Case No: 2405507/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr BRIAN WEBSTER**

Respondent: **DIAMOND BUS (NORTH WEST) LIMITED**

JUDGMENT

The claimant's application dated 21 August 2023 (by email) for reconsideration of the judgment sent to the parties on 5 July 2023 is refused.

REASONS

1. I have undertaken preliminary consideration of the Claimant's application for reconsideration of the judgment dismissing his claims. That application is contained in an email dated 21 August 2021. I have not seen any submissions from the Respondent. References in square brackets (e.g. [25]) are references to paragraph numbers from the reasons promulgated with the judgment.

The Law

2. An application for reconsideration is an exception to the general principle that (subject to 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. Rule 72(1) of the 2013 Rules of Procedure empowers me to refuse the 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** 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."**

5. Similarly in **Liddington v 2Gether NHS Foundation Trust EAT/0002/16** the EAT chaired by Simler P said in paragraph 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."**

6. In **Ebury Partners UK Limited v David [2023] EAT 40** the EAT put it this way in paragraph 24:

> **"The employment tribunal can therefore only reconsider a decision if it is necessary to do so "in the interests of justice." A central aspect of the interests of justice is that there should be finality in litigation. It is therefore unusual for a litigant to be allowed a "second bite of the cherry" and the jurisdiction to reconsider should be exercised with caution. In general, while it may be appropriate to reconsider a decision where there has been some procedural mishap such that a party had been denied a fair and proper opportunity to present his case, the jurisdiction should not be invoked to correct a supposed error made by the ET after the parties have had a fair opportunity to present their cases on the relevant issue. This is particularly the case where the error alleged is one of law which is more appropriately corrected by the EAT."**

7. In common with all powers under the 2013 Rules, preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay. Achieving finality in litigation is part of a fair and just adjudication.

The Application

8. All of the points raised by the Claimant are attempts to re-open issues of fact on which the Tribunal heard evidence from both sides and made a determination. In that sense they represent a "second bite at the cherry" which undermines the principle of finality. Such attempts have a reasonable prospect of resulting in the decision being varied or revoked only if the Tribunal has missed something important, or if there is new evidence available which could not reasonably have been put forward at the hearing. A Tribunal will not reconsider a finding of fact just because the Claimant wishes it had gone in his favour.

9. That broad principle disposes of almost all the points made by the Claimant. However, there are some points he makes in his email dated 21 August 2023 which should be addressed specifically:

(i) In relation to the Claimant's first point in his email about the potential CCTV footage and which he emphasised repeatedly in the hearing of this matter and in relation to which he had raised at least twice at case management hearings, we as a panel were satisfied that the footage did not exist. We understand that the Claimant was aware that the relevant buses that he drove, or some of them, were fitted with CCTV cameras. We noted

that, because the buses were fitted with CCTV camaras then he genuinely believed that CCTV footage would exist. However, we accepted the evidence of the Respondent's witnesses that the CCTV cameras were not operational at the material times which the Claimant referred to in his evidence. In short the, CCTV camaras on the buses were not set up nor working at the time. We do not criticise the Claimant for having made his applications to obtain the footage, nor his tenaciously raising of the issue at the final liability hearing. However, our firm decision was that the CCTV footage does not, and never did, exist. Further, I observe that at no point did the Claimant provide any evidence that the footage *did* exist or reasons why the Respondent's stated position on the point was wrong. He simply repeated the point that he observed that camaras existed from which he deduced that there must be footage. Regrettably this does not take into account our finding that the camaras were not functional.

(ii) In relation to his second point, the Claimant was/is not criticised by the Tribunal for raising the possibility of inconsistency between the "ticket data" and the complaint note of the passenger. However, we were satisfied that, on balance, the note was genuine and so the complaint was genuine. Further, the Claimant's assertion in the email of 21 August 2023 that "*the arguments I advance in litigation against the respondent should not have a bearing on the decision as it was up to the tribunal to make a decision upon the evidence presented*" does not make sense. The Tribunal heard his evidence and submissions and rejected the Claimant's case that passenger complaint was not genuine. We preferred the evidence of the Respondent that it *was* a genuine complaint.

(iii) We fully understood the role of the DVSA/Traffic Commissioner. The Claimant was entitled to contact them. However, having contacted these bodies and the Tribunal having found that significant elements of his claims were unfounded, the contacting of the DVSA/Traffic Commissioner was also evidence that the Claimant did not trust the Respondent. This was part of a pattern of a complete lack of trust. This detail informed our decision that there had been a break down in the professional relationship between the Claimant and the Respondent, as a result of which, the idea of him ever being able to work constructively with and for the Respondent ever again was impracticable [see §19 and §26 in particular]. The reporting was very cogent evidence that all trust and confidence between the parties had been lost irretrievably.

(iv) The same point as at (iii) above is made in relation to the fact that the Claimant contacted the local media concerning his case. There was no evidence in our findings that contacting the local media was in any way in the public interest.

(v) We note that the Claimant says that the Respondent's failure to record his working time was the underlying issue in his complaint. To an extent that is correct as far as the Claimant's proposition is consistent with our findings. However, it was not necessary for the Claimant to go to the DVSA, Traffic Commissioner or the media. Their involvement added nothing to the liability issues in the case except to demonstrate the Claimant's distrust of the Respondent. We also note that the Claimant has had the burden of proof in the case throughout. Having noted and complained at the relevant times that the Respondent were not recording his working times correctly, then it is very surprising that he did not keep his own private log of his shift details: the dates, times, particular duties, breaks and start/finish times as well as where he started and finished his shifts.

(vi) At all times the parties could have made different decisions. The reason what we as a panel were charged with making the decisions we did was because the parties did not trust each other and could find a way of compromising the claim. When we considered reinstatement, which is of itself an infrequently applied remedy, we easily found that trust and confidence between the parties had irretrievably broken down and, accordingly, it was not conceivable that the Claimant could ever work for the Respondent again. We also found that the Claimant did not give satisfactory reasons as to why he wanted to be reinstated [§14]. He failed to provide a witness statement dealing with the issue in advance of the reinstatement hearing. Further, we remind that the Claimant only gave the reasons that he did when we allowed him to provide a witness statement during the course of the hearing to deal with matters which he should have dealt with and revealed weeks previously.

(vii) That these Tribunal decisions are available online is irrelevant to the Claimant's application for reinstatement.

10. We note that the remedies hearing in this case is listed for 13 November 2023. We again urge the parties to communicate with a view to settling the claim. We also remind the Claimant that he has the burden of proof and that he needs to exercise judgment in considering what he can and cannot prove. As ever, we also urge the Claimant to seek professional legal advice from the sources that are available to him.

Conclusion

11. Having considered all the points made by the Claimant I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The points of significance were considered and addressed at the hearing. The application for reconsideration is refused.

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Tribunal Judge Holt

DATE 6 September 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON

19 September 2023

FOR THE TRIBUNAL OFFICE