



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A R Wilson

v

Network Rail Infrastructure Limited

Tribunal: Leeds

Dated: 21 November 2022

Before: Employment Judge A James

RECONSIDERATION JUDGMENT

(1) The application for reconsideration of the Judgment dated 26 September 2022 (Employment Tribunals Rules of Procedure 2013 – Rules 70 to 73) is refused for the reasons set out below.

REASONS

1. The reserved judgment dated 26 September 2022 was sent to the claimant on 28 September 2022.
2. An application was made by the claimant on 11 October 2022 for a reconsideration of judgment. That arrived during a period of non-working for the Judge. Today had been the first opportunity to consider the application in detail.

The Law

3. Rules 70, 71 and 72 of the Employment Tribunal Rules of Procedure 2013 provide as follows:

RECONSIDERATION OF JUDGMENTS

Principles

70. 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.

Application

71. *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.*

Process

72. (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.*

4. Whilst the discretion under the rules is wide under the 'interests of justice' test, it is not boundless; it must be exercised judicially and with regard, not just to the interests of the party seeking the review, but also to the interests of the other party and to the public interest requirement that there should, as far as possible, be finality of litigation - *Flint v Eastern Electricity Board [1975] ICR 395 at 401*, per Phillips J, at 404.
5. The Judge has carefully considered the contents of the application for reconsideration under Rule 72(1) and decided that there is no reasonable prospect of the decision being varied or revoked. A hearing is not therefore necessary. The reasons are as follows.

The grounds for the application

6. It appears to the Judge that there are two main bases for the claimant's request for a reconsideration. The first is that he disagrees with the Tribunal's findings of fact. The second is that he disagrees with the Tribunal's conclusions in relation to the level crossing manager role. Those are dealt with in turn below.

Challenge to findings of fact

7. The claimant states on the first page of the reconsideration request
I feel the decisions and conclusion arrived at for my case, I think the tribunal may have got the facts wrong as I feel my evidence was not included in your decision making which could prove the way I had been treated from 2017 up until my dismissal in May 2021. The policies and procedures not followed which would have reduced my mental health condition had they been followed.
8. This appears to be a challenge to the Tribunal's findings of fact. Whilst the Judge acknowledges that the claimant disagrees with a number of findings of fact, those facts were arrived at after careful consideration of the evidence as a whole. Nothing said by the claimant comes close to persuading the Judge that those findings of fact were not reasonably open to the tribunal, on the basis of the documentary and witness evidence presented.

9. For example, the claimant refers at paragraph 2 of his reconsideration request to para 37 of the Judgment, regarding the advertising of his WDM role on a permanent basis. The claimant refers to page 361A, which he says showed that his role was advertised seven months before the Tribunal found that it should have been, following a meeting on 27 November 2019 with the claimant, at which he confirmed that he did not wish to return to his substantive role. Since page 361A has been redacted, it is by no means clear that is what page 361A shows. But in any event, it does not change the finding at #37 of the Judgment, which was that until 27 November 2019, the claimant's substantive role was deemed to be the WDM role. Following that meeting, formal attempts to redeploy him could be made (although it took some months to start those). Efforts to redeploy the claimant continued until his employment ended on 11 May 2021, some 18 months later.
10. The contents of paragraphs 4 to 15 of the reconsideration request are noted by the Judge, but they appear to be further attempts by the claimant to raise issues with the facts or the conclusions set out in the Judgment. In the view of the Judge, none of the matters raised have any merit, nor have they any material bearing on the overall conclusions in the Judgment.

Interview for the Level Crossing Manager (LXM) role

11. In relation to the claimant's interview for the LXM role, the claimant argues that he has found new evidence, being an email dated 10 March 2021, which sets out reasons why Mr Lloyd did not consider that the claimant was suitable for that role, following a competitive interview.
12. The Tribunal concluded in relation to the LXM role:

[109] Finally, in relation to the LXM role, the tribunal concludes, on the basis of the evidence given by Mr Morgan [at] the hearing, the evidence contained in the disability impact statement of the claimant and the content of the Social Entitlement Chamber decision from March 2021, that even if the claimant had been given a suitability interview, which he should have been, he still would not have been redeployed into that role. [The Tribunal a]ccepted that one of the reasons he did not want to take on a planning role was because of the stress associated with that role; the tribunal concludes, on the basis of the evidence, that [the stress of] the level crossing manager role would if anything, have been even greater. Given the claimant's continuing ill health issues, the tribunal is satisfied that the respondent would not have considered it appropriate to redeploy the claimant into such a high risk role, during the redeployment period. ...

[114] Whilst the claimant should have been offered a suitability interview for the Thirsk LXM role, the tribunal has concluded that even if he had been, that role would not have been suitable at that time. ...

[119] The claimant was not offered a ring fenced suitability interview. Instead, he was invited to a competitive interview, with others who were not redeployees. However, the tribunal has concluded that in any event the claimant would not have been appointed to the role as it was not suitable. In those circumstances, there was not a real prospect that the adjustment would have alleviated the substantial disadvantage. The claimant would still have been dismissed. On that basis, the [reasonable adjustments] claim fails in any event. [Words in square brackets added]

13. The Judge notes, first, that the email of 10 March 2021 was in the claimant's possession at the time of the hearing, on a memory stick, and could have been provided to the Tribunal. In any event, taking the conclusions above as a whole, even if that email had been before the Tribunal, it would have made no difference to the overall conclusions. On the contrary, it further reinforces the conclusion that the view was reasonably taken by the respondent, that the claimant's skill set and experience profile was less than 50% compatible with the skills and experience of the LXM role; a safety critical and stressful role. In those circumstances, that role would not have been offered to the claimant, even if he had been offered a ring-fenced, instead of a competitive interview for the role in the first instance.

Conclusion

14. For all of the above reasons, the reconsideration application is rejected under Rule 72(1).

Employment Judge James

Dated 21 November 2022

response.

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