EMPLOYMENT TRIBUNALS

Claimant: Mr S Chadwick

Respondent: Sainsbury's Supermarkets Ltd

HELD AT: Manchester **ON:** 7 April 2017

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: In person
Respondent: Ms Danvers, Solicitor

JUDGMENT ON APPLICATION FOR RECONSIDERATION

It is judgment of the Tribunal that the application for reconsideration is dismissed, and the judgment of the Tribunal sent to the parties on 25 October 2016 is confirmed.

REASONS

1. The Tribunal has today been considering an application by the claimant for reconsideration of its judgment sent to the parties on 25 October 2016, in which the claimant's claims were dismissed pursuant to rule 37 of the 2013 Rules of Procedure as having no reasonable prospects of success. That judgment was issued orally on 6 October 2016, and then confirmed in writing, the Tribunal having heard the claimant's complaint of constructive unfair dismissal over 4, 5 and 6 October 2016. In the hearing the claimant gave evidence, and had concluded his case when, of its own motion, the Tribunal raised with the parties whether the claimant had any reasonable prospect of showing that the alleged final straw that he was relying upon in support of his complaint of constructive dismissal could in fact be so categorised so as to give him any reasonable prospects of establishing that he was constructively dismissed. As his case depended upon establishing that, the Tribunal, having examined his evidence in relation to that particular issue and that issue only, concluded that he had no reasonable prospects of establishing such an incident as

constituting a last straw and consequently issued its judgment dismissing his claim for that reason.

2. That afternoon, as he was leaving the Tribunal, the claimant in fact contacted the Tribunal by email, an email that he sent at 14:20, in which he said after some gracious and complimentary comments about the handling of his case over the last three days, some comments he went on to make in relation to the evidence that had been given. In particular he said this:

> *"It occurred to me as I was coming home that it had not been clear why a conversation between Julia and myself and Alex and myself were implicitly different irrespective of personal relationships. With Alex it could only be about a disciplinary procedure. If I wanted to appeal that decision it would go to Julia. With Julia it would only have been a coaching conversation. Julia does not disciplinary investigations as she is the line of appeal. If Julia issues warnings the line of appeal becomes Neil Chason and that would not have been applicable, so if it had been Julia than yes, I wouldn't have walked out but it wouldn't have been a disciplinary meeting it would have been a coaching conversation."*

3. He went on to raise the questions to whether the judgment was final and whether the Tribunal could reconsider it, but those were the points that he wished to make and made very shortly after leaving the Tribunal hearing that lunchtime.

4. The Tribunal took that as a potential application for reconsideration, but, as the written judgment had not been sent to the parties at that time it was not acted on immediately but the claimant was advised to await the written judgment before pursuing that application, which he duly did. Consequently he sent to the Tribunal a fully documented application for reconsideration which he sent on 7 November 2016. This runs to some 20 paragraphs, and the claimant has used that as the basis for the application today and has elaborated upon it in his oral submissions today.

5. The respondents responded, and by a letter dated 24 November 2016 they advanced their contentions in opposition to the claimant's application and have again attended today, represented on this occasion by Ms Danvers, who did not appear on the last occasion, but she has spoken to that document, and indeed added further grounds of opposition in relation to the application.

6. In terms of the written application, it can perhaps be broken down into various sections. In paragraphs 1-7 the claimant sets out what he has described today as "the guts of the application" which very much echo what he said in his email on 6 October, in relation to the difference in role between the two individuals concerned, Julia and Alex, and the paragraphs referred to very much deal with that aspect of his application. Paragraphs 8-12 go on to deal with what be termed "more procedural and legal issues" in relation to case law, and the way in which the matter was put in the List of Issues, but thereafter paragraphs 13-16 relate to the claimant's health issues and in particular his condition of depression, and then in relation to paragraphs 17-18 the claimant again goes on to deal with other issues relating to the events of 19 December, which was of course the day of his resignation. Then he concludes, ultimately, in paragraph 19 with some general observations in relation to the striking out, and submits that the Tribunal only did so on the basis of facts that, as he puts it, "it misinterpreted". So that, as it were, is the written basis for his

application, and today in his oral submissions he focussed largely on what, as I say, he has termed the "guts" of the application, which is the significance of the respective roles of Alex and Julia, to which I will come in due course.

7. The judgment of the Tribunal striking out the claimant's claims was made on a very narrow basis, but one which was, the Tribunal considered, fatal to his claim, and indeed the claimant has not sought to argue that the Tribunal was wrong to take that approach in terms of the significance of the issue. He simply ultimately argues that the Tribunal should not have come to the view that it did. But the reason why the issue in question was so important was that the claimant's case depended on establishing that there had been what lawyers call a "last straw". The claimant in his complaint of constructive unfair dismissal relied upon a number of actions taken against him , and conduct towards him largely on the part of Alex McKendry, and as set out in the Tribunal's previous judgment that went on over a number of months, and prior to the events of 19 December 2015 the most recent incident had been in respect of what had been termed "the wine stunt" and the way in which Mr McKendry had, in the claimant's view, thwarted the claimant's efforts to have a good showing on that particular promotion. The Tribunal heard all his evidence which, of course, for the purposes of the rule 37 consideration, it accepted at its highest in relation to that conduct.

8. Crucially, thereafter the event which made the claimant resign, because he did not resign before then, whatever happened, was that on 19 December when he attended a meeting with Mr McKendry, and indeed his resignation took place in that meeting, although it was subsequently confirmed in writing by him on 24 December. It is common ground in the claimant's case that he walked out; he resigned in that meeting with Mr McKendry. Consequently the claimant's case was, and he has not sought to dissent from this, always that the meeting on 19 December with Mr McKendry in response to which he resigned, and in response to which he was entitled to resign.

9. Consequently it was that, particularly with reference to the authority of ***Omilaju*** which, as the claimant has said this morning, he was provided with in the last hearing, the Tribunal looked at his evidence of what the last straw was said to be. Again, accepting his account of what happened in that incident, in response both to cross examination and the Tribunal's own questions, it was on the basis of his evidence that the Tribunal, on the previous occasion, came to the conclusion that the claimant had no reasonable prospects of establishing that that incident, on 19 December, could constitute a last straw within the meaning of ***Omilaju*** so as to give him the entitlement to resign, and that consequently was fatal to his prospects of success in the constructive dismissal claim and that is the reason why it was struck out.

10. In relation to that finding, the claimant effectively relies upon the evidence that he would have (if he had thought more on the question) given to the Tribunal, in essence, to the effect of the difference in the two individuals concerned, Alex McKendry with whom he had the meeting and Julia Blackett, who was the store manager superior to Mr McKendry. The difference in their roles was such that Julia Blackett would not, ordinarily, conduct a disciplinary meeting but Mr McKendry would do, and that as it was Mr McKendry who was having this meeting in which the claimant says, and for these purposes the Tribunal accepts (and in any event notes Mr McKendry's own evidence, is very much to this effect in his own witness

statement), that the claimant was told that there was going to be a disciplinary which the claimant, of course, says in paragraph 139 of his witness statement. So clearly that was before the Tribunal on the last occasion.

11. The point made by the claimant in his application, and indeed very shortly after that hearing concluded on 6 October, was that as Julia Blackett did not ordinarily conduct disciplinary meetings, he would not have taken a meeting with her as being a potential disciplinary, but in the case of Mr McKendry he did, and indeed his evidence was that that was said, and the Tribunal accepts that for these purposes. That, he says, was something of what he describes as a "light bulb moment" later, as he was returning home, and that is why he emailed the Tribunal as he did and that email, of course, is very similar in terms to the main basis of his application in paragraphs 1-7 of his application today. It is, as he puts it quite rightly, the guts of the application.

12. In terms of that being contended in the course of this application, the respondents' position primarily is that it is too late for the claimant to do that. Ms Danvers who appears for the respondent today has taken the Tribunal through a number of authorities: ***AF Stephenson v Golden Wonder Limited***; ***Trimble v Super Travel Limited***; ***Williams v Ferguson Limited***; ***Newcastle-upon-Tyne City Council v Marsden*** and ***Eastern Eye Plymouth Ltd v Hussain***, and has taken the Tribunal to various parts of those judgments which make it clear, in summary, that a reconsideration application cannot be used as, as it were, a "second bite of the cherry" and that if a party, represented or otherwise, has simply not put his or her case as well as they wish they had done in hindsight, then that of itself is not a ground for seeking reconsideration. There should be finality in litigation so that the Tribunal should not accede to a request for reconsideration simply on that basis.

13. The Tribunal, of course, takes that case law into account, but as Ms Danvers is aware, and would accept the basis for reconsideration is now under rule 70 of the 2013 Rules simply on the basis that it would be in the interests of justice to reconsider the previous judgment. The earlier Rules, of course, had sub-categories in relation to the grounds for such applications of which the interests of justice was in fact one, as something of a residual category, but there were other more specific categories which have been done away with in the 2013 Rules, and there is now just the simple one rule with the broad test of whether it is in the interests of justice to do so. That said, as Ms Danvers submits, the previous case law still remains relevant, particularly when, as those cases often did, the interests of justice were also relied upon in that context as well, so the previous cases do not cease to be relevant but the test is now the very simple test of whether it is in the interests of justice, and in coming to that conclusion the Tribunal has to consider all of the circumstances.

14. In terms of the main contention made by the claimant, the essence, of course, is the difference in status and position of the two individuals concerned, Alex McKendry and Julia Blackett. The claimant was familiar with their evidence, in the form of their witnesses statements, and indeed commented upon evidence that they had given, in the case of Mr McKendry in his witness statement, or indeed as both of them gave in the course of the investigation that was carried out after his resignation. In terms of what he wishes to put forward, effectively it seems to me what he is saying is that in answer to the Tribunal's questions as to whether, had it been Julia Blackett that held this meeting as opposed to Alex McKendry, he would still have resigned, to which he accepts, and is clearly the case that he answered "no", he

would not have done in those circumstances, that he would have added, as it were, a gloss to that evidence, by making reference to the difference in status that they held, and how it would not be usual or normal for Julia Blackett to hold a disciplinary He would therefore not regard a meeting with her as disciplinary.

15. In terms of that contention, the respondents say they do not accept it necessarily, but for the purposes of the rule 37 consideration, of course, the Tribunal would have accepted that, and indeed it is a very common situation and certainly for the purposes of such an application the Tribunal would be entitled to say "well that's a reasonable view to hold", and the Tribunal would have accepted that the claimant held that view. Whether it was strictly speaking accurate or not would not matter at that stage, and whether the respondents went on to challenge it in their own evidence would not have mattered: the fact is the Tribunal would have accepted that that was the claimant's view , and would have accepted for these purposes that it was one that he genuinely held.

16. Two questions effectively arise, then, in this application. The first is whether the claimant can in effect even make it, which is effectively the first part of the respondents' resistance to it, based on the cases that have been cited, effectively the respondent saying, "well the claimant cannot, on his way home, have a light bulb moment, and then wish he had put that forward and invite a reconsideration on that basis", that is a second bite at the cherry of the nature that is held by a number of cases not to be the proper basis for a reconsideration application and consequently he cannot, as it were, even get that far as to raise this as a ground.

17. Whilst appreciating the force of what the respondents submit in that context, the Tribunal does not accept that argument. Whilst appreciating that a second bite at the cherry is not something that reconsideration applications can be legitimately used for, the Tribunal does take very much into account the unusual circumstances giving rise to this application, and indeed giving rise to the Tribunal's previous judgment. Those circumstances were that having heard the claimant's case in its entirety the Tribunal of its own motion raised the question, because of course it is one that goes to jurisdiction ultimately, as to whether the Tribunal could be satisfied that the claimant had reasonable prospects of success in an essential element of his claim. That was a surprise, the Tribunal accepts, to both sides, but obviously in particular to the claimant, because it affected his case particularly rather than the respondents' case. So in terms of the circumstances in which he was put, the Tribunal accepts that they were unusual and doubtless were somewhat difficult for him.

18. In terms of time, the claimant accepts that he was afforded time and the Tribunal has recorded that fact and both parties were offered the opportunity to take as long as they want to consider the issue, and the claimant indicated that he had had the time he needed. He contends that during the time that he was considering the matter and considering the case of ***Omilaju*** which he was provided with, the respondent's counsel interrupted his preparations for other reasons, and whether or not that happened, frankly, seems to me not to be of great moment. The fact is the claimant had a limited amount of time, and whilst he considered that he had had enough time and did not raise with the Tribunal when he came back into the hearing on 6 October that he had been interrupted in his preparations, it is not surprising that in those circumstances under a degree of pressure, and, of course, as an unrepresented litigant, that he did not think of something that he did later think of. He

thought of it clearly very soon after the hearing, because he emailed the Tribunal at 2.20pm, and it was, I am quite satisfied, something of an oversight, and a result of the somewhat pressurised conditions that he was operating under that the claimant omitted to give that answer, or make that point at that point in the hearing. Whilst I do not hold the respondents responsible for that, and do not think it greatly matters whether they were or were not, it seems to me that the mere fact that he has sought to add an additional factor, or a gloss to his evidence or a point he would have made, having raised it so soon after the Tribunal concluded its judgment on 6 October, I do not think that that of itself precludes the Tribunal from considering in this application the matters that he now seeks to put forward. So, whilst it may be to some extent a second bite at the cherry, it is one that the Tribunal thinks that the claimant ought to be able to raise, given the somewhat unusual and difficult circumstances in dealing with a highly technical and legal application, and issues that were raised suddenly and unexpectedly in the course of the hearing on the last occasion. So that argument the Tribunal considers is not fatal to his application and the Tribunal will therefore go on to consider the more important aspect, perhaps, and that is the effect of the additional matters the claimant relies upon in relation to the Tribunal's previous finding, and whether those matters incline the Tribunal to alter its previous finding and reverse it so as to hold that the claimant has reasonable prospects of success, and should be allowed to continue with the hearing.

19. That, then, in essence is a question of the merits of these additional matters and what difference, if any, they would have made to the Tribunal's findings under rule 37 on the last occasion.

20. In relation to that, the facts that the claimant accepted in his evidence, and indeed still does, and has clarified today , from his combination of his evidence and the documents put to him which he accepted previously, and still does, are these. Julia Blackett was the Store Manager; Alex McKendry was a Deputy Manager. Both were senior to the claimant, who was himself a manager. The matters giving rise to the meeting on 19 December were not disputed by the claimant in that, as he accepted in his evidence on the last occasion, and as is recorded in the Tribunal's judgment, he as a manager was responsible for carrying out performance reviews (College Performance Review), CPRs as they were known, of the staff under him. By 19 December 2915, however, there were still a number, something like 27 or so, outstanding. This was a matter which was of a concern to Julia Blackett and the claimant accepted that she was so concerned, and that she would be entitled to be so concerned.

21. The claimant's case, of course, was that , to the extent that he had not been able to carry out that part of his responsibilities, Mr McKendry was himself partially or wholly responsible for that, because one of his "beefs", as it were, with Mr McKendry was that Mr McKendry's management of him over the previous few months or so had been such as to deprive him of the time that he, the claimant, needed to carry out those reviews as well as other duties. This was part of what the claimant perceived and indeed had alleged was the bullying that was taking place of him by Mr McKendry. So to that extent, whilst the claimant accepted the facts of the lateness of his CPRs and Ms Blackett's concerns about them, he nonetheless considered that the responsibility for that, if anywhere, lay with Alex McKendry and that it was not the claimant's fault, or certainly not entirely his fault.

22. It was against that background that the meeting on 19 December occurred, but the basic facts giving rise to it were not disputed by the claimant in his evidence last time nor indeed today.

23. The accounts given, both by Mr McKendry and by Ms Blackett, which were given , in her case, in an interview in the investigation that was carried out after the claimant left, and in Mr McKendry;s case both in that interview and in his witness statement, are accounts the claimant has said, said, previously ,and indeed has confirmed today, he would not have challenged. The account given by Ms Blackett, that it was she who had raised the issue of the outstanding CPRs: she had raised them with Mr McKendry and it was she that directed him to speak to the claimant about it.

24. Furthermore, in terms of the timing of the matter, Mr McKendry was the one who had suggested that this be delayed until after Christmas, but it was Ms Blackett who insisted that he carry out this meeting before Christmas. So in terms of the raising of the issue at all with the claimant, and the timing of it, the claimant accepted then, as indeed is clearly the case, but that was his evidence before the Tribunal then and it remains unchallenged by him, that it was Ms Blackett who was the instigator of him being spoken to about the matter at all, and , further, being spoken to at that time, rather than subsequently, after Christmas.

25. Consequently, when the claimant was called by Mr McKendry to what is said, and I accept, a potential disciplinary matter, the claimant did not know then, but accepts from what he has learned subsequently, that the instigator of all that was Ms Blackett. The claimant's reaction, however, to that meeting was, as is set out in his own evidence, and indeed was accepted by him on the last occasion, was that he reacted very badly to it; walked out in fact, resigning in the course of that meeting and probably, accepting as he did in cross examination on the last occasion, swearing at Mr McKendry. The reason that he so reacted, however, was clearly, as he accepted on the last occasion, the history between the two of them, and to some extent, as he relies upon and repeats in his application to the Tribunal particularly at paragraphs 13 onwards, in a large measure due to his own health at the time. As he reiterates in his application, in many ways seeking to contest any dispute that the respondents may make about this, but frankly this is not a matter that he need concern himself with, because , again the Tribunal accepts his evidence at face value, that undoubtedly , as he says his health had a bearing on his reaction on the day in question to the actions of Alex McKendry.

26. Consequently, the Tribunal's view is that paramount, and shining through this incident is the fact that Mr McKendry and the claimant's relationship up until that time was not a good one. The claimant had, for the reasons set out in the previous judgment, been very conscious that day of the last incident which he held Mr McKendry responsible for which was the wine stunt, as it was so called, and it will be recalled, of course, that the claimant's evidence was very much that one of the reasons why, when he walked in to see Mr McKendry in the room in answer to his summons to the meeting, he [Mr Chadwick] had that very day been restocking Prosecco which brought back into his mind the very issues in relation to the wine stunt that had given rise to the problems with Mr McKendry only a month or so before. That was very much the background against which the claimant went into that meeting. So the position is, and always was, that those were the facts the

claimant accepted, or indeed alleged, led to the meeting on 19 December, which then caused him to resign.

27. What, then, is the new additional factor that he seeks to rely upon to establish before the Tribunal that he has reasonable prospects now of showing that that meeting on 19 December was capable, (and that is all that he needs to show) of amounting to a "last straw" within the meaning of ***Omilaju***? The only matter put forward, it seems to me, is this difference in status between Julia Blackett and Alex McKendry in terms of whether Julia Blackett, if she had held that meeting would have been likely to holding a disciplinary, whereas in the case of Mr McKendry that was the case. The question for the Tribunal is whether, had that been in evidence or submission before it on 6 October, or previously in the claimant's evidence, that would have made any difference to the conclusion that the Tribunal came to.

28. Having considered it, and accepting as I said the claimant's evidence, or submissions at least, that that difference in status was there and would have been accepted by the Tribunal as a relevant fact in determining the rule 37 issue, the Tribunal's view is that it would have made no difference. Whilst appreciating that the claimant has had that additional idea and thought since the Tribunal's hearing, and appreciating that he is doubtless right in that, it seems to the Tribunal, however, not actually to matter. In many ways the claimant says so himself, in terms of how he came to look at this matter and how he appreciated what he should have said at the time, and in particular the difference between objectivity and subjectivity. One of the reasons the Tribunal came to the conclusion that it did on the last occasion was that it came to the view that the claimant's reaction to Mr McKendry was a highly subjective one. It was a highly understandable one , in the context of what had gone on in the preceding months on the claimant's case, and in particular in relation to the resurrection, in his mind, of the wine stunt incident only a few moments before the meeting, because the claimant was carrying out something that reminded him of it. Add to that the claimant's health condition at the time, which again he has referred to in terms of his own vulnerability in terms of health, the Tribunal considered on the last occasion, and still considers that all of this lays very much the ground for a subjective, and a highly subjective, reaction, and it must be said overreaction, to those circumstances. Indeed in paragraph 12 of his written application the claimant says this:

> *"At the time I tried to justify the outburst I had in response to the action being taken by Alex rather than answer the question the Tribunal was actually asking. It wasn't till I was on the way home I realised that in order to think objectively I should have been thinking in terms of store manager and deputy manager rather than Julia and Alex."*

29. Well pausing there, yes maybe in answer to the Tribunal's question he should have been, but the Tribunal does not consider for one moment that he was thinking objectively on the day in question. The tribunal thinks and is satisfied from his evidence on the last occasion that he gave it that he reacted in a highly subjective way, and the overwhelming impression that the Tribunal got then and gets now, from everything he said, and notwithstanding this difference in status, is that it was the reaction to the person holding the meeting as opposed to its content that matters. Indeed looking back on its notes from the last occasion the Tribunal notes that in answer to the question "so it was the person not the actions that led to your resignation" the claimant said "yes". That was overwhelming, in the Tribunal's view,

on the last occasion and notwithstanding that the claimant has now, admittedly with hindsight, identified this objective difference between the two roles of the persons involved , the Tribunal does not think that this “objective” difference would have made any difference. The Tribunal would still have come to the view that the claimant's reaction was a highly subjective one to the person holding the meeting and not to the contents and circumstances of that meeting: a meeting which, had it been conducted by Julia Blackett may not have been disciplinary, the Tribunal accepts that, and may been of a different nature, but was nonetheless instigated by her; she instructed Mr McKendry, the claimant accepts, to hold a meeting at all, and she instructed him to hold it at that time.

30. In terms of the ***Omilaju*** test as to whether or not all this satisfies that test, what the Tribunal would be left with is what would otherwise be a perfectly legitimate and innocuous management request in relation to looking into an admitted issue in relation to the CPRs at a time when the Store Manager had decided it should be dealt with, and had then delegated the matter to Mr McKendry. It seems to the Tribunal that in those circumstances, as it believed previously and still finds, the overwhelming reason for the claimant’s reaction was “the singer, not the song”, as it were: it was the personality , the identity, of the person holding the meeting, and that, of itself, is not capable of amounting to a final straw. In short, if the claimant would have no grounds to resign and complain of constructive dismissal if Ms Blackett had held even a potentially disciplinary meeting with him at that time, and for those reasons, that cannot change simply because the same actions were then taken, on her instructions, by someone else. The claimant may not have expected any such meeting to become disciplinary if held by her, but he would not have been entitled to resign in those circumstances if it had. We come back to the identity of the person carrying out the action, rather than the action itself, when judged objectively. Given that the claimant , though given time to reflect, and not act in haste, did not reflect in this way upon these matters and withdraw his resignation, but confirmed it, the Tribunal can see no basis for reconsidering his prospect fo success.

31. So whilst appreciating the claimant's very cogent application, and everything that he has set out, and having considered, as the Tribunal thinks it was entitled to, the matters that he has put forward, the Tribunal does not, however, find that those are of sufficient weight to revoke or vary the judgment that it made. The Tribunal’s conclusion remains the same and therefore the previous judgment is confirmed.

Employment Judge Holmes

Dated: 26 April 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

3 May 2017

FOR THE TRIBUNAL OFFICE