EMPLOYMENT TRIBUNALS

Claimant: **Ms J Gill**

Respondent: **BDW Trading Ltd**

Held at: **London South Employment Tribunals**

On: 13 January 2025

Before: **Employment Judge Burge**
Ms C Oldfield
Ms S Dengate

Representation
Claimant: In person
Respondent: Ms Ifeka, Counsel

RESERVED RECONSIDERATION JUDGMENT

1. It is the Judgment of the Tribunal that upon reconsidering the Judgment of the Tribunal handed down to the parties orally on 12 September 2024, and sent to the parties in writing on 20 September 2024, the Judgment is confirmed.

REASONS

2. At the final hearing the Tribunal decided that the Claimant's complaint of indirect sex discrimination in relation to being required to work five days a week in the office/on site with no prior notice from October 2021 succeeded. The other complaints were not well founded and were dismissed.

3. Upon receipt of the Claimant's medical records, disclosed in preparation for the remedy hearing, the Respondent made an application for reconsideration of the Tribunal's liability Judgment.

4. The reason for the Respondent's application was that the Claimant had given evidence to the Tribunal that she was effectively a single parent and

was separated from her partner from July 2021 through to after she resigned. The Tribunal had found that she had suffered individual disadvantage. However, the Claimant's medical records show three entries indicating that the Claimant was still living with her partner, the final entry on 10 November 2021 saying that everything was stable.

5. The Employment Tribunal Rules of Procedure 2024 provide:

> *68.—(1) The 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.*
>
> *(2) A judgment under reconsideration may be confirmed, varied or revoked.*
>
> *(3) If the judgment under reconsideration is revoked the Tribunal may take the decision again.*
> *In doing so, the Tribunal is not required to come to the same conclusion.*
>
> *Application for reconsideration*
>
> *69. Except where it is made in the course of a hearing, an application for reconsideration must be made in writing setting out why reconsideration is necessary and must be sent to the Tribunal within 14 days of the later of—*
> *(a) the date on which the written record of the judgment sought to be reconsidered was sent to the parties, or*
> *(b) the date that the written reasons were sent, if these were sent separately.*
>
> *Process for reconsideration*
>
> *70.—(1) The Tribunal must consider any application made under rule 69 (application for reconsideration).*
>
> *(2) If the Tribunal considers that there is no reasonable prospect of the judgment being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application must be refused and the Tribunal must inform the parties of the refusal.*
>
> *(3) If the application has not been refused under paragraph (2), the Tribunal must send a notice to the parties specifying the period by which any written representations in respect of the application must be received by the Tribunal, and seeking the views of the parties on whether the application can be determined without a hearing. The notice may also set out the Tribunal's provisional views on the application.*
>
> *(4) If the application has not been refused under paragraph (2), the judgment must be reconsidered at a hearing unless the Tribunal considers, having regard to any written representations provided under paragraph (3), that a hearing is not necessary in the interests of justice.*
>
> *(5) If the Tribunal determines the application without a hearing the parties must be given a reasonable opportunity to make further written representations in respect of the application.*

6. *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489 held that it was possible to consider fresh evidence on reconsideration if:
   (a) that the evidence could not have been obtained with reasonable diligence for use at the original hearing
   (b) that it is relevant and would probably have had an important influence on the hearing; and
   (c) that it is apparently credible

7. This was confirmed in *Outasight VB Ltd v Brown* UKEAT/0253/14 (21 November 2014, unreported) and *Dundee City Council v Malcolm* UKEATS/0019/15 (9 February 2016, unreported)).

8. The Tribunal decided it was in the interests of justice to reconsider the Judgment and hear the Respondent's application out of time. In accordance with *Ladd*:

    a. The evidence from the GP could not have been obtained by the Respondent with reasonable diligence. It was for the Claimant to obtain and disclose the evidence. The Claimant is a litigant in person and the original Case Management Order was not clear about what relevance the medical records had to the issues.

    b. The evidence appeared to contradict the Claimant's evidence to the Tribunal and so it was relevant and was likely to have had an important influence on the hearing; and

    c. The evidence was credible - it was her GP record.

9. The Tribunal therefore granted the application for the new evidence to be adduced, the Claimant's witness statement to be admitted and for her to be examined on the evidence and witness statement.

10. The Respondent's reconsideration application is premised on the inconsistency between the Claimant's evidence to the Tribunal and the medical evidence which raises serious questions as to:
    (i) the Claimant's credibility as a witness of truth;
    (ii) the Tribunal's findings of fact; and
    (iii) the Tribunal's finding on liability.

11. The Claimant objected to the application, submitting that what she told the GP was incorrect but the evidence she gave to the Tribunal was true.

Findings of Fact

12. In its Judgment the Tribunal found that

> The Claimant is the carer for her young school age daughter. She separated from her partner in July 2021, although she did not tell anyone at Barratts. The Claimant says that this meant that she was effectively a single parent. There was also a complication in that the Claimant lived in St Albans and she had been contractually promised a company car which had not yet arrived. It would have taken the Claimant 1 ½ hours to commute to the Brentford Office without the car on public transport and she had to perform some school pick ups and drop offs throughout the week for her daughter. [paragraph 22]
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> …
>
> The Claimant did not attend the office two days a week from the week commencing 6 September 2021 as she had said she would. The

> Claimant's evidence to the Tribunal is accepted that even if her company car had arrived she still would have found it difficult. There was a shortage of childcare, there were long waiting lists for full time child care. In September she only had 2 days a week cover. She would often do the school runs herself and work earlier or later in the day to compensate. She also relied on friends to help. Mr Power's evidence is accepted that "as long as the work was getting done, I don't mind where" it is being done. [paragraph 25]
>
> …
>
> … the Claimant did not work from the office the following week as she had promised. She did however continue visiting site twice a week or when needed. She would sometimes work in the morning or the evening. Evidence was provided to the Tribunal of a few emails showing that the Claimant had sent short emails in the morning or evening outside of working hours. The Claimant also gave evidence that she would often do school drop offs or pick ups and would make up for the lost time in the morning or evening. The Tribunal rejects her contention that she was overworked, the Tribunal finds that she had a flexible arrangement whereby she could do pick ups and drops offs and she would make up time outside of the working day. She was in a professional role and her job as Technical Manager of the issues relating to Lombard Wharf with its issues since 2017 was a busy one. [paragraph 28]
>
> …
>
> On 21 October 2021 Mr Power and the Claimant had a conversation. The Claimant gave evidence, that is accepted, that she was in shock during the call and she does not really remember it. Mr Power gave evidence, that is accepted, that he had spoken to Mr Weaver and Ms Foley about what to do in light of his view that the Claimant's performance issues had continued – she had still never come into the office and her work was not being completed. Mr Power gave evidence that they decided that in order to properly support the Claimant to improve, they would ask her to come in to the office or be on site 5 days a week. In evidence to the Tribunal Mr Power said "I called the Claimant to discuss and explained my rationale – I told her that her work was not being done and that we needed to get a handle on it." Mr Power's oral evidence confirmed that this was him telling her, there was no discussion. When asked by the Tribunal Mr Power said that the Claimant did not challenge him during the telephone call. The Tribunal finds that on the telephone call Mr Power mandated the Claimant to come into the office 5 days per week going forward (two days in the office and three days on site) from 9 – 5.30. The Claimant took this to mean from the following Monday (25 October) and this was confirmed on Friday 22 October by Ms Foley, HR. The Tribunal finds that Mr Power knew that the Claimant would be unable to comply with the directive due to her childcare arrangements. [paragraph 35]
>
> …

13. The Tribunal concluded that:

> …the Claimant's allegation that she was required to work two days or more in the office between August – October 2021 did not happen. …The reason why he asked her if she had worked over the weekend was because she had said she would, in the context that he allowed her to work flexibly to accommodate her difficulties with childcare…[para 94]
>
> … She told him "I have had issues at home" she has said "I'm really struggling with this at the moment" and yet no enquiry is made as to her welfare and whether there is anything that could help from a work perspective, instead he puts pressure on her to deliver "no excuses". …[para 95]
>
> …When the Claimant gets mandated to come into the office 5 days a week at short notice, Mr Power knows that she cannot do this. Mr Power knows that at that time she had some child care for some days but there were other days where she did pick ups and drop offs and worked back the time earlier/later in the day...[para 96]
> …
> The case of Dobson makes it clear that the Tribunal should take judicial notice that women, because of their childcare responsibilities, were less likely to be able to accommodate certain working patterns than men. The Tribunal takes judicial notice in this case. Women, because of their childcare responsibilities, would be less likely to be able to comply with the requirement to work 5 days from the office/on site. Ms Ifeka submits that the Claimant appears to be saying that single mothers are less likely to be able to comply. The Tribunal rejects this. The Claimant is saying that women are less likely to comply and the Claimant explains her particular disadvantage was because she was a single mother without childcare in place to cover 5 days a week working 9 – 5.30 in the office which was compounded by the fact that Barratts had not yet provided the company car she was entitled to. The Tribunal concludes that women suffer group disadvantage and the Claimant suffered particular disadvantage. [101]
> …
> When the Claimant did not appear to be delivering Mr Power set weekly meetings to go through tasks. From August 2021 he knew that the Claimant had a young school age daughter, the Claimant had problems with childcare, that there were "issues at home" and she was "really struggling with this at the moment". He was flexible with the Claimant's hours, she could do some drop offs/pick ups and could make back the hours. However, Mr Power's view became that she was not delivering enough in relation to Lombards Wharf. [103]

14. In relation to justification the Tribunal concluded

> In the knowledge that the Claimant could not work on site/in the office 5 days a week from 9 – 5.30, nevertheless Mr Power and HR mandated her to do it. The Claimant's contract stated she would be based in the office 5 days a week and work between 9 - 5.30 at least. However, in the context of the home working arrangements during

covid and the introduction of a hybrid way of working for roles such as the claimant's, a sudden move to enforce the 5 day working on site/ in office was discriminatory. There was no consideration of any other option. There was no consideration of her issues with childcare at all. Could the proper and efficient functioning of its workforce to the performance standard required have been achieved in a less discriminatory way? The Tribunal concludes that it could. Had Mr Power, with the assistance of HR, had a conversation with the Claimant about what was and was not possible in respect of childcare and with that in mind, given her reasonable notice to enable her to put childcare in place then the legitimate aim could still have been achieved but in a less discriminatory way. [104]

The Claimant's claim of indirect discrimination in relation to the requirement to work 5 days in the office/onsite therefore succeeds.[105]

15. The GP records are at odds with the evidence that the Claimant gave in the liability hearing. The notes have three entries whereby the Claimant tells the GP that she is still with her partner. The Tribunal did consider whether this meant that the Claimant's credibility as a witness of truth was undermined but concluded that it did not. The Claimant gave evidence, that is accepted, that she separated from her partner in July 2021 and that her ex partner would come and go and did not help her with childcare. The Claimant says that she told the GP that her partner was still living at home because she was concerned that her health and lack of support might cause the GP to question her ability to care for her child, although looking back the Claimant can see that this was not logical nor rational. The Tribunal accepts this evidence and accepts that at the time the Claimant was depressed, anxious and not sleeping and thinking properly.

16. The Tribunal also concludes that the new information does not affect its findings of fact and finding in liability. The Tribunal's findings and conclusions were based on the Claimant's issues with childcare. That does not change. The Claimant suffered particular disadvantage - she had a young school age child, had issues with childcare and was unable to comply with the PCP. Under Rule 68(2) the Judgment is therefore confirmed.

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Employment Judge Burge
Date: **16 January 2025**

JUDGMENT SENT TO THE PARTIES ON
28 January 2025
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