EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Miss C Dyer		University of London

JUDGMENT

The Claimant's application for reconsideration of 12 February 2023 is dismissed.

REASONS

1. By an application sent to the Tribunal on 12 February 2023 (supplemented by a further email on 13 February 2023) the Claimant seeks reconsideration of the liability judgment in this matter sent to the parties on 1 February 2023 following the final hearing that took place between 23 November 2022 and 2 December 2022.

2. I apologise for the delay in dealing with the Claimant's application, which has been owing to pressure of work. I have considered the Claimant's application on the papers. There has been no need to seek representations from the Respondent.

The law

3. Rules 70-73 of the Tribunal Rules provides as follows:-

> **70. Principles**
> 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.
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> **71. Application**

> 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.
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> **72. Process**
> (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.
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> (2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.
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> (3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.
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> **73. Reconsideration by the Tribunal on its own initiative**
> Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).

4. The Tribunal thus has discretion to reconsider a judgment if it considers it in the interests of justice to do so. Under Rule 72(1), I must dismiss the application if I consider that there is no reasonable prospect of the original decision being varied or revoked. Otherwise, I must (under Rule 72(2)) consider whether a hearing is necessary in the interests of justice to enable the application to be determined. A hearing would, unless not practicable, be a hearing of the full tribunal that made the original decision (Rule 72(3)). If, however, I decide that it is in the interests of justice to determine the application without a hearing under Rule 72(2), then I must give the parties a reasonable opportunity to make further written representations.

5. In deciding whether or not to reconsider the judgment, the authorities indicate that I have a broad discretion, which *"must be exercised judicially … having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible be*

finality of litigation" (*Outasight v Brown* [2015] ICR D11). The Court of Appeal in *Ministry of Justice v Burton* [2016] ICR 1128 also emphasised the importance of the finality of litigation (ibid, [20]).

6. That said, if an obvious error has been made which may lead to a judgment or part of it being corrected on appeal, it will generally be appropriate for it to be dealt with by way of reconsideration: *Williams v Ferrosan Ltd* [2004] IRLR 607 at [17] *per* Hooper J (an approach approved by Underhill J, as he then was, in *Newcastle upon Tyne City Council v Marsden* [2010] ICR 743 at [16]).

7. It may also be appropriate for a judgment to be reconsidered if a party for some reason has not had a fair opportunity to address the Tribunal on a particular point (*Trimble v Supertravel Ltd* [1982] ICR 440, and *Newcastle-upon-Tyne City Council v Marsden* ibid at [19]).

8. However, a mere failure by a party (in particular, but not only, a represented party) or the Tribunal to raise a particular point is not normally grounds for review: *Ministry of Justice v Burton* (ibid) at [24]. Nor is wrong or incompetent conduct by a representative: *Newcastle-upon-Tyne City Council v Marsden* (ibid) at [19].

9. A reconsideration application cannot be used merely to challenge reasons rather than the substantive outcome: *Ms Y Ameyaw v Pricewaterhousecoopers Services Ltd* (EA-2019-000480-LA and 000503) at [44]-[46] *per* Matthew Gullick QC (Deputy Judge of the High Court).

10. Where a party wishes to rely on fresh evidence, the most appropriate way to do so is by way of an application for reconsideration of the tribunal's decision, rather than an appeal to the EAT, since the tribunal is better placed to decide whether the evidence would if available at the original hearing have made any difference to its conclusions: *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 and [9] of the *Practice Direction (Employment Appeal Tribunal - Procedure) 2018*. The same *Ladd v Marshall* test applies both on reconsideration and on appeal to the question of whether fresh evidence should be admitted, i.e. the question is whether the evidence have been obtained with reasonable diligence for use at the hearing; whether it is relevant and would probably have had an important influence on the hearing; and whether it is apparently credible: *Outasight VB Ltd v Brown* [2015] ICR D11 (approved by the Court of Appeal in *Ministry of Justice v Burton* [2016] EWCA Civ 714, [2016] ICR 1128). However, as the EAT made clear in *Outasight* ([31]), reconsideration may be permitted on the basis of fresh evidence not meeting the *Ladd v Marshall* test where it is in the interests of justice to do so.

11. The normal time limit for submitting a reconsideration application is 14 days under Rule 70. However, the Tribunal has power under Rule 5 to extend that time limit. This is a broad discretion to be exercised in accordance with the overriding objective: *Gosalakkal v University Hospitals of Leicester NHS Trust* (UKEAT/0223/18/DA) *per* HHJ Richardson at [10].

The Claimant's application

12. The Claimant's application raises a number of points, which I will deal with in turn.

(1) New evidence

13. First, the Claimant provides two items of what she describes as 'new' documentary evidence 'found since Judgment'. The two items are:

    a. An email from someone else to Ms Oliver of 10 May 2019 raising issues that this person has had as a member of staff at The Careers Group over the previous two years;
    b. Investigation Meeting Notes dated 18 December 2019 for someone else's formal grievance.

14. The Claimant argues that the liability judgment at [237] compares the Claimant to colleagues at TCG to decide if she committed wrongdoing. The Claimant suggests that the judgment compares her to a colleague employed by the Respondent who was also a carer and who raised a grievance, that the colleague was treated respectfully, granted a subject access request (SAR) in a way that was different to the treatment of the Claimant. She suggests that the two 'new' documents refer to the same people involved in her case and deal with organisational issues in Spring 2019 regarding bullying, harassment and discrimination. The Claimant says that she has also remembered further oral evidence to the effect that (she alleges) Mr Gilworth asked her in the office in around Autumn 2019 if she were to make a complaint would she use social media.

15. I do not consider that any of this alleged 'new' material even arguably meets the *Ladd v Marshall* threshold for two reasons: (1) the documents plainly could have been obtained with reasonable diligence for use at the hearing as they were (I infer from the use of the words *"found since judgment"*) in the Claimant's possession already. Obviously, her own recollections were in her possession; (2) they could not arguably have had an important influence on the outcome. Indeed, the evidence appears to me to be irrelevant. The Claimant seeks to link this evidence to [237] of the judgment, but I was not there comparing the Claimant to other colleagues. I merely found that because of what happened with other colleagues in the summer, it ought to have been obvious to her that her email of 18 September 2020 was inappropriate. Insofar as the Claimant now seeks to raise a new complaint of less favourable treatment in comparison to others, I cannot see that is made out on the facts she has referred to, or that it has any bearing at all on her constructive dismissal claim which did not rely on any such comparison.

(2) Final hearing - statement

16. The Claimant suggests that she received unwelcome conduct and was treated very badly at the Tribunal and states that she has maintained a detailed diary of interactions with staff on site which she has chosen not to

provide with her application. As she has not provided the diary, I cannot consider it, but I am very sorry to hear that the Claimant feels she was treated badly. I personally worked hard during the hearing to try to address her various concerns and to treat her courteously and fairly. Some of those efforts were detailed in the liability judgment especially at [35]-[47]. If the Claimant has complaints about other members of staff, she should make a complaint to the Employment Tribunal, through the same channels as she has used previously.

(3) Association of Professional Notetakers' records

17. The Claimant says that in her view around 90% of the judgment contains errors and omissions as to what she said, but she does not identify any specific problem, so I could not possibly conclude that she has any arguable ground of complaint on the basis of what she has included in her application.

18. She has appended very heavily redacted versions of the notes taken by the professional stenographers that she employed during the hearing. I have reviewed those and can see nothing in them that causes me any concern as regards the judgment, almost all crucial elements of which turned on the content of the Claimant's own emails as she wrote them at the time, rather than anything that she said at the hearing.

19. The Claimant refers specifically to [153] of the judgment where I attempt to summarise a point the Claimant made numerous times in the hearing about the Honorarium she received, but she does not indicate what she considers to be wrong with that paragraph.

(4) Trains of thought were closed

20. The Claimant complains that I had a closed mind about management not being 'part of the case'. She refers to [87], but as that paragraph contains nothing relating to this issue, I take it she means [71]. What I said there about her claim having to be against her employer rather than a management committee merely reflects the provisions of the ERA 1996. It cannot sensibly be taken as evidence of a 'closed mind'. If I had accepted the Claimant's argument, I would have had to strike her claim out as not having been brought against her employer as required by the Act.

21. The Claimant does not identify any arguable basis for suggesting that I had, or appeared to have, a closed mind to her case or otherwise appeared to be biased. I considered her case very carefully.

22. As to the Claimant's *"regret"* that she confirmed when asked that Mr Gilworth's conduct was not part of her reason for resigning, this issue is dealt with at [81]. I cannot now recall precisely how I phrased this question to the Claimant, but the context was, as is apparent from [81] that the Claimant had not included these allegations about Mr Gilworth in her Singular List of Issues. As that indicated that it was not therefore part of her case that this conduct was part of her reasons for resigning, I may well have phrased the question

in the negative as I was merely checking with her that her case remained as set out in the Singular List of Issues. In any event, for all the reasons set out in paragraph [81] and throughout the judgment (but in particular at [185]), I concluded that nothing Mr Gilworth did played any material part in the Claimant's decision to resign.

(5) Issues not questioned

23. The Claimant under point 5 complains that I have not dealt with every point raised or every item of evidence before me or that she disagrees with my conclusions on the facts. However, my judgment is already a full one, that deals with all of what appeared to me to be the principal planks of the Claimant's case. Out of respect for the Claimant's detailed arguments, and voluminous evidence relied on, the judgment is much more detailed that it needed to be in order to answer the legal issues in this case. I cannot see anything in the Claimant's submission here that comes anywhere near the (high) threshold for perversity.

(6) Delay in receiving the judgment (2 months)

24. I have apologised for the delay, which was not very great, and this is not a ground for reconsideration.

(7) The Claimant could not be legally represented

25. Most Tribunal claimants are not legally represented. The Claimant had ample opportunity to obtain legal representation if she wished or could afford it. This is not a ground for reconsideration.

(8) The chronology timeline required was not acknowledged (2017-2020, since a carer)

26. I do not understand the Claimant's point (8). The judgment covers the whole timeline in the evidence adduced by the parties.

Conclusion

27. For these reasons, I consider that the Claimant's application for reconsideration stands no reasonable prospect of success and it is hereby dismissed.

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Employment Judge Stout

24 March 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

24/03/2023

FOR THE TRIBUNAL OFFICE