be presented within 14 days of the date the written record of the original decision was sent to the parties. As such, the application is in time.

9. In the email, the claimant provides explanations and context regarding her non-attendance at the hearing on 22 April 2024 that resulted in the claim being struck out. This includes references to not receiving notice of the hearing being scheduled, her mother's ill health, unsuccessful attempts to obtain representation, and confusion over believed postponement.

10. She expresses apologies for her non-attendance and requests advice on how to move forward to resolve the case as soon as possible. The claimant has not expressly submitted additional evidence alongside the application; however, her email sets out her account of circumstances leading to the non-attendance.

11. Given the application was made promptly and with reference to reasons the claimant considers prevented her participation, I have decided it is appropriate to treat her email as a reconsideration request and give due consideration to her position.

12. It does not appear that she sent a copy of her email to the Respondent.

The law

13. Rule 70 of The Employment Tribunals Rules of Procedure 2013 states that a Tribunal may reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the original decision may be confirmed, varied, or revoked. If revoked, it may be taken again.

14. Rule 71 provides that an application for reconsideration shall be presented in writing, copied to all other parties, within 14 days of the written record of the original decision being sent to the parties. The application shall set out why reconsideration of the original decision is necessary.

15. Rule 72(1) states that the Tribunal shall consider any application made under Rule 71 and if there is no reasonable prospect of the original decision being varied or revoked, the application shall be refused.

16. Rule 72(2) says that if the application has not been refused under Rule 72(1), the original decision shall be reconsidered at a hearing unless the Tribunal considers that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing, the parties shall be given opportunity to make further written representations.

17. Rule 73 provides that where at a hearing under Rule 72(2) the Tribunal decides to vary or revoke its decision then in an unpaid wages or other sum claim, the Tribunal may order that the unpaid wages or other sum be paid to the clerk of the Tribunal.

18. Therefore, in summary, I have power under the Rules to reconsider the original decision to strike out the claim if it is in the interests of justice to do so. I must consider whether the claimant's application has reasonable prospects of succeeding. If so, I can reconsider at a hearing or through written representations. On reconsideration, I may confirm, vary, or revoke the original decision to strike out the claim.

19. The main, recent, authority relevant to an application for reconsideration of a judgment is the Employment Appeal Tribunal decision in Ebury Partners UK Ltd v Mr M Acton Davis [2023] EAT 40.

20. In Ebury, HHJ Shanks held that the "interests of justice" test for reconsideration under Rule 70 of the Employment Tribunal Rules of Procedure involves considering the need for finality in litigation. At paragraph 25 he stated:

21. "...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."

22. He went on to find that the Employment Tribunal judge had failed to properly consider the interests of justice before reconsidering the judgment. The judge made an error of law in undertaking the reconsideration in circumstances where there was no procedural irregularity, and the claimant could have made arguments on the contractual interpretation point at the original hearing.

23. Ebury establishes that reconsideration is exceptional, not for correcting supposed errors of law, and requires a compelling reason related to procedural fairness or prevention of injustice. It emphasises the overriding public interest in litigation having finality.

24. This authority provides the key principles I must apply regarding whether reconsideration of my original judgment dismissing the claim is warranted in the interests of justice in this specific case.

25. The Employment Appeal Tribunal decision in Outasight VB Ltd v Mr L Brown UKEAT/0253/14/LA is also highly applicable to the question of reconsideration.

26. In Outasight, HHJ Eady QC (as she then was) held that the approach laid down in Ladd v Marshall [1954] 1 WLR 1489 will generally encapsulate the interests of justice when considering an application to admit fresh evidence after judgment. At paragraph 49, she stated the Ladd v Marshall principles "...set down the relevant questions in most cases where judicial discretion has to be exercised upon an application to admit fresh evidence in the interests of justice."

27. HHJ Eady QC found that the Employment Tribunal had wrongly thought the rules permitting reconsideration in the interests of justice allowed it to depart from the principles in Ladd v Marshall. She held this was an error of law that led the Tribunal to an impulsive conclusion. There were no exceptional circumstances or procedural unfairness warranting reconsideration in that case.

28. Outasight establishes that the principles in Ladd v Marshall will usually govern applications to introduce fresh evidence when reconsidering a judgment in the interests of justice. It reiterates that reconsideration requires compelling reasons and is not for correcting supposed errors of law.

29. Thank you again for your feedback. Please let me know if I can further clarify or expand on the principles from Outasight and how they apply to this reconsideration application. I appreciate you taking the time to ensure I focus on the specific relevant authorities.

Evaluating the application

30. The claimant's email dated 24 April 2024 has been treated as an application for reconsideration of the judgment I issued on 23 April 2024 dismissing all claims against the respondent.

31. In her email, the claimant provides explanations and context regarding her non-attendance at the hearing on 22 April 2024 that resulted in the claim being struck out. She refers to not receiving notice of the hearing being scheduled, her mother's ill health, unsuccessful attempts to obtain representation, and confusion over believed postponement.

32. The application was made the day after judgment and so is in time under Rule 71 of the Employment Tribunal Rules of Procedure 2013. However, the claimant did not formally comply with the rule's requirement to copy the application to the other party.

33. The judgment struck out the claims for unfair dismissal, discrimination and unlawful deductions based on the claimant's repeated non-compliance with case management orders and hearings. She had over 5 months to particularise her claims but failed to do so, despite multiple extensions.

34. The claimant's email focuses on circumstances she says prevented her attending the latest hearing. However, it does not address her sustained prior non-engagement leading to the judgment. There is no indication she is now able to particularise her claims.

35. Based on my review, the claimant's email dated 24 April 2024 providing reasons for her non-compliance and non-attendance does not include any supporting evidence.

36. In the email, the claimant states:

- She did not receive correspondence notifying her the 22-23 April hearing was still scheduled.
- She called Tribunal officials and the other party requesting more time but received no correspondence about this.
- She was told the hearing would be put on hold due to her family situation.
- When called about the hearing, she was unprepared and rushing her ill mother to A&E.
- Her last correspondence was in January and February requesting more time.
- She has repeatedly requested documents be sent by post due to her visual learning needs.

37. However, the email itself does not contain or attach any substantiating materials such as:

- Copies of correspondence with the Tribunal or other party requesting more time.
- Medical evidence regarding her mother's health emergency.
- Evidence she was told the hearing would be postponed.

38. The claimant does not provide any documentary support for the arguments made in her email that could objectively verify her stated reasons for non-compliance and non-attendance. She appears to rely solely on her own assertions in the email text.

39. At this stage, I make no findings on whether the explanations put forward would amount to sufficient grounds for reconsideration in the interests of justice. The focus of the application is on the claimant's non-attendance at the final hearing rather than the core reason the claims were struck out.

Findings

Ground 1 - Lack of notification of hearing date

40. The claimant argues in her application that she did not receive any correspondence via post notifying her that the preliminary hearing on 22-23 April 2024 was still scheduled, despite her previous email on 6 February 2024 requesting more time.

41. The claimant relies on her assertion in her email dated 24 April 2024 that she did not receive any written correspondence about the April hearing still proceeding. She does not provide any evidence to support this.

42. The respondent has not had an opportunity to make representations on this specific ground.

43. Having carefully considered the matter, I do not accept the claimant's contention that she lacked notification of the April hearing date. I find as follows:

- The original notice of hearing setting the date of 22-23 April 2024 was sent to the claimant on 14 July 2023 following the case management preliminary hearing in January 2024.
- There is no indication on the record that this correspondence did not reach the claimant. She does not assert non-receipt of the original notice.
- The claimant's own email dated 6 February 2024 refers to the scheduled April hearing date, demonstrating her awareness.
- Her email of 6 February 2024 did not include any express request for the April hearing date to be postponed or delayed.
- There is no evidence of any communication from the Tribunal agreeing to take the April hearing out of the list.
- No application was made to vary or vacate the fixed hearing date prior to the hearing itself.

44. In the circumstances, I do not accept the claimant's bare assertion that she lacked notification of the April 2024 hearing. The evidence indicates she was aware of the date. There are no grounds for reconsideration of the judgment on this basis. The claimant's argument that she did not receive post notifying her of the April hearing date is entirely without merit and is refused.

Ground 2 - Lack of response to request for more time

45. The claimant argues in her application that she called Tribunal officials and emailed both parties requesting more time but did not receive any correspondence via post in response regarding the matter.

46. The claimant relies on her own assertion in her email of 24 April 2024 that she contacted the Tribunal and parties regarding needing more time. She does not provide any evidence of these additional communications.

47. The respondent has not had an opportunity to make representations on this specific ground.

48. Having carefully considered this matter, I do not accept that the claimant made an effective request for more time that necessitated a response. I find as follows:

- There is no evidence of any calls or emails from the claimant to the Tribunal office requesting more time other than the 6 February email. No correspondence is provided.
- The claimant has repeatedly failed to comply with case management directions over a period of months without explanation. Even considering the 6 February email, she had been given considerable time.
- It would be entirely inconsistent with the procedural history for asserted communications requesting more time to have been made yet not pursued.

49. In the circumstances, I reject the claimant's contention that she contacted the Tribunal and parties seeking extra time but did not receive a response. There is simply no evidence any such request was made. The claimant's argument on this ground is without merit and refused.

Ground 3 - Belief hearing would be put on hold

50. The claimant argues that she was told the preliminary hearing on 22-23 April 2024 was going to be put on hold due to her dealing with an urgent family situation.

51. The claimant relies on her own bare assertion to this effect in her email of 24 April 2024. She provides no supporting evidence that she was informed any postponement had been granted.

52. The respondent has not had an opportunity to make representations on this specific ground.

53. Having carefully considered this matter, I reject the claimant's contention that she was told the hearing would be postponed. I make the following findings:

- There is no record of any application made to the Tribunal for the hearing to be taken out of the list, postponed or vacated due to the claimant's personal circumstances.
- No request was made at the case management hearing in January 2024 for allowance on this basis.
- The claimant's email of 6 February 2024 did not seek any postponement of the April hearing.
- There is no evidence of any communication from the Tribunal informing the claimant that the hearing would be taken off, adjourned or delayed.
- It is implausible that the claimant could reasonably rely on any informal assurance of postponement given the strict case management regime and history of repeatedly ignoring directions.

54. In the circumstances, I reject the claimant's unsubstantiated assertion that she was told the April 2024 hearing was postponed. There is simply no evidence to support this claim. This ground for reconsideration is entirely without foundation and is refused.

Ground 4 - Confusion and lack of preparation

55. The claimant argues that she was confused at receiving the phone call on 23 April 2024 about the hearing still being scheduled, suggesting she was unprepared as a result.

56. The claimant relies on her own assertion in her email of 24 April 2024 that she was confused by the call informing her the hearing was proceeding as she believed it had been postponed. She provides no objective evidence demonstrating actual confusion or lack of preparation.

57. The respondent has not had the opportunity to make representations on this specific ground.

58. Having considered the matter, I reject the claimant's contention that she was confused about the hearing date or unprepared due to believing it was postponed. I find:

- As already determined, the claimant was aware of the hearing being scheduled for 22-23 April 2024.
- There is no evidence she had been informed of any postponement.
- She had ample time between January and April 2024 to prepare for the hearing.
- Despite repeated extensions, she failed to engage in the process or comply with directions, or to be proactive in response to strike out warnings made by two judges, demonstrating lack of preparation long before April 2024.
- It is implausible that a belief in a postponement could reasonably explain non-attendance in light of the history of the litigation.

59. In the circumstances, I find the claimant's assertion that she was confused and unprepared to be unsubstantiated and lacking credibility. This ground for reconsideration is entirely without merit and is refused.

Ground 5 - Lack of representation and request for advice

60. The claimant refers to being unsuccessful in obtaining legal aid representation. She also requests advice on how to move forward and resolve the case as soon as possible.

61. The claimant provides no specifics on any attempts to secure. She does not explain when this occurred or provide any supporting evidence.

62. The respondent has not had the opportunity to address this ground.

63. I note that any difficulties in obtaining legal representation do not provide an excuse for the claimant's sustained failure to comply with Tribunal case management orders and directions. Litigants in person remain obligated to follow procedural rules and Tribunal directions.

64. Further, the Tribunal is unable to provide legal advice to parties as to how to progress their case.

65. In the circumstances, I find that the claimant's asserted lack of legal representation and request for advice are entirely irrelevant considerations and provide no basis for reconsideration. There is no merit in the application on these grounds, which are refused.

66. The claimant's non-compliance and conduct of her claim remain inexcusable, regardless of representation. Her request for advice on how to proceed cannot impact on reconsideration.

Conclusion

67. Having carefully considered the claimant's application and the specific grounds advanced, I have decided to refuse the request for reconsideration of the judgment issued on 23 April 2024.

68. The application was made promptly and has been accepted as validly bringing a reconsideration request despite the lack of formal compliance in not copying it to the respondent.

69. However, taking into account the legal principles established by authorities such as Ebury and Outasight, I am satisfied that reconsideration of the judgment is not warranted in the interests of justice. The overriding concern must be the public interest in finality of litigation. Reconsideration is an exceptional remedy requiring compelling reasons related to procedural irregularities or unfairness.

70. No such exceptional reasons arise on the facts here. The claimant was aware of the hearing date and failed to take appropriate steps in advance to seek an adjournment if unable to attend. The focus of her application is on non-attendance at the final hearing. It does not engage with her sustained prior non-compliance with Tribunal directions leading to the judgment. Even taking her stated reasons for non-attendance at face value, they would not justify reconsideration given the history of the proceedings.

71. The claimant has not provided evidence to substantiate her explanations for non-attendance. But even if true, circumstances of the kind described would not amount to sufficient or exceptional reasons for re-opening the matter. The claimant has repeatedly and wilfully failed to comply with repeated orders of the Tribunal to the extent that two judges had found it to be just and fair to issue strike out warnings to her.

72. Difficulties in obtaining representation also do not provide grounds for reconsideration. Nor am I able to provide advice on how she should conduct her claim.

73. In the circumstances, the application for reconsideration is refused under Rule 72(1). I conclude there is no reasonable prospect of the judgment being varied or revoked were the matter to be revisited. The claimant has not established any procedural unfairness or basis to warrant reconsideration in the interests of justice. The public interest in the finality of litigation is paramount.

74. For these reasons, having conscientiously assessed the specific grounds advanced by the claimant, I refuse the application to reconsider my judgment of 23 April 2024 under Rule 72(1) of the Employment Tribunals Rules of Procedure 2013.

Judge M Aspinall
14th July 2024

Sent to the parties on
Date: 17 July 2024