EMPLOYMENT TRIBUNALS

Claimant: **Mr S Ali**

Respondent: **Royal Mail Group Ltd**

RECONSIDERATION DECISION

The claimant's application for reconsideration of my judgment dated 23 June 2022 is refused.

REASONS

The reconsideration application

1. I have undertaken a preliminary consideration of the claimant's application for reconsideration of my judgment on preliminary issues where I struck out part of the claimant's case on the basis it had no reasonable prospect of success and I refused permission for some amendments to the claim (some other amendments had been allowed by consent). The claimant made his application on 6 July and added some further information on 8 July.

The law

2. An application for reconsideration is an exception to the general principle that (subject to an 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. Under Rule 71 an application for reconsideration has to be made within 14 days of the date on which the written reasons were sent.

4. Under Rule 72(1) I may refuse an application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked.

5. The importance of finality was confirmed by the Court of Appeal in Ministry of Justice v Burton and anor [2016] EWCA Civ 714 where it was said:

> *"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."*

6. Similarly in Liddington v 2Gether NHS Foundation Trust EAT/0002/16 the Employment Appeal Tribunal said:

> *"a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or 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."*

Decision

7. The reasons for my decision are as follows.

Strike out of the claimant's complaint of direct disability discrimination about loss of entitlement to TBR in 2015

8. I struck out this complaint on the basis that I was satisfied, taking the claimant's case at its highest, he had no reasonable prospect of establishing it was part of a continuing act of discrimination or (if out of time) should be granted an extension of time on a just and equitable basis.

9. In his reconsideration application the claimant says that Mr Colclough made another decision within the 6 year period as Mr Colclough advised Ms Maunder to reinstate the claimant's TBR on the alleged basis that it was 15 minutes a day and not worth the management time in dealing with the dispute. The claimant alleges that in doing so Mr Colclough was seeking, in effect, to both hide and correct, what he says Mr Colclough

knew was an earlier breach of the Equality Act when he originally withdrew the claimant's TBR. He considers that Mr Colclough was anticipating that legal action was coming. The claimant refers to paragraph 5 of the respondent's grounds of resistance which state "*His manager, Abigail Maunder contacted Andrew Colclough in or around June 2021 in relation to TBR. Mr Colclough had previously been the Claimant's manager, but no longer worked at the Mail Centre at the time Ms Maunder contacted him. It is believed Mr Colclough advised Ms Maunder to commence payments of TBR to the Claimant, on the basis that the payment related to 15 minutes per day and did not justify the management time that would be involved in dealing with any dispute over entitlement to TBR..."*

10. This is not, however, how the claimant presented his case at the preliminary hearing. In fact it is the opposite. The point arose in cross examination of the claimant and he referred to the ET3 response form and was then taken to the extract in question. The claimant then said, words to the effect: "*why would she (Ms Maunder) contact Mr Colclough about TBR, he's not HR, and I think she went to HR; I don't think she went to Mr Colclough about it."* Mr Hoare then said the respondent disputed the claimant's version of events.

11. It is therefore not the case that I was unaware of what the respondent said in their ET3 response form. I was aware of it and it was specifically referred to at the preliminary hearing. However, I had to reach my decision on the basis of what the claimant's case was, not the respondent's case. The claimant's case that he presented to me was that he did not accept that Ms Maunder had spoken to Mr Colclough when deciding to reinstate his TBR, only to HR.

12. On that basis I do not consider that there are reasonable prospects of my decision on this point being revoked. There has to be structure and finality in litigation and I have to be able to proceed on the basis of assessing the case that the claimant puts before me. It is not in the interests of justice for parties to change their case to put it a different way once there has been a decision that is not in their favour.

13. In reaching this decision I have taken into account what the claimant says about fairness and the suggestion that he felt ambushed at the preliminary hearing. He says that before the preliminary hearing he had not seen the email sent at my direction on 26 May explaining what the preliminary hearing was about, and that it was not just about amendment and case management but was also about time limit issues. The claimant emailed the Tribunal on 28 May to say he had only found the email after the hearing on the 27 May when looking at his spam email folder. He says he feels he was disadvantaged in not being able to put forward his relevant evidence.

14. I should be clear that when I drafted and promulgated my reserved judgment on preliminary issues I was not aware that the claimant had not received the email of 26 May. His emails to the Tribunal had not been referred to me and I only became aware of them when the claimant made his reconsideration application. I also was not aware at the hearing itself that the claimant had not received that email. I believe I did refer to it at the start of the hearing, but I will readily accept that it is the type of point where it would be easy to be at cross purposes and for there to be a misunderstanding.

15. I do not, consider, however, that this means it is in the interests of justice for there to be a reconsideration hearing. This is for the following reasons:

(a) I do not consider it was reasonable for the claimant to have been under the misapprehension that time limits were not going to be considered at the preliminary hearing. The "out of time" issue was clearly set out in the notice of preliminary hearing of 5 May 2022 as the first issue that was going to be addressed;

(b) At the start of the hearing itself I explained again what needed to be decided at that hearing, including what was relevant to the time limit issues;

(c) During the course of the hearing on two other occasions I again explained to the claimant why it was necessary for him to give evidence under oath;

(d) The claimant was ultimately being asked to explain what he was saying amounted to discrimination and why, and what he was saying the linkage was between these things so as to arguable making them a continuing act/state of discriminatory affairs. In essence, that is being asked to set out what the basics of your case is. A litigant, including a litigant in person, should be in a position to explain those things at a hearing. A Judge is entitled to ask and the other party entitled to know the basic ways in which a case is put;

(e) This is even more the case in the circumstances in which there had been opportunities for the claimant to consider and set out his case. These include: his claim form; his further and better particulars of his victimisation claim; his application to amend; the case management hearing with EJ Ryan;

(f) There was also the hearing before me where the claimant had multiple opportunities to set out what he wanted to say. I went through the different types of complaint he was seeking to bring at the start of the hearing; he then gave evidence where he had opportunity say what he wanted to in

answers to questions from me, cross examination by the respondent and anything else he wanted to clarify; he then had the opportunity to make final observations after the respondent set out how they put their case on the preliminary hearing issues;

(g) The claimant refers to not being able to put his documents forward. There was no formal direction for exchanging documents and preparation of a preliminary hearing bundle. However, he does not dispute that the respondent had asked him if he wanted to add any documents to the bundle they had voluntarily prepared and he did have access to it. I was also fully content to take into account, and take at face value, what the claimant told me about what ever documents he said existed. For example, he wanted to refresh his memory from a grievance document prepared by Ms Maunder that he had on his phone and he did so and read parts out. There was no issue with him doing that. Moreover, I was ultimately deciding the point on the case that the claimant set out and explained to me; not about what documents said.

16. The other observation I make is that the claimant has not until now set out his claim as being about the actions of Mr Colclough in 2021. His complaint about discrimination in 2021, with regard to TBR, was about the actions of Ms Maunder; not Mr Colclough. He identified the act of discrimination as being Ms Maunder re-stating that he was not entitled to TBR. In his ET1 claim form the claimant complained about the actions of Ms Maunder in redelivering paperwork saying he was not entitled to TBR. In the claimant's application to amend (incident 4) he said "On or around June 2021 the late shift manager Abigail Maunder continued the direct discrimination course of conduct of her predecessor late shift manager Andrew Colclough by the continuing act of revoking my TBR…during the alignment exercise." He said that when she was given the opportunity to correct the discrimination about his TBR she confidently asserted he had no entitlement to TBR. The claimant referred to Ms Maunder later "repenting" and reinstating his TBR but said that the act of direct disability discrimination had occurred for a further 2 weeks as a result of her initial decision. At the preliminary hearing before me the claimant continued to put forward his case in the same way; in particular that the discriminatory act was the action by Ms Maunder in her letter of 24 June saying he had no right to TBR. As part of my consideration of the issue of time limits, it was therefore the link between that action by Ms Maunder and the original actions of Mr Colclough that I was considering as part of my decision making; because that is the way in which the claimant had consistently presented his case.

17. The claimant therefore did not present his case as being about Mr Colclough committing further acts of discrimination in advice or direction given to Ms Maunder. As already stated, the claimant at the preliminary hearing specifically rejected the notion that there had been contact

between Ms Maunder and Mr Colclough in that way. Again, here my viewpoint is that I was entitled to expect the claimant to set out his case to me and to proceed on that basis of what he told me.

18. The claimant now says that Ms Maunder did not make a fresh new decision (or not until later on after he raised a fresh discrimination complaint). Again that is simply the opposite of how he described it at the preliminary hearing.

19. The claimant says there is conduct extending over a period because there is linkage to other more recent detriments that are within time. He gives as examples the creation of what he terms the fictitious document. But again that is simply not how he presented the case at the preliminary hearing. I very carefully asked him about what he accepted were isolated acts and what he was saying was linked to what and why. I then proceeded on that basis in my decision making.

20. The claimant also seeks to make a link with earlier events such as theft allegations in 2010 and Mr Colclough seeking ill health retirement for him in 2012/2013. They would not serve to bring the complaint about TBR in time. But in any event, again that is not how he presented his case at the preliminary hearing.

21. The claimant refers to case law such as Pugh v National Assembly about the need not to focus upon terminology such as whether there is a rule, regime or practice but on the substance of the complaint of discrimination. I directly set out the authorities on this very point in my reserved judgment and reminded myself of the principles in my decision making. At the end of the day you have to use some terminology to explain your reasoning when giving a decision. The case law such as Coutts is a helpful tool to structured decision making to make sure the various ways in which time limit points may be put forward have been fully considered. But it is and was to me in my decision making no more than that. I focused on the substance of what the claimant told me he was complaining about and what he said was linked to what.

22. In summary, I am satisfied on the basis of what is before me that there is no reasonable prospect of my original decision being varied or revoked. The application for reconsideration is therefore refused.

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Employment Judge Harfield
Dated: 6 October 2022

JUDGMENT SENT TO THE PARTIES ON 10 October 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche