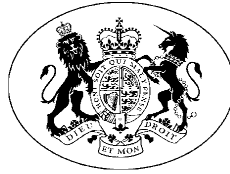
Cases No. 2414360/2021
2414395/2021
2415292/2021
& 2401710/2022



EMPLOYMENT TRIBUNALS

Claimant: Mr C Mackay

Respondent: Pyramid Display Materials Limited

JUDGMENT

The application of the claimant, made on 1 February 2024, for reconsideration of the Judgment made on 19 January 2024 and sent to the parties on 23 January 2024, is refused.

REASONS

There is no reasonable prospect of the original decision being varied or revoked, because:

1. The Judgment was issued after a lengthy hearing. A significant amount of documentation was considered. A large amount of evidence was heard and considered, including the evidence given by the claimant personally.

2. The application to reconsider appears to rely upon further argument which the claimant wishes to pursue arising from facts and matters of which he was entirely aware at the time of the hearing.

3. The application for reconsideration does not provide any information about events which have occurred since the hearing, or detail that evidence/documents have come to the claimant's attention since the hearing (save for reference to a conversation which the claimant has had with a senior mental health practitioner). The application appears to be based upon facts and arguments about which the claimant was aware at the time of the hearing.

4. 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). The Court of Appeal in **Ministry of Justice v Burton** [2016] EWCA Civ 714 has emphasised the importance of finality, which militates against

the discretion being exercised too readily. In exercising the discretion, I must have 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, so far as possible, be finality of litigation.

5. In **Ebury Partners UK v Davis** [2023] IRLR HHJ Shanks said:

> "*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.*"

6. As is said in that Judgment, it may be appropriate to reconsider a decision where there has been some procedural mishap such that a party has been denied a fair and proper opportunity to present his case. The claimant was given a fair and proper opportunity to present his case, as clearly evidenced by the fact that he was successful in his unfair dismissal claim.

7. 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. 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. That includes, so far as practicable, saving expense. Achieving finality in litigation is part of a fair and just adjudication.

8. The claimant's reconsideration request includes a significant amount of information about a variety of different things. The claimant has also attached numerous documents to his application. I have focused upon what was said in the application, I have not considered all of the content of all of the documents provided.

9. What the claimant quotes in his reconsideration application are not parts of the Equality Act 2010 itself, but rather are parts of the Equality & Human Rights Commission's Code of Practice on Employment. That was a document from which the claimant quoted during his submissions and a document which we considered when reaching our decision. Had the claimant wanted to emphasise any specific parts of that Code, he had the opportunity to do so. Paragraph 5.15, upon which the claimant places particular emphasis in his reconsideration application, can be found under the heading in the code "*What if the employer does not know that the person is disabled?*" and addresses the possibility of an employer defending a claim for discrimination arising from disability (section 15 of the Equality Act 2010) by arguing that the employer did not know that the person had the disability in

question and could not reasonably have been expected to know that the disabled person had the disability. What is said in that part of the Code is not a freestanding right upon which a claimant can base a claim. The relevant part of the EHRC Code of Practice was considered by us when we reached our decision, which is why we explicitly referred to and addressed it in paragraphs 132 and 133 of the Judgment. In fact, we did not determine the issue of knowledge as it applied to discrimination arising from disability, as was explained in the final sentence of paragraph 190 of the Judgment (it was issue 1.4). We addressed the discrimination arising from disability claims on their substantive merits (see paragraphs 186-189). Accordingly, the arguments based upon paragraph 5.15 of the Code of Practice had no material impact upon the outcome of the claim.

10. We also considered knowledge as it applied to the claim for breach of the duty to make reasonable adjustments and explained our decision at paragraphs 194-195 (on issue 6.3). As confirmed at paragraph 141, when we considered the reasonable adjustments claims, we took into account what was said in the EHRC Code of Practice. That included paragraphs 6.19-6.22 of the Code.

11. It is not entirely clear from the reconsideration application, but it appears that part of the reason for the application is that the claimant contends that we did not determine all the issues which he believes should have been determined. We were told at the start of the hearing that the parties had agreed the list of issues provided to us on 28 September 2023. We relied upon that agreed list as being the document which set out the issues which we needed to determine. The claimant did object to an updated list which the respondent provided at the start of the hearing, but he did not object to the agreed list. The hearing was to determine the issues arising from four different claims entered by the claimant which had been considered over four preliminary hearings. It was a complex set of claims. It was entirely appropriate for us to determine the issues set out in the list of issues provided to us as an agreed list. It would not be in accordance with the overriding objective for us to reconsider and revoke or vary the Judgment, so that the claimant can now seek to pursue an issue which was missing from the list which was put before us as agreed, because he might be able to identify such an issue as having been referred to in a previous version of the list of issues. **Moustache v Chelsea & Westminster NHS Foundation Trust** [2022] EAT 204 is a case in which the Employment Appeal Tribunal emphasised that a list of issues is not a pleading and there should not be slavish adherence to it, albeit that it is an exceptionally useful case management tool. There is nothing highlighted in the reconsideration application which identifies a discrimination claim clearly identified in the claim form which was not addressed. On the date of the alleged protected act, the claimant was able to address that issue during the hearing and we reached our decision based upon what was said. The claimant was fully able to argue the claims he wished to pursue.

12. The decision which we reached regarding anxiety, was based upon the evidence which we heard at the hearing. It is not appropriate for the Judgment to be reconsidered on that issue based upon the application made. In any event, as recorded at paragraph 185 of the Judgment, it was not clear that anything material arose from our finding that the claimant had not proved that he had a disability at

the relevant time as a result of his anxiety (where we found that he did have disabilities at the relevant time by virtue of the other conditions relied upon).

13. Whilst it is noted that the claimant believes that the respondent tried to take unfair advantage of him as a litigant in person, it would not be my view that they did so, nor is there anything recorded in the reconsideration application which appears to support the assertion and which might lead to the decision needing to be reconsidered. There was certainly no bias as appears to be suggested. We found the claimant to be an intelligent individual (paragraph 231). The claimant succeeded in his unfair dismissal claim, albeit not in his other claims.

14. I do not find that it is necessary in the interests of justice to reconsider the Judgment, based upon the application made by the claimant. There is no reasonable prospect of the original decision being varied or revoked, based upon the reasons given. The application for reconsideration is refused.

Employment Judge Phil Allen

13 February 2024

JUDGMENT SENT TO THE PARTIES ON
14 February 2024

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FOR THE TRIBUNAL OFFICE