



EMPLOYMENT TRIBUNALS

Claimant: Mr S Sathanantham

Respondent: BP Express Shopping Limited

Before: Employment Judge John Crosfill

RECONSIDERATION JUDGMENT

1. The Claimant's application made by e-mail sent on 6 June 2018 for a reconsideration of the reasons signed by me on 22 May 2018 has no reasonable prospects of success and is dismissed.

REASONS

1. Following the full merits hearing that took place on 3 January 2018 I dismissed the Claimant's Claim of unfair dismissal. I had delivered an oral judgment with reasons on that day. The Claimant sought full written reasons and they were signed by me on 22 May 2018. The Claimant now seeks a reconsideration of my judgment.
2. The Claimant supports his application with an 'application for reconsideration' running to 6 pages together with some additional documentation. He had sent in a previous application for a reconsideration in advance of receiving my written reasons. I had suggested that that was premature and that he await my reasons. The Claimant has therefore renewed that application. I have had regard to both applications when making this decision.

The rules

3. The Employment Tribunal Rules of Procedure 2013 as amended set out the rules governing reconsiderations. The pertinent rules are as follows:

"Principles

A 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. On reconsideration, the decision (“the original decision”) may be confirmed, varied or revoked. If it is revoked it may be taken again.

Application

Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

Process

72.—(1) An Employment Judge shall consider any application made under rule

71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge’s provisional views on the application. (2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations. (3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

Discussion and Conclusions

4. In accordance with the Employment Tribunal Rules of Procedure if I consider that there is no reasonable prospect of the original decision being varied or revoked I must refuse the application for reconsideration without a hearing. That is my conclusion here.
5. The Claimant’s application for a reconsideration is broken down into paragraphs and I shall address each of those in turn.

6. The first point made by the Claimant relates to the decision by the Respondent to cancel an appointment made by the Respondent with its OH service which had been made before the decision to dismiss and was set for shortly after the date of the dismissal. The Claimant's case is that his health was improving and that that it was unreasonable for the Respondent not to wait. I had been aware of that and made findings in respect of that at paragraphs 18 and 19 of my judgment.
7. I was fully aware that this was an important issue in the case. I have dealt with the question of whether the decision not to await any further medical report meant that the decision to dismiss was unfair at paragraphs 43 to 45 of my reasons. It is important to bear in mind that my role in hearing this case was not to decide what I might have done but to examine whether or not the employer had acted 'within a band of reasonable responses'. In those paragraphs I have concluded that whilst the decision not to await a further report was robust it was supported by evidence and could not be said to be one which fell outside the range of reasonable responses. There had been a very long period of absence and there was no clear indication when the Claimant would return. The further medical report offered only the possibility of some fresh information. Whilst some employers might have awaited a further report the decision not to do so was not unreasonable.
8. It was not unreasonable for the Respondent to rely upon the summary given by their own OH advisors as to how far the Claimant could walk.
9. The next point made by the Claimant relates to paragraph 22 of my reasons and in particular to part of the letter of dismissal referring to the Claimant saying he would struggle to lift items. I have made a finding of fact in paragraph 22 that the letter of dismissal contains an accurate summary of the meeting. I have set out my reasons for doing so. It was written close to the time of the meeting and is in many respect consistent with the short notes of the meeting. Amongst those notes is one where the Claimant acknowledges difficulties with manual handling. There is no record of the Claimant saying that he was able to carry a considerable amount of weight with his left arm/hand.
10. It was not my function to make my own mind up as to what the Claimant could or could not do. I had to make findings as to the evidence that was, or ought reasonably to have been, before the decision maker. I have found that the evidence before the decision maker was that there would have been the difficulties with lifting that I have recorded. The Claimant does not say that he told Ms Mitson that he was fit enough to lift heavy items. He cannot rely in these proceedings on assertions made after the decision was taken. There is nothing in this point that would cause me to reconsider my judgment.
11. The Claimant's next point relates to the fact that the Tudor Service station had been converted from a conventional service station to a convenience store. He has produced various receipts to show that even before this the service station sold various items. I accept that this was the case although it does not actually conflict with the evidence that I have accepted. It is obvious to me that the wider the product range the greater the emphasis on shopping as opposed to petrol sales. That was the conclusion reached by the Respondent's witnesses and it was plainly based on evidence and was a reasonable conclusion to reach. It was not that there had been no sales of goods before merely that the emphasis

on such sales had increased. There is nothing in this point that would cause me to reconsider my judgment.

12. The Claimant next refers to paragraph 47 of my reasons. Nicola Mitson had said that she had made enquiries about vacancies and there were none. The Claimant now seeks to adduce evidence that there was such a vacancy. He gives fresh evidence and says that a friend was offered a job in Hornchurch on 20 April 2017.
13. The evidence now relied upon was not relied upon in this form at the hearing. No explanation has been given why that was the case. It has been confirmed in **Outsight VB Ltd v Brown UKEAT/0253/14** that ordinarily, but not without exception, the test that should be applied to fresh evidence adduced upon an application for a reconsideration would be the same as in civil appeals namely that first explained in **Ladd v Marshall [1954] 3 All ER 745** namely that:
 - 13.1. that the evidence could not have been obtained with reasonable diligence for use at the original hearing;
 - 13.2. that it is relevant and would probably have had an important influence on the hearing; and
 - 13.3. that it is apparently credible
14. Putting aside the first and third of the **Ladd v Marshall** criteria the difficulty that the Claimant's application faces is that he quotes my finding '*While there were no vacancies that did not form the basis for the rejection of that possibility as an option*'. I accepted the Respondent's case that they terminated the Claimant's contract of employment because they believed he was not fit enough to work anywhere for the near future. I have held that there was a reasonable basis for that belief. Even if there were vacancies, and in her evidence Ms Mitson accepted the possibility of placing the Claimant on a rota, it would have made no difference to her decision on the basis of my findings of fact.
15. The next point relates to paragraph 51 of my reasons. At 26 of my reasons I set out my findings as to what the Claimant said about being able to lift his backpack during the appeal. Those were findings of fact made after hearing the evidence of the Claimant and Ms Tilbury. The Claimant now seeks to classify that as a 'misunderstanding' and refer to CCTV evidence which was not shown to me. It seemed clear to me that there had been reference to the backpack as a measure of the ability to lift. I saw no reason to reject Ms Mitson's account of events and did not do so. It is not in the interests of justice to seek to re-open findings of fact made after hearing the evidence and submissions and I decline to do so.
16. The Claimant now complains that he had no interpreter at the hearing. The Claimant was represented by experienced Counsel. At the outset of the hearing the fact that an interpreter had been sought at the very last minute was discussed. It was not suggested that the Claimant needed an interpreter just that he was nervous. No application to adjourn was made and no difficulties were raised during the hearing. The Claimant gave clear answers when cross examined. At no time during his evidence did the Claimant say that he could not understand the proceedings. The Claimant addressed me in good English and was able to answer my questions with no hesitation.

17. The emphasis in any claim of unfair dismissal is on the conduct of the Respondent. There was no significant conflict of evidence in the case before me. I do not accept that the Claimant was disadvantaged in any way. Had he been at any disadvantage his Counsel would no doubt have raised the matter.
18. I did not consider that the Claimant was asked any unnecessary questions by Counsel for the Respondent. Both Counsel behaved with the courtesy that I would have expected and each put their client's case to the opposing witnesses.
19. In short I do not consider that there was any failure to conduct a hearing that would justify me in reconsidering my judgment.
20. The final point made by the Claimant is to suggest that Ms Tilbury has misled me in saying that the Respondent operates its stores with minimal staff. I did not consider this a material matter. I made no finding upon it and no great weight was placed upon it by Ms Tilbury in reaching her conclusion to dismiss the appeal. I have accepted her evidence that she considered that the Claimant would be unfit to work for some time. That was the matter that caused her to reject the appeal.
21. For the reasons set out above I find that the Claimant's application for a reconsideration has no reasonable prospects of success and I dismiss it without a hearing.

Employment Judge John Crosfill

Dated 21 July 2018