Case No: 2405468/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr D Taheri

Respondent: Prosurance Limited

JUDGMENT

The claimant's application dated 16 October 2019 for reconsideration of the judgment sent to the parties on 16 October 2019 is refused on the grounds that there is no reasonable prospect of the decision being varied or revoked.

REASONS

1. The claimant wrote on 16 October 2019, with the heading "Appeal against decision to strike out claim". I have treated this as an application to reconsider the judgment. I have undertaken a preliminary consideration of the claimant's application set out in his letter of 16 October 2019 with further arguments put in a letter dated 19 October 2019. I have also considered the comments of the respondent on the application in their letter of 18 October 2019.

2. Reference to paragraph numbers in these reasons are to paragraphs in the reasons for my judgment sent to the parties on 16 October 2019.

The Law

3. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70).

4. Rule 72(1) of the 2013 Rules of Procedure provides that an application shall be refused if the judge considers that there is no reasonable prospect of the original decision being varied or revoked.

5. 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. Similarly 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. In common with all powers under the 2013 Rules, 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. Achieving finality in litigation is part of a fair and just adjudication.

The Application

8. The claimant's application made in his letter of 16 October 2019, supplemented by his letter of 19 October 2019, put forward the following arguments as to why I should reverse my decision:

8.1. That proceeding without the claimant being allowed to make his representations was a breach of his Article 6 Human Rights and discrimination under the Equalities Act 2010.

8.2. That I should not have allowed a "without prejudice" email to be admitted.

8.3. That the claim was a clear case of discrimination as the claimant had stated that he had the relevant experience.

8.4. That I formed a biased opinion.

8.5. That my reasons were nonsense and wrong in principle and I was merely "nit-picking" at the claimant's prima facie case.

8.6. That I had colluded with Ms Elvin (the respondent's representative) and we are friends.

8.7. That the claimant was told (by the respondent) that private health care was provided for employees and the claimant merely mentioned to John Carter, would existing conditions such as his prostate cancer be covered? (The claimant wrote "John Cater" but I assume was referring to John Carter).

9. I will deal with each of these specific arguments, taking 8.4 and 8.6 together, since they appear both to relate to an argument that I was biased.

That proceeding without the claimant being allowed to make his representations was a breach of his Article 6 Human Rights and discrimination under the Equalities Act 2010

10. This is, in effect, an objection to my decision to continue with the hearing without allowing the claimant to participate by telephone. My reasons for doing so are set out in paragraphs 4-9.

11. Dealing first with the Article 6 argument, the only part of Article 6 of the European Convention on Human Rights which appears potentially relevant is the requirement that, in the determination of his civil rights, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This was a public hearing. The claimant's argument would appear to be that it was not fair to proceed without him being allowed to participate by telephone. The claimant has not put forward any argument or information which leads me to conclude that my decision was not fair, in the circumstances I described in my judgment.

12. The claimant has not explained in what way he alleges that my refusal to allow him to participate by telephone was discrimination under the Equalities Act 2010. The medical evidence provided by the claimant is dealt with in paragraph 6. As noted in paragraph 7, this had not persuaded my judicial colleagues who made decisions prior to the day of the hearing to refuse to allow the hearing to be conducted by telephone, that the claimant was unable to attend the hearing in person. As noted in paragraph 8, the claimant had attended a hearing in person on 11 and 12 September 2019. The claimant has not put forward any argument or information which leads me to conclude that there is any basis for his allegation that I have discriminated against him in relation to a protected characteristic by refusing to allow him to participate by telephone in the hearing.

13. It appears that the claimant is seeking, not only to have a second bite at the cherry, but a fourth bite, in that his application to have the preliminary hearing conducted by telephone had been refused twice before my refusal, with no change in circumstances (see paragraphs 4 and 9). There is no reasonable prospect that I will decide that I should have allowed the claimant to participate in the hearing by telephone.

That I should not have allowed a "without prejudice" email to be admitted

14. The claimant gives no reasons as to why my reasoned decision on this point is incorrect. I deal with the email itself at paragraph 26 and my reasoning that it is admissible evidence at paragraph 42. There is no reasonable prospect that I will decide that I should not have allowed evidence of the "without prejudice" email to be admitted.

That the claim was a clear case of discrimination as the claimant had stated that he had the relevant experience

15. I assumed for the purposes of the hearing that the claimant did have the

relevant experience for the job in question (see paragraph 29). I explained in my reasons why, despite this assumption, I concluded that the claim was vexatious and, in the alternative had no reasonable prospect of success (see paragraphs 39-45). There is no reasonable prospect that I would revoke my decision on the basis that the claimant had relevant experience because the decision was made on the assumption that the claimant did have such experience.

That I formed a biased opinion
That I had colluded with Ms Elvin (the respondent's representative) and we are friends

16. I will deal with these two points together since the second, contained in the claimant's letter of 19 October 2019, expresses a belief which is the only basis explained in the claimant's letters for his assertion that I formed a biased opinion.

17. There is no basis given for the assertion that I had colluded with Ms Elvin, and I dispute this.

18. The claimant does not provide any basis for his belief that Ms Elvin and I are friends. Even if I had been friends with Ms Elvin, a professional representative, this would not form a proper basis for an allegation of bias; this not being something which would cause a fair-minded and informed observer to conclude that there was a real possibility that I was biased. However, for the avoidance of doubt, I am not friends with Ms Elvin.

19. I reached my decision after considering all the relevant information available to me. There is no reasonable prospect that this allegation of bias, made without any basis in fact, would cause me to change my decision.

That my reasons were nonsense and wrong in principle and I was merely "nit-picking" at the claimant's prima facie case

20. This seems to be simply an attempt to have a second bite at the cherry. I explained my reasons for my decision. There is no reasonable prospect that this view expressed by the claimant would cause me to change my decision.

That the claimant was told (by the respondent) that private health care was provided for employees and the claimant merely mentioned to John Carter, would existing conditions such as his prostate cancer be covered?

21. This is an assertion made for the first time in the claimant's letter of 19 October 2019. It is an attempt to introduce new evidence, which would have been available to the claimant prior to the hearing. The claimant stated only in his claim form that he had "informed" John Carter that he had prostate cancer. This is somewhat different to asking a question about whether this condition would be covered by private health care. The claimant chose not to send written representations to the tribunal when he was not going to attend in person. A reconsideration is not an opportunity to put forward evidence which would have been available but was not put forward at the hearing. However, even if this evidence had been put forward by the claimant, there is no reasonable prospect that it would have led to a different conclusion. What the claimant now asserts does not contradict the respondent's assertion, in its response, that the claimant, without specifically being asked about the state of his health, informed Mr Carter

that he had prostate cancer. If I had heard this evidence, I would have assumed, for the purposes of the strike out application that the proffering of the information about prostate cancer had arisen in the context of a discussion about private health care, since I would have taken the claimant's case at its highest. However, this would still have left the claimant in the position that his case did not even go as far as asserting a difference in treatment and a difference in protected characteristic. I would have reached the same conclusion as I set out in paragraph 43, that the claimant had no proper basis for linking his rejection with his age or disability and cannot have had a genuine view when he presented his claim that it had merit. There is no reasonable prospect that this new evidence, even if I considered it could be introduced at this late stage, would cause me to change my decision.

Conclusion

22. For the reasons I have given in relation to the specific points made by the claimant, I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The application for reconsideration is refused.

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Employment Judge Slater

Date: 11 November 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

14 November 2019

FOR THE TRIBUNAL OFFICE