



EMPLOYMENT TRIBUNALS

Claimant: Mr S Otamiyekowie Lyare

Respondent: Fedex Express UK Transportation Ltd

JUDGMENT

The claimant's application dated 29 September 2024 for reconsideration of the judgment sent to the parties on 16 September 2024 is refused.

REASONS

There is no reasonable prospect of the original decision being varied or revoked, for the following reasons:

1. The claimant has made an application for me to reconsider my judgment in which I ordered him to pay the respondent's costs in the sum of £2,000.
2. He has sent a document setting out the grounds of his request which contains some supporting documents and has separately sent a number of documents also in support. These are referred to below.
3. The Tribunal's powers concerning reconsideration of judgments are contained in rules 70 to 73 of the Employment Tribunals Rules of Procedure 2013. A judgment may be reconsidered where "it is necessary in the interests of justice to do so." Applications are subject to a preliminary consideration. They are to be refused if the judge considers there is no reasonable prospect of the decision being varied or revoked. If not refused, the application may be considered at a hearing or, if the judge considers it in the interests of justice, without a hearing. In that event the parties must have a reasonable opportunity to make further representations. Upon reconsideration the decision may be confirmed, varied or revoked and, if revoked, may be taken again.

4. Under rule 71 an application for reconsideration must be made within 14 days the date on which the judgment (or written reasons, if later) was sent to the parties. I accept that this application was clearly made in time.
5. The approach to be taken to applications for reconsideration was set out in the case of Liddington v 2Gether NHS Foundation Trust UKEAT/0002/16/DA in the judgment of Simler P. The Tribunal is required to:
 - a. identify the Rules relating to reconsideration and in particular to the provision in the Rules enabling a Judge who considers that there is no reasonable prospect of the original decision being varied or revoked refusing the application without a hearing at a preliminary stage.
 - b. address each ground in turn and consider whether is anything in each of the particular grounds relied on that might lead ET to vary or revoke the decision; and
 - c. give reasons for concluding that there is nothing in the grounds advanced by the claimant that could lead him to vary or revoke his decision.
6. In paragraph 34 and 35 of the Judgment, HHJ Simler included the following:

“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 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. Tribunals have a wide discretion whether or not to order reconsideration.

Where ... a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application.”

7. Under the Tribunal’s previous Rules of Procedure 2004, the equivalent of rule 70 set out five grounds on which a judgment could be reviewed:
 - a. that the decision was wrongly made as a result of an administrative error
 - b. that a party did not receive notice of the proceedings leading to the decision
 - c. that the decision was made in the absence of a party
 - d. that new evidence had become available since the conclusion of the tribunal hearing to which the decision related, the existence of which could not have been reasonably known of or foreseen at that time.
 - e. and/or that the interests of justice required a review.
8. When 2013 Rules were introduced, there was an absence of official commentary to explain why the first four specific grounds for review were

dropped in favour of the single ground of “necessary in the interests of justice”. However, it is widely presumed that, since the parties routinely cited the interests of justice in addition to one of the specific grounds, this change was a matter of simplification and did not alter the substantive legal principles. This view has been confirmed in Outasight VB Ltd v Brown (2015) ICR D11, EAT. For this reason, I have where appropriate taken these matters into account.

9. I considered the various grounds cited by the claimant adopting his headings.

Medical condition preventing employment.

10. The claimant has provided a copy of a medical report based on his examination on 19 July 2024. This has been prepared by Mr S Kohli, a Trauma & Orthopedic Surgeon at Princess Royal University Hospital.

11. The claimant has not given any explanation as to why it was not possible to provide such a report or similar either before or at the costs’ hearing. However, it does appear that this report has been prepared in respect of a personal injury claim relating to the injury sustained to his right shoulder on 22 April 2021.

12. The report focuses on the history of the claimant’s injury and the most up to date medical evidence referenced is for 2023. The section headed Opinion and Prognosis appears to be the most pertinent. This states that in Mr Kohli’s opinion, the claimant’s symptoms are likely to have resolved between 9-12 months from the time of the incident and within six months from the time of injection, whichever is later (at sub-paragraph (10) on page 19). Further, he states that the claimant is unlikely to have any long-term residual sequelae as a direct result of the injury and the injury has not affected his employability (at sub-paragraphs (13) & (14) on page 20.

13. This report is therefore of no assistance to the claimant in his assertion that it provides evidence of a medical condition preventing employment.

14. The claimant has also provided copies of fitness for work certificates issued by his GP. These are all historic. The latest one covers the period 11 September to 15 October 2023. Two of them relate to shoulder pain but two of them relate to essential hypertension and one to depression.

15. They therefore provide no evidence in support of the claimant’s contention that he has a medical condition preventing employment, which I assessed as of the date of the hearing going forward.

16. The claimant has also provided letters from Lewisham and Greenwich NHS Trust. Three of these are appointments for physiotherapy in February, May and October 2024. However, they are no more than appointment letters and do not assist the claimant in his contention. One is a note of a physiotherapy appointment that the claimant attended in September 2024 which references an issue relating to chronic Achilles tendinitis, does not contain anything indicating an obvious impairment preventing him from future employment.

17. The claimant has also provided his GP records. These are marked as being printed on 4 April 2022 and none of them are post that date. Whilst there are

a number of letters relating to past medical treatment none of these are dated later than 2021. Again, this does not provide evidence in support of the claimant's assertion.

18. Finally, the claimant has provided what appears to be a report of his referral to the respondent's occupational health advisers. However, this is dated 12 January 2023 and in any event is superceded by the report provided by Mr Kohli.
19. I find nothing with these documents that gives rise to reasonable prospects that his application for reconsideration will succeed.

Living situation and ineligibility for social security benefits

20. Whilst I sympathise with what the claimant says, I do not see why living with a friend would prevent him from claiming Universal Credit which is either paid to those available for work or those unable to work due to ill-health or disability.
21. Whilst he has recently contacted Deptford Reach does not explain why he did not make enquiries sooner than this, given that he finished working for the respondent in October 2023.
22. In any event, I made the award of costs on the basis that the claimant's position was not necessarily going to remain static and that whilst he might not have had any income or employment at the time I made the costs order moment did not mean that this would not change in the foreseeable future.
23. He has not presented any grounds to consider this would not be the case.
24. Thus, I find that this element of his application does not give rise to reasonable prospects of success.

Honesty of evidence and financial situation

25. I note what the claimant says but I based my assessment on the evidence he provided at the costs hearing and he has not provided anything which materially changes my view. Whilst he has provided a copy of a Request for Pay of £702.00 this is payable by LB & Co Solicitors and he has not provided any indication as to why he did not provide this before or at the costs hearing. Indeed, the document date is incomplete.
26. I therefore find that this element of his application has no reasonable prospects of success.

No indication on the file of the solicitor no longer representing me

27. I found that the claimant certainly had solicitors acting for him until at least 17 May 2023 when they wrote to the Tribunal advising that he had not paid the deposit order. I further found that there was no indication on file that they ever wrote to the Tribunal coming off the record.

28. The claimant has provided copies of emails between him and his solicitors. I would warn the claimant that by seeking to rely on what are private emails which would not normally be shown to a court or tribunal or the other party which are between him and his solicitors he risks waiving privilege on all documentation between the two of them. However, I can see that as of 2 June 2023 the solicitors clearly state that they are no longer acting for the claimant, without the need to go into more detail.
29. However, this information does not materially affect the decision to make the costs order. I would emphasise that I made my decision on the basis of the evidence before me on the day and the claimant offers no explanation as to why he could not have provided confirmation that his solicitors were no longer acting either before or at that hearing. Further, I do not understand why the solicitors did not advise the Tribunal of this themselves.
30. I do not believe that this element of his application has reasonable prospects of success.

Other matters

31. The claimant requests that I remove the costs awarded to the respondent and points to the distress, pain and suffering caused to him as a result of his injury at work. He sets out some detail of how he was treated at work, that he was forced to withdraw his case due to health reasons, not because of lack of merit but to avoid going to court. He cites an unsuccessful attempt to apply for a personal injury claim whilst at work being denied and this resulting in him escalating the matter to court. I am unclear whether by the use of the word "court" the claimant in fact means the Tribunal or indeed as to his reference to the hearing in January 2024. The claimant appears to raise this in the context of extending leniency to a claimant bringing a discrimination case and in the first instance his claim was one of discrimination, and that each party should bear their own costs given the hardships he has faced.
32. Again, whilst I might sympathise with the claimant, as part of my decision I took into account that an award of costs should be the exception rather than the rule but decided it was appropriate in the circumstances to make an award and to make it in the amount ordered. These other matters do not provide grounds which indicate reasonable prospects of success.
33. Whilst the claimant has asked me to order payment by small monthly instalments (which of course begs the question how he can do so if his principal position is that he has no income and has various debts) I do not have the power to do that. However, there is nothing to stop the parties agreeing this between them.
34. So in conclusion I find that the Claimant's application does not have reasonable prospects of success in terms of meeting the test that it is necessary in the interests of justice to revoke or vary the Judgment.

Employment Judge Tsamados
5 December 2024

JUDGMENT SENT TO THE PARTIES ON

8 January 2025

FOR THE TRIBUNAL OFFICE

P Wing