EMPLOYMENT TRIBUNALS

Claimant: Mr. M Usman

Respondent: Bidvest Noonan (UK) Limited

JUDGMENT

The claimant's application dated 6 May 2024 for reconsideration of the judgment sent to the parties on 26 March 2024 is refused.

REASONS

I have undertaken preliminary consideration of the claimant's application for reconsideration of the judgment dismissing his claims. That application was contained in a 4-page document attached to an email dated 6 May 2024 @02:40 and a 6-page document attached to an email dated 6 May 2024 @15.55.

The Law

1. Reconsideration is covered by the Employment Tribunal rules 2013 rules 70 – 73, which state:

> ***"Principles***
> *70. 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.*
>
> ***Application***
> *71. 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.*
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> ***Process***
> *72.—*
> *(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.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a 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.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full Tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full Tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full Tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

2. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law or perversity of the factual findings) 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 us 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:

"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. More recently in **Ebury Partners UK v Davis [2023] IRLR 486**, HHJ Shanks said at 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. The application was significantly out of time. It should have been made on or before 9 April 2024 with written reasons having been sent out on 23 March 2024. However, I have considered the application in any event.

9. The majority of the points raised by the claimant are attempts to re-open issues of fact upon 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 almost all the points made by the claimant. However, there are some points he makes which should be addressed specifically.

11. There are allegations of bias contained within the application. Again, the fact the tribunal found in favour of the respondent is no evidence of bias.

12. I believe the Tribunal considered all the evidence and made appropriate and reasoned findings of fact and applied the law correctly. Upon any reasonable view of the Tribunal's decision, which I remind the Claimant was a decision of all three panel members, not my decision alone, we have made very critical findings against the respondent and, in my view, this clearly shows the Tribunal was not biased against the Claimant whether apparently or actually and indeed, he would need to prove that the majority of the panel if not all of its members were biased against him.

13. There is also a mention of the oral judgment and points made in that compared to the written reasons. The written reasons take precedence.

14. Part of the Claimant's application is about the tribunal allegedly failing to call Kirsty Black from HR as a witness. It is not for the tribunal to call witnesses except in very rare and exceptional circumstances. There is no property in a witness and if the Claimant thought that Ms Black was an important witness for him, then he could and should have called upon her to attend the hearing himself or applied for a witness order compelling her to attend. He did neither.

15. Finally, I consider the criticism about the comparator issue raised at para 17 of the written reasons. I have considered this and it is clear from the Claim form that no actual comparator is pleaded in the claim form. At the final hearing the Claimant sought to rely upon a female white security officer, which is dealt with in the reasons at paragraph 149 and where we found that the female security officer was a not a valid actual comparator because her circumstances were materially different from the Claimant's.

16. Clearly the Claimant is unhappy with the decision we have made and still believes, despite our decision, that he was discriminated against in some way by the Respondent. However, that does not mean there has been an error of law, a mistake of fact or that there were findings about important facts made that no reasonable Tribunal could have come to.

17. Consequently, having considered the points made in both the written documents the Claimant submitted in his application, the relevant rules and law about reconsideration as well as the overriding objective, none of the points are valid or have any reasonable chance of successfully procuring an amendment or revocation of the whole or part of the written reasons.

Conclusion

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. Finality of litigation prevails.

Case No: 3315921/2021

Employment Judge Smart

05 June 2024