Case No 2407553/2021
2401493/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr R Wagener

Respondents: R1 The Cabinet Office
R2 The Commissioners of His Majesty's Revenue and Customs

JUDGMENT

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

REASONS

Background to this application for reconsideration

1. The claimant's disability discrimination complaints came before a full panel comprising EJ Aspinall and non legal members Ms A Ross-Sercombe and Mr A Wells and were heard over four days from 10-13 July 2023 with a fifth day for in chambers deliberation on 16 August 2023.

2. The Tribunal's Reserved Judgment and Reasons was sent to the parties on 12 September 2023. The claimant's complaints of discrimination arising from disability and failure to reasonably adjust against The Cabinet Office failed. His complaints against HMRC for discrimination arising from disability, failure to reasonably adjust and for indirect disability discrimination also failed.

3. The claimant's application for reconsideration was contained in a 36 page and 207 paragraph document dated 25 September 2023. It came to the attention of Employment Judge Aspinall on 3 January 2024. The delay was occasioned by other matters raised by the claimant having been addressed first by the Regional Employment Judge.

4. On 1 February 2024 the claimant sent a revised version of his application for reconsideration to the Tribunal. He said it was to correct typographical errors and clarify meaning. He does not appear to have copied it to the respondent. This document is sent out of time, and, having regard to the overriding objective, it would not be a good use of judicial time to compare the two lengthy documents

and respond to each of them. Accordingly, the tribunal is responding to the 25 September 2023 application only.

The Relevant Law

5. Rule 70 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 provides that a Tribunal may reconsider any judgment where it is necessary in the interests of justice to do so.

6. Rule 71 provides that 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 as necessary.

7. Rule 72 provides that an Employment Judge shall consider any application made under Rule 71. Where practicable the consideration shall be made by the Employment Judge who made the original decision or who chaired the full Tribunal which made it. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked the application shall be refused.

8. A Tribunal dealing with an application for reconsideration must seek to give effect to the overriding objective to deal with cases fairly and justly contained within Rule 2 of the Regulations. This includes ensuring that the parties are an equal footing, dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay, so far as compatible with proper consideration of the issues, and saving expense.

9. Consideration of whether reconsideration is "necessary in the interests of justice" allows the Tribunal a broad discretion which must be exercised judicially which means having regard not only to the interests of the party seeking the reconsideration but also to the interests of the other party to the litigation, and to the public interest requirement that there should be so far as possible finality in litigation.

10. 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).

11. 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 <u>Lindsay v Ironsides Ray and Vials [1994] ICR 384</u> 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."

12. 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."**

Application of law on reconsideration

13. This Tribunal has not seen a copy of the covering email by which the claimant made his application for reconsideration. It does not know if the claimant has complied with the requirement in Rule 71 which provides that an application for reconsideration *shall be presented in writing and copied to all the other parties*. It appears from correspondence that the Tribunal has seen that the application was copied to the following address matthewwhelan@governmentlegal. No representations have been received from either respondent.

14. The majority 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.

15. In particular the claimant seeks to re-open findings about the Rest Record document and about his disabled status due to his ME/CFS prior to October 2021. Having read the application, the Reserved Judgment and revisited the notes of evidence at final hearing, the Tribunal finds that it has not missed something important and there is nothing new that could not reasonably have been put forward at the hearing in relation to any of the matters raised in the application. A Tribunal will not reconsider a finding of fact just because the claimant wishes it had gone in his favour.

16. In the application the claimant **attempts to reframe the List of Issues** in particular the PCPs he relied on. At paragraph 140 of his application (which refers to paragraph 140 of the Reserved Judgment) he says:

> *"The offending PCP was the practice of refusing to grant adjustments of this kind except in cases of recruitment and retention. This lay behind the*

actions of both parties. It is not clear why the Tribunal cannot regard this as the relevant PCP, simply because it wasn't articulated properly in an obviously defective list of issues."

17. That was not a PCP relied on at the hearing. The PCPs were set out in the agreed List of Issues.

18. At paragraph 135 of his application he says:

"The claimant said during submissions that it had become clear during cross-examination that the key offending PCP was the practice by both respondents of only applying rule 2.24 to recruitment and retention issues. The claimant argued this was prejudicial to him and to disabled people generally….."

19. And at paragraph 136:

"why...did an experienced judge and barrister go along with an obviously defective form of words ……"

20. At paragraph 140 of the application *the claimant invites the Tribunal to review its decision about the correct PCP.*

21. This shows the claimant's attempt to relitigate. He agreed the List of Issues. The Tribunal dealt with the List at paragraphs 5 – 8 of the Reserved Judgment and specifically with his drafting of his PCPs at paragraph 7 and paragraphs 135 -138 of the Reserved Judgment. It was not the role of the Tribunal nor the respondent to construct his case for him. His PCPs were clearly drafted in the List of Issues and the claimant's request that the matter be reconsidered on the basis of a reframed PCP is rejected as being an attempt to relitigate.

22. The reconsideration application also attempts to bring a claim of indirect disability discrimination against The Cabinet Office. The claimant was offered a short adjournment to have time to consider whether or not he wished to make an amendment application at 10.42 on the first day of the hearing (for this purpose) and said he did not need a break, he was clear that he did not wish to pursue a complaint of indirect discrimination against anyone other than HMRC. This point was addressed at paragraph 6 of the Reserved Judgment and is rejected as a request for reconsideration on the basis that it is an attempt to relitigate.

23. The principle that the claimant cannot seek reconsideration in order to relitigate disposes of almost all the points made by the claimant. However, there are some points he makes which should be addressed specifically:

(1) He is right that the numbering of the Reserved Judgment goes awry at paragraph 30 on page 11. The Tribunal apologises to the parties for that formatting error.

(2) The Tribunal apologises for getting Mr Mark Beadles' name wrong.

(3) The Tribunal apologises for not recording the exact age at which the claimant was diagnosed with Type1 diabetes. The Reserved Judgment recorded his having been diagnosed *as a young man* and at 17. The Tribunal accepts his statement in his application that he was diagnosed at 16.

(4) The claimant alleges a *procedural irregularity* in that Ms Ling the respondent's barrister was able to further cross-examine the claimant about a matter arising out of a panel question. The notes of hearing have been checked and the Tribunal does not accept that there was a procedural irregularity. Miss Ling objected to the claimant having given evidence in response to a panel question that was not in his witness statement. The panel consulted the parties and it was agreed at 10.25 on the second day, that Miss Ling may question the claimant on that point only, which she did and which the claimant answered. There is no reasonable prospect of this point (alleged *procedural irregularity*) resulting in the decision of the Tribunal being varied or revoked.

(5) He says his *brain fog meant that he did not deliver his evidence as cogently and coherently as he would have liked to*. Paragraphs 9 – 11 of the Reserved Judgment deal with the discussion about reasonable adjustments in place for the hearing. The claimant had prepared a written witness statement. The notes of hearing reveal that the claimant was offered breaks and checks were made that he was not experiencing brain fog and was able to continue at regular intervals during the final hearing. On each occasion he confirmed he was well and wanting to continue. He had prepared two separate Closing Submission Skeleton Argument documents and spoke to them in oral closing submission. The Tribunal notes that he said in his application for reconsideration that he *was content that he was able ultimately to make most of the points he originally wanted to make.* The Tribunal finds that his suggestion now that his brain fog affected his presentation of his case does not amount to a reasonable prospect of the judgment being varied or revoked.

24. None of the points in paragraph 23 above taken individually or together amount to a reasonable prospect of the judgment being varied or revoked.

25. The claimant requests Written Reasons in his application. They have been provided in the Reserved Judgment. He requests the handwritten notes of the Judge and members. They are not available to him from the Employment Judge. His request has been passed to the Regional Employment Judge.

26. He asks for rectification / correction of the Judgment where it accuses him of mendacity. No such accusation is made.

Conclusion

27. The claimant's grounds relate to matters that were before the Tribunal and have been determined. There is nothing new here that would affect or have affected the outcome. The law is clear that matters that have been determined cannot be reopened in this way for further discussion or persuasion.

28. In reaching the decision not to reconsider the Tribunal has had regard to the importance of finality in litigation for both parties and has considered the impact of a reconsideration determination either on paper or in person for the parties and the cost to which that would put both parties.

29. The Tribunal rejects the request for reconsideration on the ground that it is not necessary in the interests of justice as there is no reasonable prospect that any one of the grounds set out in the claimant's application, or all of them taken together, could lead to the original decision being varied or revoked.

____

Employment Judge Aspinall

Date: 5 February 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 February 2024

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.