EMPLOYMENT TRIBUNALS

Claimant: Mr Peter Ryan

First Respondent: Secretary of State for Justice
Second Respondent: Ms Christine Robson
Third respondent: Ms Helen Lau
Fourth respondent: Ms Claire Paton-Baines
Fifth respondent: Mr Kevin Hunt
Sixth respondent: Ms Karen Telfer
Seventh respondent: Mr David Keane

JUDGMENT

The claimant's application dated 9 February 2021 for reconsideration of the judgment sent to the parties on 26 January 2021 is refused. There are no reasonable prospects of establishing that it is in the interests of justice to reconsider the judgment.

REASONS

Background

1. I have undertaken a preliminary consideration of the claimant's application for reconsideration of the judgment dismissing his claim.

2. At a hearing lasting around 16 days, and following detailed deliberations, in a reserved judgment issued to the parties on 26 January 2021, each of the claimant's claims were dismissed.

3. The claimant sought reconsideration of the judgment by a communication dated 9 February 2021. On 25 March 2021 the respondent argued that the application should be rejected since it contained no new evidence and represented an attempt to re-argue points that had already been determined.

The law

4. 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).

5. 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.

6. The importance of finality was confirmed by the Court of Appeal in **Ministry of Justice v Burton [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."

7. Similarly, in **Liddington v 2Gether NHS Foundation Trust EAT/0002/16** the Employment Appeal Tribunal 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."

8. 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. It is also important to recognise that fairness and justice applies to both parties – the claimant and the respondent.

The application

9. I have gone through the points made by the claimant in relation to the judgment. These were matters there were considered at the time including within his submissions and written statement. The issues the claimant raises comprise his arguments that were raised at the Hearing and duly considered in detail when

the Tribunal considered all the evidence presented to it. The Tribunal sought to provide written reasons that were proportionate to the issues in line with rule 62(4) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 given the amount of issues and evidence that was led. That necessarily means that only the material facts and issues arising were set out in the judgment. The material issues arising in the claimant's reconsideration have been fully considered and are set out below. Reference to paragraph numbers below are to paragraphs within our judgment.

Final written warning not manifestly inappropriate

10. The first issue the claimant raises is in connection with the issue of the final written warning which the claimant argued was manifestly inappropriate. We dealt with this at paragraphs 985 to 1002.

11. The claimant argues we did not deal with his submission as to the level of misconduct found and the sanction. He argues that the sanction was disproportionate to the conduct and that on the facts found at the time he could not have been found to have said anything that entitled the imposition of a final written warning. It is argued that the Tribunal did not make any findings of fact as to what was actually said at the time given the issue was about what the claimant had said.

12. We took full account of the claimant's submissions. As we said at paragraph 987, the incident in question was witnessed by more than one person and although the evidence was not identical, and there were inconsistencies, which the claimant pointed out, it was clear that Ms Banks took the full factual matrix into consideration. There was clear evidence in support of the outcome. Thus during his interview of 5 July 2016 Mr Harris confirmed that the claimant had called him a "prick" and that he said "I'll take you outside" to him which was entirely consistent with his original written statement. The evidence of Mr Southern, Ms Paton-Baines's investigation and the cleaner were all relevant considerations. Two of the three allegations were upheld.

13. We found that the evidence before the respondent justified the imposition of a final written warning. The claimant's conduct was serious misconduct. The language the claimant had used and the inference made justified the outcome on the facts. At paragraphs 271 and 272 the claimant noted the seriousness himself: having been told he was being given a final written warning he asked if it was because of the seriousness of the behaviour. He knew that the behaviour in question was viewed with sufficient seriousness to justify the sanction. The reason why the behaviour was considered, reasonably, to amount to serious misconduct is referred to at paragraphs 272 and 276.

14. We considered this at paragraph 1000 and 1050. Our judgment was that the 2 allegations which were upheld were of sufficient seriousness to justify being considered serious misconduct and to justify the imposition of a final written warning. We found that the conclusions reached in the investigation report that

led to the final written warning were reasonable on the facts and based upon the information before the first respondent at the time. While the claimant may disagree with their content, we found that the way in which the investigation was carried out was reasonable and the conclusions reached sustainable and fair in all the circumstances.

Claimant's provocation was considered when he used the word "prick"

15. The claimant then asks that we reconsider our judgment because we did not consider the issue of provocation and the claimant's use of the word "prick". We considered all of the facts before the respondent at the time, which included that the claimant argued he had been provoked. Ultimately the respondent acted reasonably in our view as to the sanction from the facts before them. The respondent acted reasonably from the information before it.

16. We were satisfied that the respondent did take account of all the surrounding circumstances in considering this matter including those points raised by the claimant, as referred to at paragraphs 271 and 987. We noted at paragraph 267 that the claimant accepted he used the word in question which was considered in context. The provocation to which the claimant was subject was considered by the respondent.

Inconsistencies in evidence were taken into account

17. The claimant next asks that we reconsider our decision because we did not deal with the inconsistencies in the evidence between the security guards. At paragraph 856 we noted that there were inconsistencies but we decided, having considered the evidence as a whole, that the inconsistencies in the evidence were not such so as to materially affect our decision. The claimant alleges that they were not telling the truth and his position was to be preferred. We did not consider that to be the case. We were satisfied that, notwithstanding the inconsistencies in the evidence, the outcome reached by the respondent was reasonable and sustainable.

18. We concluded that Ms Banks had properly analysed the evidence and took account of the claimant's points. She reached a fair and reasonable conclusion. The respondent expressly considered the inconsistencies at the time (see paragraph 270) and considered the evidence as a whole in reaching their conclusion. The inconsistencies and issues raised by the claimant were considered. On the facts before us we were satisfied that the position adopted by the respondent was sustainable, notwithstanding the inconsistencies.

Position of Mr Harris was properly considered

19. Next, the claimant refers to Mr Harris. We set out our position so far as material at paragraph 18. While there were inconsistencies in his evidence and he was

unable to remember certain matters, we considered Mr Harris's evidence in the context of the evidence before us, and we were satisfied that the evidence he gave was as we set out. We did not consider the issues the claimant raised to have significantly affected our decision on the material points. We considered all the evidence before the Tribunal, which included the oral and written evidence of Mr Harris, together with the surrounding facts which justified the conclusions we reached. The points raised by the claimant were considered but did not alter our judgment given the facts we found.

Position of Mr Hope was reasonable

20. The claimant asks that we reconsider our judgment because Mr Hope should have been interviewed. We did not consider that the failure to interview Mr Hope on the facts before the respondent had a material bearing on the matter. As we noted at paragraph 756, a written statement had already been obtained from him. As we set out at paragraph 207, Mr Harris had spoken to Mr Hope to find out the process for complaining given what he said the claimant had done. At paragraphs 208 and 210 it can be seen that Mr Harbertson then spoke with Mr Harris to obtain the specific details as to what happened. As is set out at paragraph 245, there was no need to seek further input from Mr Hope on the facts. The respondent took into account the evidence before them, including what the claimant (and the others, particularly Mr Harris) said and reached a conclusion which we considered reasonable having adopted a reasonable procedure. The process was not perfect but it was reasonable.

21. The claimant argues the respondent did not properly consider Mr Hope's statement and that Mr Harris changed his position. We did not consider such matters to have any material bearing on the conclusion we reached. The respondent considered the evidence that it had obtained and reached a reasonable conclusion in light of that. The failure to obtain further information from Mr Hope did not alter that position.

Allegation claimant was harassed was taken into account

22. The claimant argues that Mr Harris had harassed him and that this had been ignored during the disciplinary process (or at least not positively and specifically considered). He submits that: "A single line broad statement that she had considered every issue I raised is inadequate and shows she did not take the matter seriously. Therefore, I have been subject to less favourable treatment in comparison with a hypothetical comparator."

23. We did not consider that argument to have merit. The full facts (including the points raised by the claimant, such as his belief that he had been harassed) were appropriately considered by the respondent.

24. The respondent had assisted the claimant with his complaint about being harassed (bearing in mind the allegation was against someone who was not employed by the respondent). This is set out at paragraphs 246 and 251-252.

25. The respondent specifically considered the claimant's contention in this matter and took it into account in reaching its decision – see paragraphs 760 and 914.

Ms Lau's credibility was fully and carefully assessed from the evidence

26. The claimant asks the Tribunal to reconsider its decision in relation to the credibility of Ms Lau as a witness as the claimant argues that she was not credible and that the Tribunal did not properly deal with the arguments he made as to why she was not a credible witness.

27. The Tribunal during its deliberations spent a considerable period of time carefully assessing the credibility of Ms Lau. The Tribunal considered each of the arguments presented by the claimant but did not uphold them.

28. We set out why we considered Ms Lau to be credible in relation to each of the issues in our judgment. It is not uncommon for there to be inconsistencies in evidence but ultimately we assessed the evidence as a whole and concluded that Ms Lau's evidence was to be preferred to the claimant's evidence (see for example paragraphs 11-13 where we set out some of our general concerns in relation to the evidence we heard and the reasons why we found Ms Lau to be credible). We carefully assessed each issue and explained why we preferred the evidence we did which led to our judgment (see for example paragraph 350 where we explain why we preferred Ms Lau's evidence).

Discrimination arising from disability was fully considered from the evidence

29. The claimant submits that the Tribunal should reconsider this issue as it did not apply the test to the evidence. The claimant notes that the Tribunal stated that there was no medical evidence to link his disability to the writing of the mail on 30 June 2017 but he disagrees. He argues that the Respondent accepted on receipt of his GP records going back 15 years or so that he had a disability related to depression and anxiety. The claimant argues that the symptoms of anxiety and depression and panic attacks are well known and so the Tribunal should reconsider that there is medical evidence to prove the 'in consequence' element of the test.

30. We dealt with this matter in detail at paragraph 1100 to 1116. We carefully and at length analysed the evidence before the Tribunal and on the facts which we found we were not satisfied this claim had been established.

31. At paragraph 1112 we considered the reasons why the claimant said his disability caused him to make the comments he did. He submitted that he was anxious and stressed and felt under threat given the allegations against him and the treatment he believed he had suffered. He argued that "given the emphasis placed on the time lag between the sexual harassment by Ms Lau and the attack by email and his reply the Tribunal should accept there is a sufficient causative link between the email and the disability." He referred to his anxiety and panic attacks. In our view his explanation did not explain why the claimant would make

the comment in relation to Ms Paton-Baines, rather than say Ms Lau. We do not consider the explanations tendered by the claimant at the time of the disciplinary process and before us sufficient to link his disability and the specific comments he made in the circumstances of this case (in the absence of any other evidence).

32. We also noted that it is easy simply to assert that one's impairment was a reason or in some way connected (particularly as a defence to a disciplinary allegation) but in our view given the strong evidence that suggests the contrary, we do not consider what the claimant to have said to be accurate, from the evidence before us. If there was no evidence to suggest the contrary position, the claimant saying that his disability was a reason would have had greater strength but we must look at the full picture in making this decision. It was open to the claimant to present evidence linking his conduct with his disability but he did not do so.

33. The claimant's argument that the connection was to be taken because he believed he was the victim of harassment by Ms Lau and that he was medicated for anxiety, depression and panic attacks at the time he wrote the email was considered. From the evidence before the Tribunal we did not consider that to have been established on the facts for the reasons we set out.

34. The claimant had been given opportunity to provide evidence showing a link between his disability and the conduct (see paragraphs 534 and 545) but at the Tribunal no evidence was provided. We did not consider that it was self-evident for the detailed reasons we provided that there was a link. A mere assertion that there was a connection was, in our view from the evidence and on the facts, insufficient.

Procedural issue was not material

35. The claimant refers to the fact that the Tribunal did not address the procedural failure of only notifying him about the investigation of 22 June but this was not an issue before the Tribunal that would have a material bearing on the matters to be determined.

The claimant's use of the word "enemy" was fully considered

36. The Tribunal asks the Tribunal to reconsider its decision in relation to the claimant's use of the word "enemy" since he argues it was not intended to offend because it was not written to the person who claimed to be offended and that the context was not properly considered.

37. We considered the claimant's arguments in relation to this in detail. At paragraph 1047 we explained that we considered the claimant's description of Ms Paton-Baines as "my enemy" was reasonably considered by Ms Telfer to be inappropriate and damaging to the relationship between an employee and their line manager, that is, serious misconduct. We accepted the respondents' agent's submission that the claimant's downplaying of his use of that phrase

was semantic and unpersuasive. He had failed to appreciate how his comment could be received, which had been a common theme during the claimant's employment and something about which he had been informally warned before in his discussions with Ms Paton-Baines as to his comments about Mr Harbertson in 2016.

38. As a civil servant the claimant was subject to the civil service code which governed how he communicated with colleagues (see paragraph 549). As a matter of fact Ms Paton-Baines was offended by the email, which the claimant accepted was sent by him via his work email account (see paragraph 1053). The claimant accepted that the word was strong and serious albeit denied that it was derogatory (see paragraph 440).

39. While the claimant had an explanation for the use of the word, he had failed to appreciate how it could reasonably be perceived, whether by the person receiving it or if the person about whom the comment was made, if she received it (which happened in this case). We considered the context of the remark and the claimant's submissions in detail, as had the respondent, but did not uphold them for the reasons we set out.

40. The context of the email was properly taken into account, as was the fact that Ms Lau had referred to the claimant as "strange" (paragraph 410). The claimant had similarly referred to Ms Lau's behaviour as "strange" (paragraph 411). Mr Keane expressly considered the context (paragraph 523). He had not closed his mind to the claimant's position but ultimately did not accept the claimant's explanation, which was a reasonable course to adopt in light of the facts we found.

The Tribunal did consider the equity argument raised by the claimant

41. The claimant argues that the Tribunal failed to consider the equity argument that Ms Robson's calling the claimant "the problem" was not considered worthy of disciplinary action and yet his conduct in using the word "enemy" was. We consider this in paragraphs 1061 to 1062. We set out what Ms Robson meant in her email at paragraphs 328 to 332. She believed the issues arising with the claimant had caused the concerns she required to consider which was why she used the language she did which was a matter we took into account.

42. Mr Keane explained this at paragraph 510 given the claimant was the "centre" of the issues. We considered the equity argument but rejected it. The claimant was treated fairly and reasonably in all the circumstances, including equity and the substantial merits of the case.

The argument Ms Lau fabricated allegations against the claimant was considered

43. The claimant also argued that the Tribunal should reconsider its judgment and find

that Ms Lau made up false allegations against the claimant had not been properly considered.

44. In his application he refers to passages of evidence and that Ms Lau was unable to explain for example why she said the claimant had twisted things. There are a number of passages in the facts that demonstrate Ms Lau's position, including paragraphs 345 and 346 (referring to the claimant "twisting" things following the discussion he had with Ms Lau) and paragraphs 348 and 417 (giving examples as to where the claimant is alleged to have twisted things). Ms Lau was concerned that following day to day chats with the claimant in the course of work, he would take matters out of context or view remarks differently from how they had been intended. Ms Lau was upset by the claimant's use of the word "maternity" since he had been referring to something Ms Lau had missed which she considered offensive and the last straw.

45. We dealt with the credibility of Ms Lau in detail in our judgment in relation to each relevant factual dispute. The Tribunal fully considered the evidence before it and the inconsistencies referred to by the claimant. Ultimately the Tribunal concluded that Ms Lau was a credible and reliable witness in relation to the material facts for the reasons set out in our judgment in relation to each of the issues in question.

46. The claimant argues that the Tribunal "seemed to have placed undue weight on the fact that I did not formally complain to management about her sexualised remarks. I chose not to because just like Helen Lau herself, I wanted to deal with it myself which I did". The Tribunal did not place undue weight on the fact the claimant did not formally report the matter but considered that as part of the full factual matrix, including the claimant's explanation for his actions. We noted that the claimant had not raised any concerns about Ms Lau (paragraph 354) which was background information in relation to our assessment of the evidence and that the issues were raised by the claimant some time later and only after Ms Lau had raised the matter formally. We balanced these factors in reaching our conclusion.

47. The claimant asks the Tribunal to reconsider "the inherent improbability of her negative allegations and claims about her thoughts and feelings about me. In doing so I ask the Tribunal to have full regard to my comprehensive and carefully sourced analysis of her post 21 June claims and behaviour as evidenced in emails and her behaviour". The Tribunal did so but preferred the position advanced by the respondent. It also considered the 'elephant in the room' argument referred to by the claimant as to why Ms Lau alleged she felt trapped and nervous around the claimant and discussed the matters she did with the claimant. We set out our reasons at paragraph 360. In short the claimant and Ms Lau did have a reasonably good working relationship. The discussion that took place was as a consequence of that.

48. The issue had come to a head as a result of the claimant's reference to "maternity" and the offence that caused Ms Lau. It was clear that the parties had a generally good working relationship (a matter the claimant accepted – paragraph 360) but the comments the claimant made crossed the line and were unacceptable to Ms Lau (paragraph 361 and 527). Paragraph 941 sets out the reasons why Ms Lau's position was more credible than the claimant's position.

Comments made by Ms Lau were not of a sexual nature nor related to sex

49. In his application he notes that he is "astonished that the Tribunal found that they were not comments of a sexual nature". He argues that Ms Lau had admitted they were of a sexual nature and uninvited and that it was perverse to conclude otherwise.

50. We considered this at paragraph 936 and 937. We considered that the conduct was not related to sex but related to dreams that Ms Lau believed men had (which may or may not be accurate). In Ms Lau's witness statement (at paragraph 34) she stated that the comment ("I don't have dirty dreams") was: "not an invitation to talk about anything sexual. It was a throwaway comment. I should not have said it and I am embarrassed by it. Peter carried on our conversation and gave no indication to me that he had been upset or offended by the comment before he submitted his grievance in December 2017 [6 months later]. The conversation continued for about 5-10 minutes." She also said that: "I did not want the conversation to continue in a similar fashion or become anything sexual." Her evidence, which we accepted, was that the way the claimant asked her whether she had any interesting dreams prompted her to say she did not have any dirty dreams. It was because he asked about "interesting" dreams that she said she gave the response she did. It was not sexual nor related to sex on the facts.

51. We appreciate there is a fine line in cases such as these and that the comment could in principle be of a sexual nature or related to sex but on the facts from the evidence before us we were not satisfied the comments were related to sex or of a sexual nature. It was a throwaway remark (paragraphs 342, 358 and 395) about a factual matter. The claimant had explained that he was offended that Ms Lau had changed the topic of discussion (rather than because he considered the matter to be of a sexual nature – paragraph 347). The issue was about dreams not about sex or sexually related matters – see paragraphs 358 to 361 - where we explain that the issue was about the fact of dreams *per se*. It was a discussion about dreams (paragraph 395) with the comment about "dirty dreams" being a throwaway remark (paragraph 407). The claimant had taken it out of context during the appeal hearing (see paragraph 508).

52. Even if the we were wrong about that, for the reasons set out at paragraph 944 to 946 we found that the necessary ingredients for this comment to be unlawful had not been established. The comment did not (self-evidently) have the purpose of violating the claimant's dignity or creating an adverse environment for him in terms of section 26 of the Equality Act 2010. We concluded from the facts before us that the claimant did not believe the conduct to have the effect of violating his dignity or creating an adverse environment for him. The claimant was having a discussion with Ms Lau about interpretation of dreams and she made a quip about dreams men have, in her opinion. The claimant continued to have the discussion. Other than the claimant arguing that it was harassment a significant time after the event, there is no evidence to justify the claimant's later assertion that it was

harassment. We did not find his assertion credible. Looking at all the circumstances we also concluded that it was not reasonable for him to so conclude on the facts.

Other comments relating to Ms Lau were considered

53. The claimant argues that the comments he alleges Ms Lau made about being dominated should be considered. The Tribunal analysed the facts and concluded that this comment had not been made by Ms Lau – see paragraph 356. We preferred Ms Lau's evidence to the claimant's on this point.

54. The claimant also makes further reference to passages of evidence that he says show Ms Lau was not a truthful witness. The Tribunal considered this evidence against the entire evidence before the Tribunal and conclude that Ms Lau was credible.

55. For example at paragraph 356 we set out why we preferred the evidence of Ms Lau to that of the claimant on the facts. We considered the context and the entire evidence presented to the Tribunal.

56. Mr Keane also considered whether Ms Lau had fabricated the allegations against the claimant (see paragraph 540) and he balanced the position of the claimant and Ms Lau (paragraph 547 and 548) explaining why he preferred the evidence of Ms Lau. That was a reasonable position to adopt from the evidence before us. While there were some inconsistencies and contradictions, as referred to by the claimant, balancing all the evidence before the Tribunal, we preferred the evidence of Ms Lau.

Not in the interests of justice to allow reconsideration

57. The points raised by the claimant are attempts to re-open issues of fact on which the Tribunal heard evidence from both sides and made a determination having considered the facts presented during the hearing and applied the law. 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. A Tribunal will not reconsider a finding of fact just because the claimant wishes it had gone in his favour.

58. That broad principle disposes of all the points made by the claimant. There is no evidence that shows the Tribunal has missed something important or that new evidence is being presented that could not reasonable have been put forward at the time. The claimant was given a fair opportunity to present his case and challenge the respondent which he did. The claimant produced detailed submissions which were considered in detail and the Tribunal assessed all the evidence before it. While not every detail was considered the Tribunal sought to proportionately set out its reasons and decision and covered each of the points arising to allow a decision to be made on the relevant issues.

Conclusion

59. I considered the overriding objecting in reaching my decision to ensure the decision taken was fair and just. That applies to both the claimant and the respondent since justice requires to be achieved for both parties. I have done so carefully.

60. 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 significance were considered and addressed at the Hearing. Each of the points raised by the claimant in his application were points that were appropriately and proportionately addressed in the judgment as set out above. It is not in the interests of justice to reconsider the decision the Tribunal reached.

61. The application for reconsideration is therefore refused under rule 72(1) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

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Employment Judge Hoey

Dated: 15 April 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

11 May 2021

FOR THE TRIBUNAL OFFICE