EMPLOYMENT TRIBUNALS

Claimants: **Mr Sean Dunbarry**

Respondent: **Sainsburys Supermarkets Limited**

RECONSIDERATION JUDGMENT

1. The Claimant's application made on 22 February 2021 for a reconsideration of the judgment dated 8 February 2021 and sent to the parties on the same day has no reasonable prospects of success and is dismissed.

REASONS

1. By an e-mail sent at 16:08 on 22 February 2021 the Claimant seeks a reconsideration of one aspect of the judgment signed and sent to the parties on 8 February 2021. The Claimant asks the Tribunal to reconsider its dismissal of the Claimant's claim to an uplift under Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

The rules

2. The Employment Tribunal Rules of Procedure 2013 as amended set out the rules governing reconsiderations. The pertinent rules are as follows:

> *"Principles*
>
> *70. - A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.*
>
> *Application*
>
> *71 - Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.*

Process

72.—(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

3. The expression 'necessary in the interests of justice' does not give rise to an unfettered discretion to reopen matters. 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 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."

4. 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."

5. Any 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. That principle militates against permitting a party to reargue matters that have already been considered or referring to evidence which could or should have been considered at the earlier hearing.

6. In accordance with the Employment Tribunal Rules of Procedure I must reconsider any judgement where it is in the interests of justice to do so. Further, if I considered that there is no reasonable prospect of the original decision being varied or revoked I must refuse the application for reconsideration.

Discussion and Conclusions

7. At paragraph 276 of our judgment we recorded that whilst the list of issues included reference to Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 no submissions were made in respect of this. In the reconsideration it is now suggested that it was for the Tribunal not only to have regard to the code (which we did) but also to identify what if any parts of the code might have been breached.

8. As we have recorded at paragraph 276 we did undertake that exercise but did so without any assistance from the parties. It was entirely open to the Claimant's Counsel to make the submissions now relied upon in this application. If that had been done fairness would have demanded that the Respondent's Counsel would have had an opportunity to respond. The present application has all the appearances of a second bite at the cherry' with submissions being made now that could or should have been made at the time. I do not need to decide the application on that basis.

9. Having carefully considered the submissions now made I have concluded that even if they had been made at the time they would not have made any difference to our decision. I shall deal with each point in turn.

10. I should firstly note that whilst the judgment refers to the 2009 code that has been replaced by the 2015 code. It is that code, reproduced in the Butterworths 'green book' that we considered.

11. The application invites me to have regard to the ACAS Guide on Discipline and Grievances at Work ('the guide') when interpreting the ACAS Code of Practice on Disciplinary and Grievance Procedures (the code'). Section 207 requires a tribunal to have regard to the terms of the code but not the guide which is of no statutory effect. That said I accept it is a very useful statement of practice.

12. The material parts of Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 read as follows:

> *207A Effect of failure to comply with Code: adjustment of awards*

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%

13. The proper approach to be applied under that section was considered in ***Allma Construction Ltd v Laing*** **UKEATS/0041/11** where Lady Smith said:

'In such circumstances, an employment tribunal requires to ask itself: does a relevant Code of Practice apply? Has the employer failed to comply with that Code in any respect? If so, in what respect? Do we consider that that failure was unreasonable? If so, why? Do we consider it just and equitable, in all the circumstances, to increase the claimant's award? Why is it just and equitable to do so? If we consider that the award ought to be increased, by how much ought it to be increased? Why do we consider that that increase is appropriate?'

14. It is now said that our findings of fact are inconsistent with our conclusions that there was no breach of any relevant code. In the Claimant's application it is suggested that having made findings of fact in respect of the disciplinary process it was not open to us to have concluded that there was no breach of the code. I take each alleged breach in turn.

15. It is said that the forward to the code says that the Respondent should keep written records of any disciplinary cases they deal with. In fact, the forward to the 2015 code says *Employers would be well advised to keep a written record of any disciplinary or grievance cases they deal with'*. The 2009 code had the same wording.

16. The alleged failure is that Greg Spicer failed to make a written record of his meetings with the customer who complained about the Claimant. We found that he did not do so at paragraph 251 of the judgment. I must ask whether the Claimant has any reasonable prospects of persuading the full tribunal that this amounts to a failure to comply with the code. I do not consider that the argument has any prospects of success at all.

17. The forward is not a part of the code at all. I accept that it might be used to interpret the code but that is as far as it goes.

18. I do not accept that even if the forward is to be taken as a part of the code it requires any written records to be kept in the passage quoted to me in this application.

It is self-evident that the phrase 'would be well advised' does not amount to a requirement.

19. Insofar as the Claimant's application suggests that it is a requirement of the code that every possible relevant matter is documented then that is plainly wrong. That extreme interpretation is not supported by the guide which as the application sets out suggests that a record should be made of '*the findings made and actions taken'*. That is a good common-sense suggestion but falls far short of the interpretation I am invited to find in this application. The Code does go on to set out what must be recorded in writing. Those include, invitations to disciplinary meetings (para 9) and outcome letters (para 18 and 29).

20. I find that there is no requirement in the code for any oral statement made during the disciplinary investigation to be reduced to writing. As such there was no breach of the code by the failure of Greg Spicer to record what the customer said. We have of course said that he should have done so but that is a finding made on the facts of this case and is not something prescribed by the code.

21. Next it is said that there was 'unreasonable delay' in carrying out an investigation. Paragraph 5 of the code says that any investigation should take place without unreasonable delay. It is said that our findings at paragraphs 253 and 267 establish that there was an unreasonable delay in establishing the facts.

22. In neither paragraphs 253 and 267 do we make findings that the investigation was delayed. In each we suggest that the investigation was not sufficiently robust and that the conclusions were not on reasonable grounds. It appears that the alleged failure relied upon to support an uplift under Section 207A is not the time taken to investigate but the sufficiency of the investigation and or the conclusions. I do not consider that it will be a breach of paragraph 5 of the code where the employer reaches a conclusion that the tribunal find was wrong or outside the band of reasonable responses. The sentence of the code relied upon includes the word necessary but is clearly aimed at avoiding delay. I consider that the interpretation the Claimant invites me to put on paragraph 5 is wrong. I do not consider that where an employer does conduct an investigation within a reasonable time the fact that more could have been done and the fact that the conclusions drawn were wrong means that there is a breach of paragraph 5.

23. The final point made relates to the appeal. It is said that our findings support a conclusion that there has been a failure to comply with paragraph 27 of the code. That provision requires that any appeal is dealt with impartially and wherever possible by a manager who has not been previously involved. It is said that our finding that the appeal failed to cure any of the defects in reasoning that led to the dismissal means that there was a breach of this provision. I disagree. The appeal was dealt with by Jason Roberts. He was a manager with no previous involvement in the matter. That leaves only the issue of whether he was 'impartial'. I consider that this word is intended to have its ordinary meaning namely a requirement that the manager hears the appeal with an open mind. I do not accept that it would be a breach of the code where the appeal officer failed to cure defects in the reasoning of the appeal officer unless there was evidence that there was a predisposition to do that. In other words, getting it wrong is not to be equated with a lack of impartiality.

24. Taking these points individually and cumulatively I do not consider that any of the arguments raised have any reasonable prospect of showing that it would be in the interests of justice to vary or revoke the decision of the tribunal.

25. I therefore dismiss the application on the papers.

Employment Judge Crosfill
Dated: 16 March 2021