# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms A. Junaid**

**Respondent:** **Tower Hamlets Council for Voluntary Service**

# JUDGMENT ON THE CLAIMANT'S APPLICATION FOR RECONSIDERATION

**The Claimant's application for reconsideration of the judgment striking out her claim, sent to the parties on 25 August 2023, is refused pursuant to rule 72(1) of the ET rules.**

# REASONS

1. By email dated 5 September 2023, the Claimant made an application for reconsideration of the Tribunal's judgment striking out her case, sent to the parties on 25 August 2023.

2. Oral reasons were given at the hearing. Written reasons are now provided (in a separate document) after a request by the Respondent.

## The law on reconsideration

3. Rules 70 to 73 of the Employment Tribunal's Rules of Procedure 2013, make provision for the reconsideration of tribunal judgments 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.**

> **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 considered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that 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.**

4. The Tribunal thus has discretion to reconsider a judgment if it considers it is in the interests of justice to do so.

5. 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. It is a mandatory requirement for a judge to determine whether there are reasonable prospects of a judgment being varied or revoked before seeking the other party's response and the views of the parties as to whether the matter can be determined without a hearing, potentially giving any provisional view, and deciding how the reconsideration application will be determined for the purposes of rule 72(2): *T.W. White & Sons Ltd v White*, UKEAT/0022/21.

6. If I consider there are reasonable prospects, 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.

7. In *Outasight VB Ltd v Brown* UKEAT/0253/14 the EAT held (at [46-48]) that the Rule 70 ground for reconsidering Judgments (the interests of justice) did not represent a broadening of discretion from the provisions of Rule 34 contained in the replaced 2004 rules. HHJ Eady QC (as she then was) explained that the previous specified categories under the old rules were only examples of where it would be in the interests of justice to reconsider. The 2014 rules remove the unnecessary specified grounds, leaving only what was in truth always the fundamental consideration: the interests of justice. This means that decisions under the old rules remain pertinent under the new rules.

8. The key point is that it must be in the interests of justice to reconsider a judgment. That means that there must be something about the case that makes it necessary to go back and reconsider, for example a new piece of evidence that could not have been produced at the original hearing or a mistake as to the law. It is not the purpose of the reconsideration provisions to give an unsuccessful party an opportunity to reargue his or her case. If there has been a hearing at which both parties have been in attendance, where all material evidence had been available for consideration, where both parties

have had their opportunity to present their evidence and their arguments before a decision was reached and at which no error of law was made, then the interests of justice are that there should be finality in litigation. An unsuccessful litigant in such circumstances, without something more, is not permitted to simply reargue his or her case, to have 'a second bite at the cherry' (*per* Phillips J in *Flint v Eastern Electricity Board* [1975] IRLR 277).

9. The expression 'necessary in the interests of justice' does not give rise to an unfettered discretion to reopen matters. The importance of finality was confirmed by the Court of Appeal in *Ministry of Justice v Burton and anor [2016] EWCA Civ 714* in July 2016 where Elias LJ said that:

> **'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.'**

10. In *Liddington v 2Gether NHS Foundation Trust* EAT/0002/16 the EAT, *per* Simler P (as she then was), held at [34] that:

> **'a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to 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.'**

## Assessment of the application under Rule 72(1)

11. The Claimant's application runs to 14 pages, with several attachments.

12. The central point the Claimant seeks to make is that there is new evidence which casts doubt on the reliability of Ms Healy-Birt's evidence that she overheard the Claimant and Ms Shahzad discussing the Claimant's evidence.

13. Firstly, she relies on the fact that, at one point in her evidence, Ms Healy-Birt said that she thought she was at East India DLR station at around 17.30. The Claimant has secured a schedule of journeys made by her using her Oyster card, which records that she arrived at Woolwich Arsenal station at 17.31. The departure time is not shown; I understand (from the Claimant's account at para 16 of her reconsideration application) that she may have used the wrong card to tap in. She argues that it is impossible to get from East India to Woolwich Arsenal in one minute and therefore Ms Healy-Birt cannot have been on East India station at the same time as her.

14. Unfortunately, the Claimant has given only a partial account of Ms Healy-Birt's evidence, which was as follows. She initially said that she thought that she was on the platform 'probably around 5.30 I think, I don't recall what time the hearing finished'. I asked Ms Healy-Birt how long she stayed in the Tribunal building before she went to the station. She replied: 'perhaps 10 minutes, I had to check some emails before leaving'. I then checked my note from the

previous day and confirmed that the hearing finished at 16.58. Ms Healy Birt then said: 'I was probably at the station at quarter past five.' I note that Ms Healy Birt gave this answer before I read out Mrs Jeary's account, which was that she was on the station at about 17.10.

15. I do not consider that there is any significant inconsistency between Ms Healy Birt's final answer and the new evidence the Claimant seeks to rely on. It is also broadly consistent with Mrs Jeary's account, bearing in mind that both of them were giving estimates, not precise times.

16. The Claimant calls into question some other aspects of Ms Healy-Birt's account.

17. She says that Ms Healy-Birt's evidence was that she saw Ms Shahzad on platform when the Claimant's train pulled away but did not see the Claimant. She queries why Ms Healy-Birt did not take the train since it was going in her direction. That was not Ms Healy-Birt's evidence, which was that she did take the first train from her platform. Before she did so, she saw Ms Shahzad arrive on the platform but not the Claimant. However, she observed that she had moved along the platform to distance herself from them; although she did not see the Claimant, she was not looking for her. That reflects our assessment of her evidence: that she was careful not to overstate, to describe only what she saw and no more, and to make concessions as appropriate. We found her to be a credible witness.

18. At para 51 the Claimant appears to be implying that, because I had to prompt her to speak up at various points in her evidence, it was unlikely that Ms Healy-Birt would have been able to overhear her on the station. This is not a persuasive point: the air conditioning in the tribunal rooms is noisy; reminding witnesses to speak up is a daily, sometimes hourly, occurrence; Mrs Jeary's account of observing the Claimant at the station was that she was 'very animated in conversation'.

19. Turning to Ms Shahzad's evidence, the Claimant recalls (para 18) that Ms Shahzad clarified that she meant to say that she had 'heard me talk about all African women and HIV in the tribunal room all day that day, but not outside of the tribunal after closing.' Ms Shahzad did not say that; in her second answer she suggested that the discussion about African women was 'in this room *this morning*, she did not talk about it yesterday [emphasis added].' She was clearly referring to the day on which she was giving her evidence, not the previous day on which the incident occurred.

20. As for the fact that Counsel for the Respondent sought to rely on the fact that Ms Shahzad was the Claimant's representative (para 25 onwards), the Claimant is right that she did so initially. However, partly prompted by observations made by me, Ms Urquhart later accepted that, for all practical purposes, Ms Shahzad was not the Claimant's representative, albeit she appeared to have remained on the record. For the purposes of our decision, the Tribunal treated Ms Shahzad as the Claimant's friend, not her representative; we expressly said that Ms Shahzad's conduct in giving evidence, some of which we might have regarded as unreasonable, would not be laid at the Claimant's feet.

21. The fact that the Tribunal did not accept all Ms Urquhart's submissions on every occasion (page 7 onwards) is not an indicator that she sought to mislead the Tribunal or manipulate evidence in any way. To be clear: she presented her client's case professionally and appropriately at all times, having due regard to the fact that the Claimant was a litigant in person. The Claimant's criticisms of the Respondent's conduct earlier in the proceedings (page 9 onwards) are not material to this application.

22. The Claimant refers to her mental health in the application. On the first day of the hearing, I explained that, having read the Claimant's witness statement, the Tribunal proposed to take a break every hour; the Claimant agreed that this would be helpful. I asked if there were any other adjustments she required; she said there were not. At the beginning of her cross-examination, I reminded the Claimant that she could ask for a break at any point.

23. The Claimant says (para 21) that she was in a state of panic, anxiety and bewilderment when she learnt of the suggestion that she had been discussing her evidence. That was not what I observed: she appeared calm and self-possessed while we were dealing with these issues; her evidence was clear, confident and articulate. After hearing the Respondent's strikeout application, the Tribunal broke for lunch to give the Claimant an opportunity to consider her position. I asked her if that would be enough time for her and she replied that it would. When we returned, I asked if she had had enough time to think about what she wanted to say and she confirmed that she had. She explained that she was going to read out her response to Ms Urquhart's submissions from a prepared statement, which she had clearly drafted up during the break. She did so in a calm and composed manner.

24. She did not suggest that she was struggling in any way to deal with the issue because of her mental health. She did not ask for an adjournment, as she had done on the first day of the hearing when she became visibly agitated; then she asked for additional time to prepare her clarification of the issues; we agreed and rose early to give her the time she had asked for; she produced highly organised and detailed documents overnight. When the Claimant was cross-examined about her mental health on the second day of the hearing, she described her practice of self-management and referred back to the events of the previous day, saying: 'it is not that I am not unwell, but I choose not to be unwell. I declared it to you so you can work with me, like yesterday, once I was given the support I needed, I could function'.

25. Finally, the Claimant restates in in her application her position that she did not discuss her evidence with Ms Shahzad. Unfortunately, the Tribunal reached a different conclusion, for the reasons already given in our judgment.

## Conclusion

26. For all these reasons, I am satisfied that there is no reasonable prospect of the Tribunal varying or revoking its judgment. The application for reconsideration is refused pursuant to rule 72(1). Because I have dismissed it at the first stage

of the process, I have not invited the Respondent to comment on the application.

**Employment Judge Massarella**

**14 September 2023**