EMPLOYMENT TRIBUNALS

Claimant Mr K Coyle

v

Respondent The Royal Marsden NHS Foundation Trust

JUDGMENT ON THIRD RECONSIDERATION

Upon the Claimant's application under Rule 71 (Schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) ("Rules") to reconsider further the decision to refuse his claim for Interim Relief, the application to reconsider is refused under Rule 72(1) as there is no reasonable prospect of the decision being varied or revoked.

REASONS

Introduction

1. The Claimant worked as a Kitchen Porter for the Respondent, from 12 February 2012 until his dismissal on 28 July 2022.

2. The Claimant's application for Interim Relief (IR) was refused at a public preliminary hearing (PH) on 24 August 2022 with the written decision being signed the following day.

3. The Claimant's first application for reconsideration ("First Reconsideration") was refused under Rule 72(1) on 17 September 2022 as there was no reasonable prospect of the decision being varied or revoked.

4. A further Reconsideration decision was made on 25 September 2022 ("Second Reconsideration") as not all the documents on which the Claimant sought to rely had been before the Tribunal at the First Reconsideration. Again it was refused because there was no reasonable prospect of the decision being varied or revoked.

5. This decision should be read in conjunction with the First and Second Reconsideration reasons to provide the background to the application and to the First and Second Reconsiderations.

6. This claim has been listed with case number 2202063/2022 (and, I understand, two further claims) for a 15-day full merits Hearing starting in April 2025. Since

the IR hearing in August 2022, the matters have been consolidated and most recently have been case managed by EJ Khan.

Application for Third Reconsideration

7. Further to EJ Khan's case management, I have been forwarded and have considered the following documents supplied by the Claimant. There were a number of duplicates. Many of them were copies of documents that had previously been before me, a very large number of them were heavily marked up and highlighted by the Claimant and some of them were created not only after the Claimant's dismissal but also after my initial decision on the IR application:

    a. 14 screenshots;
    b. 1 page email: "KC v RMH appeal 23.08.22";
    c. 132 pages: "KC – Interim Relief minutes";
    d. 4 pages of "Notes";
    e. 45 pages of emails ("KC emails 28.03.22");
    f. 2 pages of commentary ("PS allegations no 678");
    g. 12 pages: "KC dismissal hearing minutes";
    h. 5 pages: "1 July 2022 – dismissal hearing minutes";
    i. 1 page: FAO EJ Khan;
    j. 8 pages: "interim relief hearing – Respondent's conduct";
    k. 46 pages of "Notes 2";
    l. 2 pages FAO EJ Khan (two different versions);
    m. 12 pages: "KC 2017 18 19";
    n. 13 pages: "KC RMH DSAR";
    o. 4 pages: "KC v RMH";
    p. 9 pages: witness statement Ms V Topp;
    q. 22 pages: "KC further docs";
    r. 202 pages: "DSAR";
    s. 164 pages: "Internal";
    t. 132 pages: "Claimant minutes and docs";
    u. EAT's decision in *University Hospital of North Tees and Hartlepool NHS Foundation Trust v Fairhall* (Tayler J) (EAT/0150/20/VP);
    v. 4 pages: "2202063.CMOs";
    w. 18 pages "Comparison AGOR 050724";
    x. 132 pages "KC - Claimant's doc" (a duplicate of (t) above);
    y. 202 pages "img-617112131.pdf"; (a duplicate of (r) above); and
    z. 2-page letter "postponement of disciplinary hearing KC".

8. In addition, I had the Respondent's letter of 21 June 2024 regarding this latest reconsideration application, a letter sent to the parties under EJ Khan's instruction on 1 August 2024 and EJ Khan's Case Management Orders (CMO) from the PH he conducted on 7-8 February 2024, the latter not being promulgated until 7 May 2024.

9. Despite the Claimant saying on 19 June that he would be sending his final submission the following day, and notwithstanding EJ Khan's directions in that CMO having been that the Claimant was to provide either a single document

making all the representations he wished to make about this Third Reconsideration by 31 May 2024 or to provide a list in a single email or letter identifying all the specific emails on which he relies, the Claimant has done neither. Rather, he has sent in piecemeal multiple items, annotated as I have described above, without any index or proper cross-referencing. I understand that the Claimant was told that after 31 July 2024, no further material would be considered but he nonetheless sent in a number of emails with documents attached or embedded subsequently. In the interests of justice and to ensure finality in this matter, I have taken all the documents supplied by the Claimant (and their covering emails) into account in conducting this Third Reconsideration.

Rules

10. The relevant Rules for this application, as set out previously, read as follows:

RECONSIDERATION OF JUDGMENTS

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.

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.

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.

11. As with the previous Reconsiderations, this means that the task before the Tribunal is to consider whether reconsideration of the decision is in the

interests of justice. If there is no reasonable prospect of the decision being varied or revoked, under Rule 72, the application shall be refused.

Discussion and Conclusions

12. I have reminded myself of the original basis for this application. It was, in summary, that the Claimant was dismissed for exercising rights under PIDA ("whistleblowing") and because he was a trade union member. It was not, as the Claimant most recently asserts, an application based on dismissal for asserting a statutory right under section 104 Employment Rights Act 1996. The Tribunal did not have jurisdiction to hear an IR application regarding trade union membership because of the lack of an appropriate certificate. So what I had to decide was whether the Claimant was likely to show at the full Hearing that the reason for his dismissal was that he had made a protected disclosure or disclosures.

13. There are considerable difficulties with being asked to reconsider the application nearly two years later, through the lens of some 850 pages of documents that the Claimant has sent in as being relevant in this regard:

    a. The first is that an application for IR is generally intended to require an "expeditious summary assessment" of the untested evidence before the Employment Judge as to how the matter looks on the material he or she has - see for instance *London City Airport v Chacko [2013] IRLR 610*. The EAT said in that case that the Employment Judge: "*must do the best they can with such material as the parties are able to deploy*". I consider that the EAT intended that to mean such material as the parties are able to deploy by the date of the IR hearing.

    b. I made a summary assessment, or what is often referred to as an "impressionistic view" on 24 August 2022, based on the evidence before me at that date. It would not be enough for the Claimant to have a pretty good chance of showing that he made a protected disclosure, or more than one. My focus was therefore on the second part of the test – whether the Claimant had a pretty good chance of showing that any such disclosure(s) were the principal reason for his dismissal. I concluded that he did not, and I gave my reasons for so concluding.

    c. It is recognised generally that the timings for submission of the ET1 and the listing of the IR hearing in such a case are very tight, when considering that the case can take many months or even years to be disposed of fully. Often, as was the case here, no appeal against dismissal has taken place by the date of the IR hearing, and no ET3 yet submitted. So the material before the Tribunal is of necessity much more limited than it will be at a 15-day full hearing. The judge must not determine facts as though he or she was conducting that final hearing (see *Raja v Secretary of State for Justice UKEAT/0364/09/CEA*).

d. As a general policy rule, I do not consider that Parliament intended an applicant for IR to be able to return to the Tribunal at multiple later stages, for example when disclosure or the results of a DSAR (or more than one) have been made available to them, or at any stage where that applicant believes he has uncovered something that will certainly prove his case or has decided to mount his argument in a different way. If that had been Parliament's intention, I consider it would have legislated for claimants to do exactly that. It did not do so. It required the claim to be submitted within one week and the IR hearing to be heard as soon as practicable, on just seven days' notice, and for the EJ's decision to be made at that point.

14. The Court of Appeal has said in *Kuzel v Roche Products Limited [2008] EWCA Civ 380 CA* that it is for the Claimant to show that there is a real issue as to whether the reason put forward by the Respondent was not the true reason. Further, as the EAT said in *Eiger Securities LLP v Korshunova UKEAT/0149/16*, it is not enough for a protected disclosure to be in the employer's mind at the time of dismissal. The question is whether the disclosure was the reason or the principal reason.

15. As I have said in a previous reconsideration decision, the strength of the Claimant's case is diluted by the fact that he sought to rely on more than one putative reason as being the reason or principal reason for his dismissal (protected disclosures and/or TU membership). He is now also seeking to rely on another reason or reasons (asserting a statutory right). With all that in mind, I have considered whether the new material the Claimant has now put before the Tribunal would, if it had been before me two years ago, have made a material difference to the outcome. I conclude it would not.

16. The Claimant has set out in speech marks in his "Notes" documents some lines from a document which, on looking solely at his Notes, would appear to give him a promising line of attack in this regard. He purports to quote from what he describes as a "Protected disclosure dismissal letter dated 30 March 2022". The "quote" in question that he sets out is this:

    "*We are dismissing you because the evidence that you submitted suggests that you are going to take your case to the highest level – (the very definition of protected disclosure retaliation)…*".

    The Claimant appears to believe that the decision to dismiss him had been taken by Ms Searight ("PS") as in another document he says, "*The dismissing officer, PS – explicitly states the reason for dismissal – in the contemporaneous dismissal letter dated 30 March 2022*".

17. The difficulty for the Claimant in seeking to rely on this "dismissal letter" and/or advancing the theory that Ms Searight was the decision-maker is at least three-fold: first, he was not dismissed on or shortly after 30 March 2022. He was dismissed on 22 July 2022. It is common ground that the

Respondent did not send to the Claimant this letter of 30 March 2022, which I consider is likely to have been a draft. For instance, in telling the Claimant he is to make arrangements to retrieve his personal possessions, it asks as an aside "*WITH WHO??* [sic]". As I set out in the quote below, there is a further query on the first page.

18. Second, Ms Searight is not the purported author of the letter of 30 March 2022. This letter is signed by Mr Jackson, Head of Facilities. Nor is Ms Searight the purported author of the letter of dismissal that the Claimant was sent on 22 July. That purports to have been sent by Ms Topp, though I make no specific finding in this regard.

19. Third, and most significantly however, the passage is not quoted accurately and/or fully. What the letter actually says (referring to a disciplinary hearing held on 30 March 2022) is:

"*You advised in advance that you would not be attending due to mental health issues and that you would provide a valid medical certificate to validate this. DID THIS MATERIALISE?* [sic] *However, it was decided that the hearing should proceed for the following reasons:*

- *The evidence that you submitted suggested that you were going to try and take your case to the highest level*
- *You repeatedly responded to emails showing no regard or intention to follow the process outlined in the Trust's Disciplinary Policy and in other correspondence*
- *The inappropriate nature and content of the messages that you were sending to numerous people were considered to be escalating and the Trust has a responsibility to protect its employees from such communications*
- *The protraction of this disciplinary process appeared to be having a detrimental impact on your mental health with content of emails becoming increasingly irrelevant, unrelenting and erratic.*
- *There is strong and compelling evidence that the allegations are founded with little or no mitigation received in response, despite numerous emails being received and delaying the hearing is unlikely to yield any different outcome*".

20. When the lines "quoted" by the Claimant are read accurately and in their full context, it is clear that the author of the letter is not admitting to dismissal as "protected disclosure retaliation". This is a gloss that has been put on the words by the Claimant. The Claimant's indication that he was going to take his case "to the highest level" was said to be one of the contributing factors to the decision not to postpone the disciplinary hearing and has not been advanced in this letter or in any other document before me as the reason why the Claimant was dismissed. The Claimant's interpretation of the actual words used and the intention behind them can of course be put to the Respondent's witnesses at the full Hearing.

21. What is further clear (apparently from the results of a Subject Access Request) is that on 1 July 2022, Ms Topp, who on the face of it dismissed the Claimant three weeks later, emailed colleagues to flag her concerns that a letter inviting the Claimant to a meeting had been sent "from" her without her having any knowledge of its contents. She concludes, "*I'm not going to say I've done something when I haven't*".

22. As I have previously noted, in her witness statement (on which she was not cross-examined at the IR hearing) and in the dismissal letter, Ms Topp sets out the purported reason(s) for the Claimant's dismissal: his conduct and behaviour during a previous investigation was found to be inappropriate, he was found to have acted in a rude and aggressive manner towards managers, and he allegedly failed to engage with managers and disobeyed a management instruction not to sleep on site, notwithstanding a prior written warning and a reminder for the latter. As I have previously found, the Claimant had admitted some of the behaviour alleged, despite wanting to put it in context and/or arguing that it should not have been considered to amount to (gross) misconduct. Those are points for him to advance at the full Hearing next year.

23. Again, questions about the status of the letter of 30 March and the other points that the Claimant makes about Ms Searight's involvement in the process can also be put to the Respondent's witnesses, if necessary, at the full Hearing. However, the 1 July 2022 email does not assist the Claimant before me in pursuing the argument that Ms Searight was the person to dismiss him and/or that that dismissal was because he had made a protected disclosure(s). Thus I remain unable to find that the Claimant has a pretty good chance of showing that any protected disclosure(s) he had made were the reason or principal reason why the decision-maker, whether or not that was Ms Topp, decided to dismiss him.

24. The Claimant's reliance on *Fairhall*, which did not concern an application for interim relief, is also misplaced in this context.

25. In the circumstances, I did not consider it necessary to ask the Respondent to reply further to the application, which is refused.

_____

Employment Judge Norris
Date: 12 August 2024
JUDGMENT SENT TO THE PARTIES ON

16 August 2024
.....

.....
FOR THE TRIBUNAL OFFICE