EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Chmielnik**

Respondent: **Stanwell Road Surgery**

JUDGMENT

1. Time for presentation of an application to reconsider the reserved judgment is extended to 22 March 2022.

2. The claimant's application dated 22 March 2022 for reconsideration of the judgment sent to the parties on 16 February 2022 is refused.

REASONS

There is no reasonable prospect of the original decision being varied or revoked, because:

1. The reserved judgement in the present case was sent to the parties on 16 February 2022. The claimant applied for an extension of time to make an application for reconsideration of that judgement on 28 February 2022, within the 14 day time limit for reconsideration. The basis of the application was that she had experienced anxiety when she read the reserved judgement and realised that her claims had been dismissed. This coincided with the start of the new permanent job. That anxiety triggered the other health conditions which are set out in paragraphs 1 to 3 of her witness statement for the substantive hearing and she wished to concentrate on seeking to learn the tasks necessary for new role. She asked for an extension of time to 21 March 2022.

2. The respondent objected to this application because the claimant stated that her anxiety was "related to the abuse I experienced from the respondents' hands". They argued that for her to suggest that some 2 ½ years after her employment ceased she was still suffering abuse and anxiety was not plausible, particularly given that she had apparently been fit to look for work. They argued that she had not demonstrated a

reasonable excuse for not being able to present the reconsideration application within the normal 14 day period.

3. Unfortunately this correspondence was not immediately referred to me. I did not see it until after 21 March 2022 when the claimant's application for reconsideration was received by the tribunal. The respondent put in brief objections by email dated 22 March 2022.

4. The two-stage process for a reconsideration application is that set out under rule 72 of the Employment Tribunal Rules of Procedure 2013. At this first stage, the question for me consider is whether there are no reasonable prospects of the original decision being varied or revoked. If that is my conclusion then the application shall be refused. Otherwise case management orders shall be made for a response, any further submissions, and, potentially a hearing.

5. I have decided to extend time for this reconsideration application to be made. The claimant has set out some basis for the application, namely the impact of the medical conditions of which the tribunal was already aware. I am persuaded that, in those circumstances, there should be an extension of time so that the claimant has a reasonable opportunity to formulate the basis of her application.

6. The application for reconsideration is 39 pages long. The claimant directs the Tribunal's attention to the case of P J Drakard and Sons Ltd v Wilton [1977] ICR 642 EAT. This appears to state the before refusing an application for what is now called reconsideration the Tribunal must give an opportunity to the applying party to elaborate in writing on the grounds. The claimant has given full details of the basis of the application in the 39 page document and therefore appears to have had that full opportunity.

7. I have read the application in full and considered it in the round. I have concluded that there are no reasonable prospects of the judgment being varied or revoked because the claimant repeats arguments which she either made or had the opportunity to make at the final hearing. Set against that general point, I particularly note the following;

    a. The claimant refers to the case of Barber v Somerset County Council [2004] ICR 457 a decision of the House of Lords. That decision sets out guidance on the nature of the overall test of an employer's duty of care towards employees. It is applicable to a claim that an employer has failed in that duty and caused personal injury to the employee. That is not a type of claim which the Employment Tribunal has jurisdiction to hear.

    b. The claimant argues that the conduct of the respondent should be regarded as being a pattern of behaviour. She repeats arguments that she made at the final hearing that she had been singled out on many occasions over the course of the three years of her employment on grounds of her race.

c. In particular, she points to the dismissal of her complaints of race discrimination in respect of the 4 July 2017 incident on the basis that it was out of time and argues that it was part of a pattern of behaviour or culture of behaviour. From page 3 to page 4 she sets out specific incidents which she argues amount to this pattern or culture. Some incidents were within the agreed list of issues and some were not. Those issues were set at a preliminary hearing which took place on 8 December 2020.

d. I do not read the application for reconsideration to include an application to amend her claim (after the judgment has been delivered) and remind myself that the claimant made an unsuccessful application to amend the claim to add a disability discrimination complaint at an earlier stage in the proceedings. Clarification of the issues in this case took place after active management by the Tribunal as to what those issues should be.

e. The race discrimination and harassment complaints other than that based on the meeting on 4 July 2017 were not made out for reasons set out in paras.186 to 198 of the reserved judgment. Since there was only one successful complaint of race discrimination there was no other *unlawful* act for it to be potentially linked to form a continuing course of conduct.

f. In order for the claimant to be able successfully to argue that there was a pattern or culture of behaviour that amounted to a continuing course of conduct or continuing act extending over a period that ended not more than three months before presentation of the claim, the incident on 4 July 2017 would have to be capable of being linked to other acts which had been found to be unlawful under the Equality Act 2010. Therefore this argument has no prospects of succeeding unless the claimant can succeed in overturning the Tribunal's conclusion that the other incidents about which she complained were acts of discrimination or otherwise unlawful under the EQA.

g. At the bottom of page 6 of the application, the claimant makes a general allegation that the respondent,

> "effectively prohibited me from sharing the workload equally with my other colleagues; prohibited me from developing within my job equally to others; prohibited me from progression within the business structure equally to others; prohibited me from working within health and safety standards;… Did not care to maintain my personal files in right way and effectively deleted very important reason case along with medical for."

h. To the extent that these allegations fell within the issues set out in the case management order of 8 December 2020 these were considered within our reserved judgement. To the extent that they did not fall within those issues they were not within the scope of

the tribunal claim and could not be pursued by the claimant without a successful application to amend it.

i. On page 7 the claimant seeks reconsideration of "my claims regarding the usage and location of my specialist equipment that was quick very quickly dismissed". This did not fall within the scope of the list of issues and was not an issue which we needed to consider. That factual matrix may well have fallen within a disability discrimination claim had such claim been permitted to be joined but the application to do so was rejected in the middle of 2021.

j. The claimant also argues that the respondent's witnesses gave untruthful evidence either orally or in writing. She continues to point out instances where she disagrees with evidence given on behalf of the respondent. She comments on the way we express our reasons in terms which essentially repeat arguments that she made at the final hearing. We made the findings we did for the reasons we outlined taking into account the arguments of the claimant about the credibility of those witnesses and the claimant does not now raise any new evidence which could not with reasonable diligence have been available at the time which would be likely to affect those findings.

k. In particular, the claimant criticises Mrs Horsley's evidence about points of detail concerning the procedure for handling deliveries that need to be refrigerated, including on page 31 of the application. An important reason for our conclusions on the health and safety claim is the finding (reserved judgment paragraph 177) that the claimant did not believe that Mrs Horsley would put patients at risk and this meant that she could not show that she had reasonable grounds for thinking that circumstances existed which were harmful or potentially harmful to health and safety. She therefore did not have the protection of s.100(1)(c) ERA. In the light of that finding we did not need to engage with much of the evidence about exactly what occurred in relation to that incident.

l. The claimant's arguments at page 33 to 34 concern the claimant's now state of belief not what she believed at the time or what she drew to the respondent's attention at the time and it is only that which could have been responsible for actions which caused her to resign.

m. The claimant argues that the fact that she was managed by a different individual at the time she was questioned in relation to the complaint by SG than was AT when the claimant complained about the latter's behaviour was not relevant and did not absolve the employer of liability. We reached the conclusion that this was a material circumstance within the meaning of s.23 of the EQA which meant that SG was not suitable to be an actual comparator. We were aware that the existence of a different decision-maker need not prevent the comparison being a valid one (Olalekan v

Serco Ltd [2019] IRLR 314), but on the facts of the present case we concluded that it did for reasons which we have given. The claimant may disagree with that decision but she has not raised anything which means there is a reasonable prospect of that conclusion being varied.

n. She argued that it was the respondent's own failings that led to the non-availability of documents and they should not benefit from that failing via conclusion that they would be prejudiced in having to respond to an allegation based upon it. (RR see page 12 of the application). This is a valid point but it was not the only reason why we were of the view that the respondent had shown that they were prejudiced by the claim based upon the 2017 incident being brought out of time (see reserved judgment para.201).

o. The claimant returns to the explanation for that delay at page 35 where she says that at the time she had not wanted to believe that the actions were race discrimination and was afraid of being dismissed "as very inconvenient employee". The claimant had the opportunity to raise arguments in relation to whether it would be just and equitable to extend time at the final hearing and any such arguments could and should have been raised then.

p. I accept that there is a typographical error in that at paragraphs 44 and 54 AT is referred to as being a prodigy of a particular doctor when the claimant's evidence was that she was referred to as a protégé.

q. She asks for the basis of the conclusion that Ms Happs did not make that statement about AT. It was that we accepted the respondent's evidence about AT's previous work experience and the way in which AT was recruited and that was inconsistent with AT being a protégé of a single doctor. Although we found the claimant to be doing her best to give honest evidence to the Tribunal and found Ms Happs to have imperfect recollection in some respects, we did not find Ms Happs to be a dishonest witness and, given the true state of affairs it was improbable that she had made that comment.

r. At page 21 and 24 and 27 the claimant takes issue with the finding that the role that she was engaged in (that of receptionist) was a valid material difference with the comparators and argues that in SG's case this was not information that she had known prior to the hearing. She does not, however, provide any basis for thinking there are reasonable grounds that we might conclude that SG was in fact a valid comparator or that any difference in treatment was on grounds of race. The claimant argues that she was more experienced than SG but in a discrimination claim it is not whether it was unfair that she did not have the same administrative opportunities as someone engaged as a receptionist/administrator. The question is whether there are grounds for thinking that she was treated less favourably than SG

on grounds of race rather than on grounds of the role which each was employed.

s. The claimant argues that the consequence of the judgment is that the Tribunal has shown leniency towards the respondents' wrong actions and inactions. The Tribunal upheld the claimant's unfair dismissal claim based upon the allegation that the respondent's conduct had breached the implied term of mutual trust and confidence. What the Tribunal did not find made out was the claimant's discrimination and harassment complaints or automatically unfair constructive dismissal complaint.

t. In general, the arguments raised by the claimant either were or could have been raised at the final hearing. For example, where the claimant criticises our conclusions that there was nothing from which we could infer that AT would behave differently to a British receptionist colleague we were aware of the claimant's evidence that AT only spoke that way to her. We did not have evidence of any comparable situation in which AT might have been provoked by a British colleague and noted that AT had complained about bullying by a British colleague. These were reasons to conclude that the claimant had not shown anything from which it might be inferred that AT targeted her because of her race.

8. The claimant is understandably of the view that the respondent should have managed her better and should have managed the situation better but the allegation with which we were concerned was whether there treatment of the claimant was unlawful race discrimination or harassment or whether it was motivated by a health & safety concern. Those allegations were rejected for reasons set out in the reserved judgement.

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Employment Judge George

Date 28 June 2022

JUDGMENT SENT TO THE PARTIES ON

1 July 2022

FOR THE TRIBUNAL OFFICE