



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Number: 4106898/2020

Ms M MacKay

Employment Judge D Hoey

Claimant  
Represented by:

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Mr Argue  
(Consultant  
Solicitor)

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Taylor Wimpey UK Limited

Respondent  
Not present

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The claimant's agent's application received on 21 June 2022 for reconsideration of the judgment of 7 June 2022 is refused, there being no reasonable prospects of the judgment being varied or revoked.

### REASONS

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1. At a Hearing from 9th until 13<sup>th</sup> May 2022 the claimant's claims for failure to comply with the duty to make reasonable adjustments, disability harassment and victimisation and constructive unfair dismissal were heard.

2. Following conclusion of the hearing, the parties were advised that the Tribunal would issue a reserved judgment following deliberation. Deliberation took place on 16, 26 and 27 May 2022.

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3. Written reasons were issued on 7 June 2022. The unanimous judgment of the Tribunal was that the claim in respect of a failure to comply with the duty to

make reasonable adjustments was partially upheld and the remaining claims were dismissed.

### **The reconsideration application**

4. On 21 June 2021, by email, the claimant's agent applied for reconsideration arguing that there was insufficient reasons for not accepting the evidence led on behalf of the claimant with reference to the grievance hearing of 8 January 2020 and telephone call of 29 June 2020. It was argued that the evidence led on behalf of the claimant (from the claimant, her sister and mother), ought to have been preferred to that of the respondent, and that insufficient reasons were given for not preferring the evidence led on behalf of the claimant (including the claimant, her sister and her mother and the claimant's sister's notes that had been provided) such that the claims that were dismissed should be reconsidered.
5. It was argued that the Tribunal took into account irrelevant matters, namely the status of the claimant's sister (and her former career as a "legal professional") and that there was a lack of clarity as to why the Tribunal did not prefer the evidence led on behalf of the claimant.
6. This decision follows my preliminary consideration of the claimant's agent's application for reconsideration of the judgment applying the legal principles.

### **The law**

7. 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).
8. 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.

9. The importance of finality was confirmed in **Liddington v 2Gether NHS Foundation Trust EAT/0002/16**, Employment Appeal Tribunal, chaired by Simler P, who 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.”*
10. 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. It is also important to recognise that fairness and justice applies to both parties.
11. Reference to paragraphs below are to the paragraphs in the judgment.

### **The decision and reasons**

12. In considering the application for reconsideration I considered what the Tribunal set out in its observations with regard to how it dealt with the fundamental evidential disputes and the Tribunal’s unanimous decision with regard to its conclusions. This was found in the section entitled “Observations on the evidence” from paragraph 150.
13. The Tribunal carefully analysed the evidence the claimant led, including from the claimant herself, the claimant’s sister and her mother (see paragraph 157) and the productions in this case. The Tribunal repeated what the claimant’s

agent had noted, that there was a stark conflict in the position adopted by the claimant on the one hand and the respondent on the other and that both could not be correct. The Tribunal therefore had to determine which position it preferred with regard to the facts it had to find, based upon a careful assessment of the evidence that had been led. The Tribunal's role was to assess the evidence led carefully and determine on the balance of probabilities what it considered to have happened, at both the meeting of 8 January 2020 and call of 29 June 2020.

10 14. The key issue in this case was not so much what was said but whether it was said in an aggressive way. A key part of the claimant's case was that how the respondent treated the claimant verbally differed from what was written down. The respondent disputed this arguing the claimant was treated fairly.

15 15. At paragraph 159 the Tribunal noted that it had carefully analysed the evidence the claimant's sister and mother had provided to the Tribunal (which contradicted the respondent's evidence in material ways). The Tribunal noted that the written notes the claimant's sister had taken were not verbatim notes and were essentially edited by the claimant's sister, presenting her comment, on occasion, as to what the claimant's sister believed had occurred. The Tribunal considered that in so doing the claimant's sister had adopted the approach that the claimant had taken, namely to seeing the actions of the respondent as negative and adverse, rather than as supportive. The notes had not been provided to the respondent and so the respondent had not been given the chance, at the time, to comment upon their accuracy. The Tribunal considered the notes and preferred the evidence led by the respondent on the material points. The respondent's notes were less detailed containing only key points that were discussed. The issue was how the claimant was spoken to during the meeting and call and whether this was aggressive.

30 16. At paragraph 160 the Tribunal noted that it analysed all the evidence the claimant, her sister and mother had provided and determined that the position advanced by the respondent was considered more likely than not to be

accurate. From the evidence presented to the Tribunal, the panel were unanimously of the view, having heard and considered the evidence, that the respondent's evidence was more credible and was to be preferred to that the claimant had led. That was based upon an assessment of the oral and written evidence and the documents that were produced at the time (including notes and correspondence). The claimant's position had been that what the respondent put in writing had fundamentally differed to how the respondent acted at meetings or during calls. The Tribunal analysed the evidence and unanimously rejected that submission. The Tribunal considered that the approach the respondent took orally and in writing was consistent. It was supportive and reasonable, as set out in Ms McDonald's evidence.

17. The Tribunal noted at paragraph 161 that it found the evidence of Ms McDonald more credible and reliable than the evidence led on behalf of the claimant. Further, the Tribunal found that the written evidence provided to the Tribunal supported the respondent's position. At paragraph 162 the Tribunal confirmed it balanced all the evidence, including that presented by the claimant's sister and mother. The respondent had accepted their approach had not been perfect and discussions were, on occasion, fraught (see paragraph 165). The claimant's refusal to see any alternative to her preferred position had led to the claimant's managers becoming frustrated as the claimant was not prepared to explore alternative options.

18. The Tribunal concluded that the claimant, her sister and mother's evidence was found to be less credible to that presented by the respondent and on balance the approach the respondent took in writing was consistent with how the claimant was treated verbally. That was the conclusion of the Tribunal's balancing and analysis of all the evidence it had heard, seen and read. It involved carefully considering what had been provided at the Hearing, and what had been produced at the time. From its assessment of the evidence (looking at the evidence individually and as a whole) the Tribunal concluded that the position advanced by the respondent was to be preferred.

**Specific issues in the application – meeting of 8 January 2020 and the claimant’s sister’s status (as a former solicitor)**

5 19. The claimant’s agent argued that there was a paucity of reasoning in respect of the meeting of 8 January 2020 and why the claimant’s sister’s evidence was not preferred. The Tribunal referred to the claimant’s sister’s background which had been a matter on which evidence had been led. The claimant’s sister had been a solicitor but was no longer a solicitor by the time of the meeting. The respondent had noted that no legal professional was permitted to accompany her. The claimant’s sister was no longer a solicitor.

15 20. At paragraph 56 the Tribunal found: “*The claimant had been advised that the respondent would extend their policy and allow her to bring a companion to the meeting, provided such a person was not a “legal or HR professional as that would be deemed inappropriate to the structure of the meeting”. The claimant had responded saying her sister worked in policy for the Scottish Government. The claimant brought her sister who was a lawyer but had ceased to practise (formerly having worked as a solicitor for the Procurator Fiscal service). The claimant (and her sister) did not advise the respondent as to this.*”

25 21. This was background information that had been led before the Tribunal and did not feature in the Tribunal’s decision making as to the issues to be determined. The claimant’s sister’s status at the time of the meeting was not a relevant consideration, for the Tribunal, in assessing the evidence. It was noted as background. The claimant’s sister was not a lawyer at the time of the meeting (and was not regarded as such). Her status was irrelevant.

30 22. The Tribunal attached no weight to that background information in its assessment of the evidence. The Tribunal’s findings set out above set out what the factual position was. The claimant’s sister was a lawyer who had ceased to practice and had given up her law society connection. That historical fact had not been disclosed to the respondent but neither the

claimant nor her sister had been asked as to disclose whether her sister had been a solicitor in the past. She was only told she should not be a legal professional. The fact was not relevant in the Tribunal's assessment. It had been recorded as background material as part of the narrative.

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23. The Tribunal did not take this issue into account in reaching its decision since it was not a relevant consideration for the issues before the Tribunal, being background material which had been raised and referred to by the parties.

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**Specific issues in the application – Claimant's sister's notes**

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24. The claimant's agent argued that the Tribunal failed to explain why it did not prefer the claimant's sister's evidence, given the terms of her notes and why the Tribunal referred to the claimant's sister's decision not to provide the respondent with the notes she had taken of the meeting.

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25. At paragraph 159 the Tribunal observed: "*The Tribunal did not consider the notes the claimant's sister took (which were not presented to the respondent at the time) to be an objective record but a summary of what the claimant and her sister understood had occurred (seen from the claimant's perspective). It was notable that the notes that were taken of the grievance meeting were not provided to the respondent at the time (when it would have been possible to deal with any issues that arose).*"

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26. The Tribunal assessed all the evidence that had been presented in reaching its conclusions. The claimant's sister had produced notes to the Tribunal which had been taken at the time. The respondent had initially been advised the notes would be provided to them but the claimant's sister did not do so. The reason why the Tribunal makes reference to the failure to provide the notes to the respondent is because the notes differ from the evidence the respondent led. Had the notes been provided at the time, the respondent would have been given a chance to comment upon them (and identify any inaccuracies and avoid the disparity that arose at the Hearing). The Tribunal

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considered all the notes that had been taken at the time together with the oral evidence led and preferred, from its assessment of the evidence before it, the evidence presented by the respondent to that led by or on behalf of the claimant, including the notes the claimant's sister had taken.

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27. That position was arrived at, taking account of the claimant's sister's professional position and the full factual matrix. The Tribunal unanimously concluded that the respondent's position was to be preferred having analysed the evidence before it.

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**Specific issues in the application – call of 29 June 2020**

28. The claimant's agent argued that the Tribunal did not give sufficient reasons why it preferred the respondent's position to the claimant's sister and other in respect of the call of 29 June 2020. The Tribunal carefully considered what those present said and preferred the account given by the respondent. The Tribunal found the evidence of the respondent more credible from the evidence presented to the Tribunal, taking into account the issues the claimant's agent had raised and carefully considering the full factual matrix. The Tribunal took into account the claimant's position that the nature and tone of the discussion with Ms McDonald was influential in the breakdown of the relationship but that was due to how the claimant perceived she was being treated and her interpretation of the acts of Ms McDonald, which objectively viewed were assessed by the Tribunal as reasonable and supportive.

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29. The Tribunal was careful in its assessment of the evidence presented to it to analyse the oral and written evidence in its deliberations. The Tribunal was mindful of the fundamentally different approaches and the key factual disputes in this case. The Tribunal, as an industrial jury, was satisfied that the evidence led by the respondent was to be preferred to that led on behalf of the claimant. That decision was arrived at by carefully considering what the claimant, her sister and mother said and considering that evidence with the evidence led on behalf of the respondent. The Tribunal was unanimous in its decision to

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prefer the position advanced by the respondent from the evidence.

**Not in the interests of justice to allow reconsideration**

- 5 30. The Tribunal was unanimous in finding the evidence of the respondent on the points set out in the application was to be preferred. That was based on an assessment of the evidence before the Tribunal and the Tribunal making a decision on the balance of probabilities. That assessment took account of all the oral and written evidence led, together with what was said and written at the relevant times during detailed and careful deliberations by the Tribunal.
- 10 31. There is no evidence that shows the Tribunal has missed something important or that new evidence is being presented that could not reasonably have been put forward at the time. The claimant was given a fair opportunity to present her case and challenge the position adopted by the respondent (which was done). The Tribunal found the evidence of Ms McDonald in particular reliable and credible. It preferred her evidence to that led on behalf of the claimant.
- 15 32. The judgment was issued on the basis of the information before it with both parties having been given a fair opportunity to present their case and hear each other's submissions and present their response.

**Conclusion**

- 20 33. I considered the overriding objecting in reaching my decision to ensure the decision as to the reconsideration application taken was fair and just. That applies to both the claimant and the respondent since justice requires to be achieved for both parties. I have done so carefully.
- 25 34. Having considered all the points made by the claimant's agent, in light of the unanimous judgment and the approach to assessing the conflicts in evidence, I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The evidential points and conflict in evidence were fully considered and the Reasons set out why the respondent's position was preferred to that of the claimant. That was a position the Tribunal arrived at applying its industrial expertise as an industrial jury and assessing the

evidence before it with care. The approach the respondent maintained at the Hearing was consistent with the information presented at the time and was preferred to that advanced on behalf of the claimant (including by the claimant's sister and mother).

5 35. The decision reached was unanimous and based on the information presented to the Tribunal, both orally and in writing on the balance of probabilities. The position advanced by the respondent was found to be more likely than not to be the case. It is not in the interests of justice to reconsider the decision the Tribunal reached.

10 36. The application for reconsideration is therefore refused under rule 72(1) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

15 Employment Judge: David Hoey  
Date of Judgment: 24 June 2022  
Entered in register: 27 June 2022  
and copied to parties