Case No. 2409408/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr M Khan

Respondent: Bank of New York Mellon (company registration number FC005522)

JUDGMENT

The application of the claimant, dated 27 May 2024, for reconsideration of the Judgment dated 10 May 2024 and sent to the parties on 20 May 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 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. The application appears to be based upon facts and arguments about which the claimant was aware at the time of the hearing. For the majority of the matters referred to, they were things which the claimant argued at the hearing and that were considered in the Judgment reached.

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). 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.

4. 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.*"

5. 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.

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

7. The application to reconsider initially addresses the decision reached on time and jurisdiction (for the claims for detriment, unfair dismissal, unauthorised deduction from wages, breach of contract and for holiday pay). That appears to rely (in summary) upon the following assertions:

- The delay in entering the claim happened because of the grievance and grievance appeal;

- It was not the claimant's fault, the delay happened because of the respondent side; and/or

- The relevant claims were entered within the relevant time limits and the Judge agreed to proceed with the claim in the first preliminary hearing, something which is dated in the application as having taken place on 29 December 2022.

8. I have considered those points. The Tribunal's findings of fact in relation to time limits were set out at paragraphs 56-57 of the Judgment. The claimant was able to present evidence to explain the late claim and why it might be said it was not reasonably practicable to enter the claim earlier. The law as it applied to time limits was set out at paragraphs 59-70, which included (at 70) a reference to the respondent's representative's reliance upon the case of **John Lewis Partnership v Charman**, a case which addresses the issue of internal procedures and what they mean for the application of the reasonably practicable test. The decision reached on time/jurisdiction issues was set out at paragraphs 108-116 of the Judgment. Paragraph 109 explains why it was found that the claim had been entered outside the primary time limit. Paragraph 110 detailed why it was found that it had been reasonably practicable for the claim to have been entered in time. In particular, it was found that, in this case, any ongoing internal procedures made no material difference to the issue and the Tribunal found they had not meant that it was not reasonably practicable for the claim to have been entered in time.

9. Addressing the third point, the bundle of documents did not contain any document which recorded a preliminary hearing having taken place on 29 December 2022 and there is nothing in the Tribunal file which appears to record any such hearing. That date falls after the claim had been accepted and served on the respondent (1 December 2022) and after the response had been submitted (22 December 2022), but before the Tribunal acknowledged receipt of the response (16 January 2023). The first preliminary hearing which appears to have taken place in the claim was on 17 September 2023 before Employment Judge Holmes. The case management order sent following that hearing, set out very clearly that the issue of jurisdiction, and whether the claim had been entered within the time required, was an issue which needed to be determined (see paragraphs 33-34). It had been intended that those issues would be determined at a separate public preliminary hearing, but the hearing which took place on 20 October 2023 (heard by Employment Judge M Butler, that hearing appears to have been erroneously referred to in the Judgment as having taken place on 19 October), did not do so because there was not time to do so (see paragraph 33 of the case management order sent following that hearing). The list of issues appended to the case management order sent following the hearing of 20 October 2023 clearly set out at issue one that jurisdiction/time was an issue to be determined (with issues 1.1 and 1.3 listing the issues to be determined for those claims ultimately found to have been entered out of time). That list was confirmed at the start of the final hearing as being the list of issues to be determined (see paragraph 2 of the Judgment). Accordingly, the issue of jurisdiction/time was an issue which it was agreed at the start of the final hearing was one to be determined, having not previously been decided (contrary to what appears to be suggested in the application to reconsider).

10. In any event, the Tribunal did go on to consider the relevant issues and address the claims which had been entered out of time on their merits, in the Judgment sent to the parties. As recorded in that Judgment, even had the claim been entered in the time required, the claimant would not have succeeded in any of those claims in any event for the reasons given.

11. Whilst the remainder of the reconsideration application is unclear and difficult to follow, it appears that the remainder of the issues raised are things which the claimant raised and argued at the final hearing, or, at least, was able to raise and argue if he wished to do so (as they relate to the matters which the Tribunal heard and determined). As confirmed in the Judgment, the Tribunal was considering only an unfair dismissal claim under section 103A of the Employment Rights Act 1996 and not an ordinary unfair dismissal claim. That claim did not succeed because: the Tribunal did not find that the claimant had made a protected disclosure (see paragraphs 119-120); and, even had it been found that the claimant had made a protected disclosure, the Tribunal would not have found that to have been the principal reason for the dismissal (see paragraphs 121-122). To the extent that the application to reconsider raises matters relating to an ordinary unfair dismissal claim, that was not a claim which the Tribunal was considering.

12. 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.

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Employment Judge Phil Allen
21 June 2024

JUDGMENT SENT TO THE PARTIES ON
2 July 2024

FOR THE TRIBUNAL OFFICE