EMPLOYMENT TRIBUNALS

Claimant: Dr Abdel-Bari

Respondent: East Lancashire Hospitals NHS Trust

JUDGMENT

The claimant's application dated 23 June 2023 for reconsideration of the judgment sent to the parties on 12 June is refused.

REASONS

Introduction

1. Employment Judge Cookson has considered the application sent by the claimant on 23 June 2023. The application for reconsideration was set out in an attached to an email. The email also makes reference to various aspects of the case. Those have been taken into account in reaching this decision. There are two further attachments to the application. They are letters to two of the witnesses. Those letters have not been taken into account.

2. Employment Judge Cookson has concluded that there is no reasonable prospect of the original decision being varied or revoked. She has reached that decision for the reasons set below.

The Law

3. Under rule 70, a judgment will only be reconsidered where it is 'necessary in the interests of justice to do so'. This does not mean that in every case where a litigant is unsuccessful, he or she is automatically entitled to a reconsideration: it is likely that most unsuccessful litigants think that the interests of justice require the decided outcome in their cases to be reconsidered. Instead, a Tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases 'fairly and justly' — rule 2. This includes:

   a. ensuring that the parties are on an equal footing;

b. dealing with cases in ways which are proportionate to the complexity and importance of the issues;

c. avoiding unnecessary formality and seeking flexibility in the proceedings;

d. avoiding delay, so far as compatible with proper consideration of the issues; and

e. saving expense.

4. In *Outasight VB Ltd v Brown* 2015 ICR D11, EAT, Her Honour Judge Eady QC accepted that the wording 'necessary in the interests of justice' in rule 70 allows Employment Tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially, *'which means 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*'.

Conclusions about the application for reconsideration in this case

5. The grounds for the application are not entirely clear but in his covering email and in the attached document the claimant says that the following are his main grounds (set out below as received by the Tribunal):

"*1. I have based my reconsideration on the facts of the case.*

2. The ET based its decision based 100% on hearsay and ignored the facts, which I referred to.

3. The ET Panel was unfair and unequally in my case with direct support to R and support of vicious insults to me and my practice. (P197)

4. It is illegal to blame me for harm and mismanagement for a patient during period of time where I have not even seen the patient. I have only seen this mum at 17:33 on 1/12/2020. (P 276) Whatever happened before this time got nothing to do with me. It is that caused serious harm to the baby of this mum. This a finding and not hearsay.

5. The ET told me not amend, but allowed a lay person to overrule the clinical finding made in the case written and documents by two consultants and made in this case allowing this lay person to trivialise this finding three years later, while this is what the case is about and all the statement is amended to suit R. The never commented, but I objected.

6. To delete a relevant finding in a legal case can lead to a prison sentence. But here is deletion is admitted by R, but the ET ignored this.

> *7. It is written quite clearly by midwife Lord "Dr Abdel Bari stood at the computer system where he started documenting". I have not seen my documentation. A fife year old child or any lay person will easily say "This documentation was deleted" Never mind they brought an expert to state "it is not deleted" I go by facts but not by fabrication. Any court will go by facts in front of it. To follow is obvious inequality and unfair treatment of this ET.*
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> *8. Then while I am ordered not amend my statement by Judge Cookson but (1) - The respondent allowed to amend their Grounds of Resistance (P68) and midwife Lord was also allowed to amend her statement in day two of the hearing and a lay person was allowed to guide the hearing in what he got no idea about."*

6. In the attachment the claimant also comments at some length on the Tribunal's Judgment and Reasons. Although at times his arguments are somewhat difficult to follow, the points he raises appear to relate in broad terms to the grounds above, in essence what the claimant says is that he thinks the Tribunal made the wrong findings of fact and was biased against him.

7. In terms of the claimant's grounds 5 and 8, the claimant suggests that the Tribunal improperly refused to allow him to amend his claim and witness statement but allowed the respondent to amend its defence. That is not correct.

8. As the Judgment and Reasons explain, the claimant presented an additional witness statement at the start of the hearing. That did not suggest a new grounds of complaint or present any new evidence as such, it was a commentary on the respondent's witness evidence and set out the claimant's views. The Tribunal's decision is explained in its Reasons but the claimant was told he should use this as the basis to ask cross examination questions and to make his submissions.

9. The respondent did not apply to amend its response to the claim. The respondent's grounds of resistance to this claim were not amended at the final hearing. One of the witnesses, Mrs Lord did tell us that she had made a mistake in her written statement. She was allowed to clarify her statement, but that did not mean her evidence was simply accepted because she had changed her statement. When the Tribunal came to make its finding of facts about the relevant matter, that is when the foetal heart rate became pathological, we made findings based on all of the evidence before us, including the evidence of the claimant and as the reason explained, on this point the Tribunal was particularly persuaded by the evidence of Dr Harmer and Dr Wittersheim when taken alongside the contemporaneous evidence of the documents from the time.

10. The balance of the claimant's application for a reconsideration, whilst not entirely clear, appears to be based on his assertion that the Tribunal has made incorrect findings of fact and is biased. It is perhaps not surprising that he is unhappy that we preferred the evidence of the respondent's witnesses, but why the panel reached the conclusions that it did is explained in the Reasons. That fact that he disagrees with those findings is not in itself a reason why it would be in the interests of justice for the decision to be reconsidered, nor is that evidence of any bias against

him. It is likely that every unsuccessful party to litigation feels the same way, but it is generally in the interest of justice for cases to be considered once on the basis of the evidence presented at the hearing. That is the case here.

11. One of the grounds set out above is that panel made its decision based on hearsay evidence. It is not clear what the claimant means by this. The Tribunal heard direct witness evidence from those whose actions were said to amount to direct discrimination and with reference to contemporaneous documentary evidence. It may be that what the claimant means is that we heard evidence from Dr Harmer and Dr Wittersheim about the foetal heart rate trace but also we heard evidence from the claimant about those traces. We took care to explain why we reached the conclusions that we did on the basis of the evidence before us.

12. Matters such as the timing and content of the claimant's entries onto the respondent's computer system were determined by the Tribunal based on the evidence before us, including evidence from the respondent about the extent to which an entry could be deleted. Our findings about that are set out in our judgment. As explained our findings on this reflected the fact that we heard inconsistent evidence from the claimant.

13. Whilst the claimant has said that we made incorrect findings of fact, his application fails to address the primary reason why his claim failed. As the reasons record, despite the judge taking time to ensure that the claimant's attention had been drawn to the need for the claimant to explain to us what evidence he relied to show that the reason for the treatment he alleged could be because of his race, the claimant relied on no more than that the fact that Mrs Lord and the consultants Dr Harmer and Dr Wittersheim are white. Further it is clear that that the focus of the claimant in this application continues to be based on a misapprehension that this Tribunal was making a decision about the quality of his clinical practice and whether he was to blame for a baby being born in circumstances which he says caused harm, although the respondent denies that. That was never the case. As the claimant was reminded on many occasions and including by Employment Judge Holmes at a previous case management hearing, this was a case to determine if he had been subject to direct race discrimination and it is significant that he has still failed to suggest any basis on which the Tribunal could find that reason for the alleged less favourable treatment was his race, other than a difference in racial background between him and the staff about whom he complained. The claimant wishes us to make different findings of fact but fails to out forward any basis for our decision on his claims of direct discrimination being overturned. It is not in the interests of justice to reconsider our judgment in those circumstances.

14. In his application the claimant has also referred to the following (set out as per his email) "*Because I was seriously harmed about fabrication of assaulting the vagina of a Muslim woman, while a simple question to the patient in question could have avoided me three years of suspension for a patient I have not seen (see attached). Criminal racist must be caught not like in this case, fully supported*". For the avoidance of any doubt, what the claimant refers to here is another complaint made about him at another hospital which resulted in a wholly separate GMC investigation. This was referred to in evidence before us but this Tribunal did not take into account evidence

about that case or make any findings about it because the claimant offered no basis for suggesting that it had any bearing on the case before us.

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Employment Judge Cookson

Date: 5 July 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON

12 July 2023

FOR THE TRIBUNAL OFFICE