EMPLOYMENT TRIBUNALS

Claimant: **Mr G Lewis**

Respondent: **Dow Silicones UK Limited**

RECONSIDERATION JUDGMENT

The claimant's application dated 5 January 2020 for reconsideration of the judgment dated 23 December 2019 is refused.

REASONS

1. I have undertaken preliminary consideration of the claimant's application for reconsideration of the judgment dated 23 December 2019. The application was made under cover of an email dated 5 January 2020. Prior to that on 30 December 2019 the claimant emailed the Tribunal requesting an extension of time for his reconsideration application so that he could seek legal advice. That request was not referred to me and I was unaware of it until I read the claimant's reconsideration application. In the interests of fairness on 11 February 2020 the claimant was given a further 7 days to confirm whether he had any amended grounds for his reconsideration application following obtaining legal advice. On 17 February 2020 the claimant provided two additional documents which he says relate to an appeal to the Employment Appeal Tribunal headed "background" and "grounds of appeal", which appear to be drafted by counsel engaged by the claimant. The claimant asked that they be added to his reconsideration application. The respondent has received a copy of the claimant's reconsideration application and grounds and has not provided any comments.

The law

2. An application for reconsideration is an exception to the general principle that (subject to an 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. Under Rule 72(1) I may refuse an 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 where Elias LJ said:

> "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 emphasized 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 that:

> "a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or 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."

The Application

6. The claimant's application of 5 January 2019 extends to 15 pages and covers multiple issues. The "grounds of appeal" cover some of the same grounds. I will therefore address the themes raised in the application.

Disclosure of documents

7. The claimant is seeking the disclosure of additional documents. If they are relevant an application could have been made, using reasonable diligence, during the currency of the proceedings. It is not in the interests of justice, including the importance of finality in litigation, to seek to

relitigate a case on the basis of evidence that could reasonably have been obtained and made available.

Further evidence from the claimant

8. The claimant is seeking himself to give new evidence on matters such as the relationship between Engie and the respondent and the competing working patterns as well as various other matters which, if he considered relevant, he could properly have put before the tribunal in his own written witness statement. It is not in the interests of justice, including the importance of finality in litigation, to seek to relitigate a case on the basis of evidence that could reasonably have been obtained and made available.

Regulation 4(4) of TUPE

9. The Tribunal[1] were aware of Regulation 4(4) of TUPE 2006. It did not feature in the reserved judgment because the Tribunal found there had not been a variation of the contract of employment.

Holiday entitlement and shift and unsociable hours allowance

10. The Tribunal did not find that the respondent was reducing the claimant's holiday entitlement or the shift and unsociable hours allowance. The Tribunal found as a finding of fact that whilst initially there was some confusion over the claimant's contractual terms on the part of the respondent, once the true position came to light it would have been accommodated by the respondent if the claimant had not resigned (paragraph 86, reserved judgment).

Standby and call out

11. The Tribunal did not find that the claimant would be required to work 40 hours a week. The respondent's 5 week shift cycle produced 168 hours; the same amount of hours as the Engie shift cycle (page 192 and 319 of the Tribunal bundle). Moreover, the claimant accepted in evidence under cross examination that the respondent's 5 week shift cycle produced the same 168 working hours as under his Engie work pattern. This left the same shortfall of 177 hours; the Tribunal was entitled to proceed on the basis of that oral evidence. The Tribunal therefore did not find, as asserted in the Grounds of Appeal, that the claimant would be required to work an additional 152 hours and a further 150 hours a year. The Tribunal

[1] The claimant's grounds of appeal refer to the decision being made by a "Chairman" – to be clear the Tribunal was a full panel made up of an Employment Judge and two non-legal members who reached an unanimous decision.

also did not find that the 150 hours primary cover were or would be unpaid or (as above) that the premium would be reduced.

12. The claimant is seeking to argue that the requirement to go on standby and call out would be void and/or that it was a substantial change to the claimant's working conditions to his material detriment. The Tribunal, however, found that the respondent was entitled to do so within the claimant's existing contract and it was also not a substantial change to the claimant's working conditions and gave reasons for those conclusions. The fact that the claimant disagrees with that conclusion is not a valid basis for a reconsideration in the interest of justice; the point has already been litigated, decided and reasons given. The claimant is also seeking to challenge the Tribunal's analysis of contractual wording relating to the shift pattern. Again, the fact that the claimant disagrees with the Tribunal's conclusions is not a valid basis for a reconsideration in the interests of justice; the point has already been litigated and decided.

Working Time Regulations

13. The claimant is seeking to present a new argument that the respondent's working pattern would be in breach of the Working Time Regulations. This is an argument, if relevant, the claimant could have raised during the proceedings and it is not in the interests of justice, and particularly the need for finality in litigation, for it to be raised now.

Safe Work Permit/ Work Control Document

14. The claimant seeks to argue that the Tribunal should have found the requirement to put people to work under the Safe Work Permit was a void contractual change and/or a substantial change in working conditions to his material detriment. The Tribunal, however, found that the respondent was entitled to do so within the claimant's existing contract and it was also not a substantial change to the claimant's working conditions and gave reasons for those conclusions (paragraphs 80 to 82 of the reserved judgment). The fact that the claimant disagrees with that conclusion is not a valid basis for a reconsideration in the interest of justice; the point has already been litigated, decided and reasons given.

Company level collective agreement

15. The claimant seeks to argue that a change to a collective agreement needed to go to company level. To the extent this was at all relevant, the claimant could have, with reasonable diligence, put such an argument before the Tribunal during the proceedings.

Health and Safety Concerns

16. The claimant seeks to re-open the Tribunal's findings under section 44(1)(c) of the Employment Rights Act. These are issues which the Tribunal heard and reached a conclusion for with reasons as set out within the Judgment of 23 December 2019; in particular at paragraph 61. The fact that the claimant disagrees with the analysis is not a valid basis for a reconsideration in the interests of justice.

Having considered all the points made by the claimant I am satisfied that there is no reasonable prospect of the Tribunal's original decision being varied or revoked. The application for reconsideration is therefore refused.

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Employment Judge Harfield
Dated: 5 March 2020

JUDGMENT SENT TO THE PARTIES ON 5 March 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS