EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr N Aijaz		Department for Environment, Food and Rural Affairs

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The Claimant's application for reconsideration is refused.

REASONS

Introduction

1. At a hearing on 17 March 2021 I decided that the Claimant's claims under the Equality Act 2010 (EA 2010) fall outwith the Tribunal's jurisdiction under ss 123 and 140B of that Act insofar as they concern matters occurring prior to 14 January 2020 and those parts of the claims were accordingly dismissed. I gave reasons orally at the hearing and a judgment and Case Management Order were subsequently promulgated. The Claimant on 4 April 2021 requested written reasons and written reasons were sent to the parties on 7 May 2021.

2. By application of 21 May 2021 the Claimant seeks reconsideration of my judgment.

The law

3. Rules 70-73 of the Tribunal Rules provides as follows:-

> **70. Principles**
> 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.
>
> **71. Application**
> 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.
>
> **72. Process**
> (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.
>
> **73. Reconsideration by the Tribunal on its own initiative**
> Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).

4. The Tribunal thus has discretion to reconsider a judgment if it considers it in the interests of justice to do so. Under Rule 72(1), I must dismiss the application if I consider that there is no reasonable prospect of the original decision being varied or revoked. I may, before finally determining the application, send a notice to the parties setting out my provisional views and inviting the Respondent's submissions on the application. If I conclude that there is a reasonable prospect

of the original decision being varied or revoked, I must (under Rule 72(2)) consider whether a hearing is necessary in the interests of justice to enable the application to be determined. A hearing would, unless not practicable, be a hearing of the full tribunal that made the original decision (Rule 72(3)). If, however, I decide that it is in the interests of justice to determine the application without a hearing under Rule 72(2), then I must give the parties a reasonable opportunity to make further written representations.

5. In deciding whether or not to reconsider the judgment, the authorities indicate that I have a broad discretion, which *"must be exercised judicially … having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible be finality of litigation"* (*Outasight v Brown* [2015] ICR D11). The Court of Appeal in *Ministry of Justice v Burton* [2016] ICR 1128 also emphasised the importance of the finality of litigation and that a case should not be reopened just for the purpose of further argument or exploration of the evidence (ibid, para 25).

6. That said, if an obvious error has been made which may lead to a judgment or part of it being corrected on appeal, it will generally be appropriate for it to be dealt with by way of reconsideration: *Williams v Ferrosan Ltd* [2004] IRLR 607 at para 17 *per* Hooper J (an approach approved by Underhill J, as he then was, in *Newcastle upon Tyne City Council v Marsden* [2010] ICR 743 at para 16).

7. It may also be appropriate for a judgment to be reconsidered if a party for some reason has not had a fair opportunity to address the Tribunal on a particular point (*Trimble v Supertravel Ltd* [1982] ICR 440, and *Newcastle-upon-Tyne City Council v Marsden* ibid at para 19).

8. However, a mere failure by a party (in particular, but not only, a represented party) or the Tribunal to raise a particular point is not normally grounds for review: *Ministry of Justice v Burton* (ibid) at para 24.

9. Where a party wishes to rely on fresh evidence, the EAT has given guidance to the effect that the most appropriate way to do so is by way of an application for reconsideration of the tribunal's decision, rather than an appeal to the EAT, since the tribunal is better placed to decide whether the evidence would if available at the original hearing have made any difference to its conclusions: *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 and para 9 of the *Practice Direction (Employment Appeal Tribunal - Procedure) 2018*. However, the same *Ladd v Marshall* test applies both on reconsideration and on appeal to the question of whether fresh evidence should be admitted, i.e. the question is whether the evidence have been obtained with reasonable diligence for use at the hearing; whether it is relevant and would probably have had an important influence on the hearing; and whether it is apparently credible: *Outasight VB Ltd v Brown* [2015] ICR D11 (approved by the Court of Appeal in *Ministry of Justice v Burton* [2016] EWCA Civ 714, [2016] ICR 1128). Nonetheless, reconsideration may be permitted on the basis of fresh evidence not meeting the *Ladd v Marshall* test where it is in the interests of justice to do so (*Outasight*, ibid, para 31).

10. The normal time limit for submitting a reconsideration application is 14 days under Rule 70. However, the Tribunal has power under Rule 5 to extend that time limit. This is a broad discretion to be exercised in accordance with the overriding objective: *Gosalakkal v University Hospitals of Leicester NHS Trust* (UKEAT/0223/18/DA) *per* HHJ Richardson at para 10.

My decision on this application

11. I have read the Claimant's further submissions carefully and taken them fully into account. The fact that I do not refer here to every point that the Claimant makes does not mean that I have not considered it.

12. I have considered whether it is in the interests of justice to review my judgment and whether there is a reasonable prospect of my judgment being varied or revoked in the light of the Claimant's application. I consider that it is not in the interests of justice. There is no reasonable prospect of my judgment being varied or revoked in the light of the Claimant's application and the important principle of finality in litigation should here be upheld.

13. It seems to me that the Claimant makes three main points, in respect of which I conclude as follows:-

14. First, the Claimant says that there was no evidence he was ill before starting working for the Respondent and so something must have happened to him between 2016 and February 2020 to cause him to be ill and that must have been a continuing act of discrimination. However, this is a series of *non sequiturs*. Even if there were evidence that the Respondent's treatment of the Claimant between 2016 and February 2020 caused him to become ill, it would not follow that there was a continuing act of discrimination. The focus of the legal question in that regard is on the alleged acts, not on their effect on the Claimant. I have analysed the nature of the acts in the judgment and concluded that there is no arguable case of for a continuing act prior to January 2020.

15. Secondly, the Claimant points to the email of 20 January 2020 from Mr Leadbetter at p 273 of the bundle. This was evidence that I had before me at the hearing on 17 March 2021 and to which I was referred by the parties. It illustrates the workings of a standard performance management process and I had it in mind in relation to paragraphs 43 and 44 of the judgment. For the reasons I set out there, I do not consider that the performance management process in the Claimant's case meant that there was a *prima facie* case of a continuing discriminatory state of affairs as between Mr Leadbetter and previous managers.

16. Thirdly, the Claimant sets out a number of reasons why he disagrees with my assessment of the facts of this case, and my application of the law to those facts. This is merely an attempt to reargue the merits of the decision and does not provide any basis for reconsideration.

17. Finally, the Claimant suggests that he also wishes to bring a breach of contract claim. The Claimant has not brought such a claim in these proceedings. He should seek independent legal advice regarding his contract if that is something he wishes to pursue.

18. For all these reasons, it is not in the interests of justice to reconsider my judgment and the application for reconsideration is refused.

Employment Judge Stout

15 June 2021

JUDGMENT SENT TO THE PARTIES ON

15th June 2021..

FOR THE TRIBUNAL OFFICE