EMPLOYMENT TRIBUNALS

Claimant: Mr D Kilburn

Respondent: The Drivers Vehicles Standards Agency (Office of the Traffic Commissioner)

JUDGMENT

The claimant's application dated **24 April 2021** for reconsideration of the judgment sent to the parties on **14 April 2021** is refused.

REASONS

1. I have undertaken a preliminary consideration of the claimant's application for reconsideration of the Judgment dismissing his claims. References in square brackets (e.g. [25]) are references to paragraph numbers from the Reasons promulgated with the Judgment.

The Law

2. 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).

3. 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.

4. 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."**

5. 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."**

6. 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.

The Application

7. The claimant's application for reconsideration contests paragraphs in the Judgment up to and included paragraph [94] of the Judgment. The Judgment is set out as follows:

- Paragraphs [1-2] – Introduction
- Paragraphs [3-4] – The Issues
- Paragraphs [5-7] – The Evidence
- Paragraphs [8-19] – The Relevant Law
- Paragraphs [20-82] – The Relevant Findings of Fact
- Paragraphs [83-95] – Parties' Submissions
- Paragraphs [96-140] – Discussion and Conclusions

8. In the application for reconsideration, the claimant has not asked for a reconsideration of the Discussion and Conclusions section of the Judgment. However, the points made about the preceding paragraphs which contain the largely undisputed facts and a summary of the parties' submissions, do contain issues which arise in the Discussion and Conclusions paragraphs. As a result, when considering the application for reconsideration and providing this Judgment, I have also referred to the relevant paragraphs in the Discussion and Conclusions section.

9. The claimant has made attempts to reopen 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 a 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.

10. This broad principle disposes of some points made by the claimant. However, there are some points which should be addressed specifically as follows:

(1) I don't agree that the claimant did not receive a fair hearing. The parties disclosed documents in accordance with the Case Management Orders. When it became clear during the course of witness evidence that there were documents missing from the bundle, the final hearing was adjourned part-heard to allow the respondent to disclose those documents. A witness was recalled in order to deal with the additional documentation. Paragraph [91] of the Judgment deals with the claimant's submissions on this point. Where the claimant highlighted issues during the hearing, they were dealt with and the hearing progressed.

(2) On reconvening the hearing, it was clear that the claimant wanted to revisit the questions he had put to the recalled witness during the first part of the hearing. That witness, Eleanor McKenzie, had been subject to evidence in chief, cross examination, questions from me and re-examination before the adjournment. The purpose of recalling that witness was to deal with the documentation subsequently disclosed by the respondent. The claimant was allowed to put questions about the documents subsequently disclosed. The claimant wanted to ask questions about the evidence given during the first part of the hearing, which did not arise as a result of the additional documentation. Eleanor McKenzie was not recalled for this purpose.

(3) The claimant asserts that his main complaint was that the respondent ignored a duty of care owed to the claimant. The agreed List of Issues contained at point (v) that a failure to conduct a stress risk assessment amounted to a breach of contract. My findings on this issue are dealt with at paragraphs [132] and [133] of the Judgment. The respondent tried to complete a stress risk assessment, but the claimant did not agree with the way it was being completed. I determined, for the reasons set out at paragraphs [132] and [133], that the respondent did not ignore any duty of care owed to the claimant.

(4) The claimant asserts that I ignored the historic issues he faced and that those were put to the first grievance handler. I made a finding at paragraph [103] that the respondent's policy was not to go back beyond three months, and I determined that this was not an unreasonable position to take. I subsequently found that the delay in handling that first grievance was a breach of policy, but not the outcome. I determined that the outcome was one that the respondent was entitled to reach based on the meeting with the claimant.

(5) The claimant asserts that he was stopped from asking a question of the appeal handler about the grievance process. My note of the hearing records that the question was put and answered by the grievance appeal handler.

(6) The meeting of 13 February 2018 was not an issue for me to determine, nor was it contained within the claimant's ET1 or witness statement. It was raised in the context of the second grievance. I made a finding of fact relevant to the issue about the stress risk assessment. I acknowledged that the second grievance found that there had been a failure to complete the stress risk assessment, and at paragraph [132], I agreed that there had been a failure to complete the stress risk assessment at that point. However, I also found that the claimant's managers had attempted to rectify that failure but that the claimant would not agree the relevant procedure.

(7) The claimant asserts that "without prejudice" correspondence was included within the bundle and should have been removed. The document referred to is listed at pages 596-597 of the index as "Letter Claimant to Respondent's Solicitor" and is not marked "without prejudice" either in the index or on the actual document itself. My note from the first day of the hearing records that "without prejudice" correspondence was removed from the bundle before any evidence was heard.

(8) I don't agree that I misunderstood the document at page 705. In the note of that meeting it is recorded that the claimant said the phrase "intend to leave department and go to Tribunal". This phrase was also contained in various other drafts. It was the recollection of the respondent's witness that the claimant was thinking about leaving the department.

(9) The findings I made at paragraphs [129] and [130] are based on the acceptance of the evidence of Eleanor McKenzie. At paragraph [136] I determined that the meeting on 22 November 2018 was not the last straw because the claimant was awaiting the outcome of his appeal. Paragraph [137] sets out the reasons the claimant resigned.

(10) The claimant raised issues about disclosure and the compilation of the bundle. On each occasion, the claimant was asked to set out his concerns and they were responded to by the respondent. The claimant was not on an unequal footing to the respondent. When it became clear during the evidence of Eleanor McKenzie that further disclosure was required, I adjourned the hearing so that disclosure could be made and the witness was recalled to answer evidence about that disclosure.

11. The parties agreed the List of Issues prior to the start of the evidence, and the evidence focused around those issues. Both parties were allowed to ask all relevant questions. The claimant did attempt to ask questions about matters he had learnt since his resignation which I deemed were not relevant to the issues in the case.

12. I was conscious that the claimant was a litigant in person and explained procedures and why decisions were being made. On a number of occasions, the claimant made statements of case rather than putting questions and I helped him phrase his statements into questions so they could be answered by the witnesses.

Conclusion

13. 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 application for reconsideration is refused.

Employment Judge Ainscough
Date: 6 August 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
9 August 2021

FOR THE TRIBUNAL OFFICE