Reference number
2303569-2022

EMPLOYMENT TRIBUNALS
London South Employment Tribunal

Claimant: Earl Sutherland

Respondent: London General Transport Services Limited

Reconsideration Decision

Rules 70-72 of The Employment Tribunals Rules of Procedure 2013 (as amended)

The claimant's **application seeking reconsideration** of aspects of the Tribunal's unanimous judgment is **refused in full** for the reasons set out below, the Tribunal having concluded that reconsideration is not warranted in the interests of justice based on the arguments raised and evidence produced. **There is no reasonable prospect of the judgment being varied or revoked**.

Background

1. This decision concerns an application made by the claimant, Mr Earl Sutherland, for reconsideration of aspects of the judgment we previously handed down determining his claims against his former employer, the respondent London General Transport Services Limited.

2. Mr Sutherland was employed by the respondent company from 30 August 2011 until his dismissal on 13 May 2022. The respondent operates bus services in London under the name Go-Ahead London. Mr Sutherland started as a Senior Vehicle Engineer at the New Cross bus garage and was promoted in January 2016 to the role of Service Centre Manager at the same garage, a position he remained in until the termination of his employment.

3. During his employment, between late 2019 and early 2022, Mr Sutherland was subject to disciplinary proceedings and raised several internal grievances relating to his treatment at work. In December 2019, disciplinary action was brought against Mr Sutherland alleging negligence and insubordination, which initially resulted in his demotion. However, he successfully appealed this in February 2020 and the findings were overturned, allowing him to return to the Service Centre Manager role.

4. Mr Sutherland submitted multiple grievances through 2020 complaining of victimisation. A disciplinary hearing in October 2020 found he had no case to answer regarding alleged unsatisfactory performance.

5. On 13 April 2022, there was an altercation between Mr Sutherland and a junior colleague, Mr Michael Stone, in the workplace. Following an investigation and disciplinary hearing, Mr Sutherland was dismissed for gross misconduct in May 2022. The dismissal related to his conduct during the altercation with Mr Stone. Mr Sutherland appealed internally against his dismissal, but this was upheld in August 2022.

6. In October 2022, Mr Sutherland presented claims to the Employment Tribunal alleging unfair dismissal, race discrimination and victimisation against his former employer, which proceeded to a full merits hearing and judgment. It is aspects of that judgment which Mr Sutherland now seeks reconsideration of through the present application.

Side note

7. Before turning to the substance of the reconsideration application, the Tribunal wishes to

note that while we are flattered by Ms Brown's reference to Mr Justice Aspinall (in her covering email), the judicial member remains Judge Aspinall in his capacity as an Employment Judge for this Tribunal. We gently clarify the appropriate mode of address for the future. However, no discourtesy was intended by Ms Brown and the incorrectly assumed promotion provided an unintended smile for the Judge.

The application

8. The application for reconsideration of the Tribunal's judgment was made by the claimant Mr Sutherland. It was submitted in writing by his counsel, Ms Althea Brown, on 29 October 2024.

9. The application was made within 14 days of the written judgment being sent to the parties on 16 October 2024. It is therefore in time in accordance with Rule 71 of the Employment Tribunal Rules of Procedure 2013.

10. Mr Sutherland seeks reconsideration of two aspects of the Tribunal's judgment:

    a) Firstly, he requests reconsideration of the judgment dismissing his claims of race discrimination and victimisation. The application contends that factual findings made by the Tribunal evidence less favourable treatment during the disciplinary process which should have been sufficient to establish race discrimination or victimisation.

    b) Secondly, Mr Sutherland requests reconsideration of the percentages applied by the Tribunal for the Polkey deduction (85%) and contributory fault (70%) in assessing compensation for his successful unfair dismissal claim. The application argues the factual findings are relevant to assessing the chance of dismissal with a fair process and the apportionment of culpability between Mr Sutherland and Mr Stone.

11. The application relies on the existing evidence and Tribunal findings. No additional evidence has been produced in support of the reconsideration request.

12. Mr Sutherland submits that reconsideration of these two aspects relating to his race/victimisation claims and the percentage deductions is necessary in the interests of justice based on the Tribunal's own findings.

The law

13. Rules 70-73 of The Employment Tribunals Rules of Procedure 2013 (as amended) provide the legal framework for reconsideration of Employment Tribunal (ET) judgments.

14. Rule 70 states that an ET may reconsider a judgment on its own initiative or upon application of a party, where reconsideration is necessary in the interests of justice. The original decision may then be confirmed, varied or revoked.

15. Under Rule 71, except during a hearing, an application for reconsideration must be made in writing within 14 days of the written record of the original decision being sent to parties. The application must explain why reconsideration is necessary.

16. Rule 72(1) requires the ET to consider any reconsideration application. If there is no reasonable prospect of varying or revoking the original decision, including where a similar prior application was refused, the application shall be refused and parties informed.

17. Otherwise under Rule 72(2), the ET shall notify parties, seek their views on whether a hearing is needed, and reconsider the decision at a hearing unless unjustified. Without a hearing, parties can make further written representations.

18. Rule 73 provides that where the ET proposes reconsidering a decision on its own initiative, it must notify parties of the reasons and then follow the process in Rule 72(2).

19. In summary, the Rules permit reconsideration of ET judgments either upon application within 14 days showing it is in interests of justice, or by the ET's own initiative. The ET must consider applications, allow party views on a hearing, and hold a hearing unless unjustified, reconsidering the original decision which may then be confirmed, varied or revoked.

20. This robust process ensures reconsideration occurs only where properly justified, balancing finality with flexibility to revisit decisions when essential in interests of justice. The legislation requires a stringent test be met for reconsideration, with the ET carefully assessing whether that high threshold is satisfied.

21. A leading modern authority on reconsideration is EAT case Outasight VB Limited v Mr L Brown [2014] UKEAT 0253_14_2111. This held the approach in Ladd v Marshall [1954] 1 WLR 1489 continues to encapsulate the interests of justice test for fresh evidence under the ET Rules.

22. Ladd v Marshall established four criteria for admitting fresh evidence that could not be obtained earlier which is relevant and credible, would likely influence the result, and is apparently credible. Outasight confirmed this test generally applies to fresh evidence cases, emphasizing the interests of justice include finality in litigation and avoiding “second bites at the cherry”.

23. Flint v Eastern Electricity Board [1975] ICR 395 confirmed ETs have discretion under the interests of justice to allow fresh evidence where Ladd v Marshall is not strictly met if mitigating circumstances prevented obtaining it earlier. However, General Council of British Shipping v Deria [1985] ICR 198 EAT held the mitigating circumstance must relate to the failure to obtain the evidence itself.

24. Newcastle City Council v Marsden [2010] ICR 743 EAT confirmed the continuing relevance of Flint principles on litigation finality. Article 6 fair hearing issues could also arise.

25. Ebury Partners UK Ltd v Mr M Acton Davis [2023] EAT 40 held parties cannot reopen matters they had fair chance to argue originally given the strong public interest in finality. Failing to make arguments does not generally deprive a fair opportunity to present one's case. Reconsideration based on arguments parties could have raised originally is rarely justified.

Documents and materials considered

26. In assessing this reconsideration application, I have re-examined the documents and evidence that were before the Tribunal during the original hearing. The applicant contends these existing documents and evidence that were before the Tribunal contain findings that should warrant my reconsideration of certain aspects of the Tribunal's original judgment. I have carefully reassessed the materials presented at the original hearing to determine if reconsideration is justified.

Decision

Race Discrimination and Victimisation Claims

27. I have carefully considered Mr. Sutherland's request for reconsideration of the dismissal of his race discrimination and victimisation claims.

28. However, in its original judgment, the Tribunal found that the procedural failures identified resulted from flaws in the respondent's disciplinary model itself rather than relating to Mr. Sutherland's race or protected acts. As a large employer, the respondent should have involved HR specialists and ensured proper separation between grievance and disciplinary matters. But these failures stemmed from the respondent's own deficient policies and practices, not race or victimisation.

29. While the disciplinary process followed was clearly unfair, the facts found by the Tribunal did

not establish a causal link to race or protected acts. The Tribunal remains satisfied, for the reasons set out in its judgment, that the evidence did not support inferring less favourable treatment because of race or victimisation.

30. As such, I do not consider it in the interests of justice to reconsider the Tribunal's dismissal of the race discrimination and victimisation claims. The application for reconsideration on this ground is refused.

Contributory Fault Percentage

31. On the percentage deductions for Polkey and contributory fault applied by the Tribunal, I note that it remains open for Mr. Sutherland to make submissions disputing these quantum matters during the remedy stage.

32. As there is still an opportunity for Mr. Sutherland to argue against the levels of the deductions, I do not find it necessary in the interests of justice to reconsider this issue at this stage.

33. The application for reconsideration of the percentage deductions is therefore refused at this time without prejudice to Mr. Sutherland's ability to advance his contentions on the quantum during remedy proceedings.

Conclusion

34. Having carefully considered the claimant's application, the original judgment, and the parties' submissions, I have reached a determination on whether reconsideration is warranted in the interests of justice.

35. This application was made promptly within 14 days of the Tribunal's written judgment being sent to the parties. I am satisfied it meets the time limit criteria under Rule 71.

36. The application seeks reconsideration of two discrete aspects of the Tribunal's unanimous judgment: the dismissal of the race discrimination and victimisation claims, and the percentages applied for the Polkey deduction and contributory fault reduction.

37. In assessing the application, I have had careful regard to the legal principles on reconsideration established in the binding authorities. The case law makes clear reconsideration is only permitted where strictly necessary in the interests of justice. As emphasized in Ebury Partners, the strong public interest in litigation finality means parties cannot reopen matters they had fair opportunity to address during original proceedings without very good reason.

38. The evidence before me does not provide any such exceptional reason here. No fresh evidence has been produced that might warrant re-examining the Tribunal's earlier findings on the claimant's race and victimisation complaints. The applicant has not identified any clear error of fact, law or procedure that would justify reconsideration. Rather, the application essentially seeks a 'second bite of the cherry' on points the claimant had full opportunity to address during the initial merits hearing.

39. Turning to the percentage deductions, I am satisfied there remains adequate opportunity for the claimant to make submissions on the applicable percentages during the remedy phase. Reconsideration of these quantitative issues is therefore unwarranted at this stage while that avenue remains open.

40. For these reasons, I have refused the application seeking reconsideration of the dismissal of the race discrimination and victimisation claims, and the percentages applied for Polkey deduction and contributory fault.

41. While I appreciate the claimant's understandable disappointment, I am clear after objective and rigorous analysis that the limited reconsideration gateway has not been met. The

Tribunal's unanimous core findings on liability remain sound.

42. I conclude that reconsideration of the judgment is not necessary in the interests of justice based on the arguments raised and existing evidence produced. This application is therefore refused in full.

Judge M Aspinall
21st September 2024