Case No: 2501633/17

EMPLOYMENT TRIBUNALS

Claimant: Mr M Young

Respondent: Hill Care Limited

JUDGMENT

The claimant's application dated 19 October 2019 for reconsideration of the judgment sent to the parties on 9 October 2019 is refused.

REASONS

1. I have undertaken preliminary consideration of the claimant's application for reconsideration of the judgment dismissing his claims. That application is contained in a five-page letter, dated 19 October 2019, received by the Tribunal on 22 October 2019.

The Law

2. 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).

3. Rule 72(1) of the 2013 Rules of Procedure empowers me to refuse the application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked.

4. 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."**

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

> **"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…."**

6. 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, taking into account both parties to the litigation.

The Judgment

7. The claimant's claims were dismissed under rule 47 after the claimant failed to attend the hearing. Reasons for that decision were provided.

8. In summary, the claimant was found to have been aware of the hearing, had not indicated he could not or would not attend, and despite efforts on the day he could not be contacted. The decision to dismiss the claimant's claims was made after waiting an hour from the scheduled hearing time.

The Application

9. The reasons set out below refer back to the reasons promulgated with the initial judgment dated 8 October 2019. References in square brackets (e.g. [7]) are references to paragraph numbers in the 8 October 2019 reasons.

10. The majority of the points raised by the claimant in his reconsideration application invite the consideration of matters that were taken into account, and recorded as such, within the reasons given in the 8 October 2019 judgment. In that sense they represent a 'second bite at the cherry' which undermines the principle of finality. Such attempts only have a reasonable prospect of resulting in the original decision being varied or revoked if the Tribunal has missed something important. A Tribunal should not reconsider a decision simply because the claimant believes that a different decision could, or should, have been reached.

11. The points raised by the claimant in his reconsideration application are addressed in the reasons set out below.

12. Importance of the Claimant's Alleged Disclosures

    12.1. The claimant highlights at the outset of his reconsideration application that his whistleblowing complaints arise in connection with important alleged public interest disclosures. Whilst the disclosures themselves may be of great importance, the Employment Tribunal would not examine the accuracy of any disclosures allegedly made if the case was fully heard.

12.2. The accuracy or inaccuracy of an alleged disclosure is not a material factor when determining if any treatment of the claimant is unlawful because it was connected to the fact the disclosure was made, save to the extent that it is alleged that disclosures were made in bad faith. That does not appear to be the basis of the respondent's defence to the claimant's claims. This means that the accuracy of the alleged disclosures is not something that the Tribunal would reach a judgement about in any event.

12.3. Accordingly, it would be inappropriate to proceed to a hearing on the ground that there is any public interest because the alleged disclosures relate to important matters.

13. In addition to the above, the claimant's grounds for reconsideration are set out in eight further, numbered, paragraphs. For completeness these are dealt with in turn, using the claimant's numbering. At times these paragraphs repeat the same grounds, and where this is the case it has been identified below.

14. <u>Claimant's Paragraph Number 1</u>

14.1. In this paragraph the claimant identifies five distinct grounds as follows:

Ground 1: The claimant was not sent (or at least did not receive) the 13 February 2019 notice, listing his claim for hearing 23-25 September 2019;

Ground 2: Orders to prepare for a final hearing were never issued to the parties, the Tribunal having asked the parties to propose agreed orders, which the parties did not then agree;

Ground 3: The Tribunal indicated in correspondence dated 14 May 2019 that the matter could not be listed for hearing until a timetable for preparation had been agreed by both sides;

Ground 4: The claimant had only been asked to confirm his availability for a hearing up to 31 July 2019, and the hearing was listed for September 2019;

Ground 5: The claimant had an active complaint about the Tribunal Service excluding him from correspondence at the time of the hearing.

These grounds are dealt with in turn below.

14.2. Ground 1

14.2.1. The promulgated reasons, at paragraph notes that both parties, including the claimant (and respondent) had been sent the Notice of Hearing on 13 February 2019 [1]. This was sent by post.

14.2.2. The listed dates for the hearing were then confirmed to both parties, by post, in correspondence dated 17 May 2019 [3.1].

14.2.3. The claimant in his letter to the Tribunal of 18 May 2019 refers to the listing for hearing from 23-25 September 2019.

14.2.4. The claimant was further told of the hearing date in correspondence from the Tribunal dated 6 July 2019 [3.2]. The claimant responded to this letter on 27 July 2019 [4] to state that he had "*no correspondence of Orders that relate to a listing the Employment Tribunal and Respondent have mentioned for 3 days 23-25 September 2019*". This shows the claimant was aware of the date of the listed hearing.

14.2.5. Regardless of whether the notice of hearing dated 13 February 2019 reached the claimant, the claimant was aware of the hearing date. This was noted in the 8 October 2019 reasons [4].

14.2.6. Accordingly, it is not in the interests of justice to reconsider the decision on the basis that the claimant was not aware of the hearing, as a result of not getting the initial notice of hearing (or otherwise), given he was aware of the listed date for the hearing.

14.3. Ground 2

14.3.1. It is correct that the parties had not agreed orders for the preparation for the final hearing. No reasonable party could understand that a hearing would not go ahead on the basis that the parties had not completed the preparation needed for the hearing, unless the hearing was postponed by a Judge, who may take into account the absence of adequate preparation.

14.3.2. At no point has any suggestion been made by the Tribunal, or either of the parties, that the listed hearing was postponed. To the contrary, it was repeatedly and expressly confirmed that the hearing remained as listed as noted above.

14.3.3. The claimant could not reasonably have been in any doubt that the hearing remained as listed. Accordingly, it would not be in the interests of justice to reconsider the decision on this ground.

14.4. *Ground 3*

14.4.1. It is correct that the Tribunal's letter to the parties dated 14 May 2019 that suggested, wrongly, that the case was not at that time listed for hearing.

14.4.2. The claimant was further told of the hearing date in correspondence from the Tribunal after this date (6 July 2019 [3.2]). This was in part because the respondent had sought confirmation that the hearing remained as listed. In addition, the claimant in correspondence dated 27 July 2019 [4] referred to the listed hearing date.

14.4.3. Accordingly, the hearing date was expressly confirmed after any potential confusion which may have been caused by the letter of 14 May 2019, and the claimant in July explicitly referred to the listed hearing date. It would not be in the interests of justice to reconsider the decision on the ground that there was a potential confusion, given any such confusion was subsequently fully clarified.

14.5. Ground 4

14.5.1. It is correct that the parties were only asked to provide availability up to 31 July 2019. It is not the case that the parties were told that a hearing would only be listed on or before 31 July 2019.

14.5.2. Despite the parameters of the request made, the parties both provided confirmation of their availability up to and including September 2019. The claimant did this in his letter dated 12 February 2019.

14.5.3. The hearing was listed taking into account the availability of both parties. It would not be in the interests of justice to reconsider the decision on the ground that the hearing was listed in accordance with the parties stated availability, albeit at a later date than had previously been hoped

14.6. Ground 6

14.6.1. It is noted that the claimant had, in May 2019, made a formal complaint about the Tribunal Service.

14.6.2. The claimant does not suggest in his reconsideration application why such a complaint would render it in the interests of justice to reconsider the decision reached, or why the fact he is pursuing a complaint should mean his substantive claim cannot be heard.

14.6.3. The fact the hearing remained listed was confirmed to the claimant, as noted above, after he made this complaint.

14.6.4. At no time did the Tribunal suggest to the claimant that his hearing had been postponed from 23-25 September 2019, either to consider his complaints or for any other reason. Accordingly, it is not in the interests of justice to reconsider the decision reached on this ground.

15. Claimant's Paragraph Number 2

15.1. This ground appears to mostly repeat the points raised in paragraph 1 of the claimant's reconsideration application which are addressed under the heading 'Ground 5' at 14.5 above. The only additional point the claimant appears to make in paragraph 2 of his reconsideration application is that the he was told the hearing had been 'relisted' when he did not believe it had been listed, so could not be 'relisted'.

15.2. The fact he acknowledges that he was told it was 'relisted' shows he was aware of the listing, which further confirms the claimant was aware of the listing.

15.3. The Tribunal's records show that the claimant's claim had been listed for hearing and postponed in May 2018 and again in July 2018. Accordingly, the listing for 23 September 2019 was, in fact, a relisting. Regardless, whether the hearing was a listing or relisting makes no material difference that could make it in the interests of justice to reconsider the decision made.

16. Claimant's Paragraph Number 3

16.1. This paragraph restates and adds nothing material to the points points raised in paragraph 1 of the claimant's reconsideration application which are addressed under the heading 'Ground 4' at 14.4 above.

17. Claimant's Paragraph Number 4

17.1. This paragraph restates and adds nothing material to the raised in paragraph 1 of the claimant's reconsideration application which are addressed under the heading 'Ground 6' at 14.6 above.

18. Claimant's Paragraph Number 5

18.1. The claimant raises a concern in his reconsideration application that the 8 October 2019 reasons refer to the claimant being emailed by the Tribunal [5]. The claimant had clearly stated, most recently on 12 March 2018, that email communication was "not acceptable" to him.

18.2. The emails in question were sent on 20 September 2019, after attempts to contact claimant by phone had failed. The date was such that a letter could not be sent by post before the listed hearing.

18.3. The purpose of the first email was to try to warn the claimant as early as possible that there was a risk, due to a lack of judicial resource, that the hearing of his claim for the following Monday (23 September 2019) may have to be postponed. The second email was merely to confirm to the claimant that judicial resource had been secured, and the hearing would proceed, such that the warning in the earlier email could be disregarded.

18.4. The email address used was one that had been used by the claimant himself to contact the Tribunal, and example being an email sent on 25 February 2018 at 17:11. The address is m***********4@msn.com. Whilst the claimant has specifically asked in his reconsideration application what email address was used, it is not reproduced in full in this public judgment because it makes no material difference to the determination of the claimant's reconsideration application.

18.5. The claimant states in his reconsideration application that he did not get either email. Taking into account the content of the emails and the fact the claimant saw neither, the sending of the emails had no material impact on the decision reached. Accordingly, this is not a ground to reconsider the decision.

19. Claimant's Paragraph Number 6

19.1. The claimant confirms that his phone records a missed call from the Tribunal on the morning of 23 September 2019. The claimant states that a voicemail could have been left. The 8 October 2019 reasons state that the claimant was phoned, but the call was not answered [6]. In addition, the 8 October 2019 reasons record that there was "no facility for leaving a message" when the call was not answered. It is only the part about the facility for leaving a message that the claimant argues is not correct.

19.2. Whilst the claimant states that his phone does accept voice mail messages, that is not what was reported by the clerk who sought to contact him on the morning of 23 September 2019. Regardless, had the Tribunal been able to leave a voice mail for the claimant, it is not clear it would have made any material difference to the fact the claimant did not attend the listed hearing. The claimant did not seek to contact the Tribunal to confirm or explain his non-attendance.

19.3. The fact the claimant states he believes that a voice mail message could have been left does not make it in the interests of justice to reconsider the decision made.

20. Claimant's Paragraph Number 7

20.1. This ground restates and adds nothing material to the points raised in paragraph 1 of the claimant's reconsideration application which are addressed under the headings 'Ground 3' at 14.3 and 'Ground 6' at 14.6 above.

21. Claimant's Paragraph Number 8

21.1. This ground mostly restates the points raised in paragraph 1 of the claimant's reconsideration application which are addressed under the heading 'Ground 6' at 14.6 above. The only additional point raised is in effect a submission that rule 47 should not apply when a party has unanswered complaints about the Tribunal service.

21.2. It is not correct that Rule 47 should not apply when a party has an arguable case. Such a limit on Rule 47 would negate the purpose of the rule.

Summary and Conclusion

22. The claimant was fully aware of the listed hearing date. He has stated that he did not receive the initial notice of hearing dated 13 February 2019. He did, however, become aware of the hearing from the respondent, and further, this was confirmed in writing by the Tribunal at least twice, well in advance of the hearing.

23. The claimant has put forward no suggestion that he attempted to attend the hearing, or for any reason was unable to attend the hearing. The claimant has made no suggestion that he attempted to contact the Tribunal to say he could not attend the hearing, or that he would not be attending the hearing.

24. The only potentially relevant new information relied on by the claimant relates to two emails sent to him on the last working day before the hearing, which he states he did not receive. Accordingly, they cannot form a part of any explanation or excuse for his non-attendance.

25. Having considered all the points made by the claimant I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The points of material significance were considered and addressed at the time of the initial Rule 47 decision.

26. The claimant's application for reconsideration is refused.

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Employment Judge Buzzard

26 November 2019