EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000214/2023

Employment Judge B Campbell

Ms E Stewart **Claimant**

North Lanarkshire Council **Respondent**

JUDGMENT FOLLOWING RECONSIDERATION

The claimant's application for reconsideration of the tribunal's judgment issued to parties on 8 October 2024 is refused.

REASONS

Background

1. The claim was originally presented to the employment tribunal on 10 May 2023. Before that the claimant had initiated ACAS Early Conciliation involving the respondent on 10 February 2023 and an Early Conciliation number and certificate were issued on 28 February 2023.

2. The claim involved complaints of constructive unfair dismissal under section 95(1)(c) of the Employment Rights Act 1996 ('ERA') and both (i) discrimination arising from disability and (ii) failure to make reasonable adjustments under sections 15 and 20/21 respectively of the Equality Act 2010 ('EqA').

3. The claim was defended by the respondent and a response form was presented on 12 June 2023.

4. The claim progressed to a full hearing over nine days in February, May and June 2024. The claimant represented herself and the respondent was represented by Ms Carrick, a solicitor.

5. The tribunal issued a reserved judgment with reasons to the parties on 8 October 2024 (the 'judgment'). The claimant's complaints were refused and dismissed.

6. On 18 October 2024 the claimant submitted a written application for reconsideration of the judgment under rule 71 of the Employment Tribunals (Constitution and Rules of Procedure) 2013 (the **'ET rules'**) – referred to below as the **'application'.**

7. The application was in the form of an email with an attached document in table form extending to 23 pages.

8. The application went on to outline the claimant's reasons why she believed that parts of the judgment should be reconsidered. Essentially the application was in two parts. The claimant first set out some general arguments and then she included a longer list of specific references to passages of the judgment, with comments.

9. Her general points were, in condensed form, as follows:

    a. She *'live[d] with disabilities and the tribunal found that I had one disability'.* That was to say, she suffered from conditions other than a particular medical condition she was relying on as being a disability, namely IBS and high blood pressure. She emphasised that her struggles were not confined to any one condition, but rather a combination of them, or at least more than one of them at the same time. All impact her daily to some extent.

    b. There were *'no reasons provided'* for the tribunal deciding not to uphold her constructive unfair dismissal complaint.

    c. The judgment stated that the claimant did not rely on a 'last straw' as part of that complaint, when in fact she did. The last straw she relied

on was being told that her redeployment to Central Office would only be for 12 weeks, and therefore that she would have to return to her substantive post which would not have changed in any way;

d. The tribunal incorrectly concluded that her application for a new role with another employer was all but confirmed as successful when her secondment to Central Office began;

e. The tribunal wrongly concluded that it was unreasonable for the respondent to be expected to take a substantial proportion of the claimant's duties or workload away from her and pass them to a colleague; and

f. The tribunal did not conclude that suggestions by the respondent to go on sick leave or take a break from work were discriminatory acts. It should have done. Colleagues without disabilities were not advised to do the same.

10. It is not proportionate to repeat or summarise here the further specific issues raised in the application, as they numbered approximately seventy. They were carefully considered. Some are addressed directly in this judgment and others are responded to by way of connecting themes below. Those themes were:

a. That there were inaccuracies within the findings of fact set out in the judgment;

b. There were matters covered in evidence which were not referenced in the findings of fact within the judgment; and

c. The tribunal had made decisions and exercised discretion in relation to the evidence which were not explicitly permitted in the relevant legislation.

11. The application was made within the 14-day time limit contained in rule 71.

12. On initially reviewing the application the tribunal judge did not consider there to be 'no reasonable prospect of the original decision being varied or revoked'

under rule 72(1). Subject to fuller development, and any submissions in reply by the respondent, the claimant had potentially put forward a stateable case.

13. The judge therefore did not refuse the application at that time and asked for the respondent's preliminary view on the application, and sought confirmation from both parties of whether they were content for the application to be determined without the need for a hearing.

14. Ms Carrick for the respondents provided a note summarising the claimant's reasons for resisting the application on 4 November 2024 (the '**objection'**).

15. In summary, the basis for the respondents' objection to the application was:

a. A tribunal should only reconsider an aspect of its earlier judgment if it is in the interests of justice to do so, as confirmed in rule 70 of the ET rules;

b. The tribunal has an overriding objective to deal with cases proportionately. It had already been generous to the claimant to an extent by permitting the hearing to be extended from five days to nine in order to give the claimant more time to present her case. The respondent is a publicly funded body and the cost of replying to the application is significant and relevant.

c. The application discloses no new matters which were not available to be considered at that hearing, and does not suggest that there are any;

d. Similarly, the claim had been extensively case-managed before the full hearing. In that process the claimant was given a good deal of assistance in clarifying her case in a legal sense, in terms of the statutory complaints she was making and the facts and events she alleged which supported them. Despite this she tried in the hearing, and had tried again in the application, to widen or otherwise change the scope of her list of complaints;

e. The tribunal properly applied the law to the facts it found, based on the evidence the parties led. It explained its reasoning clearly. The application identifies no error of law in that process;

f. The principle of finality of litigation should be respected, i.e. the parties deserve closure once a decision has been made and a party who has had a fair hearing of their case should not be given a 'second bite of the cherry' if they are dissatisfied with the outcome; and

g. The above factors point in favour of there being no reasonable prospects of success in the application and no need to consider it on its merits at all, but if that were to be done then the application should be dealt with by way of written submissions and not at a hearing and further directions would be awaited.

16. The tribunal judge agreed to consider the application on the basis of written submissions and gave the claimant an opportunity to provide anything further in support of her application and in light of the respondents' objection by 29 November 2024. The respondent was given until 6 December 2024 to provide any further submissions in reply.

17. The tribunal judge was content that the overriding objective under rule 2 of the ET rules was best served by dispensing with the need for a hearing, taking into account in particular the desire to save expense and further delay, and to deal with issues proportionately. Neither party specifically requested a hearing as opposed to the application being dealt with by way of written representations. The claimant was able to set out her position clearly in writing and it was felt that nothing would be lost by dealing with the application in that way rather than in person.

18. The claimant submitted a further 24-page note of submissions on 29 November 2024. This took the form essentially of a point-by-point response to Ms Carrick's submissions in table format. It repeated the key themes of her initial note. Ms Carrick provided a further note of two pages on 5 December 2024. This also largely re-stated her original points, in a more concise way.

Both were considered in the process of issuing this judgment on reconsideration.

Discussion and decision

Background law

19. The tribunal took note of the judgment of HHJ Tayler in ***T W White & Sons Limited v Ms K White UKEAT/0022/21 and UKEAT/0023/21*** and in particular paragraph 49 which summarised the sequential approach to be taken in dealing with an application for reconsideration.

20. The tribunal considered the following to be relevant to the determination of the application:

    a. If the application was to be considered on its merits, was it 'necessary in the interests of justice' that it be granted, as confirmed in rule 70 of the ET rules and ***Ebury Partners UK Limited v Mr M Action Davis 2023 EAT 40;***

    b. If the application were granted, what further orders or directions should be made.

21. The tribunal understood that the claimant was seeking a finding that she had been constructively unfairly dismissed under section 95(1)(c) ERA and also that the respondent had discriminated against her unlawfully based on her disability, contrary to sections 15 and 20/21 EqA.

The substantive application

22. A tribunal should only reconsider an aspect of its earlier judgment if it is in the interests of justice to do so, as confirmed in rule 70 of the ET rules and ***Ebury Partners UK Limited v Mr M Action Davis*** cited above.

23. In particular the principle of finality of litigation should be respected. A party who has had a fair hearing of their case should not be given a 'second bite of the cherry' simply because they are dissatisfied with the outcome. This is so

as a matter of general fairness, and also because the tribunal's overriding objective is to deal with cases in a proportionate way given their complexity and other factors. Employment tribunals are publicly funded and have finite resources in terms of financial resources and time.

24. Reconsideration as an option is more suitable to deal with procedural mishaps and the like than identifiable errors of law, which are better suited to an appeal to the Employment Appeal Tribunal. It is noted that the claimant has lodged an appeal with the EAT.

25. There is no onus on either party in terms of whether it is in the interests of justice that a tribunal decision be varied revoked under rule 71.

26. Against this background the tribunal considered the claimant's application on its merits.

27. It was not clear why she was raising some of her points in the context of a reconsideration application under rule 70. A number of them amounted to a recap of the evidence she had given in the hearing, but without any additional comment to say, for example, how a particular piece of evidence was not accepted by the tribunal when it ought to have been, or how it should have led to a different conclusion, and in what respect. An application for reconsideration cannot be a blanket request for the tribunal to effectively repeat the process undergone at the full hearing (and immediately after it at the deliberation stage). That would not be proportionate.

28. Similarly, on occasion through the application it appeared that the claimant was introducing new evidence or submissions which could have been done at the full hearing. Reconsideration is not an avenue for doing that.

29. Some other entries were simply comments on the findings made by the tribunal which supplemented but did not necessarily contradict what was said in the judgment. Again they did not explain how the tribunal was believed to have made any kind of error.

30. Not all of the claimant's comments on specific passages in the judgment were accurate. For example, she suggested in relation to paragraph 66 of the

findings of fact that the tribunal had recorded that only she and not an occupational health assessor believed that she was suffering from work-related stress. The judgment clearly stated that *'The Advisor agreed that the symptoms appeared to be caused or aggravated by stress at work.'* Similarly, the claimant said that the judgment did not include the date when she was to return to her substantive post following her secondment to Central Office, when that is clearly recorded in paragraph 79 of the findings of fact – *'This arrangement would be in place from 14 November 2022 until Friday 10 February 2023. The claimant would return to her post on the following Monday, 13 February.'*

31. Of the points raised by the claimant which were seen to be:

    a. properly set out as examples of possible errors in the judgment;

    b. relevant to the issues the tribunal had to decide and not peripheral; and

    c. accurately stated;

the tribunal considered whether they had any merit.

32. A number of the claimant's points are in the nature of challenges to the factual findings the tribunal made. She argued that they should not have been so found, and alternative findings should have been made. Having re-read the judgment, focussing on all of the passages in the judgment which the claimant referred to, the tribunal was satisfied that the findings of fact were supported by evidence and that where there was contradictory evidence on a given point, there was a sound basis for preferring the evidence pointing in one direction to the evidence pointing away from it. It is part of the tribunal's power (and often unavoidable) that it will make a finding by weighing up the evidence for and against a particular fact or event, and decide which is the most probable. It does not need specific authority in each relevant piece of employment legislation to do so. The standard of proof in employment tribunals, as in civil litigation generally, is 'on the balance of probability' – i.e. whether it is more likely than not that something occurred or existed.

33. A particular point the claimant returned to throughout the application was that the tribunal took too narrow a view of what was a disability, and what were the symptoms and effects which resulted for her. The claim proceeded on the basis that the claimant's disability was her diagnosed condition as disclosed in evidence. This was agreed as far back as the second case management preliminary hearing on 11 September 2023. The discussion at that time reflected what the claimant had said in her claim form, where she had defined her disability solely with reference to that condition (in paragraph 18 of the addendum to her ET1 form). Case management orders were issued and complied with on that basis, taking the parties up to the full hearing. Although the claimant was unrepresented, she was given appropriate assistance by the judge at the case management hearing to describe her claim. Out of general fairness, and specifically in line with the tribunal's overriding objective, that medical condition was confirmed as the basis for the disability discrimination complaints going forward. In particular, the principle of fair notice dictates that a party responding to a claim must know the case they have to answer so that they can prepare to do so. It was important for the claimant's position on what was a disability should be clarified at that early stage, and that the case progress on that basis.

34. Following on from this, the claimant's legal complaints which were based on disability could be founded on the existence and effects of the disclosed condition only, and not other conditions or events, such as irritable bowel syndrome or the removal of her gallbladder. This was recognised as being a challenge for the claimant in some aspects of her case, as she could not always ascribe effects to her disclosed condition as opposed to them being caused by another factor, or a combination of causes. At times she disagreed with her own treating medical specialists over what was the cause of a particular symptom.

35. It was therefore the task of the tribunal first to determine what were the effects of the disclosed condition, and then to go on to consider the particular allegations of discrimination arising from disability and failure to make reasonable adjustments in the context of those effects. The claimant clearly

wished the tribunal to consider other factors, and referred back to her extensive impact statement which covered her health more widely. That statement was of clear benefit to the tribunal, as were many documents she clearly took time and care to prepare, but it remained bound to deal with the matter of disability status based on what the claimant said in her claim form at the outset, as confirmed and clarified at the case management hearing.

36. A similar principle applies to other issues now raised by the claimant in relation to (i) what were the discriminatory acts or failures on the respondent's part and (ii) what were the alleged events which constituted a material breach of her contract, entitling her to resign and claim constructive unfair dismissal. Those were also identified as part of case management and the claim proceeded on that basis. Whilst a tribunal is not bound rigidly by an agreed list of issues, it is again important that a case arrives at a full hearing well focussed and does not materially stray beyond its agreed parameters.

37. The claimant asserted that the tribunal had made unsupported findings in relation to a job application she had made to an external employer in the second half of 2022, and the extent to which she had informed the respondent about it. The tribunal found, based on the evidence, that:

a. she had applied for the role some time shortly before November 2022 and by 3 November, when she met with Ms O'Hanlon, she had undertaken a first interview and expected an update within four weeks. She told this to Ms O'Hanlon in the meeting;

b. there was a management support meeting involving the claimant, Ms Swift and Ms Wilson on 10 November 2022 and in that meeting the 12-week secondment to Central Services was offered to the claimant and accepted by her;

c. the claimant was offered the external role, subject to satisfactory references, around 16 November 2022 and she told Ms O'Hanlon this around the same time, as the latter would be one of the referees. A reference was provided on 28 November 2022;

d. by 6 or 7 December 2022 the job offer was confirmed and the claimant was discussing with her managers a possible leaving date.

Each of those findings is supported by witness or documentary evidence, or both. The tribunal is therefore satisfied that the findings were appropriate and that the conclusions drawn from them are also sound. Those were, principally, that the respondent could reasonably assume by the end of November 2022 that the claimant would not be returning to her substantive post following the end of her secondment, and that essentially it did not need to consider either extending the secondment or making adjustments to the claimant's substantive role because of that.

38. The tribunal considered the claimant's assertion that the judgment did not explain in sufficient detail why each of her complaints was decided in the way it was. It remained of the view that there was adequate explanation of its rationale on each point.

39. The tribunal could not find within the claimant's points of argument any valid examples of errors of the type that the reconsideration process was designed to remedy.

Additional matters

40. The claimant raised two other matters in the application.

41. The first was that she had earlier asked for *'consideration to be given to part of my medical information specifically relating to my genetic condition being redacted/protected.'* She explained, giving particular reasons, why she did not want details of the condition to be a matter of public knowledge. She asked that information about the condition could be removed from the version of the judgment which would appear on the government website and be publicly viewable.

42. The second matter was in relation to the identity of her new (and to the tribunal's knowledge current) employer. She asked that this be removed from the public version of the judgment.

43. The respondent did not address these requests in its objection or any follow-up correspondence. **It is therefore requested to provide a response within seven days of the issuing of this judgment** to confirm whether it objects to variation of the original judgment in the above two ways. If it does object, reasons should be given. The proposed variations would be:

    a. To delete references to the claimant's disclosed condition by its name and any related abbreviations, and instead simply to note that the claimant had a medical condition which was disclosed and described in the hearing, thereafter in the judgment to be referred to simply as 'the disclosed condition'. It would remain necessary to describe some of the effects of the condition as part of the discussion in relation to why it met the statutory test of a disability; and

    b. Deletion of references to the identity of the claimant's employer following her resignation from the respondent. It would instead be referred to as a/the 'new employer'.

Date sent to parties **17 January 2025**