EMPLOYMENT TRIBUNALS

Claimant: **Dr F Donaldson**

Respondent: **Cwm Taf Morgannwg University Health Board**

RECONSIDERATION DECISION

The claimant's application for reconsideration dated 31 October 2022 is refused.

REASONS

The reconsideration applications

1. I have undertaken a preliminary consideration of the claimant's application for reconsideration made on 31 October 2022 following our Judgment of 14 October 2022 sent to the parties on 18 October 2022.

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 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.

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 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."*

5. 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."*

6. Under Rule 61 a Tribunal may either announce its decision in relation to any issue at the hearing or reserve it to be sent to the parties as soon as practicable in writing. Rule 62(1) provides that the Tribunal shall give reasons for its decision on any disputed issue, whether substantive or procedural and in the case of a decision in writing, the reasons shall also be given in writing. Under Rule 62(5) in the specific case of a Judgment, the reasons shall: "*identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues."*

7. As the Court of Appeal recently reiterated in *Simpson v Cantor Fitzgerald Europe [2020] EWCA Civ 1601*, the point of the rule, in relation to Judgments, is to enable the parties to know why they have won or lost. The Court of Appeal re-stated the classic observation from *Meek v City of Birmingham District Council* [1987] IRLR 250:

> *"The duty of an industrial tribunal is to give reasons for its decision. This involves making findings of fact and answering a question or questions of law. So far as the findings of fact are concerned, it is helpful to the parties to give some explanation of them, but it is not obligatory. So far as the questions of law are concerned, the reasons should show expressly or by implication what were the questions to which the industrial tribunal addressed its mind and why it reached the conclusions which it did, but the way in which it does so is entirely a matter for the industrial tribunal."*

Decision

8. The claimant's reconsideration application says:

> "*I am requesting a reconsideration of the outcome of the above mentioned case on the basis that I did not receive a fair hearing, among other reasons. The order of the Tribunal made June 2020, was to hand over to me all documents and recordings whether it assisted their defence of the claim or not.*
>
> *Document that my case relied on were withheld. Information that I asked for was not handed over. Evidence of fabrication of evidence was exposed to the Tribunal. I repeatedly complained to the Tribunal about these actions to no avail.*
>
> *I feel there was a presumption that the respondent was cooperating. This I believe prejudiced my claim. I contend that complying with the tribunal order should have comprised an absolute requirement to progress a defence. I was repeatedly informed by the Tribunal that my claim was being placed at risk by not complying with orders made.*
>
> *The behaviour demonstrated by the respondent in a continuation of behavior that its normal practise when dealing with minority employees. They withheld information that they are required to collect and have available by law. Please find attached a list of some requests/questions that were posed. I believe I was entitled to these items and the respondent should have faced sanction before the case proceeded."*

9. Attached to his application is a tabled prepared for the claimant's second claim 1600147/2021, which was not consolidated with this claim. It is 10 pages long. It sets out a list of questions, who the claimant says he directed the questions to, when he says he did so and the response he says he received.

10. In relation to that table and the reconsideration application I would observe:

    (a) Some of the stated requests the claimant says he made were not in the course of this tribunal litigation but are questions he says in general that he asked of the respondent as his then employer;

    (b) Some of the stated requests are not requests for disclosure of documents but requests for information that the respondent was under no obligation to respond to in preparation for the final hearing and, where relevant to the issues to be decided at that hearing, the claimant had the opportunity to ask questions in cross examination and make submissions to the tribunal about at the final hearing;

(c) Indeed, some of the questions he did ask in the course of the hearing and answers were given, which were taken into account in our decision making where relevant. Such questioning of witnesses did not, for example, then lead to fresh disclosure of documents or formal applications for additional disclosure during the course of the hearing of the matters in the claimant's table. (There was a discrete issue that arose in the questioning of Dr Quirke that could not have been anticipated earlier in the proceeding and does not relate to matters identified in the claimant's table);

(d) Some of the stated requests are about points directly addressed in our Oral Judgment;

(e) Some of the stated requests relate to events that happened after the specific events that were before us in this case which were limited in scope and in time. Some relate to issues that do not appear to have any direct relevance to the limited issues that were before us to decide. For example, Ms Williams was not a witness at the hearing because she only became involved with Dr Donaldson after the events in question. By way of another example the claimant refers to DBS check documents but the event about the DBS checks were not before us in this case;

(f) Some of the stated requests relate to documents which the respondent says do not exist and they are therefore unable to provide and where, on relevant issues, there is no evidence to the contrary to say they do exist;

(g) Some of the requests relate to documents the claimant accepts he did receive by the time of the final hearing;

(h) Most importantly the claimant has not set out at all how he says each document he is referring to was relevant to the issues we had to decide in the case before us which were limited in scope and duration or how and why he says they would be likely to lead to our decision on the issues before us being varied or revoked.

11. It is also important to note that in advance of the hearing I was mindful of the fact that the claimant sometimes wrote to the tribunal without the correct case number, or by reference to the case number on his second claim, without clearly differentiating which claim his correspondence related to. His second claim includes a complaint about, he says, not being given evidence and information in support of disciplinary allegation against him and led to the production by the claimant of the table that he seeks to also rely on in this reconsideration application. Legal Officer

Murphy therefore wrote to the parties at my direction on 20 September 2020 saying: "*Given the proceedings have not been consolidated, EJ Harfield understands (to the best that can be discerned from the pieces of correspondence on the file) that the parties are working together to finalise the hearing bundle and there are no outstanding applications relating to this hearing. If that is not the case, and there is an application or applications, then the party making it needs to send one succinct email* heading with the case number and the dates of the hearing, setting out exactly what application is being made and why…" There was no application made by the claimant in response for what he believed to be additional relevant disclosure that he considered remained outstanding.

12. That email also told the claimant that "*the Tribunal will not conduct litigation through correspondence and will not order the Respondent to require witnesses to provide written answers to questions. If the claimant has questions for the respondent's' witnesses that relate to the issues before the Tribunal then the appropriate course of cation is for the claimant to ask his questions during cross examination at the hearing in October."* As previously stated, the claimant had the opportunity to do that at the hearing.

13. I therefore do not consider that the claimant has reasonable prospects of establishing that he did not have a fair hearing or of the decision on the issues before us (in respect of which he received detailed oral reasons) has a reasonable prospect of being varied or revoked. We made our decision on the evidence put before us and the parties' submissions which the claimant had a full opportunity to engage with. The claimant had the opportunity to make whatever applications he wished to do so that were relevant. He received a fully reasoned decision addressing the issues before us, in respect of which this reconsideration application wholesale fails to address.

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Employment Judge Harfield
Dated: 23 January 2023

JUDGMENT SENT TO THE PARTIES ON 24 January 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche