Case No: 2300884/19

EMPLOYMENT TRIBUNALS

Claimant: Mr M Ali

Respondent: Lidl Great Britain Limited

JUDGMENT

The claimant's application dated 30 October 2019 for reconsideration of the judgment sent to the parties on 22 October 2019 is refused.

REASONS

1. I have considered the claimant's application for reconsideration of the judgment dismissing his claims. That application is contained in a 12 page document dated 30 October 2019 ("Application") and received by the Tribunal office on 3 November 2019.

2. The Tribunal wrote to the parties on 3 December 2019 noting that the application may proceed without a hearing and inviting the parties comments.

3. On 9 December 2019, the Claimant emailed the Tribunal to state that he was happy for his reconsideration application to proceed without a hearing.

4. The respondent responded by letter of 19 December 2019, noting that the reconsideration application should have been refused at an initial stage under Rule 72(1) of the Employment Tribunal Rules of Procedure 2013("Rules")

5. In accordance with Rule 72(2) on 16 January 20120 the Tribunal wrote to the parties inviting further comments in relation to the reconsideration application and stated that the reconsideration application would be considered without a hearing.

6. No further comments were received by either party.

The Law

7. 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).

8. 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."

9. 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."

10. In common with all powers under the 2013 Rules, reconsideration 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

11. The majority of the points raised by the claimant in the Application are attempts to re-open issues of fact on which I heard evidence from both sides and made a determination. In that sense they represent a "second bite at the cherry" which undermines the principle of finality. In reviewing the Application I have considered whether I may have missed something important, or if the claimant has informed of new evidence available which could not reasonably have been put forward at the hearing.

12. There are 2 specific points raised by the claimant which I decided required particular consideration. One relates to the fact that the respondent did not review CCTV footage. The other relates to the fact that there were no notes of the suspension meeting on 30 November 2018. I address these

below.

A. <u>No review of CCTV footage.</u>

13. The claimant refers to this throughout the Application

14. At the 8th and 9th page of the Application, the claimant states that a review of the CCTV may have provided evidence on the following issues:-
    a. In relation to a store "walk round" that the claimant claims to have carried out at the respondent's Leyland store on 20 November 2018
    b. In relation to the time that the claimant left the Leyland store (on the final occasion) on 20 November 2018.
    c. In relation to a phone call sequence that took place on 20 November at around 2.30pm
    d. Whether he was running in to the store during a sequence of events that took place on 20 November at around 2.30pm.

15. In my judgment I decided that the CCTV footage would have made no difference to the issue as to whether or not the claimant had carried out a walk round of the store. I based this decision on evidence I had heard and considered in relation to walk rounds as I explained in the decision.

16. It is also relevant to note in relation to the issue of walk arounds, that an allegation was made that the claimant was not providing appropriate support to the store managers in his area. This is contained in the letter inviting the claimant to a disciplinary meeting (page 53) and the allegation includes: *"specifically not conducting store visits in the proper manner and failing to offer appropriate guidance and support."* No finding was made in relation to this allegation.

17. My judgment does not deal with the issue as to whether CCTV footage may assist the claimant or respondent in identifying the time that the claimant left the store on 20 November 2018. It does not deal with the issues at 14.c and d above either (events occurring at around 2.30pm).

18. The claimant commented on the CCTV issue in his evidence.

    a. Paragraph 12 of his witness statement: *"I requested in my first disciplinary that CCTV was looked at ….. to show I had done a walk with Mike, contrary to his statement as I remember walking the chiller with him as it was just after the Xmas chiller set up and we discussed discontinued lines that were still coming in and had to be put in his Limited offer section. The CCTV was never looked at, however had the CCTV been looked at when I requested, they would have seen that Mr Downes clearly lied in his statement about me walking round with him and so if he lied about this, he could have also lied about other parts and conversations that were had that day.*
    b. paragraph 40 of his statement he states: *"also on several occasions I asked for CCTV to be reviewed. This was only included in the notes once as a generic point but I asked for the CCTV to be reviewed from 20 November specifically, yet this was never*

included in the notes.

19. I was (and remain) satisfied that both of the above extracts relates to the claimant asking to view CCTV footage from the perspective of a walk round and not in relation to the time that the claimant finally left the Leyland store on 20 November or the other issues raised at 14.c and d. above.

20. In the evidence provided at the hearing itself, I note:-

    a. Mr Marshall (dismissing manager) was asked by the claimant why the CCTV was not viewed. Mr Marshall's response was that he did not consider it would make any difference.
    b. Mr Marshall gave evidence that CCTV footage from the respondent's stores is available for 28 days.
    c. Mr Marshall was asked by the claimant whether he thought that the footage might have been relevant to identify the time that the claimant had left the store. Mr Marshall replied that it might have been.
    d. The claimant put to Ms McIntyre (appeal manager) that, had the CCTV footage been viewed, it may have shown a walk around the store. I have recorded her response as it would not have been relevant because the footage would have no sound.

21. The disciplinary hearing notes (from 12 December 2018) record the claimant making the following statement:- *"I apologise if the managers don't think I walk with them tile by tile. I've got no issue with you looking at CCTV over the past 4 weeks to see if I sit in the office or do I walk the shop."* This is a reference to reviewing CCTV in relation to the walk around issue. it is the "generic point" reference noted at paragraph 40 of his witness statement (and referred to at 18.b above)

22. I have also reviewed the claimant's 11 page internal appeal document (pages 137 to 147) and I note that the claimant refers to the CCTV in the context of whether a walk round had been carried out on 20 November 2018. No reference is made to its potential relevance about when the claimant may have left the store.

23. As noted, my judgment sets out my decision in relation to the CCTV footage and evidence of a walk round. It does not address the other points of potential relevance referred to in the Application and noted at 14 b to d above. The issues raised at 14 c and d, are new points now being raised by the claimant. In raising these, the claimant is attempting to have a "second bite of the cherry" as far the CCTV evidence is concerned. The issue at 14.b however was raised (albeit briefly) at the tribunal hearing.

24. I have decided that I should reconsider the relevance of CCTV footage at around the time that the claimant finally left the store on 20 November 2018 (ie the issue noted at 14.b above). As I have noted above, my hearing notes record that Mr Marshall accepted that it might have been relevant to identify the time the claimant left.

25. I have reconsidered whether the respondent's decision not to review the

CCTV footage, when taken into account with all other relevant circumstances, meant that the respondent acted unreasonably in treating its reasons for dismissal as sufficient reasons, applying s98(4) ERA).

26. The following is relevant:-

a. information provided by Mr Downes in the disciplinary investigation was not precise in relation to the time of day that events occurred. When interviewed on 3 December 2018 (page 56) the notes record that he says the claimant left the store (for the first time) on 20 November 2018 at *"about 14.30pm – 15.00pm"*
b. There is no precision either in relation to the time of the claimants second departure from the store on 20 November 2018. The evidence provide by Mr Downes when he was interviewed was that he was instructed by the claimant to inform anyone that called the store looking for the claimant, that he had left 5 minutes before the time of the call. The CCTV would not have assisted with the allegation that this comment was made.
c. It is not known (and not referred to by either party in evidence) where CCTV cameras would have been located other than the public areas of the store itself. As I have already noted, the main focus on the relevance of the CCTV at the Tribunal hearing, was in relation to evidence of a walk around and the evidence in relation to walk arounds focussed on the public areas of the store.
d. Whilst the claimant asked for a review of CCTV footage during the disciplinary and internal appeal stages, he did not say why this may be of assistance other than in relation to the walk round issue.
e. The relevant reason for dismissal in the dismissal letter of 7 January 2019 (pages 133-136 and particularly bullet point at bottom of 133 and top of 134) does not refer to a time that the claimant left the store. I am satisfied that the issue for the dismissing officer (Mr Marshall) was that this was an example where, he found, the claimant had asked a more junior colleague who reported to the claimant, to be misleading. It was the instruction that he decided the claimant provided to the more junior colleague (Mr Downes) rather than the time of the instruction, that was relevant to the decision to dismiss.

27. Having reconsidered whether the respondent's failure to review the CCTV footage for the 20 November 2018 made the decision unfair, I have decided that it did not.

<u>Would the CCTV have made any difference to the outcome?</u>

28. In my judgment I concluded that it would not (para 67b). I have reconsidered this, having regard to the possibility that it might have provided some evidence as to the time the claimant finally left the respondent's Leyland store on 20 November 2018.

29. It is important to note the following:-

a. The respondent's findings about the claimant's conduct on 20 November 2018, include findings in relation to events when the claimant first left the Leyland store on that day, the phone call with his manager and the instruction that the respondent concluded the claimant gave to Mr Downes. The CCTV footage would not have affected these findings.
b. The CCTV footage would not have provided any evidence about what was said between the parties at any time on 20 November 2018.
c. The CCTV footage would not have provided any evidence in relation to the findings Mr Marshall made about the claimant's conduct towards Mr Collins and Mr Foggan. Mr Marshall refers to these findings in 2 bullet points in the dismissal letter - at page 135.

B. No notes of suspension meeting

30. The claimant refers to paragraph 60a of the Judgment, noting that I had referred to the fact that there were no notes of a discussion that had taken place between Mr Lillis and Mr Downes on 30 November 2018. The point the claimant claims to have made in his submissions (which I was referring to at 60a) was that there were no notes of the discussion between him and Mr Lillis which also took place on 30 November 2018 when the claimant was informed that he was suspended. The claimant claims that I should have considered the lack of notes from the suspension meeting; not the lack of notes from the meeting between Mr Lillis and Mr Downes.

31. As the claimant also notes in the Application, Mr Lillis later provided a statement setting out his version of events of the suspension meeting. That was not provided to the claimant until shortly before the disciplinary hearing of 7 January 2019.

32. There were no notes of the initial discussion with Mr Downes. I had understood it was this that the claimant criticised in his submissions.

33. As far as the discussion between the claimant and Mr Lillis was concerned, Mr Lillis provided a short statement of this but some weeks after the discussion took place. The claimant had an opportunity to review and comment on this at the disciplinary hearing on 7 January 2019. The content of this discussion was considered by Mr Marshall at the second disciplinary hearing and the claimant was asked a number of questions about it to which he responded.

34. The fact that a note of the suspension meeting was not made and shared at the time of the meeting does not make the dismissal unfair.

Conclusion

35. For the reasons set out above, the application for reconsideration is refused.

Case No: 2300884/19

Employment Judge Leach

DATE 3 March 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

4 March 2020

FOR THE TRIBUNAL OFFICE