EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
EQ	and	Moran's Eating House Ltd

Heard at: Bristol (in public, by video) **On:** 20 February 2024

Before: Employment Judge Livesey

Appearances
For the Claimants: Mrs Hodgson, the Claimant's mother.
For the Respondent: Mr Mitchell, counsel

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The Respondent's application for reconsideration is allowed and the Judgment of 5 February 2024 is revoked.

REASONS

Introduction

1. The Respondent applied for a reconsideration of the Judgment dated 5 February 2024 which was sent to the parties on the same day. The grounds were set out in its application of 12 February 2024. The Claimant's objections were set out in Miss Hodgson's email of 12 February also.

Principles

2. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). Under rule 71, an application for reconsideration under rule 70 must have been made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The application was therefore received inside the relevant time limit.

3. The grounds for reconsideration were only those set out within rule 70, namely that it was necessary in the interests of justice to do so. The earlier

case law suggested that the 'interests of justice' ground should have been construed restrictively. The Employment Appeal Tribunal in *Trimble-v-Supertravel Ltd* [1982] ICR 440 decided that, if a matter had been ventilated and argued at the hearing, any error of law fell to be corrected on appeal and not by review. In addition, in *Fforde-v-Black* EAT 68/80 (where the applicant was seeking a review in the interests of justice under the former Rules which were analogous to a reconsideration under the current Rules) the EAT decided that the interests of justice ground of review did not mean "*that in every case where a litigant is unsuccessful he is automatically entitled to have the tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in the even more exceptional case where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order*".

4. More recent case law has suggested that the test should not have been construed as restrictively as it was prior to the introduction of the overriding objective (which is now set out in rule 2) in order to ensure that cases were dealt with fairly and justly. As confirmed in *Williams-v-Ferrosan Ltd* [2004] IRLR 607 EAT, it was no longer the case that the 'interests of justice' ground was only appropriate in exceptional circumstances. However, in *Newcastle Upon Tyne City Council-v-Marsden* [2010] IRLR 743, the EAT stated that the requirement to deal with cases justly included the need for there to be finality in litigation, which was in the interest of both parties.

5. An error by a party's representative would not ordinarily give rise to grounds for reconsideration (*Newcastle Upon Tyne City Council-v-Marsden* [2010] ICR 743), but Underhill J stated that there was a 'broad statutory discretion' based upon a 'careful assessment of what justice required'. That approach was recently restated in *Phipps-v-Priory Education* [2023] ICR 1043 in which the Court of Appeal held that the injustice caused to the innocent party by having the case reinstated, was outweighed by the fact that the party whose claim had been struck out had been wholly unaware of the negligence of the instructed representative. The interests of justice test was said to have been "*broad-textured, giving the employment judge a wide discretion*".

Background

6. By a claim form presented on 28 August 2022, the Claimant brought complaints of unfair dismissal, discrimination on the grounds of age and/or sex and breach of contract relating to notice.

7. A Response was received on 3 October 2022 and the matter proceeded to a Case Management Preliminary Hearing which was conducted by Employment Judge Dawson on 14 June 2023.

8. The Judge clarified the issues and issued case management directions by consent. A final hearing was listed for five days between 19 and 23 February

2024. Anonymisation and restricted reporting orders were made. Some of the complaints were withdrawn and a separate judgment was issued. The claims which remained were four allegations of harassment on the grounds of sex and/or age (some of which contained a number of sub-allegations) (s. 26).

9. Under the Case Management Order, disclosure was due to have taken place by 19 July 2023. The Claimant complained to the Tribunal that the Respondent had not complied with that direction and the Respondent was asked to comment by 25 September 2023. In reply, it maintained that it did not have the type of documents which might ordinarily have been disclosed in such circumstances (the Claimant's contract, personnel file or any policies). It was nevertheless asked to confirm that that was the case by 9 November in the Tribunal's further correspondence of 2 November.

10. On 29 December, the Claimant indicated that she had heard nothing further from the Respondent. It had not replied to the Tribunal's email of 2 November, no documents have been supplied and no bundle had been put together (the date for the hearing bundle had been 15 September and witness statements were supposed to have been exchanged on 15 October).

11. The Regional Employment Judge decided to vacate the hearing on 8 January 2024. He indicated that he was considering striking out the Response because the Respondent had breached Case Management orders and did not appear to have been pursuing its defence actively. It was required to write to the Tribunal by 11 January if it opposed such a step.

12. No response was received and the Response was duly struck out on 5 February 2024.

13. On the same date, DAS Law wrote to the Tribunal to request copies of all of the relevant correspondence on file since September. It indicated that it would be making a reconsideration application once the timeline had been examined. That application was then made on 12 February.

Discussion

14. Both parties produced written skeleton arguments in support of their positions. They added to them orally during the hearing. The Associate with current conduct of the case at DAS Law, Mr Jones, also produced a witness statement.

15. The Respondent's application explained what had gone wrong. Mr Fletcher was the Associate who was assigned the file within DAS Law. The solicitors' investigation revealed that he had erroneously 'concluded' the case on the internal case management system (Visual Files or 'VF') on 10 January 2023. His note indicated that the claim had settled "*for a factual reference*". 4Data reports are generated on each case for Team Leaders to have key data in order to discuss workloads with their teams. Once a file has been 'closed', the

key dates screen is not shown in any 4Data report. The team leader would not therefore have seen that case had not actually been concluded.

16. After the July Case Management Preliminary Hearing, further mistakes were made; the key case management dates were not added to the DAS prompt system and the Respondent was not sent a copy of Counsel's note following the hearing and was itself entirely unaware of the directions it needed to comply with or, indeed, of the dates of the final merits hearing.

17. Mr Fletcher left DAS in September and the usual fail safes that would have existed on the system, had the case not been closed and/or had the dates been uploaded, were not then in existence. Because the case was considered 'closed', it was not reallocated initially to someone else in the Firm. The Regional Employment Judge's strike out warning of 8 January 2024 went to the new associate who had, by then assumed conduct of the case (Mr Gwynne-Thomas), but not the Respondent.

18. DAS Law accepted blame within its application; "*for the avoidance of doubt, it is admitted that there was serial and serious non-compliance with the Orders of the Tribunal both prior to the departure of JF* [Mr Fletcher] *and after*". It did not assert that the Tribunal had been wrong to have struck out the Response in the circumstances.

19. The Respondent's case was that it was in the interests of justice to allow it back in. The case involved serious allegations of sexual harassment against the Claimant who was then a minor. Those allegations needed to be tested before the Tribunal. The alleged perpetrator remains employed by the Respondent, was identifiable and was not himself covered by any order under rule 50. A judgment could have a significant personal impact upon him and wider business consequences for the employment of others.

20. The Respondent itself had not been guilty of any of the problems in the case. The blame rested with DAS Law. Further, the errors which were made had been negligent and/or administrative in nature. It could not have been said that there had been deliberate or contumelious default.

21. It argued that a fair trial was still possible; the hearing bundle that had been prepared by Mr Fletcher was only 102 pages long (albeit that it had not been sent to the parties). Only witness statements needed to be prepared.

22. The Claimant was obviously prejudiced by the delay, but that which she suffered was outweighed by the prejudice suffered to the Respondent if the Judgment was to stand, particularly given the serious, personal nature of the allegations.

23. The Claimant's objections were understandably strong. In the email of 12 February 2024, Miss Hodgson referred to the Respondent's delays having been "*inordinate and inexcusable*". But whilst the email criticised DAS'

handling of the litigation, which was not in dispute, it did not set out any particular matters of prejudice or hardship that the Claimant might have faced were the Judgment to have been revoked.

24. In her Skeleton Argument, Miss Hodgson's referred to the effect of the alleged harassment upon the Claimant in 2022. A more pressing concern now was the fact that the Claimant was facing her A-level exams in the summer.

25. Although the claim was rather stale and many of the allegations turned upon oral exchanges and/or momentary incidents, they were due to have been determined in February 2024, approximately two years after many of them had occurred. A new hearing could have been listed within a relatively short timeframe and there was nothing to suggest that the additional delay would have caused any identifiable further evidential prejudice.

26. Taking all of these matters into account, it was in the interests of justice to revoke the judgment. The Claimant has made serious allegations and a fair trial, at which they would be properly tested, was still possible. Miss Hodgson did not assert otherwise. The hardship experienced by the Respondent in the circumstances would have been greater had the Claimant been left with her windfall judgment. Critically, the Respondent itself had not been shown to have been itself at fault for the problems which had arisen in the case and a re-listed hearing could take place within a few weeks, depending upon the Claimant's preference (see the Case Management Order of even date).

Conclusion

27. Accordingly, the application for reconsideration pursuant to rule 72 (1) was allowed and the Judgment was revoked.

28. For the avoidance of doubt, it was not reasonably practicable for the Judge who took the original decision, Regional Employment Judge Pirani, to conduct the reconsideration of it.

Employment Judge Livesey
Date: 20 February 2024

Judgment sent to Parties: 22 February 2024

For the Tribunal Office