EMPLOYMENT TRIBUNALS

Claimant: **Ms N. Christian**

Respondent: **Marks & Spencer Plc**

JUDGMENT ON CLAIMANT'S APPLICATION FOR RECONSIDERATION

The judgment of the Tribunal is that: -

1. the Claimant's application for reconsideration of the judgment on liability, sent to the parties on 4 January 2022, is refused.

REASONS

1. By letter dated 17 January 2022, received by the Tribunal on 18 January 2022, the Claimant made an application which I understood to be an application for reconsideration of my judgment in relation to her claim of unfair and wrongful dismissal, sent to the parties on 4 January 2022.

2. The application sets out seven brief points, each of which I address in my conclusions below.

The law

3. Rules 70 to 73 of the Employment Tribunal's Rules of Procedure 2013, make provision for the reconsideration of tribunal judgments 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.**
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> **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.**
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> **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.**
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> **(2) If the application has not been refused under paragraph (1), the original decision shall be considered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that 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.**

4. There is a general power to extend time in Rule 5:

> **The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired.**

5. The Tribunal thus has discretion to reconsider a judgment if it considers it in the interests of justice to do so.

6. 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. It is a mandatory requirement for a judge to determine whether there are reasonable prospects of a judgment being varied or revoked before seeking the other party's response and the views of the parties as to whether the matter can be determined without a hearing, potentially giving any provisional view, and deciding how the reconsideration application will be determined for the purposes of rule 72(2): *T.W. White & Sons Ltd v White*, UKEAT/0022/21.

7. If I consider there are reasonable prospects, 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.

8. In *Outasight VB Ltd v Brown* UKEAT/0253/14 the EAT held (at [46-48]) that the Rule 70 ground for reconsidering Judgments (the interests of justice) did not represent a broadening of discretion from the provisions of Rule 34 contained in the replaced 2004 rules. HHJ Eady QC explained that the previous specified categories under the old rules were only examples of where it would be in the interests of justice to reconsider. The 2014 rules remove the unnecessary specified grounds, leaving only what was in truth always the fundamental consideration: the interests of justice. This means that decisions under the old rules remain pertinent under the new rules.

9. The key point is that it must be in the interests of justice to reconsider a judgment. That means that there must be something about the case that makes it necessary to go back and reconsider, for example a new piece of evidence that could not have been produced at the original hearing or a mistake as to the law. It is not the purpose of the reconsideration provisions to give an unsuccessful party an opportunity to reargue his or her case. If there has been a hearing at which both parties have been in attendance, where all material evidence had been available for consideration, where both parties have had their opportunity to present their evidence and their arguments before a decision was reached and at which no error of law was made, then the interests of justice are that there should be finality in litigation. An unsuccessful litigant in such circumstances, without something more, is not permitted to simply reargue his or her case, to have 'a second bite at the cherry' (per Phillips J in *Flint v Eastern Electricity Board* [1975] IRLR 277).

10. 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.'**

11. In *Liddington v 2Gether NHS Foundation Trust* EAT/0002/16 the EAT, *per* Simler P, held at 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.'**

Conclusions

12. The Claimant made the following points in her application.[1]

1: 'The claimant claim of unfair and wrongful dismissal are not well-founded and are dismissed and pay'

13. This does not raise a ground for reconsideration, it merely restates the outcome of the case.

2: 'Discrimination and harassment defamation of character/family to be reconfigured from the (13th May)'

[1] The original text of the application is retained without amendment

14. This does not disclose a comprehensible ground for reconsideration.

3: ‘Refusal by Marks & Spencer to be seen by occupational health’

15. Detailed findings of fact were made in relation to this issue in the judgment at paragraphs 34, 37, 44, 45, 46, 47, 50, 53, 55, 57, 59, 63 and 68. I set out my conclusions at paragraphs 94-95. The application does not identify any basis on which those findings and conclusions might properly be reconsidered.

4: ‘Mrs V. O’Donoghue should not of heard the case’

16. I set out my findings and conclusions as to Mrs O’Donoghue’s conduct of the appeal and her suitability to conduct it at paragraphs 66-71 and 95. The application does not identify any basis on which those findings and conclusions might properly be reconsidered.

5: ‘Ms Powell was is not my line manager. Whom did not have the right to dismiss my occupational referral - which was signed and returned to Marks & Spencer’s company.

17. I found as a fact that the Claimant did not return the occupational health consent form until after Ms Powell had reached a decision to dismiss (paragraphs 57 and 63), despite being reminded on numerous occasions to do so (see the paragraphs listed above at para 16). There was no evidence that the Claimant had given her consent before dismissal, and there is no basis for reconsidering my findings or conclusion on this issue.

6: ‘Not given enough time to reply Mr Francis’s written submissions enclosing (13 page) Marks & Spencer’s professional qualifier counsellor’

18. I set out in my judgement the adjustments I made for the Claimant in relation to the conduct of the hearing, and closing submissions in particular, at paragraphs 2-3 and 84-89. I am satisfied that such adjustments as were reasonable were made, and that the Claimant was not disadvantaged in making her closing submissions.

‘I was a acting litigation person with dyslexia and learning difficulties. After going through such a traumatising experience and not being believed after submitting a crime number after an intruder entered my home with professional doctors medical sicknote surely the court would not disregard original sufficient government document. Along with a crime number from the police authority.’

19. I took into account such evidence as there was of the intruder incident, although as I recorded at paragraph 40 of the judgment, the Claimant was unable to give the precise date of the incident. I recorded the fact that she told Ms Powell about the incident (paragraph 50). I did not disbelieve the Claimant as to whether the incident had occurred. However, I concluded at paragraph 93, that the Claimant’s explanations for not attending the final meeting did not account for her failure to cooperate with the process, insofar as that was relevant to the fairness of dismissal. For the avoidance of doubt, that included the fact that she had been the victim of a burglary. In particular, I found as a fact (paragraph 47) that the incident did not prevent her from receiving correspondence from the Respondent.

Overall conclusion

20. I have concluded that there is no reasonable prospect of my judgment being varied or revoked on the basis of this application. It can only be understood as an invitation for me to revisit the evidence I heard and come to a different conclusion. The interests of justice are that there be finality in litigation, absent any good reason for a decision to be reconsidered. The fact that a party does not agree with the conclusions reached by a Tribunal and would like a second chance to present her arguments is not such a reason.

21. For all these reasons, the application for reconsideration is refused pursuant to rule 72(1). Because I have dismissed it at the first stage of process, I have not invited the Respondent to comment on the application.

Employment Judge Massarella
Date: 17th February 2022