THE INDUSTRIAL TRIBUNALS

CASE REF: 17294/18IT

CLAIMANT: **Jacqueline Webster**

RESPONDENTS: **1. Railway Preservation Society of Ireland**

2. Martin Black

APPLICATION FOR RECONSIDERATION

1. This is an application for a reconsideration by the tribunal of its decision on the ground that reconsideration of the original decision is necessary in the interests of justice.

2. The application was made under Part 12 of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 ("the 2020 Regulations"). Unlike the previous Regulations there is a single ground for review namely "the interests of justice" [Rule 66]. Rules 66 to 68 set out the process for dealing with applications for reconsideration and provide as follows:

"Application for reconsideration

66. Except where it is made at a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties)-

(a) within 14 days of the date on which the original decision was sent to the parties; or

(b) 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 in the interests of justice

Consideration of the application

67.-(1) An employment judge shall consider any application made under rule 66. If the employment 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 parties shall be informed of the refusal.

(2) If the application is not refused, a notice shall be sent to the parties-

(a) setting a time limit for any response to the application by the other parties;

(b) seeking the views of the parties on whether the application can be determined without a hearing; and

(c) where the employment judge considers it appropriate, setting out the employment judge's provisional views on the application.

Reconsideration of the original decision

68.-(1) If the application has not been refused under rule 67(1), the original decision shall be reconsidered at a hearing unless the employment judge considers, having regard to any response to the notice under rule 67(2), that a hearing is not necessary in the interests of justice.

(2) If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

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Outcome of reconsideration

70. Following reconsideration under rule 68, the original decision may be confirmed, varied or revoked. If it is revoked it may be taken again."

3. In the present case the tribunal's judgement was issued to the parties on 20 March 2020. On 3 April 2020, the claimant's representative, Mr McAughey made an application for a reconsideration of the Tribunal's judgment on the final day before the expiry of the 14 day time limit under Rule 66. The application for reconsideration ran to 4 pages but Mr McAughey nonetheless asked to be allowed to amplify the application after proper consultation with the claimant given the current conditions and the time limit for the lodging of the

application. In view of the difficulties posed by the Covid-19 pandemic I was content to afford Mr McAughey the opportunity to consult with the claimant and file further submissions.

4. I directed the tribunal office to ascertain when Mr McAughey would be a position to amplify his submissions and on 17 June 2020 Mr McAughey wrote to the tribunal office and requested a further period of 4 weeks to run from a date set by the tribunal. In this letter Mr McAughey provided further information concerning the reasons for the delay in attending to the matter. Mr McAughey advised that a short time before the lockdown the claimant was hospitalised with a collapsed lung. She was discharged from hospital a number of days later but given her weakened condition was ordered bed rest until she regained her strength. The pandemic then completed her incarceration as Mr McAughey put it. In these circumstances I considered it just and equitable to grant the further extension requested taking into account the claimant's health problems and the impact of the restrictions due to Covid-19. The respondent's representative, Mr Foote, did not take issue with the request but made brief written submissions as to why the application for reconsideration should be refused. The claimant's representative was given 4 weeks from 22 June 2020 to complete his submissions. On 20 July 2020 Mr McAughey completed his submissions.

5. The initial application for a reconsideration is based solely on the tribunal's findings in relation to constructive dismissal. While the application criticised some aspects of the tribunal's factual findings the main thrust of the application is set out in paragraph 12 of the application and is as follows:

> "The claimant seeks the review on the basis that the Tribunal's Judgment is inherently inconsistent. If it has directed itself appropriately as to the time period under scrutiny for the sexual discrimination limb of the Claimant's case then logically it must have mis-directed itself on the constructive dismissal limb of the Claimant's case."

Mr McAughey's point appears to be that the claimant's claim for constructive dismissal was founded on conduct which occurred during a notice period that is to say after she unambiguously resigned. While it is plainly correct that an employment relationship continues during the notice period this cannot mean that objectionable behaviour that occurs post resignation can contribute to the employee's reasons for resigning and claiming constructive dismissal.

6. Mr McAughey further submitted that the tribunal's judgment was inherently inconsistent and on the basis that it had directed itself appropriately as to the time period under scrutiny for the sexual discrimination limb of the claimant's case then logically it must have misdirected itself on the time period on the constructive dismissal limb of the claimant's case. Mr McAughey found this contention on paragraph 84 of the tribunal's judgment which reads as follows:

> "Clearly a claim of sex discrimination or harassment may be founded on conduct which occurs during a notice period as the employment relationship continues during that time."

This is a straightforward statement in relation to the law in relation to sex discrimination. In seeking to apply this to the claimant's constructive dismissal Mr McAughey is not comparing like with like. A constructive dismissal claim is based on actions or words spoken which precede and cause an employee to resign. An employee cannot resign and then seek to found a constructive dismissal on behaviour that occurs after resignation. In the present case the claimant unambiguously resigned on 31 July 2018 and the behaviour that she ultimately complained about occurred after that date. It is to the claimant's credit that she was nonetheless initially prepared to work out her notice period but that does not operate to bring post resignation actions by the respondents under the umbrella of constructive dismissal.

7. Mr McAughey also alluded to the *Malik* line of authorities and specifically the responsibility of the employer to ensure that he has the means to ensure he does not breach the legally implied term of trust and confidence. The tribunal was well aware of the importance of *Malik* in cases of this nature, although it was not in fact relied on overtly by either party, but it does not add anything to this application for reconsideration.

8. The further submissions filed on 20 July 2020 by Mr McAughey referred to a number of evidential matters which he had not identified previously.

   (1) The first point that Mr McAughey made was that Ms Barbara Boyce is referred to in paragraph 1 as a non-attender whereas she did attend but did not give evidence. The crucial fact is that she did not give evidence. The tribunal is not concerned with whether Ms Boyce attended or not. Mr McAughey also complains about Mr Alan Johnston being listed as a source of evidence in paragraph 1. It is not disputed that Mr Johnston's witness statement was provided to the tribunal and was read by the members of the tribunal in advance of the hearing in anticipation that he would be called to give evidence. Nor is it in dispute that the tribunal refused Mr McAughey's request to excise his statement from the bundle. The tribunal's view was that the statement should remain in the bundle and that little or no weight should be attached to it. In any event the tribunal's decision did not place reliance on any matter contained in Mr Johnston's witness statement and Mr McAughey has not sought to suggest otherwise. The complaint is therefore merely technical and entirely without merit.

   (2) Mr McAughey next referred to Ms Dillon's email to the claimant of 30 July sent at 22.15 and the claimant's reply on 31 July at 10.10 which he contends clearly show the link between the claimant's email of resignation which followed hard on the heels of the perceived inadequate response to her complaint. The tribunal's finding in relation to the alleged inadequate response to the claimant's complaint is set out at paragraph 81 of its decision. The tribunal found that that Ms Dillon's conduct of the meeting did not constitute a fundamental breach of contract. Furthermore, it is clear that the case made by the claimant had

largely shifted to her treatment by Canon McKegney which post-dated her resignation.

(3) Mr McAughey's next point was that the tribunal was wrong to state at paragraph 42 of its decision that the claimant took no issue with the notes of her meeting with Ms Foster on 20 August 2018. Mr McAughey drew attention to the claimant's reply upon the receipt of the report in which she gave her recollection of the meeting where it differed from the report provided. There is a difference between a challenge to the record of the meeting and the report of its outcome but this all took place some weeks after the claimant had resigned and thus has no bearing on her reasons for resigning. Mr McAughey's criticism of the respondent's failure to call Ms Foster to give evidence and Ms Dillon's concession that the report was fatally flawed are also immaterial.

(4) Mr McAughey was also critical of the description of Mrs Armstrong's responsibility as primarily "answering phones and taking bookings." Again this is not material but in any event it is clear from paragraph 8 of the tribunal's decision that Mrs Armstrong undertook a management role.

9. In his further written submission Mr McAughey also placed reliance on the decision of the English Court of Appeal in ***Western Excavating (ECC) Ltd v Sharp (CA) [1978] ICR 221.*** Mr McAughey quoted extensively from the judgments delivered in that case which is the leading case in relation to constructive dismissal. After highlighting a number of passages in the judgments Mr McAughey makes the following submissions:

> "With all due respect the claimant is of the opinion that the Tribunal has erred because it has failed to implement the reasoning laid down in Western Excavating. Clearly the claimant who in fact gave notice would if the Tribunal's reasoning were correct would be better off if she had not done so. The Tribunal would have then had to include the events of which it declared it was taking no notice. The law is contract law, the contract continues during the notice period – the legal effect of giving notice is exactly that."
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> "The test for the Tribunal was to analyse the same legal provision as that considered by the Court of Appeal in *Western Excavating.* Its process ought to have followed the direction from that case. In concluding that the events of 3 August and their effect upon the claimant were irrelevant the Tribunal erred in law. If that is the case then whatever analysis or mis-analysis of the evidence flowed from that cannot render the decision anything other than wrong."

10. I am not persuaded that there is any substance in the points advanced by Mr McAughey based on ***Western Excavating (ECC) Ltd v Sharp.*** While it is clearly correct that the contractual relationship between the employer and employee continues during any notice period it is not open to the employee to rely on events occurring during that period as a basis for her resignation.

The employee may seek to rely on post resignation behaviour by her employer in support or corroboration of what led her to resign but this is conceptually distinct from arguing the impossible namely that behaviour which took place after the employee's resignation caused her to resign.

11. Mr McAughey then goes on to submit that the tribunal's assessment of the witnesses at paragraph 87 takes its decision into the area of perversity mentioned at the beginning of Lord Justice Lawton's judgment in ***Western Excavating (ECC) Ltd v Sharp.*** The comments made by the tribunal at paragraph 87 were critical of witnesses on both sides. There is nothing in these comments that could be regarded as coming within the mantra of perversity.

Conclusion

12. I am not persuaded by the application that reconsideration is necessary in the interests of justice. Having carefully considered the application and the further submissions provided by Mr McAughey I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The application for reconsideration is therefore refused.

Employment Judge:

This judgment was entered in the register and issued to the parties on: