EMPLOYMENT TRIBUNALS

Claimant: Mr Christopher Peacock

Respondent: Teleperformance Limited

JUDGMENT

The claimant's application dated 4 August 2023 for reconsideration of the judgment sent to the parties on 11 August 2023 is refused in accordance with Rule 72(1).

REASONS

Introduction

1. Employment Judge Cookson has considered the application sent by the claimant on 4 August 2023. The application for reconsideration was set out at some length in an email with a number of attachments the claimant said he wanted to be kept confidential. The claimant had not complied with Rule 71 and 92 of the Tribunal Rules of Procedure because the application was not copied to the respondent. However, as the first stage of a reconsideration process involves an employment judge considering whether there is reasonable prospect of the original decision being varied or revoked before the views of the respondent need to be sought, Employment Judge Cookson was considered the application in any event.

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 it would be in the interests of justice for their case to be reconsidered. What a Tribunal dealing with the question of reconsideration must do is to consider how to apply 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 a case. 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 always entirely clear but in his covering email Mr Peacock says that the following are his main grounds:

> " *1. The tribunal made a mistake in the way it reached its decision*
>
> *2. There is additional evidence*
>
> *3. I believe that communication of my claim to the tribunal suffered because of the problems with communication inherent in my autistic condition.*
>
> *4. There are also additional matters to consider"*

6. These are expanded upon in the detailed document.

7. I have used the same headings as Mr Peacock in the detailed grounds document to explain why I have concluded that none of the grounds he has set out have led me to conclude that there is a reasonable prospect of the original decision being varied or revoked. I have also referred to the reasons given for the tribunal's judgment in this case. To be clear oral reasons were given for this judgment. A request for written reasons has been made but I have not yet had time to prepare those reasons.

"The tribunal made a mistake in the way it reached its decision"

8. Mr Peacock refers to provisions under the Equality Act relating to sections 20 and 21 and the law relating to making reasonable adjustments. He refers to a particular provision of criterion or practice (PCP) in his case as being "multiple and varied

computer systems and media the practice of their management relative to the criterion of performance".

9. There was a list of issues for the tribunal to decide in this case which was discussed at some length with the parties at the start of the hearing. On the basis of those discussions and after taking into account some points raised by Mr Peacock in relation to his disability, some small changes were made to the list of issues which had been identified by Employment Judge Ross. The tribunal then used that agreed list of issues to decide the legal issues in Mr Peacock's claim.

10. There was no PCP identified in the case in precisely the terms of Mr Peacock suggests in his reconsideration application, but the PCP which is closest was identified as follows "*a customer services adviser was subject to incoming information from a variety of different sources, including Microsoft teams, notifications, emails and tasks, telephone calls from members of the public, instant messaging requests and the requirement to access different job systems*". Mr Peacock said that put him at a substantial disadvantage as an autistic person because he suffered from the sensory overload.

11. Mr Peacock appears to suggest that the Tribunal may have misapplied the law in relation to elements of this complaint. In his reconsideration application he refers to this being a complex PCP and he also refers to the issue of substantial disadvantage. However the respondent, Teleperformance Limited, had conceded that it had this PCP (as set out in para 10 above and as identified in the list of issues) and it accepted that this PCP caused a substantial disadvantage to the claimant as a person disabled by

autism. This meant the tribunal did not need to make any specific findings about those legal issues.

12. In his application for reconsideration Mr Peacock goes on to refer to why he says Teleperformance Limited should have undertaken an occupational health appointment and then goes on to refer to the issues which be taken into account in relation to deciding whether a reasonable adjustment has been made. It is not entirely clear how Mr Peacock is suggesting the tribunal reached its decision incorrectly. He seems to suggest that the Tribunal failed to take into account Equality and Human Rights Commission guidance (which I understand to be a reference to the statutory code of practice) and the terms of the legislation because the tribunal had failed to take into account the size and resources of Teleperformance Limited which is a large company with around 800 staff working on the Student Finance campaign at the time of Mr Peacock's employment.

13. To be clear, the tribunal found on the evidence that Mr Peacock's team leader had made one reasonable adjustment, which he refers to in the reconsideration application. We accepted Teleperformance Limited's evidence that no other reasonable adjustments could be made to the number of computer systems, applications and media which Mr Peacock was required to have open while he was doing his job even though it was accepted that this could cause sensory overload for someone with autism.

14. We reached that conclusion because we accepted Teleperformance Limited's evidence that the nature of Mr Peacock's job as a customer services adviser meant that he was required to have a number of different computer programs and media open on his computer at the same time for him to do his job correctly. We accepted that this was to ensure that Mr Peacock answered customer questions correctly, that customers were protected from risks like identity theft and to monitor and record what was said to customers. We accepted Teleperformance Limited's evidence that all of the systems and media were essential to achieve this so it would not be reasonable for any of them to be removed from Mr Peacock while he was doing his job.

15. Mr Peacock suggests that in reaching this conclusion we failed to take into account the company's resources. That is not correct. We did take that into account Teleperformance Limited's size and resources, but that did not mean that a change could be made to the systems and media he was required to have open. We accepted that the systems and media were requited to

a. protect the students and potential students and people phoning up with queries about the student finance system;
b. to comply with legislation like the Data Protection Act and the requirements of the Financial Conduct Authority, and
c. and to show the Student Finance company (Teleperformance Limited's client) that these things were being done.

16. I conclude that there is no reasonable prospect of the Tribunal's decision been varied or revoked on this ground.

"Direct discrimination and discrimination owing to a disability"

17. The next section of Mr Peacock's grounds for reconsideration refers to "*direct discrimination and discrimination owing to a disability*". I understand by the second part of that heading that he is referring to section 15 of the Equality Act. The heading in the legislation says that this relates to "discrimination arising from disability" but the full wording says that this sort of complaint relates to discrimination which happens if someone is treated unfavourably because of something arising in consequence of that person's disability.

18. In the section which follows Mr Peacock seems to suggest that the Tribunal decision in relation to these complaints was flawed in some way. It is difficult to understand precisely what he is referring to except that he disagrees with our decisions that his complaints under these headings did not succeed.

19. What is clear is that Mr Peacock says we should not have found that Teleperformance Limited had a legitimate aim and they had behaved in a proportionate way to achieve that aim. Mr Peacock says this

"The assertion that I could not have performed given the correct mixture of reasonable adjustments is both ignorant and incorrect.

The actions taken by telephone and is in their discriminatory behaviour were therefore disproportionate to achieving their legitimate aim".

20. To be clear nowhere in our judgment or reasons was this stated assertion made.

21. In relation Mr Peacock's complaints under section 15 of the Equality Act, we did make findings about whether the company had shown that its treatment of Mr Peacock was a proportionate means of achieving a legitimate aim in relation to one complaint.

22. One of the issues which we had to decide was whether Mr Peacock was discriminated against under section 15 of the Equality Act when he was given negative performance feedback during regular performance review meetings with team leaders Molly Dobbins and Paul Bloomfield.

23. Teleperformance Limited accepted that Mr Peacock had been told that he had failed to meet the required standards in relation to a number of customer calls. This was meant to call was assessed as "risk". This is what Mr Peacock referred to as negative feedback.

24. The tribunal panel concluded that Mr Peacock could not reasonably regard this as unfavourable treatment because Teleperformance Limited needed tell employees if they were putting customers at risk of having their identity stolen by not properly checking ID, or if they were providing incorrect information by not accessing the knowledge bank or if they were not making proper records of what customers had

been told. We explained in our oral reasons that we accepted that Mr Peacock found that feedback difficult and we accepted what he told us about it affecting his self-esteem. We understood that Mr Peacock said the reason why these things happened (the failure to meet the company's requirements) was because of the sensory overload, but we concluded the company was still correct to point out to him where he had made mistakes.

25. This was the main reason why we did not uphold Mr Peacock's complaint about the negative feedback. However, we also considered what our conclusion should be if the negative feedback had been "unfavourable treatment". We concluded that the company had a legitimate aim in making sure that employees were meeting the requirements of the service by protecting customers from identity theft, being given correct information and so on and that it had proper records to show that legislation was being complied with and to show the Student Finance company that these things were being done.

26. We accepted that telling staff they were making mistakes including by not making records is a proportionate way of achieving that legitimate aim. We were satisfied that the approach that the company had taken to giving feedback had been proportionate too. We accepted that Teleperformance Limited had tried to coach employees if they made mistakes to tell them how to get it right in the future. However employees still needed to be told where they were getting it wrong.

27. In his reconsideration application under this heading Mr Peacock says that people with autism tend to have significant positive mental capabilities alongside negative attributes. He is right about that. It is still legitimate for a company to tell autistic employees if they are not doing their job correctly, especially if that means that customers might be put at risk in some way.

28. In this section of the grounds of his reconsideration application Mr Peacock also seems to suggest in rather broad terms that his claims of direct discrimination and discrimination because of something arising in consequence of his disability should succeed. This part of his application is rather difficult for me to follow, but I make the point that at the tribunal hearing the panel had to consider the specific complaints about discrimination which are set out in Mr Peacock's claim form and which had been identified in the list of issues which were agreed with him at the start of the hearing.

29. We made a decision about each of the complaints which was set out in the list of issues. We explained what we had concluded had happened on the basis of the evidence and then how the law applied to that. We had heard evidence from Mr Peacock and Ms McEvoy. Sometimes we believed what Ms McEvoy told us rather than what Mr Peacock told us. It is likely that Mr Peacock disagrees with our conclusions about that, but that is not a reason in itself for the panel to reconsider our decision. That is because it is generally in the interest of justice for cases to be considered once on the basis of the evidence presented at a hearing. If that was not the case litigation would never end because there will always the one party who has lost and who disagrees with the outcome.

"Disclosure"

30. In the next section Mr Peacock refers to disclosure. What he means by that is whether an employee needs to disclose a medical condition. It is not clear why what he says means there is something incorrect in the tribunal's judgment. Mr Peacock is right that it is up to individuals if they disclose a disability or not to an employer, but the law says that for some discrimination claims to succeed the Tribunal has to find that the employer knew or could it reasonably have known about the disability. In his grounds for reconsideration Mr Peacock has not referred to any situation where he says we applied the law about this incorrectly.

"Victimisation"

31. In the next section Mr Peacock refers to victimisation. He sets out what the Equality Act says about victimisation at section 27 and he goes on to suggest that we should consider a complaint of victimisation from him. In other words Mr Peacock suggests that at this very late stage - after judgment has been given, the tribunal panel should allow him to amend his claim. I have concluded that there is no reasonable prospect of the tribunal panel allowing him to amend his claim at this stage because he has not explained precisely what protected act he says that he did and what detriment he says he was subject to as a result.

32. It is very uncommon for a tribunal to allow the claim to be amended after judgment has been given because that would not usually be fair to the employer who has prepared for and presented evidence on the basis of the issues which the parties have identified before and at the hearing. If there was to be any prospect of the tribunal

allowing a claim to be amended, Mr Peacock would need to explain in clear terms what his amended claim was and also why he should be allowed to amend his claim at such a late stage. He has not done that.

33. Mr Peacock says *"my qualifications coupled with my disability and request for adjustments was perceived as a threat"* but that does not suggest victimisation under the Equality Act. We did not hear any relevant evidence about that at the hearing, so this seems to be Mr Peacock now seeking to argue a different case. I have to consider what is fair for Mr Peacock and also what is fair for Teleperformance Limited. I do not see any reasonable prospect of Mr Peacock showing that it will be fair for him to be allowed to now argue a different case from the one that he had first presented in 2021 and he has not raised until after the evidence has been heard and considered so this has no reasonable prospect of success.

"Evidence"

34. In the next section Mr Peacock refers to evidence. He says this about some of the evidence which the tribunal panel considered "*that I was assessed as "risk" on calls was never intended to be specific evidence of either a failure to provide reasonable adjustments or as specific evidence for discrimination, but only as supporting evidence for both. The point I am making here is the evidence I have presented should be considered strong supporting evidence of my position and not as specific and conclusive evidence of any particular point. I feel this was misinterpreted by the tribunal*".

35. It is not clear to me what Mr Peacock means by this, but I am satisfied that there is no reasonable prospect of the tribunal's original decision being varied or revoked because the tribunal panel did not consider evidence in the correct way. In our reasons for our judgment, we explained the conclusions that we had reached on the evidence from both sides and why we had reached those conclusions. That is what employment tribunal panels are required to do when they consider the evidence presented by parties at hearings. We heard evidence from Teleperformance Limted and from Mr Peacock and we took into account all of that evidence when we reached our conclusions.

36. Mr Peacock then sets out against what he is asking the Tribunal to do in response to this reconsideration application. One of the points is to "*reconsider in light of the additional evidence as set out below*" and he also refers to "*consider additional reasonable adjustments set out below*".

Additional evidence

37. Mr Peacock says this *"The issue here I believe stems from my disability in relation to effective communication to the employment judge at the identification of legal issues stage of case management with reference to autism and my inexperience within the setting.*

I can only guess what documents are required all relevant, all of that an informed guess, owing to inexperience. If the Tribunal requires it, I would ask that the Tribunal

enquire as to the existence of a document or piece of evidence, which I'll be happy to present.

This I feel should be made as a reasonable adjustment by and for the tribunal"

38. Mr Peacock seems to be suggesting that the Tribunal should reconsider its decision on the basis that we would identify to Mr Peacock what documents or evidence he could produce which could result in him succeeding in his claim. That would not be a reasonable adjustment because employment judges and employment tribunals are independent. We are here to decide the cases which are presented to us, but we cannot advise one side or the other on what evidence they could produce to help them win their case because if we did that we would be taking sides and helping one party. That would not be a fair thing to do.

39. Mr Peacock then refers to a report about his disabilities. I am not going to refer to those documents in detail here because Mr Peacock says that he considers this to be confidential and sensitive information. I do not consider that the additional information suggests that the claimant has any reasonable prospect of persuading the tribunal to vary or revoke its original decision. It was accepted that Mr Peacock was disabled by his autism. The employment tribunal was assisted at the final hearing by an independent intermediary report to help us put in place adjustments for the claimant. There is no reason suggested in the reconsideration application that our decision at the final hearing would have been any different if we had had this additional expert assessment information available to us at the final hearing.

Tarbuck v Sainsbury's

40. In the next section the claimant refers to *Tarbuck v Sainsbury's (Dr L Tarbuck v Sainsbury Supermarkets Ltd* UKEAT/0136/06/LA) which is a decision which the employment judge drew his attention to the course of the hearing in relation to his assertion as part of his claim about reasonable adjustments, that it would have been a reasonable adjustment for Teleperformance Ltd to have referred him to occupational health.

41. The reason why this decision had been highlighted to Mr Peacock, as explained at the time, is that the decision explains why taking a step which might result in adjustments being made is not *in itself* a reasonable adjustment. The Tarbuck case is about consulting with an employee about adjustments, but the same principle applies to seeking advice from occupational health about what adjustments should be put in place.

42. Mr Peacock suggests that by referring to the Tarbuck case the tribunal placed case law "*as primary relative to legislation*". He goes on to say "*where a lack of access to occupational health precludes access to reasonable adjustments, in the absence of alternative modes of prevision, a failure to provide occupational health would be a failure to provide reasonable adjustments. The question only remains for the reasonable adjustments have been made*".

43. The reason why this issue was relevant was because in the list of issues which the employment tribunal had to consider Mr Peacock's complaint is that Teleperformance Limited had a PCP of not allowing access to occupational health which created a substantial disadvantage to him because an occupational health professional will be qualified in making a professional assessment about reasonable adjustments. Mr Peacock says it would have been a reasonable adjustment to have referred him to occupational health.

44. The law requires employers to put in place reasonable adjustments if the duty to make adjustments has been triggered. The Tarbuck case is about consultation with an employee about adjustments. It makes the point that a tribunal saying that there is an obligation on an employer to consult with an employee about adjustments would be creating a separate and distinct legal obligation to actually making adjustments. It would create an obligation on employers to find out about possible adjustments by discussing those with employees as well as a duty to make an adjustment if there is a provision, criterion or practice which causes a substantial disadvantage to someone with a disability.

45. In the same way, a reference to occupational health is a step an employer can take to enable them to understand how someone is impacted by their disability. If the employer fails to take that it may be difficult for them to show that they could not have had knowledge of the substantial disadvantage caused by the disability but it is not making a reasonable adjustment to the workplace itself.

46. Case law is helpful for tribunals to understand how we should correctly apply the law. It can also help parties understand the approach that the Tribunal will take. This was why the Tarbuck case was referred to in the course of the hearing. Teleperformance Limited's solicitor also referred to other cases about this in her written submissions. The employment judge was aware that Mr Peacock is someone who finds it helpful to consider written materials and perhaps finds that easier than processing information orally. Indeed Mr Peacock seems to make a similar point in his application for reconsideration when he says that he finds setting things out in writing is a better way to convey his position. The employment judge had hoped that referring Mr Peacock to a case might help him understand the point she had raised with him in the hearing but it does not mean that the Tribunal placed more importance on the case law than on the wording of the legislation.

47. There is nothing in the application which suggests that there is a reasonable prospect of the tribunal changing its decision that the employer did not fail to make a reasonable adjustment because it did not refer Mr Peacock to occupational health when he first told them about his disability. For this reason this ground is also one which does not have any reasonable prospect of persuading the tribunal to vary or revoke its original decision.

48. In summary there is nothing in the application for reconsideration suggests the claimant has any reasonable prospect of persuading the tribunal to vary or revoke any part of the original decision taken in relation to his claims and accordingly this application is dismissed.

_____

Employment Judge Cookson

Date: 29 August 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON

Date; 12 September 2023

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.