



# EMPLOYMENT TRIBUNALS

**Claimants:** Mr Shaun Cheesman

**Respondent:** Countrywide Estate Agents Limited

## RECONSIDERATION JUDGMENT

1. The Claimant's application for a reconsideration under rule 13 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 made by letter dated 4 February 2021 is dismissed.

## REASONS

1. The Claimant presented a claim (Case Number 3201008/2020 hereafter 'the first claim') against the same Respondent on 15 April 2020 in which he complained that the acts and omissions of the Respondent in advertising a position as including a requirement that applicants must possess a full driving license amounted to unlawful discrimination and a failure to make reasonable adjustments. It was the Claimant's case that by reason of a visual impairment he has a disability for the purposes of Section 6 of the Equality Act 2010. He said that as such he was unable to fulfill the requirement to drive.

2. In his particulars of claim in the first claim were treated as including claims of direct, indirect discrimination and a claim that there had been unlawful discrimination contrary to Section 15 of the Equality Act 2010. In addition, the Claimant claimed that the Respondent failed to make reasonable adjustments by making alternative transport arrangements. In support of those claims the Claimant set out that having contacted the Respondent there had been a suggestion that the Respondent would consider the Claimant for what it deemed was a suitable role but that the Respondent had then failed to revert to him.

3. The Respondent made an application to strike out the Claimant's first claim and/or for a deposit order. That application came before EJ Tobin on 21 September 2020. The Claimant had indicated that he would be unable to attend and, EJ Tobin decided that he would proceed in the Claimant's absence. He struck out the claims brought under Section 15 and sections 20 & 21 of the Equality Act 2010. He accepted the Respondent's position that the Respondent had no knowledge of the Claimant

and/or his disability at the time it advertised the position(s). He went on to make deposit orders in respect of the claims of direct and indirect discrimination.

4. The Claimant was aggrieved by those decisions. He applied for a reconsideration but that was refused by EJ Tobin. He told me that he had not paid the deposits that had been ordered. As such the whole of the first claim was struck out.

5. On 18 January 2021 the Claimant presented Case No: 3200185/2021 ('the second claim'. His ET1 contains a long narrative of his claims running to 162 paragraphs. No dates are given as to when any allegedly unlawful act took place.

6. Regional Employment Judge Taylor rejected the second claim. Her reasons for doing so were that she considered that the second claim was 'an abuse of process'. The Tribunal wrote to the Claimant on 2 February 2021 erroneously stating that the reason for the rejection was that the Tribunal had no jurisdiction to entertain the claim. On 4 February 2021 the Claimant applied for a reconsideration of the rejection of his claim form. When reviewing that application REJ Taylor listed the matter for a hearing and corrected the basis upon which she had rejected the claim form to make it clear that the reason had been that she considered the second claim to be an abuse of process.

7. The matter was then converted to a hearing by CVP. Unfortunately, an e-mail from the Claimant dated 19 February 2021 which explained that he had no video camera on his computer was not spotted by the administration and came to my attention shortly before the hearing. I converted the hearing to a telephone hearing which Mr Cheesman attended. I apologised to him for the inconvenience and do so again here.

8. The question I needed to determine was whether I ought to reconsider the decision of REJ Taylor to reject the ET1.

### **The rules**

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

*Rejection: substantive defects—*

*12-(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, maybe —*

*(a) one which the Tribunal has no jurisdiction to consider;*

*(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process;.....*

*Reconsideration of rejection*

*13.—(1) A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration on the basis that either—*

*(a) the decision to reject was wrong; or*

*(b) the notified defect can be rectified.*

*(2) The application shall be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. It shall explain why the decision is said to have been wrong or rectify the defect and if the claimant wishes to request a hearing this shall be requested in the application.*

*(3)....*

*(4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified.*

### **Discussion and Conclusions**

10. The Claimant made it clear during the hearing and indeed in his ET1 that he had issued his second claim in response to the decisions of EJ Tobin. He believed that as EJ Tobin, in paragraph 9 of his judgment had identified the possibility of a discrimination claim arising from these circumstances he had permitted the claims to go forward. I disagree. I accept that EJ Tobin identified that a claim arising from a job advertisement was theoretically possible. EJ Tobin then dealt with the particular claims brought by making strike out and deposit orders. I reject the suggestion that somehow EJ Tobin's judgment paves the way for a second claim.

11. I explained to the Claimant that it was not open to me to vary or go behind the judgment of EJ Tobin. I acknowledge that the Claimant considers that the Respondent misled EJ Tobin and that he considers the decisions to be wrong. The Claimant indicated that he had not paid the deposits ordered. As a consequence, all of the first claim has been struck out. I informed the Claimant that he could, if so advised, ask for EJ Tobin to consider whether to vary his deposit orders and/or to permit him to pursue the claim see *Sodexo Ltd v Gibbons* 2005 ICR 1647, EAT. Unless or until that is done I must treat the first claim as having been struck out.

12. In **Henderson v Henderson 1843 3 Hare 100, ChD**. Sir James Wigram VC stated: 'where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case'.

13. The 'rule' that emerges from the principle in **Henderson v Henderson** a party will not ordinarily be permitted to advance a second claim if they could or should have brought the claim within an earlier set of proceedings.

14. Whilst not every attempt to advance claims brought in earlier proceedings will fall foul of this principle, where, as here, a judge has examined the merits of the first claim and struck out part of the claim and made deposit orders on the second part I have no doubt that it would amount to an abuse of process.

15. I had carefully read the 162 paragraph addendum to the ET1. Like REJ Taylor I had thought that the ET1 simply repeated the claims set out in the first claim.

However, I was anxious to ensure that I was correct. I explained to the Claimant that if he had referred to some new act of discrimination that had arisen after he issued the first claim then I would be minded to permit any such claim proceed as it could not have been brought in the first claim.

16. The Claimant suggested that he might be able to argue that, as the Respondent had still not reverted to him in respect of any suitable jobs he could rely on that continued state of affairs as a new act. I disagree. The Claimant had complained of the failure to revert to him in the first claim. The fact that that continued does not give rise to a new claim without some fresh consideration or event. Section 123 of the Equality Act 2010 makes it clear that an omission is considered a one-off act. I accept that had the Claimant pleaded that there had been some reconsideration or revisiting of the omission he might have been able to identify a new act. He would have needed to have pleaded that (by amendment or otherwise).

17. Ultimately the Claimant, with very good grace, accepted that he had not identified any new act of discrimination in the second claim not already put forward in the first claim. I think he was right to do so. I had been unable to identify any new event from the ET1.

18. It follows in my view that the Claimant has in effect simply represented the claim that had been struck out as a consequence of EJ Tobin's orders. I am satisfied that that is not a route by which the Tribunal should permit a party to bypass orders made under rules 37 and 39. It is, in the language of rule 12, an abuse of the process of the Tribunal.

19. I have therefore concluded that REJ Taylor was right not to accept the claim. If the Claimant wishes to pursue these issues his remedies by challenging the decisions of EJ Tobin via reconsideration or appeal. He should take such advice as he can particularly in respect of the relevant time limits.

**Employment Judge Crosfill  
Dated: 16 March 2021**