EMPLOYMENT TRIBUNALS

Claimant:	**M**
Respondent:	**Home Office**
Heard at:	**London Central Tribunal**
On:	**29 and 30 August in chambers**
Before:	**Employment Judge Smart** **Ms J Marshall** **Mr. R Pell**

JUDGMENT

The Claimant's application dated 30 April 2024 for reconsideration of the judgment sent to the parties on 17 April 2024 is refused with the exception of issuing a correction at paragraph 171 of the written reasons.

REASONS

1. The Application for reconsideration could not be said, on paper sift, to have no reasonable prospect of success. It was therefore sent to the Respondent with notice and we received their submissions.

2. The parties were asked if an actual hearing was needed given the detailed application and submissions form the Respondent. We confirm both parties agreed by consent for the reconsideration application to be dealt with on the papers.

3. We received further representations from the Claimant but not the Respondent. We note the Claimant failed to comply with Tribunal rule 92 in sending them. Despite this, we have received detailed submissions from both parties and have been able to decide the application.

The Law

4. 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.

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.

5. 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).

6. 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.

7. 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."

8. 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."

9. 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.

10. When exercising the power in Rule 70, appropriate weight must be given to the principle of finality of litigation **Flint v Eastern Electricity Board [1975] ICR 395** and **Ebury Partners UK v Davis [2023] IRLR 486.**

11. Reconsideration of a judgment is usually not appropriate where both parties have had a fair opportunity to present their case and the decision was made in light of all available arguments put forward **Trimble v Super Travel Limited [1982] ICR 440.**

12. Similarly, the interests of justice test is not open ended and must be exercised in a principled way and past case law cannot be ignored about it **Newcastle on Tyne City Council v Marsden [2010] ICR 743.**

The Application

13. 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. A Tribunal will not reconsider a finding of fact just because the claimant wishes it had gone in his favour.

The claimant's initial application

14. We consider each of the points made in the Claimant's original application below. The Claimant often refers to himself as being a litigant in person in his application. At all times we have kept in mind the fact that the Claimant is an experienced tribunal litigant having presented several claims over several years. He has had legal assistance in the background, since the inception of his case, from the CAB and he has an honours' degree in law from Brunel University in accordance with paragraph 24 of the Reading Judgment. He also had experienced counsel who represented him during closing submissions.

15. The Claimant is not a usual litigant in person. He is very experienced in conducting tribunal litigation, had pleaded his case clearly and well and was able to cross examine the Respondent's witnesses ably. He drafted his own written submissions, which contain references to relevant case law, sections of the Equality Act 2010, the evidence and statutory guidance. In the submissions, the Claimant also referred to notes of the evidence he took during the hearing.

    15.1. **Bandwidth:** We have considered what the Claimant has submitted. He alleges the tribunal ignored his evidence. All the evidence we were taken to in statements, the bundles or during questioning was reviewed and considered including the Skype manual. The Claimant simply disagrees with the Tribunals' unanimous factual finding. That is no reason to reconsider the judgment and reasons.

    15.2. **Removal of disabilities from the application form:** Here we have considered the Claimant's submissions and have spotted an error at paragraph 171 in the written reasons.

    15.3. Reference to Ms Mapara giving evidence about this should be replaced with Mr. Moore who mentions this issue at paragraph 8 of his witness statement as follows *"…Prior to his interview I had no prior knowledge of [M], including [their] age or particular disability. Personal information relating to candidates, such as their age and disability, is redacted in their applications to ensure fairness."*

    15.4. The Claimant also discusses this in his statement at paragraph 45 quoting from the annual report in the Supplemental bundle at page 42, where the report speaks about removing bias *"45. I am aware in the Home Office there is a regular failure by disabled people to succeed in promotional interview as shown by the Annual Report of 2020/21 records, - see page which details.*

    • *In December 2020 we developed a robust Disability Action Plan, which seeks to increase disability representation and inclusion, by ensuring a level playing field in the way in which we recruit, retain and*

develop disabled colleagues. We ensure success of the plan through our Disability Champions Board. – see page 97 of the SB.

• *We are continually evolving and maturing our recruitment practices to create a diverse workforce, using inclusive job descriptions, anonymised recruitment and diverse shortlists to eliminate potential bias in the recruitment process…."*

15.5. This is why we found as we did, we simply erroneously misnamed the witness who gave evidence about that, it should have been Mr. Moore not Ms Mapara.

15.6. We have considered whether this error has had any impact on the findings of fact we made about why the Home Office redacted its application forms to remove reference to particular disability details, and we have concluded it made no difference.

15.7. The remainder of the submissions appear to be an attempt to reargue the case and are therefore no reason to vary the Judgment.

15.8. **Requirement of knowledge:** Having considered what the Claimant has said, we don't understand why he is raising this as an issue. We agreed with the Claimant that the Respondent had knowledge of his disabilities either constructive or actual and would impute that to the panel members themselves. We also found that at least Ms Mapara as chair of the interview panel, did not take reasonable steps to fully inform herself about the disability.

15.9. However, for a reasonable adjustments claim there must be knowledge not only of the disability but also the disadvantage.

15.10. We did not find anyone had knowledge actual or constructive of the disadvantage. We found at paragraph 227 that there was no disadvantage at the interview.

15.11. Secondly, at paragraph 235 this is applying the guidance in **A v Z Limited** at page 118 in the bundle. When considering point 7 of HHJ Eady's reasoning in that case *"(7) Reasonableness, for the purposes of s 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code"* so we must take into account the likelihood of enquiries yielding results. If the enquiry was not made but would not have informed the enquirer to any additional extent, then that is something which suggests it would not have been a reasonable enquiry to make or that making the enquiry would have made no difference to the knowledge of the individual making the enquiry.

15.12. Paragraph 238 says *"238. The Respondent has therefore proven that it did not have any actual or constructive knowledge about the disadvantage pleaded by the Claimant."* Consequently, nothing is left hanging about our findings on that issue.

15.13. The Cases quoted in the application namely **Newham Sixth Form College v Saunders 2004 EWCA Civ 734 and Lamb v Business Academy Bexley EAT 0226/15** were not referred to by the Claimant's barrister during oral closing submissions neither do they appear in the written submissions provided by the Claimant. The Claimant and his barrister had ample opportunity to do so at submissions, but failed to.

15.14. The final point we address is the Claimant arguing that our findings were contradictory. The Claimant here is confusing our findings about knowledge of disability, and knowledge of disadvantage. We are clear in our finding about knowledge of disability at paragraph 207: *"207. Consequently, the Respondent has failed to prove that it did not have actual knowledge of the Claimants disability, and its knowledge defence for the section 15 claim fails."*

15.15. We are equally clear on our findings about knowledge of disadvantage at paragraph 238: *"238. The Respondent has therefore proven that it did not have any actual or constructive knowledge about the disadvantage pleaded by the Claimant."*

15.16. This is another attempt to reargue the case with both legal and factual arguments that could and should have been raised during the hearing.

15.17. **PCP:** The PCP finding is an alternative finding after the Respondent succeeded in its knowledge of disadvantage defence. If the Claimant is saying that there has been an error of law then the EAT will be best placed to provide the answer to that issue. The other submissions are rearguing about our findings of fact, which is not a reason to vary the judgment.

15.18. The Claimant was represented by counsel at submissions stage. These arguments could and should have been raised then.

15.19. **Disadvantages of disabilities:** The Claimant suggests we ignored his evidence. We did not. We have simply found against him on various factual points.

15.20. When considering the exclusion of the July 2020 GP referral document the Claimant mentions, what happened was this:

15.20.1. The first two days of the hearing were discussing the bundle and what should be admitted into evidence and what shouldn't be.

15.20.2. At the end of that process on day three, by consent, the Tribunal made an order at the hearing that no further documents would be admitted into evidence unless there was a material change in circumstances, or other exceptional circumstances.

15.20.3. We heard the Claimant's evidence, which took up most of day three and half of day four. Cross examination of the Claimant finished at lunchtime on day 4.

15.20.4. We broke for lunch and came back in at 13.58. The tribunal then asked its questions of the Claimant.

15.20.5. After that, despite the tribunal's earlier order about documents, the Claimant said he had spoken to his GP practice (whilst still under oath) during the lunch break and discussed a referral document from July 2020. The Respondent objected to this and argued the Claimant shouldn't have been discussing any evidence with anyone whilst under oath.

15.20.6. We considered the application and decided unanimously to disallow the document because the Claimant's cross examination had already finished which prejudiced the Respondent and there had been no material change in circumstances that would allow us to revisit the bundle. The Claimant could and should have disclosed this document earlier in proceedings and it was prejudicial to the Respondent to include it now.

15.20.7. This is alluded to in paragraph 62.2.1 of the written reasons when we mentioned a breach of the order not to allow further documents into the bundle.

15.21. The remainder of the submissions are an attempt to reargue the case and finality must prevail. We took all of the evidence presented into account.

15.22. **Failing to consider something arising in consequence of the Claimant's disabilities:** The Claimant argues here that the tribunal have made assumptions and ignored the evidence. We have not and this is another attempt by the Claimant to reargue facts that we have already heard argument about and decided. The Claimant simply disagrees with our decision and that is not a good reason to vary the judgment.

15.23. **Unfairness:** The Claimant raises various points about perceived unfairness at the hearing. We respond to some but not all of the specific points raised because generally if there is an allegation of an unfair hearing, the EAT are best placed to deal with that appeal point. Our unanimous responses are:

15.24. The Claimant alleges counsel laughed at him at the hearing when he became confused about his medication. This did not happen. No-one laughed at the Claimant.

15.25. When considering if the words of the tribunal were denigrating, we made findings of fact at paragraph 62.2.1 of the judgment, about a point the Claimant raised in his impact statement at paragraph 18 where he said *"I am compliant in that I tend not to challenge or question…".* Our findings were not denigrating. We consider them to be factual having considered the evidence before us. The Claimant succeeded in proving he was disabled for the unconceded impairment alleged regardless.

15.26. When considering the findings at paragraph 62.2.2 of the Judgment, our judgment was based on findings of a previous Tribunal where those factual findings were relevant to the proceedings of this case.

15.27. When considering paragraph 205 of the judgment, the Claimant complains that we had a fixed mindset based on what that paragraph said. However, we were not talking about the Home Office as a respondent in that paragraph, but describing a hypothetical scenario when explaining our thoughts about the law of knowledge and imputing that knowledge.

Further representations

16. The Claimant made further representations in his email of 20 August 2024. We respond to those where necessary below and where the submissions were not a repeat of those in his original application.

16.1. The Claimant now alleges that the Tribunal should have considered his case under sections 111 and 112 of the Equality Act 2010 despite the case never being pleaded on those grounds. In support he cites the Case of **Bailey v Stonewall [2024] EAT 119** decided in the EAT in July 2024, several months after his case was heard. In any case that authority is not relevant to the list of issues the Claimant agreed were the correct issues at the start of the hearing.

16.2. He also cites the case of **Nagarajan v London Regional Transport [2000] 1 AC** as not being considered. This case was considered, because it is mentioned in numerous cases cited in the authorities bundle the respondent provided for submissions for example in **Pnaiser** we just haven't specifically referred to it in the judgment.

16.3. The Claimant failed to raise these points at hearing, indeed the Bailey case could not have been raised at the hearing predating it. He was represented by counsel for submissions. If the Claimant thinks we've got the law wrong, then the EAT is best placed to resolve that issue.

16.4. The Claimant suggests that he was put under *"unbearable stress"* by being asked to complete his cross examination of Ms Mapara by the end of day 5 leaving day 6 to hear from both Mr. Moore and Mr. Ryder. The Claimant's statement is not accurate. The judge asked the Claimant to "try" to get the cross examination of Ms Mapara finished by the end of the day, not that he must.

16.5. When considering the situation involving the GP referral of 20 July 2020, the Claimant now argues that the Judge was abrupt, very agitated and threatened to strike out his claim. The unanimous view of the Tribunal is, these things did not happen at all.

16.6. The Tribunal is accused of cross examining the Claimant. That too did not take place. We asked the Claimant questions but it was not by way of cross examination. In our view the Claimant was given an ample and fair opportunity to give his evidence and present his case at all times.

16.7. The Claimant refers to a threat of costs being made about the Reading judgment. We cannot recall any such threat being made by anyone at the hearing.

16.8. When considering paragraph 62.2.4 of the judgment, the reason we mentioned that Counsel for the Respondent had not committed any misconduct is because she did not do any of the things the Claimant accuses her of doing at the hearing.

Conclusion and outcome

17. Ultimately, virtually all of the Claimant's reconsideration application is an attempt to reargue the case either factually or by referring to case the Claimant could and should have argued at the hearing. The Claimant was demonstrably able to argue those points either himself or with the assistance of his barrister at closing submissions, but he failed to do so.

18. There is one factual point where the tribunal has spotted an error by confusing the evidence said by one witness, when it was another witness. We have considered that and in our view it make no difference to the overall findings of fact about why the Home Office redacted its application documents.

19. When considering the PCP and ancillary provisions of the Equality Act 2010, the Claimant simply did not bring his claim under those provisions or arguing that PCP, when he was demonstrably capable of having done so.

20. When applying **Flint** and **Ebury,** we have taken finality of litigation into account when making our decision.

21. When considering **Trimble,** we have considered the allegations of unfairness the Claimant alleges where necessary. In our judgment, both parties have had a fair opportunity to argue their case both factually and legally.

22. Our unanimous view is, the Claimant's application is an attempt at a "second bite of the cherry" as per the guidance in **Liddington** quoted above. Consequently, it is not appropriate to vary the judgment.

23. If the Claimant believes he has been treated unfairly by us, the EAT are best placed to resolved that issue in the same way that any alleged errors of law should be resolved by the EAT.

24. The Claimant's application is therefore refused with the exception of issuing a certificate of correction of the witness named at paragraph 171 in the written reasons changing the name from Ms Mapara to Mr. Moore.

25. Finality of litigation prevails and it is not in the interests of justice or the overriding objective to vary the judgment further or indeed revoke it.

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Employment Judge Smart

30 August 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON

6 September 2024
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FOR THE TRIBUNAL OFFICE