Case Number: 3320632/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Khan	**v**	**Slough Borough Council**

Heard at: Reading **On**: 29 August 2024

Before: Employment Judge George
Dr C Whitehouse
Mrs M Thorne

Appearances

For the Claimant: in person
For the Respondent: Mr S Bishop, counsel

UPON APPLICATION made by letter dated 4 July 2024 to reconsider the judgment dated 3 June 2024, sent to the parties on 4 June 2024 under rule 71 of the Employment Tribunals Rules of Procedure 2013

JUDGMENT

The respondent's application to reconsider the judgments in respect of the victimisation complaint and in respect of the unfair dismissal complaint is rejected.

REASONS

1. In this reconsideration hearing we have had the benefit of the hearing file complied by the respondent which contains the documents set out in the index. The claimant has also sent some documents in electronically and in hard copy but those are documents that he wished to rely on in relation to remedy if that became necessary. We have also had the benefit of a written skeleton argument from Mr Bishop and oral submissions from him on behalf of the respondent and from the claimant.

2. The respondent applied for a reconsideration of the judgment made in the claimant's favour in respect of his unfair dismissal complaint and his victimisation complaint as in their application at page A141.

3. The application was made on 4 July 2024, 14 days outside the two week time limit prescribed in the rules for such application. Judge George extended time

for presentation of the application and, on an initial consideration, decided that the application should proceed. The claimant was asked for his views and the parties were asked whether the application could be determined without a hearing (see page A150).

4. Following the reserved judgment, the parties had been asked to provide dates to avoid for a one day remedy hearing and when agreeing that the reconsideration application could proceed, Judge George extended the time estimate to two days so that there would be time available to consider all of the issues set out in the tribunal's letter of 8 July 2024.

5. There was initially some confusion because the notice of hearing only referred to a remedy hearing, however, that was clarified by the tribunal the week before the hearing when the respondent's application to postpone it was refused.

6. In summary, the respondent's reasons for arguing that it is in the interests of justice for the judgments to be reconsidered are as follows:

   6.1 In relation to the victimisation judgment, the respondent argues that there is credible evidence that was not before the tribunal at the hearing in January and March 2024 that would be likely to have an important influence on the issue of when the claimant knew, or ought reasonably to have known, of his rights to bring an employment tribunal claim and of the process by which that should be initiated. That was a factor taken into account in the majority decision that it was just and equitable to extend time for the victimisation complaint. The respondent argues that they did not have a fair opportunity to put forward this evidence at the original hearing and, therefore, that it is in the interests of justice that the judgment should be reconsidered so that they can do so.

   6.2 In relation to the unfair dismissal judgment, the respondent argues that the tribunal's reasoning for its conclusion that the claimant was unfairly dismissed is flawed. In particular, the respondent points to our conclusion that no reasonable employer would have included Mrs Hothi on the interview panel when the claimant and his colleagues were interviewed in connection with selection for the remaining posts in the redundancy exercise. They do not seek to go behind that conclusion but argue that this was an insufficient basis for the overall conclusion that the claimant was unfairly dismissed. Alternatively. They argue that the reasons for that conclusion were insufficiently expressed. The respondent argues that, having decided the reason for the dismissal was redundancy, we appear to have failed to carry out the wider exercise of deciding whether the employer acted reasonably in all the circumstances in treating redundancy as grounds for dismissing this particular employee, relying upon Taylor v OCS Group Ltd [2006] ICR 1602 and in particular paragraph 48. The Court of Appeal reinforced the message that procedural issues should be considered together with the reason for the dismissal because the employ tribunal's task is to decide whether, in all the circumstances of

the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss – taking into account any procedural imperfections. They appear further to argue that, had that exercise been carried out, we would be bound to conclude that the respondent had acted reasonably in treating redundancy as grounds for dismissing this employee.

7. The power to reconsider a judgment under Rule 70 of the 2013 Rules can only be used if it is necessary to do so in the interest of justice. That is apparent from the wording of the rule itself and, as explained by His Honour Judge Shanks in Ebury Partners UK Limited v Acton Davies [2023] IRLR 486 EAT. A central aspect of the interests of justice is that there should be finality in litigation. Paragraph 24 of the judgment states:

> "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 has 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."

8. When a litigant applies for reconsideration on the grounds that new evidence is available they must persuade the tribunal that the evidence could not have been obtained with reasonable diligence for use at the hearing, that the evidence would probably have had an important influence on the outcome of the case and is credible. That is often referred to as the test in Ladd v Marshall [1954] 1 WLR 1489 CA. It is not necessary that the new evidence should be shown to be likely to be decisive but rather that it would probably have had an important influence on the outcome of the case.

Victimisation

9. The additional pieces of evidence the respondent wishes to rely on are the early conciliation certificates in respect of Mr Mapembe and Mr Abbas' claims against Slough Borough Council. They have also put in the hearing file the reserved judgments in their cases but, as we understand it, these last are relied on solely as evidence of the dates on which the claims were presented and the dates on which those gentlemen's employments respectively ended. The dates in question are set out in paragraphs 3.6 and 3.7 of the respondent's skeleton argument. The relevance is to identify *their* presumed dates of knowledge of three things: the ability to claim; the process by which that should be done; and apparent knowledge that you can contact ACAS during employment.

10. As we set out in the reserved judgment, the claimant had consented to be interviewed at the request of Mr Mapembe and Mr Abbas in relation to grievances brought by each of them. Part of our findings (see judgment paragraph 201) were that the claimant was told by colleagues who were also preparing to bring claims that he needed to contact ACAS before bringing an employment tribunal claim. The respondent argues that it is more likely than

not that these were Mr Mapembe and Mr Abbas; that it is unlikely that the claimant did not ask questions of Mr Mapembe or Mr Abbas about their situations and learn from them of his right to present a claim during employment and his need to contact ACAS before doing so. Alternatively, it is argued that it was not reasonable for the claimant not to have asked these questions of Mr Mapembe and Mr Abbas given his relationship with them, so the claimant ought reasonably to have found out about the right to claim within a short period of time of 4 November 2020, the date of the incident that we have found to be victimisation. The respondent argues that the claimant ought reasonably to have found out that he could contact ACAS while still employed and Mr Abbas apparently contacted ACAS whilst employed on 20 December 2020.

11. In the original application the respondent set out their then understanding that the only evidence before the tribunal about the claimant's reason for delaying in bringing a claim had come from the claimant in oral evidence in answer to tribunal questions. The claimant, in his response to the application at page A157, stated in relation to an apparent assumption that Mr Mapembe and Mr Abbas had told him how to claim, that he had categorically said during the trial that, "I did not have any discussion with them on this topic in case I would have been aware of this process and how it was possible to miss the deadline". This was challenged as being untrue on the basis of the findings of the tribunal.

12. Consequently, Judge George requested the recording of the hearing of the relevant day, which was Day 4 on 13 March 2024, to be obtained. The relevant section (from 2 hours 21 minutes of the recording to 2 hours 34 minutes of the recording) was played at the start of the reconsideration hearing. The section that was played comes towards the end of the claimant's cross examination when he was re-called to answer questions about the additional documentation that had been produced during the interval between the two hearing sessions. Judge George amended her contemporaneous notes as the recording was played and, as corrected, those notes show the following exchange between Mr Amunwa (BA), the claimant (C) and Judge George (EJ).

Questions	Answers
BA: (I want to ask) why you brought the claim when you did. Just to explain – you contact ACAS on 4.8.2021, what that means in summary is that for any allegation before 5.5.2021 the starting point for the ET is that that's too late and unless there is good reason or fair to allow you to bring a claim that's last (day). On 4.11 you get the phone call the worst you've received after a string of	C: My claim was within the allowed timescale

similar threats and putting up with bad treatment in office by KH. On 16.11 you get chance to volunteer information to SK during year bit clouded by the grievances you participated in surely by 16.11.2020 you must have known that or should have known that if you were going to bring a claim about these matters you should do it.	
EJ There are different time scales for different complaints Repeat the question	C: I was in touch with ACAS and I was not allowed to submit the claim without the certificate
BA: Why not go to ACAS sooner	C: When my job ended I contacted ACAS straightaway.
BA: You were involved in quite serious grievances about discrimination you say felt threatened – threatened with job loss and other types of bad treatment, isn't the reality that you didn't go promptly to ACAS and you left it until after the termination	C: I was not sure that I could reach ACAS while I was working there..
BA: Why	C: Whoever guided me I need to get certificate before I go to ET. I was not aware when submit grievance I need to go to ACAS also.
BA: Who	Some other colleagues who were working with me.
BA: Do you know who they were	C: I discussed with Mohamed Saleem and he told me I need the certificate before go to the ET
BA: He didn't say only claim after termination did he?	C: I was not sure when – do I need to contact ACAS while I was still working. I thought ACAS was outside body and you only contact them when not employed
EJ: do you know Why you thought that. What was the reason you thought that	C: Not aware of the process
BA: What steps to find the process	C: All process dealt with by Slough Borough Council. I did not think that external body would be involved while still there and my grievance was not dealt with by outside investigator which should have been done.
BA: you are clearly a resourceful man, able to type out para after para detailed complaint matters covering years seemingly without legal assistance resourceful albeit might	C: Whatever process I know, I have followed.

have had assistance from your colleagues – fair to say that you have no good reason as to why didn't find out for yourself what the process was and what the time limits were so that you were not timed out to bring claims against KH for extraordinary unacceptable threats you say she made on 4.11.2020.	
BA: those are my questions.	Thank you

13. That evidence is the only reference in evidence to the claimant's reasons for contacting ACAS when he did that the tribunal has been able to find. It appears therefore that the claimant did not in fact say, as we have recorded in our judgment, that colleagues who were also preparing to bring claims informed him that he needed to contact ACAS but rather that "colleagues who were working with me." Our record of his evidence in the judgment is therefore inaccurate.

14. It can be seen from that extract that in fact it was in answer to question in cross examination from Mr Amunwa, the counsel for the respondent, that the claimant first explained that he had found out how to contact acas from colleagues after he had been told he was unsuccessful in the job application. That was approximately in the last week of March 2021. He was then asked, "which colleagues" by Mr Amunwa and had responded "Mr Saleem," that being the name of the colleague who was also ringfenced for the position with him.

15. It is true that the claimant did not put forward evidence in chief about the reason for not bringing a claim sooner. This was a case in which both sides' statements had omitted key evidence which needed to be supplemented by them adopting passages of their claim form or response in evidence. It was an issue in the list of issues and the burden of proving this point was on the claimant (see page A:95 of the list of issues). The respondent is correct that they had no warning before the oral evidence of what the claimant would say.

16. The suggestion in the application that the respondent did not cross-examine the claimant about this topic is inaccurate; we do not criticise the respondent for making it because there has been a change in counsel. However we do note from the tribunal paper file that Ms Rowlands, Mrs Hothi and Mr De Cruz are all shown on the attendance sheet as being present on 13 March 2024. That does not mean that all or any of them were present in tribunal when the evidence was given – the tribunal does not always note when observers arrive and leave and one or more might have left before the end of the day, we do not assume they were present. The suggestion that the tribunal acted inquisitorially seems to have fallen away in light of playing the recording.

17. The claimant spoke of "colleagues" and named one. Our judgment inaccurately refers to colleagues who were contemplating bringing their claim when that was not the evidence that he had given. It was not suggested to

him in the liability hearing that he had or could have asked Mr Mapembe or Mr Abbas, so the specific point that the respondent wishes to rely on now as the basis for actual knowledge of the right to claim or unreasonable ignorance as the right to claim, was not put to claimant in cross-examination. We think that means that if we agree to respondent's application to adduce further evidence then the claimant needs to have the opportunity to respond to it.

18. The respondent tendered witnesses at the start of Day 5 and evidence finished at about 11.30 am. It is argued that this means there was insufficient time for the respondent to be able to react to this unexpected evidence from the claimant. Further, it is argued that Mr Amunwa, who was not counsel with conduct in the Mapembe and Abbas tribunal cases, could not reasonably be expected to have realised the potential importance of the chronology in those cases to Mr Khan's knowledge of the right to claim.

19. However, we recall that Mr Amunwa had had cause to look at the hearing file in Mr Mapembe's case because of the mystery of the missing "witness statement" relied on in this claim by this claimant as a protected act. His explanation on Day 3 of the liability hearing for how the record of the interview with Ms Kitson came to light, included that he had happened to locate that interview record within the documentation in the Mapembe file. Obviously, given the size of the hearing files in these claims, we do not think that respondent's counsel ought reasonably to have been aware of all details in the documents in another claim. We do not take it further than reminding ourselves that, as is apparent at the time, Mr Amunwa was aware that there were other tribunal claims and had had cause to look in the hearing file for one of them.

20. However, we do think that there was an opportunity to ask the questions of the claimant and to put to him that the colleagues he mentioned included Mr Mapembe (who had given evidence in the present case) and Mr Abbas. That opportunity did not only exist on Day 4 but could have been the subject of the request to recall the claimant after reflection on Day 5. We do not think it fair to ascribe to Mr Amunwa's detailed knowledge of the chronology in the Mapembe and Abbas cases and do not do so. But the fact that there were other claims was well known.

21. Furthermore, counsel was attended, at least in part, on Day 4. If Ms Rowlands was not present during the evidence she could have been contacted for instructions between the giving of the claimant's evidence and the close of the respondent's evidence the next day. It is not unreasonable in our view to expect the respondent to be able to react to the answers referenced to matters within their collective knowledge having raised the questions themselves. We do not think we are expecting perfection of the legal team to say that it would have been possible with reasonable diligence to put forward this additional evidence before the close of evidence and before submissions were finished at the liability hearing.

22. So, the application to adduce further evidence fails because it is not the case that it could not, with reasonable diligence, have been obtained at the proper time.

23. In case we are wrong about that, we consider whether the evidence (which we accept is credible) was likely to have an important influence on the outcome. By outcome we mean the majority view that the claimant was genuinely and reasonably unaware that he needed to contact ACAS before bringing a claim until after he was unsuccessful in the selection exercise; that he genuinely and reasonably believed that he could not bring a claim when his employment was ongoing. Does that evidence have the potential to impact on the judgment about whether it was just and equitable to extend time. The question is whether evidence about the actual knowledge of Mr Mapembe and Mr Abbas is likely to have an important influence on that conclusion. The conclusions in question are set out in paragraphs 207 to 209 of the judgment.

24. Dr Whitehouse and Mrs Thorne are of the view that the evidence would not be likely to have had an important influence on their reasoning. They are of the view that that evidence was not likely to impact their view on the credibility of the claimant which was not based solely on one thing but also on his actions in not contacting ACAS until days after his employment had ended and their acceptance that he was likely not to understand that time might start to run from each act. Furthermore, their conclusion that it was just and equitable to extend time was itself not based only on the reasonableness of the claimant's ignorance but on other factors are not likely to be affected by this additional evidence and those factors are set out in their original conclusions at paragraphs 208 and 209.

Unfair dismissal.

25. The respondent relies on the Taylor case as set out above as the basis for an argument that procedural unfairness is insufficient on its own to make a dismissal unfair. We were also taken to Sharkey v Lloyds Bank plc [2015] 8 WLUK 124, in particular paragraph 26. There the EAT said that it is for the Tribunal to evaluate whether a flaw in the process is so significant as to amount to unfairness

> "any prospect of there having been a dismissal in any event being a matter for compensation and not going to the fairness of the dismissal itself. …. Procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together."

26. Essentially, the argument is that either this tribunal misapplied the law or did not explain how the procedural unfairness that we had found meant that the dismissal was unfair. They argue that an inevitable corollary of our finding that Mrs Hothi did not abuse the opportunity of being on the selection panel that her presence – even if a procedural flaw – was of no consequence.

27. Our primary judgment in relation to this is that either argument is not within the scope of a reconsideration application as explained by Ebury Partners and it is not in the interests of justice that the respondent should have the opportunity to re-argue points which were argued on the last occasion now with reference to well-known authorities such as Taylor and Sharkey.

28. In any event, we disagree that we failed to apply the law correctly in this instance.

29. We turn to the passage in the reserved judgment at page A: 126 in paragraph 162 that continues over to the top of page 127. We remind ourselves of the contents of that and of the contents of the paragraphs that are cross referred to in that section. In particular, we explained that, whilst true that the claimant had not objected to Mrs Hothi's inclusion, no one had consulted with him about it; no one had explained why an HR panel member was being included. Additionally, there had been insufficient time to address the recommendations of the internal investigation into recruitment practices, confidentiality meant that the claimant was not named in the report and his specific allegation about the telephone call on 4 November was apparently not investigated. However, the high level of mistrust in the department was explained in the report and that should have caused any reasonable employer to remove Mrs Hothi from interviewing these candidates until the recommendations could be implemented.

30. We consider that a fair process would be one where reasonable steps are taken to ensure the candidates have trust in the process and the respondent does not appear to have considered this perspective despite the finding of the SPM's report. It is part of ensuring that the candidates have a fair chance to do themselves justice in interview.

31. We are not saying that if candidates do not subjectively think the process fair then it is not within the range of reasonable responses. We are saying that for a process to be objectively fair, circumstances specific to the candidates may need to be taking into account and reasonable steps taken. Perhaps the word "ensure" overstates our reasoning here - "a fair chance to do themselves justice" is what we focused on – the interview process should give the candidates a fair chance to do themselves justice. No reasonable employer would operate a process which does not do that.

32. This sets out our reasoning on what the effect of Mrs Hothi's presence was and why we concluded that any reasonable employer would have removed her from interviewing the candidates.

33. It is true that we concluded that Mrs Hothi did not manipulate the process as alleged by the claimant – see our conclusions in 172. But, in paragraph 173 we conclude that because a fair process was not adopted for both candidates, the dismissal was unfair. We explained elsewhere our conclusion that the process was outside the range of reasonable responses and that was the same process for both candidates. Although the phrase "not a fair procedure" is used in paragraph 173 we think that the use of language elsewhere makes clear that we actually had in mind the test of whether no reasonable employer would have adopted that process.

34. The circumstances were that Mrs Hothi had told the claimant that she would not be on the panel. He had not expected her to be on the panel. He told us – when asked why he had not objected to her presence that he had no say in it. He did not know in advance that she would be there and therefore was

unable to object in advance. It is true that he felt the interview went well but the results were that two long serving employers with no adverse performance issues scored so poorly that they were both assessed as unappointable. They scored identical scores overall. We thought that Mrs Hothi's present on the panel in those circumstances, despite the fact she did not in fact behave improperly, was so significant that the selection process was unfair because of the prospect that neither candidate could do themselves justice. No reasonable employer, given all the other facts in this case that we refer to about the investigation into recruitment practices, would have arranged the selection process in that way.

35. When selection is in effect determinative of whether the claimant should be made redundant (absent any suitable alternative employment), the employer did not act reasonably in treating redundancy as a sufficient reason for dismissal because an unfair selection process had taken place.

36. Turning to the quotation in Sharkey from Paragraph 26, the question of the prospect of there being a dismissal in any event had somebody else been on the panel, is a matter for compensation and it does not go to the fairness of the dismissal itself.

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Employment Judge George

Date: 1 December 2024

Sent to the parties on: 2 December 2024

For the Tribunal Office

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