EMPLOYMENT TRIBUNALS

Claimant: Ms. S McNuff

Respondent: Parliamentary and Health Service Ombudsman

JUDGMENT

The respondent's application dated 16th May 2022 for reconsideration of the judgment sent to the parties on 3rd May 2022 is refused.

REASONS

1. I have undertaken preliminary consideration of the respondent's application for reconsideration of the judgment in which the claimant's complaint of unfair dismissal was held to be well founded. That application is contained in a three page document attached to an email dated 3rd May 2022.

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** 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. That broad principle alone is sufficient to dispose of the application, but for the sake of completeness, some additional points are addressed below.

9. In relation to the last straw, this was explored at the outset of the hearing. The fact that the content of the phone call with Ms Woodward amounted to the last straw is consistent with what was agreed between the parties and the claimant's witness statement. The parties and the Tribunal proceeded on this basis, including in oral evidence. The Tribunal does not recall and does not have a note of the claimant suggesting otherwise in her closing submission. Indeed, had the claimant contradicted the agreed position between the parties in her closing, the Tribunal would have spent additional time clarifying such an abrupt and unnecessary (given the timing) change in position. In any event, the evidence is that which is said on oath.

10. In relation to the respondent's complaints regarding the facts found, it is important to guard against selective or wishful summaries of the evidence devoid of context. Ultimately, the claimant's evidence was credible and she established the necessary facts. There were gaps in the documentary and witness evidence called by the respondent to rebut the claimants contentions.

11. With regard to the facts found, the respondent now seeks to rely upon the investigation of Ms Gill Kilpatrick who was not called as a witness. The correspondence relied upon post-dates the claimant's decision to resign. The parties were agreed that post-resignation matters were of little assistance, which includes the exploring the motivation of the claimants work colleagues post resignation, which would have significantly widened the scope of the factual enquiry. Indeed, when the claimant sought to advance wide-ranging evidence about her work colleagues post resignation, the agreed position of all parties was

that it was better to focus on pre-resignation matters.

12. In relation to the issue of note taking, the summary in the application is overly-generous to Ms Woodward. Ms Woodward was in a senior HR position. Her witness statement did not suggest that she took notes and limited internal documentation was provided to the Tribunal. Given the seriousness of the events within the respondent over the relevant time period, it is reasonable for the Tribunal to expect a senior HR officer to take and retain notes of key meetings and discussions. Ms Woodward was given every opportunity to deal with this point.

13. Even if the summary of the evidence in the reconsideration application were accurate, the respondent's position does not improve if the specific finding were made that some notes were written down but at no time were they retained.

14. With regards to the job description, the two conversations referred to are not supportive of the respondent's position. The January 2021 conversation still placed the onus on the claimant and then around two months pass before the March email, which was of limited assistance. This length of time was the subject of criticism by the claimant as was the wider context surrounding the email.

15. The typographical error referred to has been dealt with under Rule 69. A copy of the corrected judgment will be sent to all parties in accordance with that Rule.

15. The application for reconsideration is dismissed.

Employment Judge Anderson
DATE 25th May 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
27 June 2022

FOR THE TRIBUNAL OFFICE