EMPLOYMENT TRIBUNALS

Claimant: **Ms A. Adegbite**

Respondent: **Ministry of Justice**

JUDGMENT ON THE CLAIMANT'S APPLICATION FOR RECONSIDERATION

The Claimant's application for reconsideration of the judgment dismissing her claims, sent to the parties on 16 October 2024, is refused pursuant to rule 72(1) of the ET rules.

REASONS

1. By email dated 29 October 2024, the Claimant made an application for reconsideration of the Tribunal's judgment dismissing her claims of race discrimination, which was sent to the parties on 16 October 2024

2. Oral reasons were given on the last day of the hearing, 11 October 2024. Written reasons were asked for by the Claimant and sent to the parties on 29 October 2024.

3. The Claimant's application for reconsideration is as follows:[1]

> 'I wish to apply to the Tribunal for the reconsideration of its judgment based on the following:
>
> 1. I am of a black origin.
> 2. Ladyn Mbangu who was dismissed a few weeks after me was also Black.
> 3. The people that perpetuated the acts were non-black.
> 4. I was given less favourable treatment than my non-black colleagues.
> 5. I was treated differently because of my race.
> 6. The Respondent failed to deal with my complaints properly.

[1] Original text retained, unamended

7. ACAS Code of Practice on Disciplinary and Grievance Procedures Was not applied appropriately.'

The law on reconsideration

4. Rules 70 to 73 of the Employment Tribunal's Rules of Procedure 2013, make provision for the reconsideration of tribunal judgments as follows:

> **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.**
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> **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.**
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> **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.**
>
> **(2) If the application has not been refused under paragraph (1), the original decision shall be considered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.**

5. The Tribunal thus has discretion to reconsider a judgment if it considers it is in the interests of justice to do so.

6. Under rule 72(1), I must dismiss the application if I consider that there is no reasonable prospect of the original decision being varied or revoked. It is a mandatory requirement for a judge to determine whether there are reasonable prospects of a judgment being varied or revoked before seeking the other party's response and the views of the parties as to whether the matter can be determined without a hearing, potentially giving any provisional view, and deciding how the reconsideration application will be determined for the purposes of rule 72(2): *T.W. White & Sons Ltd v White*, UKEAT/0022/21.

7. If I consider there are reasonable prospects, I must (under rule 72(2)) consider whether a hearing is necessary in the interests of justice to enable the application to be determined. A hearing would, unless not practicable, be a hearing of the full tribunal that made the original decision (rule 72(3)). If, however, I decide that it is in the interests of justice to determine the

application without a hearing under rule 72(2), then I must give the parties a reasonable opportunity to make further written representations.

8. In *Outasight VB Ltd v Brown* UKEAT/0253/14 the EAT held (at [46-48]) that the Rule 70 ground for reconsidering Judgments (the interests of justice) did not represent a broadening of discretion from the provisions of Rule 34 contained in the replaced 2004 rules. HHJ Eady QC (as she then was) explained that the previous specified categories under the old rules were only examples of where it would be in the interests of justice to reconsider. The 2014 rules remove the unnecessary specified grounds, leaving only what was in truth always the fundamental consideration: the interests of justice. This means that decisions under the old rules remain pertinent under the new rules.

9. The key point is that it must be in the interests of justice to reconsider a judgment. That means that there must be something about the case that makes it necessary to go back and reconsider, for example a new piece of evidence that could not have been produced at the original hearing or a mistake as to the law. It is not the purpose of the reconsideration provisions to give an unsuccessful party an opportunity to reargue his or her case. If there has been a hearing at which both parties have been in attendance, where all material evidence had been available for consideration, where both parties have had their opportunity to present their evidence and their arguments before a decision was reached and at which no error of law was made, then the interests of justice are that there should be finality in litigation. An unsuccessful litigant in such circumstances, without something more, is not permitted to simply reargue his or her case, to have 'a second bite at the cherry' (*per* Phillips J in *Flint v Eastern Electricity Board* [1975] IRLR 277).

10. The expression 'necessary in the interests of justice' does not give rise to an unfettered discretion to reopen matters. The importance of finality was confirmed by the Court of Appeal in *Ministry of Justice v Burton and anor [2016] EWCA Civ 714* in July 2016 where Elias LJ said that:

> **'the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (*Flint v Eastern Electricity Board* [1975] ICR 395) which militates against the discretion being exercised too readily; and in *Lindsay v Ironsides Ray and Vials* [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review.'**

11. In *Liddington v 2Gether NHS Foundation Trust* EAT/0002/16 the EAT, *per* Simler P (as she then was), held at [34] that:

> **'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 by 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.'**

Assessment of the application under Rule 72(1)

12. There is no challenge in the reconsideration application to the Tribunal's conclusion at paragraph 86 of its written reasons that, of the seven allegations of race discrimination, four did not take place and/or were not detriments: Issues 2.2.1 to 2.2.4.

13. There were three other claims.

14. As for Issue 2.2.5, there is no challenge in the reconsideration application to the Tribunal's conclusion at paragraphs 88-90 that it lacked jurisdiction in relation to this claim.

15. As for Issue 2.2.6, the Tribunal concluded at paragraph 101-103 that it was able to reach a positive conclusion as to the reason why Mr Walcott terminated the Claimant's assignment: because he was not satisfied with the her performance and considered that she was unlikely to improve. That was a conclusion which was open to the Tribunal on the evidence before it; there is no meaningful challenge to it in the application. The points made at 1 and 3 of the application cannot apply to Mr Walcott because he is Black. As for point 4, there was no evidence of less favourable treatment. The only comparator relied on by the Claimant was an employee called Ash. We found at paragraph 57 that he was not a relevant comparator because he was not in materially the same circumstances as the Claimant.

16. As for Issue 2.2.7, the Tribunal concluded that the Claimant had not proved facts from which it could reasonably conclude that Mr Jones was influenced by the Claimant's race. There is no meaningful challenge to that conclusion in the application. As for point 3 in the application, the fact that the Claimant is Black and that Mr Jones is not, is not in itself a fact from which the Tribunal could reasonably conclude that his treatment of her was discriminatory (a point made in relation to another claim at paragraph 92). As for point 6 in the application, the fact that the Tribunal expressed a concern that Mr Jones did not interview the Claimant is not sufficient for the claim to succeed; we must be satisfied that the reason why he did not do so was because of race, which we were not.

17. As for Ms Mbangu, the Tribunal declined to consider the assertions the Claimant made in relation to her for the reasons given at paragraph 100 of the reasons: she mentioned her for the first time after the conclusion of her own evidence, while cross-examining one of the Respondent's witnesses. There is no challenge to our conclusion that it was too late for her to do so.

18. Finally, as for point 7, the question of whether the ACAS Code was properly applied would have arisen only if the Claimant's claims had succeeded, which they did not.

Conclusion

19. For all these reasons, I am satisfied that there is no reasonable prospect of the Tribunal varying or revoking its judgment. The application for reconsideration is refused pursuant to rule 72(1). Because I have dismissed it at the first stage

of the process, I have not invited the Respondent to comment on the application.

Employment Judge Massarella
19 November 2024