EMPLOYMENT TRIBUNALS

Claimant: Mr J Curran

Respondent: Department for Work and Pensions

JUDGMENT

The claimant's application dated 15 December 2019 for reconsideration of the judgment sent to the parties on 14 July 2019 is refused.

REASONS

1. I have undertaken a preliminary consideration of the claimant's application for reconsideration of the judgment dismissing his complaint of constructive unfair dismissal.

The history of the application

2. Judgment and reasons were given orally in this case on 5 July 2019. Written reasons were not requested at the hearing, so, in accordance with normal practice, I prepared a written judgment, without written reasons, which was signed by me on 5 July 2019. This was sent out to the parties by the Tribunal administration on 14 July 2019.

3. A written request from the claimant for written reasons was received by the Tribunal on 10 July 2019. Unfortunately, that request was not referred to me until 31 October 2019. I prepared written reasons which were sent to the parties on 21 November 2019.

4. On 22 November 2019, the claimant requested an extension of time to submit an application for reconsideration. I granted that request and the claimant was informed of the extension of time until 16 December 2019 in a letter dated 27 November 2019.

5. Having noticed an error in the initial of the claimant's first name in the written reasons, I prepared a certificate of correction which was sent to the parties on 9 December 2019.

6. The claimant made his application for reconsideration to the Tribunal by email on 15 December 2019. It appears the claimant did not copy that application to the respondent as required by rule 71 of the 2013 Rules of Procedure.

7. Unfortunately, the application for reconsideration was not referred to me until 16 March 2020. Notification from the Employment Appeal Tribunal of an appeal lodged by the claimant appears to have alerted the administration to the earlier failure to refer the application for reconsideration to me.

8. The claimant's application for reconsideration made by email had attachments in a zipped file format which the Tribunal was unable to open. On 17 March 2020, on my instructions, a letter was sent to the claimant asking him to resend the attachments in an accessible format. The claimant sent these on 26 March 2020.

9. The application was copied to the respondent on my instructions, since it was not apparent that it had been copied by the claimant to the respondent. The respondent sent a letter to the Tribunal on 3 April 2020 which I have considered. The respondent did not provide comments on the substance of the claimant's application, having not been asked to do so, but made an application for the application for reconsideration to be struck out on the basis that the application was made outside the 14 day period. It appears from this that the respondent may not have been aware of the application made by the claimant for an extension of time to make the application for reconsideration and the grant of that request. Since the application for reconsideration was made within the extended period allowed for the extension, it can be considered.

10. The claimant's application consisted of a two page letter, another 104 page document and other attachments.

The Law

11. 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).

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

13. 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."*

14. 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."*

15. A preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2 of the 2013 Rules of Procedure, 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

16. I have dealt with the claimant's grounds for reconsideration as best I understand them under headings which relate to the bullet points included in his two page document but have considered points made in the claimant's 104 page document.

Not allowed a fair and impartial Tribunal hearing

17. I consider that I conducted the hearing in a fair and impartial way. I deal further with matters to do with the conduct of the hearing under other headings below.

That the claimant was relying on two categories of breach – duty of care and implied term of trust and confidence

18. At the outset of the hearing, the parties agreed that the issues remained as identified at the preliminary hearing on 10 July 2018, with some slight amendments which did not relate to the contract term(s) relied upon. At that preliminary hearing, the judge recorded, in Annex B to the notes, that the only term relied upon was the implied duty of mutual trust and confidence. At paragraph 5 of Annex A, the judge recorded:

> "As regards the claimant's categorisation of the alleged breaches as either a breach of the respondent's duty of care or a breach of the respondent's implied duty of trust and confidence, the claimant confirmed, following some discussion, that all the allegations could be categorised as a breach of the implied term of trust and confidence.

19. At the final hearing, the claimant raised that he was still going for duty of care as well as the implied duty of mutual trust and confidence. My notes record that, after further discussion, the claimant agreed that we could consider all matters under the heading of mutual trust and confidence only as noted at the preliminary hearing.

Each of the 11 allegations identified in the claim formed a fundamental breach of contract or in the alternative that taken cumulatively 11 incidents amounted to a fundamental breach of contract

20. It is apparent from my reasoning in the conclusions that I considered this argument but rejected it for the reasons given.

21. The majority of the points raised by the claimant in his 104 page document 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. Such attempts have a reasonable prospect of resulting in the decision being varied or revoked only if the Tribunal has missed something important, or if there is new evidence available which could not reasonably have been put forward at the hearing. I do not consider the claimant has raised anything of significance which I did not consider and has not pointed to new evidence available which could not reasonably have been put forward at the hearing.

No action taken on failure by the respondents to comply with original case management orders dated 26 February 2018

22. My notes do not indicate that this was an issue raised at the final hearing and it was not relevant to my decision.

23. There was no reason for me to consider that a fair trial was not possible on the dates the case was listed before me for a final hearing.

Evidence used at tribunal hearing by the DWP and their representatives. The illegal and deliberate addition/inclusion and tampering of documents in Tribunal Case Bundle.

24. The claimant refers to documents included in the bundle which Ann Gee said were not documents taken from the claimant's back pack. I did not rely on these documents in reaching my conclusions. Whatever the explanation might be for the inclusion of these documents in the bundle, I do not consider that this has any impact on my findings of fact and conclusions.

New case management orders not followed as directed at preliminary hearing on 21 May 2018

25. My notes do not indicate that this was an issue raised at the final hearing. It was not relevant to my decision.

26. There was no reason for me to consider that a fair trial was not possible on the dates the case was listed before me for a final hearing.

DWP and their Legal Representative withholding documents and information

27. This appears to apply to alleged failures of disclosure. The claimant raises the issue of failure to disclose an Occupational Health report dated 27 January 2016. My notes record that Mr Lewis referred to this in the initial discussion at the final hearing. He said that some documents that would be relevant had been destroyed or lost. He said they did not have the Occupational Health report. I could not make an order for specific disclosure for a document I was told the respondent did not hold.

Documents requested from the DWP and their legal teams not been followed up on

28. I am unclear what additional point, if any, this raises.

The sending of two documents (totalling 102 pages) previously requested on several occasions 3 days before the tribunal hearing, by the legal representatives of the DWP. (Thus denying/impeding the claimant the use of the documents in preparation and in his defence at the Tribunal hearing)

Attendance Management Policy and Procedures

Unacceptable Customer Behaviour Guidance

29. No application for a postponement of the hearing was made by the claimant at the final hearing or an application for these documents not to be included in the bundle of documents. My notes do not record any discussion that the claimant was not ready to proceed with the final hearing. My notes record that the claimant did not object to some policy documents being added to the bundle. I am unable to confirm from my notes whether it is these documents that were referred to.

30. The tribunal adjourned at 10.50 a.m. on the first day of hearing, after the initial discussion, for me to read witness statements and documents. My notes record that I thought that the reading would take most of the rest of the day and the claimant said he would go home and did not want the expense of coming back at 3 p.m. to start the hearing. The claimant, therefore, had much of the first day of the hearing to continue his preparation if required.

31. I had no reason to think a fair trial was not possible.

Evidence(s) not been allowed to be presented at the Tribunal Hearing

The disregarding of evidence throughout the Tribunal Hearing

The ignoring of evidence throughout the Tribunal Hearing

Deliberate ignoring of the claimant's cross examination of Witnesses and their responses

Witnesses relying on evidence given at and during Tribunal Hearing but nothing within their Witness Statements (thus not allowing the claimant to prepare prior and during the Tribunal Hearing)

Disregarding of Witness under cross examination and their responses of evidence given

The claimant not being allowed to ask Witness questions he had prepared for the Tribunal Hearing

DWP and their Legal Representatives and Witness relying on their Statement and under cross examination but not supplying any evidence to accompany this

Allowing Witness under cross examination to give responses that had nothing or any relevance to Tribunal Hearing

The Presiding Employment Judge not allowing the claimant to Fairly and Correctly to [Present his case to the Tribunal Hearing]

32. I will take all these headings together, since they all appear to relate to my conduct of the hearing. I consider that I conducted proceedings fairly, in accordance with the overriding objective. I will refer to the particular criticisms I can identify from what the claimant has written. I am unclear what the claimant refers to by some of the headings.

33. The claimant refers in his 104 page document to being unable to ask some questions due to time constraints placed on him. Although we discussed and agreed an indicative time table for the 5 day hearing in the initial discussion at the hearing, I did not say I would limit the time for cross examination of any particular witness and I did not apply any time limits to the claimant's cross examination of witnesses. Indeed, although the indicative timetable provided for submissions on the afternoon of the fourth day, the claimant continued to cross examine the respondent's witnesses until the end of the fourth day and submissions were heard on the morning of the fifth day. The claimant cross examined the respondent's six witnesses over two complete days out of the 5 day listing.

34. I did intervene when the claimant's questions were not relevant to the issues I needed to consider and sought to guide him to make the best use of time, with the aim of completing the hearing within the 5 days for which it was listed. My notes record some of my interventions which included:

34.1. At the end of day 3, when the claimant had been cross examining Louise Gabrielides for nearly two hours and said he still had a lot of questions to ask her, I gave the claimant advice to review his questions overnight, writing them down if he had not already done so. I said he needed to be quicker, noting that there had been long pauses between questions that day. I advised the claimant that he did not need to ask witnesses to confirm what they had said in their witness statements. He should focus on important areas of dispute. The following day, the claimant completed his cross examination of that witness in half an hour (no time limit having been put on this).

34.2. During the cross examination of Lee Scott-Brimelow, I intervened because the claimant kept repeating questions. I called an adjournment for 10 minutes during which I suggested that the claimant should review his questions and see if he had anything new to ask the witness. After the break, he asked two further questions of that witness.

34.3. During the claimant's cross examination of Victoria Ross, I stopped the claimant asking questions about the inaccuracy of annual leave records

since the claimant had not known about this before his resignation so it could not have been part of the reason for his resignation. I told the claimant I would not need to make any findings of fact on this.

35. At the end of the hearing, I thanked the claimant for taking on board my guidance which had been given in the spirit of attempting to move things along, in the interests of both parties.

Overall conclusion

36. The claimant raises nothing of significance to the matters I needed to decide, which I had not already taken into consideration. The claimant has not pointed to new evidence available which could not reasonably have been put forward at the hearing; rather, he makes additional arguments based on documents which were available at the hearing. Much of this is based on policy documents which he says were provided to him only a few days before the start of the hearing. Although it is regrettable if disclosure of those documents was that late, the claimant did not inform me that he needed any more time to prepare for the hearing because of that late disclosure. Had he done so, we would have had a discussion about whether he wished to apply for a postponement of the hearing. I had no reason to believe a fair trial was not possible on the dates the case was heard. As noted above, in addition to time prior to the hearing, the claimant had much of the first day of the hearing as additional preparation time, when we adjourned for me to read witness statements and documents.

37. Having considered the claimant's application, I am satisfied that there is no reasonable prospect of the original decision being varied or revoked.

38. I, therefore, refuse the application for reconsideration.

Employment Judge Slater

Date: 8 April 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

17 April 2020

FOR THE TRIBUNAL OFFICE