Case No: 2410054/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr R Jordan

Respondent: Delta Merseyside Ltd

JUDGMENT

The respondent's application dated 30 July 2021 for reconsideration of the Judgment dated 20 May 2021 (the written reasons for which were sent to the parties on 16 July 2021) is refused.

REASONS

1. I have undertaken preliminary consideration of the respondent's application for reconsideration of the judgment upholding the claimant's claim of unfair dismissal and making certain determinations in relation to remedy in respect of that claim. That application is set out over six paragraphs in an email dated 30 July 2021. The application was copied to the claimant, but I have not received any comments from him in response.

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 majority of the points raised by the respondent are attempts to re-open issues of fact on which the Tribunal 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 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 respondent wishes it had gone in his favour.

8. That broad principle disposes of almost all the points made by the respondent. However, there are some points made which should be addressed specifically. These are set out below.

9. At paragraph 2(c) of the application, the respondent asserts that the claimant admitted during the disciplinary hearing that he had failed to remove the names of the respondent's staff from his app when asked to do so. In those circumstances, it is said to be unreasonable to require the disciplining officer to 'go behind' that admission. I have considered the relevant note of the disciplinary hearing at page 310 of the bundle of documents. The claimant accepts that he did not remove the names "immediately" but said he would take legal advice. He was asked whether he accepted that that represented a failure to follow a reasonable management instruction and replied that it did not. That is entirely consistent with the findings of fact made in the judgment, which explains why it was not reasonable for the dismissing officer to conclude that there had been an act of gross misconduct in the circumstances (indeed, why the respondent had no basis to even put this allegation to the claimant as an allegation of gross misconduct given the exchanges between the claimant and Mr Hughes).

10. At point 3 it is stated that "dismissing for a breakdown of trust and confidence is an SOSR dismissal not a conduct issue and as such the tribunal has applied the wrong legal test to that element of the dismissal". As noted in the judgment, the respondent has consistently advanced its case on the basis that this was a conduct

dismissal. It is not open to it to now seek to re-argue it as an SOSR case. Further, the reference to trust and confidence in the dismissal letter asserted that the *claimant* appeared to have lost trust and confidence in his employer.

11. No grounds at all are put forward for reconsidering the parts of the decision challenged at paragraphs 4 and 5.

Conclusion

12. Having considered all the points made by the respondent 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. The application for reconsideration is refused.

Employment Judge Dunlop
DATE 3 September 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
9 September 2021

FOR THE TRIBUNAL OFFICE