# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Sonia Mortlock

**Respondent:** Clarion Housing Group

# RECONSIDERATION JUDGMENT

1. The Claimant's application made on 22 May 2019 for a reconsideration of the judgment dated 2 May 2019 has no reasonable prospects of success and is dismissed.

# REASONS

1. The Claimant had presented a claim of unfair dismissal. Following the full merits hearing that took place on 4 April 2019 I reserved my decision as there was insufficient time to give a reasoned judgment on that day. On 2 May 2019 I gave my judgment and reasons in writing to the parties. I dismissed the Claimant's claim.

2. My judgment and reasons were sent to the parties on 16 May 2019. On 22 May 2019 the Claimant asked for a reconsideration of my judgment. The grounds for the application were set out in a short document prepared by the Claimant's solicitor and an attachment prepared by the Claimant herself. In the part prepared by the Solicitor the position is summed up at paragraph 7 which says:

   *"Overall the decision and judgment goes against the fact finding. Too much latitude has been given to a large employer who failed to act fairly. Paragraph 65 does not sit well with the reasons. It should result in the Claimant winning. If the judge was troubled then any benefit should go to the Claimant.*

3. The Claimant's comments repeat this central point but she also takes issue with some of my findings of fact. In particular the Claimant maintained her position that the proposal that she work for 4 days a week was not on the table during the appeal process.

**The rules**

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

> *"Principles*
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> *70. - 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.*
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> *Application*
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> *71 - 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.*
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> *Process*
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> *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.*
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> *(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.*

5. The expression 'necessary in the interests of justice' does not give rise to an unfettered discretion to reopen matters. The importance of finality was confirmed by the Court of Appeal in ***Ministry of Justice v Burton and anor*** **[2016] EWCA Civ 714** in July 2016 where Elias LJ said that:

> "the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Ironsides Ray and Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."

6. In ***Liddington v 2Gether NHS Foundation Trust*** **EAT/0002/16** the EAT chaired by Simler P said in paragraph 34 that:

> "a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or by adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered."

7. Any preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay. That principle militates against permitting a party to reargue matters that have already been considered or referring to evidence which could or should have been considered at the earlier hearing.

8. In accordance with the Employment Tribunal Rules of Procedure I must reconsider any judgement where it is in the interest interests of justice to do so. Further, if I considered that there is no reasonable prospect of the original decision being varied or revoked I must refuse the application for reconsideration.

**Discussion and Conclusions**

9. The Claimant's application correctly notes that I found that, in a number of ways, the Respondent had handled the dismissal as well as it could have done. I was very alive to that and, as noted in the application troubled by this. That said my judgment makes it clear that I considered that the Respondent had sound business reasons for implementing the changes and for not:

   9.1. permitting the Claimant to work outside the core hours when all other employees were expected to have left the office;

9.2. working 4 hours per week from home from home or

9.3. paying the Claimant a higher rate than other employees to maintain her salary.

10. The reality was that the compromises that were initially put forward were the only realistic options that occurred to anybody at the time. I have found as a fact that the Claimant refused those options both at the time that the decision to dismiss was taken and during the appeal process. The procedural matters I have identified need to be assessed against that background.

11. I am bound by authority that prevents me substituting my own view of what the employer should have done. I have set out that case law clearly in my reasons. I came to the conclusion that despite the errors I had identified the decision to dismiss was one which was open to a reasonable employer. Insofar as it is suggested that the Claimant should get 'the benefit of the doubt' I disagree that that is the true legal test. In applying the test set out in Section 98(4) of the Employment Rights Act 1996 there is no burden on the employer and the approach of the Tribunal should be neutral. See ***Boys and Girls Welfare Society v McDonald*** **[1996] IRLR 129.**

12. The Solicitors part of the application is simply an attempt to reargue the matter. It is just the sort of 'second bite of the cherry' identified in ***Liddington.*** I have already dealt with all of the matters raised in that part of the application. The principle of finality means that I should decline to do so for a second time.

13. The part of the allocation drafted by the Claimant takes additional points where she takes issues with my findings of fact. She presents no new evidence and certainly none which could not have been deployed at the hearing. It is not the function of a reconsideration to make further submissions as to whose factual account should be preferred. I made findings of fact applying the test of 'the balance of probability' and decided what was more likely to have occurred. There is no basis for reopening those findings. I accept that I may have mistaken the job title of one witness but that was not a matter material to my ultimate decision.

14. 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
17 June 2019