



EMPLOYMENT TRIBUNALS

Claimant: Ms E Thornley

Respondent: Leisure Employment Services Ltd

Before: Employment Judge P Cadney

Representation:

Claimant: Written Submissions

Respondent: Written Submissions

Reconsideration Judgment

The judgment of the tribunal is that-

- i) The claimant's application to revoke or vary the Judgment dismissing her claims of sex discrimination is dismissed.

Reasons

1. I heard a Telephone Case Management Preliminary Hearing on 25th January 2024. At that hearing the claimant was represented by her father, and she withdrew all claims against the original first respondent; and her claims for unfair dismissal and sex discrimination against both respondents. The remaining claims of disability discrimination, unlawful deduction from wages, unpaid holiday pay, and unpaid notice pay have been listed for final hearing, as set out in the CMO.
2. As a result the claim for sex discrimination was dismissed by a Judgment dated 26th January 2024. The claimant has sought a reconsideration of the Judgment dismissing the sex discrimination claim, but not the other claims dismissed.
3. The case before EJ Hogarth on 28th May 2024 and he gave further directions on the re-consideration application. He records the claimant's father as

indicating that he had misunderstood what had happened at the TCMPh and did not believe that the s26 Harassment claim was being withdrawn. This was essentially repeated in the claimant's father's response to EJ Hogarth's direction.

4. The claim for sex discrimination as set out at Box 9.2 of the ET1 was:

Gender – One cited fault was my hair and make-up, including false eyelashes, which only applied to females (contravening Equality Act 2010)

5. On 26th February 2024 the claimant submitted Further and Better Particulars of Claim which included at para 2 (e) a claim for harassment related to sex (s26 Equality Act 2010). The basis for including this claim was set out at para 4:

However, during the same meeting, the Lawyer thought that there was a valid claim of Sex Discrimination. The Claimant thinks her Representative didn't understand that it related to her protected characteristic or the Law that protects her and so requests the Judge to sympathetically reinstate it, as it was included in the original ET1 submission. In case it is allowed, the claim is outlined as the last Claim below. Apologies for any inconvenience and confusion caused due to her being a litigant in person representing herself.

6. The proposed/draft claim itself is set out as:

Harassment related to Sex (Equality Act 2010 s. 26).

31. The Claimant contends that she was subjected to the following act of harassment by her Supervisor Ms Jordan:

32. Instructed to buy make up and false eyelashes at her own expense and apply them in her own time to meet the Respondent's 2023 Entertainment Cast Manual.

33. This Manual states some different and additional requirements for Females:

a) HAIR & MAKE UP:

Female's hair should be tied back, in a high ponytail with a natural, black or brown hair tie. There should be no dangling strands of hair.

- a. Hair extensions should look natural and be clean.*
- b. Hair accessories are not permitted.*

b) Male's hair should be neatly styled, using appropriate hair products.

c) All females must wear daytime make-up. Daytime make-up should consist of foundation, liner, mascara, blusher and a natural-coloured lipstick. Females shouldn't wear colours that are too dark for their skin tone and should always blend their make-up into the neck.

d) *Female's evening make-up should still be natural but more obvious. Avoid bright Blue and green eyeshadow and bright pink cheeks & lips.*

e) *SHOW MAKE-UP*

f) *During shows, males and females are required to wear stage make-up.*

g) *Females should wear foundation, contour, blended eyeshadow, eyeliner, false eyelashes and lipstick. Males should wear foundation, eye line and mascara.*

34. *The Claimant contends that she was also harassed by her Manager, Mr Thurgood, who included 'Appearance' in her PIPs. One cited fault in the Claimant's PIP was her hair, especially dangling strands, and make-up including false eyelashes, all of which only apply to females.*

35. *The Claimant will rely on Ms J Henry v Tattu Manchester Limited (13/7/23), where the Judge ruled that 'saying that the individual should wear some makeup, is a sex-specific comment, in that (although it is not unknown for men to wear makeup) it is not a comment that would ordinarily be made to a man'. The Claimant contends that this is even more the case with false eyelashes.*

36. *The Claimant's view is that the actions by Ms Jordan and Mr Thurgood were unwanted conduct relating to her protected characteristics, which violated her dignity and caused a degrading, intimidating and humiliating environment for the Claimant. The Claimant's perception was that she wasn't beautiful enough and didn't have the right look for the role, and therefore she felt humiliated and less valued and acceptable to audiences and her employer, reducing her self esteem.*

7. The respondent objected and the objection is set out in full below:

To assist the tribunal, a brief chronology is set out below:

- a. *The Claimant submitted her original claim on 20 October 2023.*
- b. *In respect of the preliminary hearing on 25 January 2024 ("the Preliminary Hearing"), the Claimant's representative advised the Respondent's representative by email that he had sought legal advice and at the same time provided an amended list of issues and preliminary hearing agenda. Within both documents, the Claimant had struck out any references to bringing claims for sex discrimination.*
- c. *During the Preliminary Hearing, the Claimant confirmed her intention to withdraw her claim for sex discrimination and requested the opportunity to provide further and better particulars for her existing claims, which was granted.*
- d. *At paragraph 15.3 of the Case Management Order ("the CMO"), sent to the parties following the Preliminary Hearing, the Judge ordered the Claimant to provide "The voluntary Further and Better Particulars she wishes to supply (as discussed orally these must relate solely to the claims being pursued as set out in this case management order and not any further claims)". At paragraph 77 of the CMO the Judge ordered "The claimant should in the Further and Better Particulars she has asked to*

rely on (see direction above) identify the basis upon which it is alleged that the allegations [in relation to her harassment claim] are related to disability”.

- e. *On 7 February 2024, the Tribunal sent a Judgment to the parties which confirmed that the Claimant’s claims for unfair dismissal and sex discrimination were dismissed upon withdrawal and details were provided of how to apply for a reconsideration of this decision. The Claimant has not sought a reconsideration of this decision.*
- f. *The claims set out in the CMO are for disability discrimination, harassment related to disability, discrimination arising from disability, unlawful deduction from wages and other payments. For the avoidance of doubt, the claims do not include sex discrimination and/or harassment related to sex.*

On 26 February 2024 the Claimant supplied her Further and Better Particulars (“F&BP”) within which she has sought to introduce a new claim of harassment on grounds of sex under s26 of the Equality Act 2010. She has introduced new facts and allegations, for example, at paragraph 34 of the F&BP the Claimant alleges she was harassed by Mr Thurgood because he included the requirement to improve her appearance in her personal improvement plan. These facts were not included in the Claimant’s original ET1 Claim Form dated 20 October 2023, nor were they included in her amended list of issues provided on 18 January 2024.

The Respondent objects to the introduction of a new claim at this late stage on the following grounds:

- The Claimant submitted her original claim on 20 October 2023 and sought to introduce a new claim of harassment on 26 February 2024. The Claimant has had over four months in which to consider her claims, seek legal advice and make an application to amend her claim but has opted not to. She has therefore taken the opportunity, upon being permitted to provide F&BP, to bring a new claim.*
- Allowing the Claimant to present this new claim will mean that the Respondent will have to call an additional witness to give evidence at the final hearing which will incur further expense to the Respondent and will likely impact the listing and length of the final hearing.*
- The Respondent avers the Claimant had the opportunity to bring this claim in her original ET1 claim form. She also had ample opportunity and time to raise this at the Preliminary Hearing but did not, despite having received legal advice prior.*
- The Respondent further avers that any new claim (if permitted) would be out of time, and it would not be just and equitable to extend time.*

Furthermore, in the F&BP the Claimant has requested that the Judge “reinstates” her sex discrimination claim.

The Respondent objects to the Claimant’s request to amend her claim to include sex discrimination. The Respondent avers that the Claimant sought legal advice in advance of the Preliminary Hearing which formed her decision to withdraw her claim. Furthermore, upon receiving the tribunal’s correspondence on 7 February

2024, the Claimant opted not to ask the tribunal for a reconsideration of the Judgment, and any request for a reconsideration is now out of time.

Reconsideration

8. Rule 70 of the ET Rules gives the tribunal a general power on reconsideration to confirm, vary or revoke the original decision where it is in the interests of justice to do so. However that does not give the tribunal a completely freestanding discretion to reconsider or vary/set aside any judgment. In *Outasight VB Ltd v Brown 2015 ICR D11, EAT*, Her Honour Judge Eady QC accepted that the wording 'necessary in the interests of justice' allows employment tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion 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'.
9. The specific circumstances of this case are that the claims of sex discrimination were not dismissed as the result of any finding made by the tribunal, but on withdrawal by the claimant. The circumstances governing withdrawal and the consequences of withdrawal are set out in rule 51 and 52. In my judgement the central question which must be addressed in considering whether the case should be listed for a further hearing to consider the re-consideration application is whether the withdrawal was arguably equivocal. If it was there may be grounds for permitting the withdrawal of the claims to itself be withdrawn, and the Judgment set aside, in which case it would be appropriate to list the case for a re-consideration hearing.
10. As set out above the claimant's father, in effect seeks re-consideration on the basis that he did not understand that in withdrawing the claims of sex discrimination he was withdrawing the claim of harassment relating to sex.
11. In my judgment there are a number of difficulties with this :
 - i) As set out in the respondent's objections, in my recollection it is correct that I specifically asked the claimant's representative whether the claims of sex discrimination were withdrawn and it was confirmed that they were. I cannot recall whether he indicated that they had taken legal advice but the withdrawal was in my recollection unequivocal;
 - ii) This is reflected in the fact the List of Issues did not make any reference to harassment related to sex, and that the claimant was given a further opportunity to provide Further and Better Particulars of her other claims and in particular to consider whether to pursue the claim of indirect disability discrimination in addition to the claim for reasonable adjustments;

- iii) Had the claimant been in any way equivocal about withdrawing the sex discrimination claims there would have been no reason not to have allowed her time to consider those claims as well;
 - iv) The claim for sex discrimination was one of a number of claims withdrawn, and there is no suggestion that the withdrawal of any of the others was in any way mistaken or equivocal;
 - v) As a matter of fact the new allegations do no more than amplify those set out above from the ET1; and in my judgment the claims that the claimant now seeks to re-introduce by way of setting aside the Judgment and permitting her to pursue those claims are, although expressed more fully, the same claims factually as those contained in Box 9.2 of the ET1. It follows necessarily that the claims being withdrawn were those set out factually in the ET1 and must have been understood to be those claims by the claimant's representative;
 - vi) There is in fact no suggestion from the claimant that the withdrawal was in fact in any way equivocal rather, that having taken further advice the claimant has changed her mind and now wishes to pursue the claims, which as she accepts and states were already set out in the original ET1.
12. It equally follows that in my judgment the withdrawal was unarguably unequivocal. It has long been understood (see *Kahn v Heywood and Middleton PCT [2006] UKEAT*) that the tribunal has no jurisdiction to reinstate a claim once unequivocally withdrawn. In the circumstances, and given that in my view there is nothing in the reconsideration application which sets out any basis for considering that there is a reasonable prospect of the withdrawal being held to be equivocal, and the original decision being varied or revoked (r72(1) Employment Tribunals Rule of Procedure 2013) the application is dismissed.

Employment Judge P Cadney

Dated: 25th July 2024

Judgement entered into the Register

And copies sent to the Parties on

27 August 2024

Jade Lobb

For the Tribunal Office

