EMPLOYMENT TRIBUNALS

Claimant: Mr Warburton

Respondent: Openreach Limited

JUDGMENT

1. The claimant's application dated 19 March 2024 for reconsideration of the judgment dated 28 February 2024 is refused.

REASONS

2. I have undertaken a preliminary consideration of the claimant's application for reconsideration of the judgment dismissing his claims. That application is contained in an 18-page document attached to an email dated 28 February 2024 and a version of the reasons promulgated with the judgment which has been amended by the claimant. References to the Application are a reference to the claimant's application

for reconsideration. References in square brackets (e.g. [25]) are references to paragraph numbers from the reasons promulgated with the judgment.

The Law

3. 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).
4. 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.
5. 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."

6. 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."

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.

8. I refer to each of the 6 grounds for reconsideration in the Claimant's Application, below. I have distilled from the claimant's lengthy Application what his key grounds for reconsideration are.

9. The points set out in ground 6 of the Application 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.

10. That broad principle disposes of all the points made in ground 6 of the Application. The remaining grounds of appeal in the Application are strictly speaking, matters for an appeal rather than a reconsideration, as they relate to the way the hearing

was conducted. However, to assist the claimant, I address those issues specifically below.

Grounds 1 and 3

11. The claimant says that the respondent produced documents on the first day of the trial which caused him serious prejudice. The claimant does not identify which documents those were and how they caused him serious prejudice. I have no record in my notes of the claimant raising an issue about documents produced by the respondent at the time.
12. The claimant raises a concern about the way the list of issues was identified at the start of the hearing. As set out in paragraphs [17] to [23] the tribunal spent the first two days of the final hearing clarifying and confirming the claims and issues in dispute. The tribunal gave oral reasons for the decision that the document entitled "appendix A the claimant's complaints" (which formed part of the record of the third and final preliminary hearing before Employment Judge Shotter on 23 August 2021) set out, in complete form, the claimant's complaints. The tribunal, together with the parties, carried out the exercise of identifying and clarifying the claimant's complaints prior to hearing evidence.
13. It was important for the tribunal to finalise the issues definitively prior to hearing evidence so that the parties and the tribunal understood the claimant's case and the relevant issues that the tribunal had to determine. Unfortunately, a final list of issues had not been produced prior to the final hearing, as set out in paragraph [19].

Ground 2

14. The claimant alleges that the respondent's counsel, Mr Sheehan, was in breach of the solicitor's regulatory authority code of conduct in that he did not comply with the equal treatment bench book when the claimant was not giving evidence. That does not accord with the Tribunal's view during the hearing. Mr Sheehan was careful to adjust his advocacy style during the hearing, in accordance with the guidance set out in the equal treatment bench book, to enable the claimant to participate effectively in the hearing. We found at paragraph [29] Mr Sheehan adjusted his

cross-examination style appropriately to enable the claimant to give evidence effectively.

Ground 4

15. The claimant takes issue with the witnesses called by the respondent. It is a matter for the respondent which witnesses they choose to call.

Ground 5

16. The claimant now says that the respondent failed to disclose all relevant documents. This was not a matter raised with the tribunal at the final hearing and no request for specific disclosure was made by the claimant.
17. The claimant raises an issue about the way I intervened during his cross examination and the number of times I intervened. He suggests that this meant he didn't have a fair trial.
18. Under rule 41 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 the tribunal *may regulate its own procedure and shall conduct the hearing in a manner it considers fair. The tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or illicit evidence.*
19. The interventions that the claimant has identified were appropriate under rule 41. They were designed to keep the focus of the claimant's questioning on the issues and to ensure that the case was heard within the allocated time.
20. 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 application for reconsideration is refused.

Employment Judge Childe

30 April 2024

JUDGMENT SENT TO THE PARTIES ON

3 May 2024

Mr P Guilfoyle

FOR THE TRIBUNAL OFFICE