EMPLOYMENT TRIBUNALS

Claimant: **Mr O Nawaz**

Respondent: **Wilsons Furnishers Ltd**

HELD at Sheffield (on the papers) **ON: 14 September 2021**

BEFORE: **Employment Judge Brain**

JUDGMENT ON RECONSIDERATION

The Judgment of the Employment Tribunal is that there is no reasonable prospect of the Judgment dated 31 August 2021 being varied or revoked. Accordingly, the claimant's application for reconsideration fails and stands dismissed.

REASONS

1. The Judgment in this case dated 31 August 2021 was sent to the parties on 1 September 2021. I shall now refer to this as *"the Judgment".*
2. On 7 September 2021 the Tribunal received an application from the claimant for reconsideration of the Judgment.
3. Rule 70 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides an Employment Tribunal with a general power to reconsider any Judgment where it is necessary in the interests of justice to do so. This power can be exercised either on the Tribunal's own initiative or on the application of a party. Rules 71 to 73 set out the procedure by which this power is to be exercised.
4. Rule 70 provides for a single ground for reconsideration. That ground is where it is necessary to do so in the interests of justice.

5. This does not mean that in every case where a litigant is unsuccessful, they are automatically entitled to reconsideration. Instead, a Tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases fairly and justly and the Tribunal should be guided by the common law principles of natural justice and fairness. Tribunals have a broad discretion but that must be exercised judicially which means having regard not only to the interests of the party seeking the reconsideration but also the interests of the other party to the litigation.

6. An application for reconsideration must be presented in writing and copied to all other parties within 14 days of the date upon which the written record of the decision the subject of the reconsideration application was sent to the parties. In this case, the Judgment was promulgated on 1 September 2021. The application for reconsideration is in time. The claimant complied with the procedural requirement to copy the application to the respondent's representative. Therefore, the Tribunal has jurisdiction to consider the reconsideration application made by the claimant.

7. Rule 72 of the 2013 Rules sets out the procedure that an Employment Tribunal will follow upon receipt of an application for reconsideration. Firstly, the application shall be put before the Employment Judge who decided the case or who chaired the panel hearing the case as the case may be. If the Employment Judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application will be refused and the Tribunal will inform the parties accordingly.

8. If the application is not refused, the Tribunal will send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the parties' views on whether the application can be determined without a hearing. That notice may also set out the Judge's provisional views on the application although it does not have to do so. The matter may then proceed to a hearing unless the Employment Judge considers – having regard to any response to the application – 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. It is clear that the policy intention underlying Rule 72 is that reconsideration applications will be dealt with on the papers wherever possible, thereby saving time, expense and resources.

9. The Employment Appeal Tribunal has recently emphasised the importance of following the Rule 72 procedure in the correct order in **T W White and Sons Limited v White** [UKEAT) 0022/21]. The EAT said that the procedure does not allow for the Employment Judge to decide that a hearing is necessary before he or she takes the decision under Rule 72(1) as to whether there is no reasonable prospect of the original decision being varied or revoked. This aspect of the procedure provides an important protection to the party opposing the application, in that the other party should not be put to the time and expense involved in responding to the application if the Employment Judge does not consider that there are reasonable prospects of the Judgment being varied or revoked. As I have reached the conclusion that there is no reasonable prospect of the Judgment being varied or revoked, it is my judgment that I am able to consider the application upon the papers without the respondent's input.

10. It is necessary to set out the procedural history of this matter. The claimant presented his claim form on 6 June 2021. It is agreed between the parties that he worked for the respondent between 14 November 2019 and 10 May 2021.

11. It is common ground that the claimant's employment was summarily ended on 10 May 2021.

12. Upon page 6 of the claim form, the claimant ticked the relevant boxes to indicate that he was pursuing the following claims:

    12.1. Unfair dismissal.

    12.2. Discrimination upon the grounds of race.

    12.3. Discrimination upon the grounds of his religion or belief.

13. Given the terms of the reconsideration application, it is necessary to set out in full the grounds of claim which the claimant set out on page 7 of the claim form. This reads as follows:

    "I was off for Covid from Jan 15th 2021, had regular contact with James Higgins (IT manager) initially, then Gina France and Paul Blundell in HR, on my well-being. When I got better in May and told them I'll be back on 10 May the week before, Paul said great we look forward to welcoming you back.

    When I went, James took me from the car park as soon as I got out of my car, to a separate office and said "it's just a return to work mate". Once we did this he went away to scan it for five minutes. Then took me into HR office with Paul, Paul then said "sit, not good news, we are terminating your employment due to performance issues." This shocked me and made no sense. I said "wow I'm shocked, and know its because I've been unwell and off for four months with Covid" he replied with "its not just that". To ACAS they said its not commercially viable to keep him employed.

    I was made permanent in July 2020 as well and James told me in November 2020 he is happy with me and wants me there long term.

    So it makes no sense whatsoever their reason for dismissal.

    I feel eventually they didn't want me there as I was off sick. Also they didn't like Asian origin as had comments like "you Asians are hard work aren't you" … also as I'm a Muslim and used to pray at work and was told "this Islam takes up a lot of your working time doesn't it." Even though I was praying in my own lunch time. A lot of times work was so busy I didn't even get anything to eat or pray.

    Also they made me use my personal car for business use even though I told them that's wrong and I had no business insurance.

    I don't want to go back to work for such people. I just want the compensation for unfair dismissal and race and religion discrimination which has led to stress, anxiety and depression, loss of earnings whilst I find work."

14. On page 8 of the claim form, the claimant sets out his claim for compensation in the sum of six months loss of earnings together with a sum for injury to feelings attributable to the alleged discrimination. On page 9 of the claim form he has ticked the box to say that he is making a complaint connected with "whistleblowing" at work. The relevant box gives consent for the claim form to be forwarded to the relevant regulator. On page 12 of the claim form, by way of additional information the claimant says, "*I also feel they deliberately did this*

before the two year employment mark passed as Paul has said I know its been less than two years so you have no rights to claim. Again, shocking to be honest."

15. The case benefited from a case management preliminary hearing which came before Employment Judge Davies on 13 August 2021. Her record of the case management hearing was sent to the parties also on 13 August 2021.

16. Employment Judge Davies noted that the claimant was complaining of:

    16.1. Unfair dismissal;

    16.2. Direct race and religious discrimination;

    16.3. Harassment related to race and religion.

17. In paragraph 5 of the case management summary, she said, *"The claimant had not worked for the respondent for two years when he was dismissed. I explained to him that he cannot bring an ordinary unfair dismissal claim in these circumstances. He has not identified any of the automatically unfair reasons for dismissal in which the two years' qualifying period does not apply. He told me that he thought he should be allowed to bring the claim because the respondent deliberately dismissed him before he had worked for it for two years, to avoid him being able to claim unfair dismissal. I explained that the two years' qualifying period still applies in those circumstances. I have given him seven days to confirm whether or not he still wishes to pursue his unfair dismissal complaint."*

18. Employment Judge Davies gave the claimant permission to amend his complaint of direct race or religious discrimination to include an allegation which is set out in paragraph 6 of the minute. This is a complaint that from May 2020 until January 2021 Mr Higgins of the respondent held the claimant to a higher standard of work than his colleagues. This was added to the list of discrimination complaints advanced in the claim form. In addition to the allegation against Mr Higgins, Employment Judge Davies noted the claimant's alleged complaints that Mr Higgins said to him *"you Asians are hard work aren't you?"* and *"this Islam takes up a lot of your working time doesn't it?"* She also noted the claimant's complaint that his dismissal was direct race and/or religious discrimination.

19. Employment Judge Davies made an Order for the claimant to write to the respondent and to the Employment Tribunal to confirm whether or not he wished to pursue his complaint of unfair dismissal. He was directed to do so by 20 August 2021. She directed that if he confirmed his wish to pursue his complaint of unfair dismissal then he must explain why he says the two years' qualifying period does not apply to him and that an Employment Judge may consider striking out the claim if there is no basis for saying that the two years' qualifying period does not apply.

20. On 19 August 2021 the claimant sent an email to the Employment Tribunal and to the respondent's representative. He notified the Tribunal that he wished to pursue his complaint of unfair dismissal. He said that this is due to the following reasons below. These are now set out:

    "*It was a discrimination unfair dismissal based on my race.*

    (1) It was also discriminatory unfair dismissal based on my religion, faith and beliefs.

(2) Also it was discrimination due to a change to my marital status. Making me a part time single parent. My hours were adjusted to cater for this as I had great professional working conduct, but the respondent later regretted their decision. They made mention of the hours change "favour" several times, making me feel guilty and vulnerable. Due to the marital separation I was suffering with stress, depression and anxiety but the respondent made no attempt to ask about my well-being and health.

(3) Also the respondent breached the contract of employment as they did not follow the correct protocol and guidelines of the contract for immediate dismissal. As no gross misconduct occurred and wasn't identified then there were no grounds for an immediate termination of contract due to "performance" without any prior notice, with no verbal or written warnings ever having been conducted. I was actually told it would be a return to work meeting after my Covid sickness period. Then with no notice I was hit with the bombshell of "immediate dismissal" on the day. I wasn't told of any meeting, or even given an opportunity to respond/appeal or to even bring a representative with me. This is wrongful dismissal.

(4) Also on the grounds that I was treated differently to others and interrogated and held accountable to a higher standard than others. Again, this comes back to race and religious belief discrimination, backed up by derogatory and racist remarks/comments made by the respondent.

(5) Another big reason for my automatic unfair dismissal was because I notified them (a few weeks prior to my dismissal) that I will be doing jury service. This was due to start the week after they dismissed me.

(6) Also I notified the respondent that the company has a lot of unlicensed and illegal software installed on computers, including Microsoft products and this needs resolving ASAP. This also led to my unfair dismissal.

(7) Also as I was asked to work on the computers in a warehouse environment with heavy machinery and fork lift trucks, I asked for safety equipment and clothing to be provided. Some was reluctantly and eventually provided but not everything. This also led to my unfair dismissal as I proposed to take action if nothing was done without it."

21. Upon receipt of the claimant's email of 19 August 2021, the matter came before me. I was satisfied that there was no extant complaint of unfair dismissal related to jury service, for making a public interest disclosure or for a health and safety reason and that no grounds had been shown by the claimant to permit the continuance of the unfair dismissal complaint. I therefore gave Judgment that the unfair dismissal complaint was struck out as the claimant does not have two years' qualifying service. The Judgment also provided that the complaints of discrimination by way of dismissal related to race and religion and belief, the other discrimination complaints and harassment were unaffected by the Judgment.

22. I shall now turn to consideration of the seven points raised by the claimant in his email of 19 August 2021 and how they relate to my Judgment and my reconsideration Judgment. I shall start with the consideration of the matters at numbers 1 and 4.

23. These are complaints brought under the Equality Act 2010. As identified by Employment Judge Davies, the dismissal complaints (at point 1) are allegations

of direct discrimination. The alleged derogatory remarks (at point 4) constitute direct discrimination or harassment related to race and/or religion and being held to a higher standard than others (also at point 4) is an allegation of direct race and/or religious discrimination.

24. The 2010 Act sets out the conduct which the Act prohibits. This includes direct discrimination and harassment. The prohibited conduct must relate to one or more of the protected characteristics. In this case the relevant protected characteristics are race and religion.

25. Direct discrimination and harassment related to race and religion is made unlawful in the workplace pursuant to the provisions set out in Part 5 of the 2010 Act. There is no dispute that the claimant at the material time was an employee of the respondent. By section 39(2) of the 2010 Act (which falls within Part 5 of it) an employer must not discriminate against an employee by subjecting the employee to any detriment or by dismissing the employee.

26. It follows therefore that the claimant may pursue a complaint of discriminatory dismissal or subjecting the employee to a detriment (such as by applying a higher standard of work to the employee). Further, by section 40 of the 2010 Act (again within Part 5 of it) an employer must not harass an employee.

27. The right not to be discriminated against or harassed within the workplace are sometimes referred to as *"day one rights".* This means that there is no qualifying period before an employee may benefit from the protections of the 2010 Act.

28. In contrast, generally an employee may not pursue a complaint of unfair dismissal unless they have been continually employed for a period of two years or more. There are a number of exceptions to the two years' service requirement. Dismissal for a reason related to any of the protected characteristics does not fall within any of the exceptions (save where the dismissal is for pregnancy and/or related to maternity leave which is covered both by the Employment Rights Act 1996 and the 2010 Act).

29. Of course, an employee who has more than two years of qualifying service and who is dismissed for a discriminatory reason will be able to bring a complaint of unfair dismissal as well as discrimination. However, where the employee has less than two years of service in those circumstances then (save for the pregnancy and maternity cases) the employee's remedy is under the 2010 Act and not for unfair dismissal under the 1996 Act. In the majority of cases therefore a discrimination claim will be the only option for a dismissed employee who lacks the requisite period of qualifying service to claim unfair dismissal. It follows therefore that the claimant's complaint that he was unfairly dismissed under the 1996 Act for reasons that relate to his race or religion is bad in law. There is therefore no reasonable prospect of the Judgment being varied or revoked upon this basis. The claimant may of course pursue his complaint of discriminatory dismissal pursuant to the 2010 Act.

30. I now turn to point 3 in the claimant's email of 19 August 2021. The claimant is right to say that he was wrongfully dismissed when his contract was summarily terminated on 10 May 2021. There is no issue that the claimant was guilty of any gross misconduct such as to render him liable to summary dismissal.

31. However, it appears not to be in dispute that the respondent paid the claimant a sum of money in lieu of notice. This is the respondent's entitlement. At

common law, when bringing a contract of employment to an end the employer need not give a good reason or indeed any reason. Contractually, the employment contract may be ended by the employer at any time without showing cause provided the correct contractual notice is served. If the employer chooses to end the contract summarily (except in the case of gross misconduct) then they may do so but such will constitute a wrongful dismissal rendering them liable to pay the employee damages which in the usual course will amount to the money that the employee would have earned during the notice period. If the employer pays this sum to the employee, then the employee's cause of action is extinguished. The employee may not pursue a common law claim for wrongful dismissal simply to seek a declaration that their dismissal was wrongful. Again, this may be contrasted with the statutory position under the 1996 Act (where an employee with sufficient continuity of service or who benefits from one of the exceptions to that requirement may pursue a claim of unfair dismissal with a view to seeking a declaration from the Employment Tribunal that they were unfairly dismissed).

32. Further, the claimant did not raise the issue of wrongful dismissal at the case management hearing before Employment Judge Davies. I have already observed that she noted the three complaints being brought by the claimant. Wrongful dismissal is not amongst them. The same point may be made about the issues raised by the claimant in paragraphs 2, 5, 6 and 7 to which I shall now turn.

33. Paragraph 2 appears to concern a complaint of discrimination related to the protected characteristic of marriage or alternatively a complaint of a part time discrimination under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. The protected characteristic of marriage and civil partnership only protects persons against discrimination as long as they are currently married or have civil partnership status. There is no provision providing equivalent protection for people who are single or divorced. Therefore, a complaint of discrimination or harassment upon the basis of having ceased to be married and then becoming single is misconceived.

34. In paragraph 6, the claimant contends that he was automatically unfairly dismissed because he was about to go on jury service. The claimant is right to point out that an employee who is dismissed shall be regarded for the purposes of the 1996 Act as unfairly dismissed if the reason for the dismissal (or if there is more than one reason, then the principal reason for it) is that he was summoned to attend for service as a juror. The two years' service requirement will not apply in such a case.

35. The sixth paragraph of the claimant's email of 7 September 2021 appears to give rise to a public interest disclosure complaint. The claimant appears to be saying that the reason or the principal reason for his dismissal is that he drew to the respondent's attention information which in his reasonable belief was made in the public interest and tended to show a breach of a legal obligation by the respondent. Again, dismissal for such a reason will be regarded as automatically unfair for the purposes of the 1996 Act and the two years' service requirement need not be shown in such a case.

36. The seventh numbered paragraph appears to refer to a health and safety reason for the claimant's dismissal. Again, this may constitute a public interest disclosure or may constitute a dismissal for a health and safety reason for bringing the employer's attention by reasonable means to circumstances

connected with work which the employee reasonably believes to be harmful or potentially harmful to health or safety. Dismissal for such a cause would be automatically unfair pursuant to the 1996 Act and again the two years' service requirement need not be complied with in such a case.

37. The difficulty for the claimant upon the matters identified by him in the paragraphs numbered 2, 3, 5, 6 and 7 is that none of those matters were referred to by him in the claim form. On a fair reading of the relevant passages in the claim form which I have cited, no complaints may be discerned for the following:

    37.1. Marital discrimination.

    37.2. Part time worker discrimination.

    37.3. Wrongful dismissal.

    37.4. Automatic unfair dismissal connected with jury service.

    37.5. Automatic unfair dismissal for whistleblowing.

    37.6. Automatic unfair dismissal for raising a health and safety matter with the employer.

38. In **Chandhok v Tirkey** [UK EAT/0190/14] HHJ Langstaff (President of the EAT) said as follows:

    "(16) The claim as set out in the ET1 is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.

    (17) …

    (18) In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

39. It is noteworthy, in this case, that the claimant did not raise any issue of marital discrimination, part time worker discrimination, wrongful dismissal or automatic unfair dismissal related to jury service, public interest disclosure or health and safety disclosures before Employment Judge Davies when the matter was before her on 13 August 2021. The claimant now seeks to raise a different case which suits the moment (to respectfully borrow HHJ Langstaff's terminology) from his perspective. He now seeks to advance grounds hitherto

not mentioned either in his pleaded case or when he had the opportunity of discussing the matter before the Employment Tribunal on 13 August 2021. It now suits his moment to advance as reasons for dismissal causes of action which do not depend upon having two years' continuity of service.

40. Those causes of action were not set out in the claimant's claim form. The Tribunal is not seised of them. The Tribunal is seised only of the matters expressly pleaded which are the complaints of ordinary unfair dismissal (now struck out) and direct discrimination and harassment related to the relevant protected characteristics.

41. There is no arguable basis upon which the claimant can displace the two years' qualifying service requirement to enable him to pursue a complaint of unfair dismissal. It follows therefore that there is no reasonable prospect of the Judgment being varied or revoked. The reconsideration application therefore stands dismissed.

42. The case has been listed for a hearing to take place upon 27 and 28 January 2022. At that hearing, the claimant's complaints brought under the 2010 Act shall be determined.

Employment Judge Brain

Date: 14 September 2021

Sent to the parties on:

Date: 28 September 2021