EMPLOYMENT TRIBUNALS

Claimants: **Mr Michael Cleary**

Respondent: **Rail for London (Infrastructure) Limited**

JUDGMENT FOLLOWING RECONSIDERATION

1. The Claimant's application made by e-mail on 13 January 2022 for a reconsideration of the tribunal's judgment dated 15 December 2021 and sent to the parties on 29 December 2021 has no reasonable prospects of success and is dismissed.

REASONS

1. By an by e-mail on 13 January 2022 the Claimant seeks a reconsideration of the Tribunal's judgment dated 15 December 2021. The Claimant's application is set out over 11 pages. A summary of his position is in his third substantive paragraph where he says: *'the Tribunal has taken into account irrelevant considerations, failed to make findings of fact on relevant evidence and applied the wrong test by submitting their own judgments'*.

2. The Claimant has set out a paragraph by paragraph critique of the judgment setting out where he disagrees with the conclusions reached. I have had regard to the whole of that document in dealing with the application for a reconsideration.

The rules

3. 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.

4. 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 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. 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. 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.

7. In accordance with the Employment Tribunal Rules of Procedure I must reconsider any judgment 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

8. In his application the Claimant suggests that the introduction of new documents during the hearing prejudiced him in his presentation of the case. I do not accept that that was the case. Few documents were produced and those that were of marginal importance to the conclusions reached by the Tribunal. The Claimant had ample opportunity to object to the documents being introduced and did not do so. He had ample time to consider the documents before having to cross examine the Respondent's witnesses and make his submissions.

9. The Claimant sets out a detailed critique of the Tribunal's decision. I find that the Claimant is simply expressing his dissatisfaction with the findings of fact made by the Tribunal and the conclusions reached by the tribunal relying on those findings of fact.

10. The Tribunal found that the Claimant made some protected disclosures and that he did some acts protected by Section 44 of the Employment Rights Act 1996. We have gone on to find that none of these had any influence on the Respondent when it acted in the manner complained of by the Claimant. Those findings are fatal to the Claimant's claims.

11. As an alternative reasons for dismissing the claims that predated 24 September 2019 the Tribunal held that there was no action of the Respondent that was unlawful after that date and that as it was reasonably practicable for the claim to have been presented within the time limits imposed by Section 48 it had no jurisdiction to deal with any earlier claim. As such the reconsideration application could only succeed if the Claimant could show that his suspension or dismissal was unlawful.

12. This application for a reconsideration is no more than an attempt by the Claimant to re-argue the case. In the language of Simler J (as she was) in ***Liddington v 2Gether NHS Foundation Trust***, he is having a second bite of the cherry. The Claimant makes the same arguments as he made, or could have made, before the Tribunal.

13. It is disproportionate and unnecessary to deal with each or the Claimant's disagreements with the individual paragraphs of the judgment. I have concluded that whether those points are taken together or separately have no reasonable prospects of success in persuading the Tribunal to reconsider its judgment.

Employment Judge Crosfill

18 January 2022