Neutral Citation Number: [2023] EAT 124

Case No: EA-2020-000930-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 October 2023

Before:

ANDREW BURNS KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

DR GLAUCIA PEREIRA **Appellant**

- and –

GFT FINANCIAL LIMITED **Respondent**

- -
- -

Ms Hollie Patterson (Advocate) for the **Appellant**
Mr Thomas Kibling (instructed by Orrick Harrington & Sutcliffe UK LLP) for the **Respondent**

Hearing date: 15 September 2023

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JUDGMENT

SUMMARY

SEX DISCRIMINATION AND UNFAIR DISMISSAL

The ET considered at the sift stage an application for reconsideration of a refusal to permit amendments to a claim form to add dismissal for pregnancy and/or asserting a statutory right. The ET refused reconsideration. The ET wrongly focused on whether the claims raised by amendment by the claimant were in time. It should have first asked itself whether these were new claims at all or whether, having regard to the whole of the claim form, they were already part of the claim or at least the same facts relied on were already in the claim. Any ET properly reading the claim form including its attachments would have concluded that the substance of the amendments were already part of the claim.

The ET also failed to consider the balance of prejudice in considering the interests of justice in failing to take into account the need for a full hearing about these events and facts in any event, the medical evidence submitted by the Claimant at the previous preliminary hearing about her illness at the time of presenting the claim and the new medical evidence supplied by the Claimant for the reconsideration hearing about her capabilities as a result of her illness.

It was an error for the ET to reach its own contrary conclusions on her capabilities without consideration of this medical evidence and as an impermissible exercise of discretion to exclude such relevant matters from the interests of justice consideration.

ANDREW BURNS KC, DEPUTY JUDGE OF THE HIGH COURT:

The Claim

1. This appeal arises from the termination of the Claimant's employment by the Respondent as a Senior Data Scientist in November 2018. The Claimant was dismissed after 5 months during her probationary period on the stated grounds of her performance and skill set. Her dismissal came after she had raised a grievance and 10 days after she alleges that she told the Respondent that she was pregnant.

2. The Claimant presented a claim to the Employment Tribunal ('ET') on 20 December 2018. The form ET1 contains a box at section 8.1 for claimants to indicate the type of claim they are bringing. In that section the Claimant ticked the boxes for unfair dismissal and sex discrimination, but not pregnancy or maternity discrimination. She did not set out any details whatsoever in section 8.2. This is normally not a problem as it is common practice for claimants to attach a separate sheet setting out the details of the claim and the rules are not prescriptive about the format of such grounds of complaint.

3. Claims come in all shapes and sizes and the ET must look for the substance of a complaint by considering the whole of the claim form and should not take a technical, narrow or legalistic approach to identifying a complaint. A claim does not stand or fall depending on whether a box has been ticked, but whether it has properly been included in the claim form as a whole.

4. The Claimant had included in box 9.2 (about the compensation she was claiming) details of how allegedly malicious rumours and unjustified criticism had affected her (referring to Attachment 3), how it amounted to threatening and bullying and that she was tacitly isolated (referring to Attachment 4) and her contract was terminated. It also referred to Attachment 2. Those attachments are in the EAT bundle.

5. The attachments are part of a 39-page document headed "Employment Tribunal Claim, Glaucia Pereira Early Conciliation ACAS number R345339/18: Pereira v GFT Financial Limited". The first page is dated 19 December 2018 and addressed to the ET Central Office headed "Discrimination at work – gender (sex) based bullying, threatening and harassment. Please accept this letter as a formal claim to be assessed by the England and Wales Employment Tribunal". The next few pages contain sections namely 'The facts', 'How the above events affected me' and 'Final considerations.' It appears to be her grounds of complaint.

6. The third page of that document says: "the problem persisted during about 4 to 5 months culminating with my dismissal after testing pregnant and the aggravation of my mental health condition." Further down the same page it says: "finally following my complaints when I was very vulnerable with a mental health condition in my early pregnancy, I was tacitly isolated (attachment 4) and my contract terminated." On page 4 it says: "the Equality Act 2010 (the Act) says that I am protected against discrimination and harassment at work related to my protected characteristic of sex and perhaps sex discrimination may include everything like sex harassment and everything related to be a female like being a mother".

7. The documents that follow at pages 6 to 39 of the same document are headed: "Attachment 2: Roles & Responsibilities", "Attachment 3: Evidences on Harassment", "Attachment 4 Evidences on tacit professional seclusion and contradictory redundancy allegations", "Attachment 5: Evidences on Good Performance" and "Attachment 6: the Claimant's ACAS Certificate". As I have noted, some of those attachments are expressly referred to in the ET1 form.

8. The ET wrote to the Claimant on 11 February 2019 requiring reasons why the unfair

dismissal claim should not be struck out for lack of two years' qualifying service. The ET sent the ET1 but not the attachments to the Respondent. The Grounds of Resistance said that "the Claimant's claim form is wholly unparticularised with apparent missing documentation and the Respondent reserves the right to amend these grounds of resistance pending further particularization."

Proceedings before the ET

9. On 5 April 2019 the Claimant applied to add claims for automatic unfair dismissal on grounds of her pregnancy and for asserting a statutory right. The matter came before a preliminary hearing on 24 April 2019. The ET found that she was in receipt of some legal advice during this period. The April preliminary hearing was adjourned for the Claimant to provide further particulars of her claims which she did in an 18-page document headed "Claimant's Response to Further Particulars". That set out her complaints: direct discrimination on the basis of sex, victimisation for raising complaints about harassment and discrimination, harassment on the basis of sex, pregnancy discrimination and automatic unfair dismissal on the basis of pregnancy and indicated that she was asserting statutory rights. The document gave particulars that the Claimant was ill in October 2018 and alleged that she mentioned the symptoms of early pregnancy verbally and then emailed Mrs Sira of the Respondent that she was pregnant and may need sick leave. She alleged she was dismissed because of this.

10. At a preliminary hearing on 25 July 2019 the ET considered the Claimant's application to add claims for automatic unfair dismissal claims on grounds of pregnancy and for asserting a statutory right. This was refused by Employment Judge Stewart who heard evidence from the Claimant but apparently did not have and was not referred to the grounds of complaint document or the attachments.

11. The ET found that that the proposed amendments had not been raised before, were out of time and it was not just and equitable to extend time as a highly educated woman was able to research the claims and did not need assistance in bringing a pregnancy dismissal in time. The judgment dated 29 July 2019 also considered the Claimant's further particulars that had been ordered. The ET found that the Claimant gave no clear or coherent explanation for why she did not tick the box to include a claim for pregnancy dismissal in her claim form.

12. The ET considered the principles in *Selkent Bus Co v Moore* [1996] ICR 836 and the guidance as to time limits in *Robertson v. Bexley Community Centre* [2003] IRLR 434. It concluded:

> **22. I could find nothing in the account that the Claimant provided to me of any reason why I should exercise discretion in her favour and extend the time limit on the basis that it is just and equitable so to do. I do not accept that a highly educated woman recently finding herself pregnant but also losing her job some ten days after disclosing that fact to her employer would need the guidance of a lawyer before being able to assert she had been discriminated against if she actually thought the two events were connected. She was able to research her employment rights in August and she was able to find out about the early conciliation procedure and contact ACAS within 10 days of her dismissal. In the absence of facts establishing a case as to why it would be just and equitable to extend time, I follow the guidance of Auld LJ and accept the default position to be that the claim is out of time.**
>
> **23. In respect of the automatic dismissal claim it clearly was reasonably practicable for the claimant to have brought the claim within the requisite time period because she was able to research and bring to other claims within that time.**
>
> **24. I therefore rule that both new claims are out of time and refused to allow the amendment.**

13. The Claimant did not appeal but applied for reconsideration of that decision on the basis that although highly educated, she had poor concentration and memory at the time she was presenting her claims due to her anxiety and depression disorder.

14. In a series of unfortunate events, the Claimant's application for reconsideration was effectively lost by the ET and not referred to the Judge. Some months later the Regional Employment Judge postponed the 5-day hearing fixed for March 2020 as the

reconsideration had not taken place, but the application was still not referred to EJ Stewart. No doubt because of the severe effects of the Covid-19 lockdowns on the ET administration at that time he did not receive the application and the ET file until October 2020, some 13 months later. It is unclear whether the grounds of complaint document and attachments were on the ET file which appears to have been lost. In a judgment sent to the parties on 13 October 2020 the ET decided not to reconsider and this appeal is against that judgment.

The Reconsideration Judgment

15. The judgment begins by explaining at length why the reconsideration had been delayed by 13 months through no fault of the Claimant. The ET then quotes rules 70 -72 of the Employment Tribunal Rules 2013. The ET states that it has re-read its reasons for the refusal of the Claimant's application on 25th July 2019 and the Claimant's application for reconsideration. The ET then referred to the reasons set out in the earlier judgment quoting various paragraphs including paragraph 22 which read as follows:

> **"I do not accept that a highly educated woman recently finding herself pregnant but also losing her job some 10 days after disclosing that fact to her employer would need the guidance of a lawyer before being able to assert she had been discriminated against if she actually thought the two events were connected she was able to research her employment rights in August and she was able to find out about the early conciliation procedure and contact ACAS within 10 days of dismissal."**

16. The ET concluded as follows:

> **16. The Claimant in her email of 11 September 2019 asserts there to be medical evidence that she would wish to present that would, she says, establish that medical health issues of the type she asserts herself to have suffered from can negatively affect cognition, including memory loss and deficit of attention.**
>
> **17. If I allow, for the moment, there to be medical evidence that the claimant could present that would indicate that she suffered mental health problems and for there to be research indicating the possibility that mental health could have negatively affected her cognition, her ability to research the exceptions to the requirement that she have two years' service to claim unfair dismissal suggests strongly that her attention to detail was unimpaired. Furthermore as Point number 5 was included in the list of exceptions it could have acted as a prompt to her memory and thus any cognitive deficit in the form of memory loss would have been counted.**
>
> **18. Thus, I consider that there is no reasonable prospect of my original decision being varied**

or revoked. In such circumstances I must and do refuse the application.

The Appeal

17. The appeal was initially rejected at the sift stage but then stayed by HHJ Tayler for EJ Stewart to state whether he had the Claimant's medical evidence before him in October 2020 and, if not, to give him the opportunity to reconsider out of time. In December 2021 he confirmed that he had not seen the Claimant's medical evidence and the ET could not locate a digital file for this claim for him to check. He did not take up the opportunity to reconsider.

18. At a preliminary hearing on 30 November 2022, HHJ Tucker allowed the appeal to this full hearing on three grounds:

    a. Ground 1 - That the ET erred in law in its approach to the reconsideration application in failing to engage with issues which straddled both the reconsideration application and the application to amend. Judge Stewart has not seen the medical evidence which the C seeks to rely on in having the decision reconsidered. In that [1] failed to consider at all the hardship/prejudice between the parties; [2] failed to clarify or identify the legal and factual issues in the existing Claim Form before considering the applications to amend and the reconsideration application, [3] procced on the basis that the amendment had been presented out of time without first clarifying the factual and legal issues in the claim, and [4] erroneously introduced an 'exceptionality test';

    b. Ground 2 - The ET erred in failing to admit the medical evidence adduced in the reconsideration application and/or in failing to consider the impact of that evidence to the question of prejudice between the parties; and

    c. Ground 3 - To the extent that the ET applied the correct legal approach, it nonetheless erred in the exercise of any discretion. In refusing the application for reconsideration, the ET impermissibly excluded relevant consideration, namely the contents of the

original claim and the fact that a five-day hearing was required in any event and included irrelevant considerations (namely the C's educational credentials which has no relevance to legal expertise or qualifications).

19. The Claimant had the benefit of ELAAS representation at the preliminary stage and is represented at this hearing by Ms Patterson through Advocate. The Respondent is represented by Mr Kibling who appeared below at the July preliminary hearing.

Legal principles

20. The power to reconsider a judgment is given by rule 70 of the Employment Tribunals Rules (Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Sch 1) which provides:

> **'A Tribunal may … 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."**

21. Reconsideration can only be of judgments such as those which finally determine a claim or part of a claim. Rule 71 provides:

> **'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) … and shall set out why reconsideration of the original decision is necessary.'**

22. Rule 72 provides for the process for reconsideration. If the employment judge considers there is no reasonable prospect of the original decision being varied or revoked the application shall be refused. This is referred to as the sift stage. Where practicable the reconsideration shall be by the same employment judge. If not refused at the sift stage, the original decision must be reconsidered at a hearing unless having considered any views of the parties, the ET decides a hearing is not necessary.

23. The ET can only reconsider a decision if it is necessary to do so in the interests of justice.

The discretion to act in the interests of justice is not open-ended and should be exercised in a principled way and the importance of finality militates against the discretion being exercised too readily (*Ministry of Justice v Burton* [2016] ICR 1128 at [21]). HHJ Shanks addressed this recently in *Ebury Partners UK v Davis* [2023] IRLR 486 at [24]:

> **"The employment tribunal can therefore only reconsider a decision if it is necessary to do so 'in the interests of justice.' A central aspect of the interests of justice is that there should be finality in litigation. It is therefore unusual for a litigant to be allowed a 'second bite of the cherry' and the jurisdiction to reconsider should be exercised with caution. In general, while it may be appropriate to reconsider a decision where there has been some procedural mishap such that a party had been denied a fair and proper opportunity to present his case, the jurisdiction should not be invoked to correct a supposed error made by the ET after the parties have had a fair opportunity to present their cases on the relevant issue. This is particularly the case where the error alleged is one of law which is more appropriately corrected by the EAT."**

24. The reconsideration application in that case followed full hearing where the EAT found there was no procedural mishap, the claimant had a fair opportunity to present his case and his application was based on a point of law which could have been the subject of an appeal. However it may be appropriate to reconsider a decision where there has been some procedural mishap such that a party had been denied a fair and proper opportunity to present his case.

25. The ET has a wide discretion in assessing the interest of justice. It is well used to making decisions, including case management decisions, using that touchstone. A decision not to reconsider at the sift stage involves judicial discretion in applying the 'interests of justice' test. It will generally only be overturned on appeal if the decision has taken some matter which it was improper to take into account or has failed to take into account some matter which it was necessary to take into account, or alternatively if the decision involves some mistake of law or principle or a significant misunderstanding the facts and so is one that was not open to a reasonable tribunal.

Discussion

26. Under Ground 1 Ms Patterson submits that the ET erred in failing to take into account necessary matters that were crucial to the interests of justice test. Her central point is that the ET failed to balance the hardship or prejudice between the parties of granting or refusing reconsideration. I accept her submission that a balancing exercise between the parties is at the heart of every decision involving the interests of justice. Those interests may indeed go wider than the parties, as set out in the overriding objective to deal with cases fairly and justly, but the parties are central to every claim and the interests of justice must take into account the relative effects of the decision on both sides.

27. Mr Kibling submits that although this balance is not referred to by the ET, it is so fundamental to the exercise of judicial discretion that it simply goes without saying and I should assume that the ET had that well in mind. He points out that the ET did direct itself to *Selkent Bus Co v Moore* in the original decision to refuse the amendment application and that the fourth stage in *Selkent* (at p.843F) is:

> **"whenever the discretion to grant an amendment is invoked the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it."**

28. I accept that the ET originally directed itself to *Selkent* but the ET only cites it for the need to consider time limits and does not refer to the assessment of the balance of hardship either in the original judgment or in the reconsideration judgment under appeal. Ms Patterson points out that when assessing the evidence in both judgments the ET failed to mention or consider the impact on the parties or the ability of the parties to prepare for a final hearing. At the time of reconsideration the 5-day trial had been adjourned generally and was not yet in the list. She notes that there was going to have to be a lengthy trial in any event and it would cover all of the issues that would be relevant to the amendment if reconsideration was permitted and the matter heard again. Therefore the grant of the reconsideration and the amendment would not prejudice the trial. I note that the Claimant

claimed her dismissal was sex discrimination and victimisation relying on her grievance and so the ET would need to examine broadly the same facts as under the 'new' claims. None of these factors was expressly analysed by the ET in deciding whether or not to reconsider its judgment on amendment.

29. The second main point is that the interests of justice required the ET to consider the nature of the amendment that it was being asked to reconsider. Ms Patterson relies on *Evershed v New Star Asset Management* (EAT unreported, 31 July 2009 and affirmed on appeal at [2010] EWCA Civ 870) to submit that it is necessary for the ET to reconsider whether to amend by analysing the substance of the original pleading and comparing it to the amendment. That case held that amending an unfair dismissal claim by adding a whistleblowing allegation arising out of the same facts did not require wholly different evidence and should be permitted. There have been conflicting decisions in the EAT culminating recently in *MacFarlane v Commissioner of Police of the Metropolis* [2023] EAT 111 about whether there is a 'legal rule' that unfair dismissal and automatic unfair dismissal are the same cause of action. Applying the recent EAT decisions which decided there is no such legal rule, what the ET here needed to focus on was whether reconsideration was in the interests of justice bearing in mind the substance of the amendment and whether it raised new legal or factual allegations from what was already in the claim form.

30. If the ET had analysed the ET1 it would have noted that the Claimant had pleaded that she had made complaints and her contract was terminated. It would have noted the reference to the Claimant's reliance on 'Attachments' and that she had 'briefed the case in a pdf file'. Those attachments, if considered by the ET, would have indicated that the Claimant did not need to amend her claim at all. The Claimant assumed that the ET had the

documents that she had filed electronically with her ET1. It is unfortunate that this omission was not identified and investigated as if the ET had considered the grounds of complaint and the attachments referred to in the ET1 it would have been bound to have found that the pregnancy-related dismissal case was already pleaded and did not need an amendment application. In any event an ET would have been bound to find that anything that was new was, in general terms at least, putting a new label on the facts already pleaded in the attachments to the ET1 and so time limits would probably be irrelevant.

31. Ms Patterson also submits the ET applied an 'exceptional circumstances' test by looking for the Claimant to show circumstances why it was just and equitable to extend time. I agree with Mr Kibling that the ET did not use language suggesting it was importing an exceptional circumstances test. Mr Kibling is right that the ET applied the *Selkent* just and equitable principles in revisiting the matter at the reconsideration. However this does not get over the hurdle of whether the ET considered the whole claim in deciding whether it was in the interests of justice to reconsider.

32. Ms Patterson also made submissions about whether the ET considered medical evidence in assessing the balance of justice which overlaps with Ground 2. At the reconsideration hearing the ET had to consider the circumstances put forward by the Claimant to see if there was new evidence that meant that the interests of justice required the decision that the Claimant was a well-educated person who had no excuse to make a mistake in her claim form.

33. Putting aside the fact that it now appears that the Claimant had included the key matters in her attachments, the ET, when considering the interests of justice, should have considered whether the medical evidence put forward was admissible and proved a medical condition impacting on her abilities to present a claim.

34. Mr Kibling submits that the ET found that the Claimant had secured legal advice between 5 and 29 April and so she had the opportunity to advance medical evidence at the July hearing. New evidence is generally only admissible where a claimant can satisfy the ET that it would have an important bearing on the result of the case and demonstrate that it is in the interests of justice to consider if it was not produced beforehand when it could have been (*Wileman v Minilec Engineering Ltd* [1988] ICR 318).

35. In my judgment the ET did not consider or answer the *Minilec* question. Despite the Claimant applying on medical grounds, EJ Stewart confirmed that he did not see the medical evidence at the reconsideration hearing. It is unclear to me why the ET did not look at or ask for the medical evidence that the Claimant was relying upon when carrying out the reconsideration.

36. The Claimant submitted (Mr Kibling could not remember) that the 18 April 2019 assessment reporting moderate depressive and anxiety symptoms was produced at the July preliminary hearing. She said that she then approached her GP for the letters dated 16 September 2019. These letters reported that the Claimant had been seen a number of times over the previous year for anxiety, stress and depression and had memory and concentration problems following her miscarriage in February 2019. That was important new evidence which post-dated the July hearing and responded to the original judgment. It showed that there was a relevant mental health condition affecting the 'highly educated Claimant' at the time she was presenting her claim.

37. Had the ET considered this medical evidence it would not have held that the Claimant's ability in April 2019 to carry out legal research meant that her attention to detail was unimpaired and her memory should have been jogged when she was presenting her claim. Mr Kibling very fairly referred me to *J v K* [2019] IRLR 723 and the principle that where mental ill-health has contributed to a failure to comply with a time limit, that condition

will always be an important consideration in deciding whether an extension should be granted. Medical evidence is normally required and must be examined to see if the medical condition did contribute to the relevant failure.

38. There was a wholesale failure of the ET to consider the medical evidence that had been obtained. It is not permissible for an ET to make its own medical assessments of a person's capabilities from their conduct of the proceedings without carefully comparing such conclusions with the contents and conclusions of any medical evidence that has been submitted. It was an error for the ET to fail to consider the content of the medical reports before reaching its conclusion on reconsideration.

39. As raised in Ground 3, the exclusion from considerations of the full contents of the original claim, the present circumstances of the proceedings and the medical evidence was an impermissible exercise of discretion.

40. For these reasons I allow the appeal. At the reconsideration sift the ET focused on whether the 'new' claims were in time without first asking itself whether these were new claims at all or whether having regard to the whole of the claim form they were already part of the claim or at least the same facts relied on were already in the claim. The ET also failed to consider the balance of prejudice bearing in mind the need for a full hearing about these events and facts in any event, the medical evidence submitted by the Claimant both at the July hearing and the new medical evidence for the reconsideration hearing. It was an error for the ET to reach its own contrary conclusions on her medical capabilities without a very thorough consideration of the medical evidence and as an impermissible exercise of discretion to exclude those relevant matters from the interests of justice consideration.

Disposal

41. Both parties noted that due to the unfortunate history of this claim we are now almost 5

years since the dismissal and no substantive steps have been taken in the claim after pleadings. Recollections will have faded and witnesses may be difficult to trace. It is thought that the Employment Judge has since retired. However I must decide whether the case should be remitted to the ET or whether the EAT can substitute its decision only in accordance with the principles in *Jafri v Lincoln College* [2014] IRLR 544. I can only substitute a decision if there is only one ruling that the ET could make upon the facts as found, but I should not shrink from taking a robust approach to that assessment.

42. The claim form submitted to the ET referred to the attachments sent with it. The claim form must consist of the ET1 and its attachments read together. The only conclusion that an ET on reconsideration could have reached was that the pregnancy-related dismissal case was already pleaded and did not need an amendment application. I am satisfied that it is pointless to remit this for further reconsideration at the sift stage as any ET is bound to reach only one result – that the interests of justice demand reconsideration where the Claimant (suffering from the effects of her depression and unfortunate miscarriage) did her best to include all the facts and matters in attachments to the claim form but those attachments were not taken into account by the ET.

43. However under rule 72 of the ET Rules 2013, once it is determined that the application for reconsideration is not to be sifted out at the first stage, the ET must send a notice to the parties setting a time limit to respond and seeking their views on whether the application can be determined without a hearing. That has not happened. The notice may also set out the judge's provisional views on the application. It may be that this judgment stands in the place of such provisional views. The Respondent is now entitled to give its views as to whether there should be a hearing about whether the original judgment refusing the amendment should be varied or revoked on the grounds put forward by the Claimant and outlined in this appeal.

44. I therefore remit this to a fresh ET to decide whether a reconsideration hearing is required and whether the original judgment should be affirmed, varied or revoked.

45. As it appears that the ET has lost its original file, the parties should co-operate in advance of such reconsideration to compile a chronological bundle of the pleadings including attachments, particulars, judgments, correspondence and other documents that would usually be on an ET file and should lodge this with the ET.