Case No: 1305343/2023

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant:	**Ms D Baker**
Respondent:	**Bar Standards Board**
Heard at:	**Birmingham (Midlands West) Employment Tribunal**
Before:	**Employment Judge Smart**

JUDGMENT

The claimant's application dated 2 January 2025 for reconsideration of the judgment sent to the parties on 16 December 2024 is refused.

REASONS

1. I have undertaken preliminary consideration of the claimant's application for reconsideration of the judgment striking out some of the Claimant's claims.

The Law

2. Reconsideration is covered by the Employment Tribunal rules 2024 rules 68 - 71, which state where relevant:

Principles

68.—*(1) The 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.*

(2) A judgment under reconsideration may be confirmed, varied or revoked.

(3) If the judgment under reconsideration is revoked the Tribunal may take the decision again. In doing so, the Tribunal is not required to come to the same conclusion.

Application for reconsideration

69. *Except where it is made in the course of a hearing, an application for reconsideration must be made in writing setting out why reconsideration is necessary and must be sent to the Tribunal within 14 days of the later of—*

(a)the date on which the written record of the judgment sought to be reconsidered was sent to the parties, or

(b)the date that the written reasons were sent, if these were sent separately.

Process for reconsideration

70.*—(1) The Tribunal must consider any application made under rule 69 (application for reconsideration).*

(2) If the Tribunal considers that there is no reasonable prospect of the judgment being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application must be refused and the Tribunal must inform the parties of the refusal.

(3) If the application has not been refused under paragraph (2), the Tribunal must send a notice to the parties specifying the period by which any written representations in respect of the application must be received by the Tribunal, and seeking the views of the parties on whether the application can be determined without a hearing. The notice may also set out the Tribunal's provisional views on the application.

(4) If the application has not been refused under paragraph (2), the judgment must be reconsidered at a hearing unless the Tribunal considers, having regard to any written representations provided under paragraph (3), that a hearing is not necessary in the interests of justice.

(5) If the Tribunal determines the application without a hearing the parties must be given a reasonable opportunity to make further written representations in respect of the application.

Reconsideration by the Tribunal on its own initiative

71. *…"*

3. 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 68).

4. Rule 70 (2) of the 2024 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.

5. 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."

6. 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."

7. 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."

8. In common with all powers under the 2024 Rules, preliminary consideration

under rule 70(1) must be conducted in accordance with the overriding objective which appears in rule 3, 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

9. The Claimant takes issue with the decision to strike out allegation 5.1.1 from the list of issues and with striking out the harassment allegations the Claimant sought to bring under the jurisdiction of s53 of the Equality Act 2010.

Strike out of the claim at paragraph 5.1.1

10. The Claimant takes issue with the strike out of this claim because she argues that I struck out that claim without addressing the case put forward in her submissions sent in on 23 September 2024 and also without taking into account her pleaded case at paragraphs 40 – 47 in her statement of case.

11. I address the point she makes in her covering email to the application that it is not clear whether I considered the document she sent into the tribunal containing her submissions after the preliminary hearing was adjourned.

12. With respect, the whole reason why the last preliminary hearing was adjourned, was to allow the Claimant to provide the submissions she sent to the tribunal. I did not then simply ignore them. I considered the submissions dated 23 September 2023 before handing down the reserved judgment. That was the point of the adjournment and was why I made the findings I did about allegations 5.1.2 and 5.1.3 of the list of issues.

13. Paragraph 5.1.1 of the list of issues says as follows after being clarified at two previous preliminary hearings before the case was allocated to me: *"In 2018 the respondent accepted and made the claimant aware of the Jones complaint. The respondent did not follow their procedure in respect of this complaint."*

14. The wording of this issue is about a single complaint because it says, *"the Jones complaint"*. It is not about multiple complaints.

15. The following of the procedure is also about the singular Jones complaint in 2018. It says, *"The Respondent did not follow their procedure in respect of this complaint."* Again, singular procedure and singular complaint. The Claimant knows this issue is about the procedure for one complaint because it is obviously worded as such.

16. The Claimant says her case is that the Respondent did not provide all of the complaints Jones made.

17. The Claimant explained her case in the 2018 ET proceedings in a case

management agenda at box 2.3. She stated as follows:

"The Claimant's case is that as a result of the publication of the overturned disciplinary finding she has been the subject of multiple complaints, personal attacks and insults. In August 2018, Francis Jones, the Claimant neighbour target the Claimant because of the publication on the internet. He then made a totally false claim against the Claimant to the BSB/the Respondent. The complaint was dismissed. The respondent has provided a copy of the complaint form to the Claimant but has not provided the documents that he supplied in support of his complaint. The Claimant has requested the documents from the Respondent, but the respondent has not responded."

18. Consequently, the Claimant knew of the Jones complaint, was aware of how it had been handled and knew the result, namely that it had been dismissed. This is the factual circumstance that gives rise to allegation 5.1.1 about the singular Jones complaint and the singular Jones complaint procedure.

19. If the Claimant thought that was handled in a way that was improper or discriminatory, she could and should have said so at that time and she failed to. Clearly, the cause of action was known to her about that complaint because it was mentioned in her 2018 ET1 dismissed by Judge Broughton.

20. The remainder of the Claimant's case about what she discovered because of what she alleged was the late disclosure of documents about the Jones complaint and others, are still all live issues that have not been struck out with the exception of being brought as harassment claims under s53 Equality Act 2010. I therefore fail to see why the Claimant is seeking a reconsideration of the strike out judgment on those grounds.

21. Paragraphs 5.1.2 – 5.1.12 all include allegations of discrimination about the withholding of complaint material and documents until May 2023 and some subsequent behaviours complained about in June 2023. It is a matter of fact for determination of the Tribunal about how that material, to the extent it contained additional complaints the Claimant may not have been aware of, was dealt with, whether that material was dealt with in a discriminatory way and/or whether those issues have been brought in time.

22. Consequently, the Claimant's case has been addressed because I decided not to strike out allegations 5.1.2 onwards. For anything other than s53 (3) harassment claims.

23. The Claimant alleges that I failed to address the most important part of the Claimant's case and that is said to be that the High Court and previous Employment Tribunal proceedings were invalidated because of the Respondent's alleged non-disclosure of crucial material.

24. I did not consider paragraph 17 of the Claimant's submission to be relevant or indeed serious. I say this for the following basic reasons, which the Claimant must in my view already know or ought reasonably to know considering she is a barrister:

24.1. I have absolutely no power to invalidate or in any way vary proceedings previously conducted in the High Court for any reason that have then settled part way through.

24.2. I also have no power to go behind a Judgment of the Employment Tribunal made by another Judge who heard evidence and made his decision accordingly when there has been no application to set aside or vary that judgment and no successful appeal about it.

24.3. The Claimant makes comment about these issues discussing how Judge Broughton's decision was wrong and that she appealed it and in her view the appeal had very good prospects of success. However, that appeal was settled as I found in my judgment. It was therefore not relevant to comment about items that are the Claimant's untested opinion after she chose to settle that appeal.

24.4. Finally, the Claimant stated at the start of paragraph 17: *"It is possible to go further to point out that the decision of the previous Tribunal was appealed and point out that there was a very good prospect of success. However, it is not necessary to go any further for the reasons set out above."*

25. Consequently, paragraph 17 is, at best, a rhetorical statement commenting about a judgment that was not successfully appealed and where there has been no application to vary it or set it aside, combined with a statement about how the withholding of documents were grounds for re-opening two sets of previous proceedings, where they have not been reopened and I have no power to reopen them.

26. The Claimant was aware at the time about how the Jones complaint was handled. She had the opportunity to raise that point back in 2018 when she submitted her previous Tribunal complaint and she failed to.

27. The Tribunal considered out of time points and dismissed all the claims as a result and there was no successful appeal or variation of that judgment. It therefore stands.

28. Consequently, any argument now about 5.1.1 is issue estopped because of the time point and, even though the facts relied upon in the 2018 ET proceedings and in this claim are the same, I found there was no cause of action estoppel but the claim still could and should have been brought when she presented her 2018 ET1.

29. I can identify no factual error in the findings that are relevant to the decision to strike out the paragraph 5.1.1 claim as an abuse of process under Henderson and because it is issue estopped.

30. If the Claimant thinks I have got the law wrong, then that is a matter for the EAT, not reconsideration.

31. The Claimant also alleges that there is a material factual error in the outline background to the case.

32. That paragraph is a summary paragraph to set the scene. The paragraph states that opposing solicitors complained about the Claimant and professional misconduct proceedings were subsequently organised. The Claimant accepted in her reconsideration application Mr. Cunliffe was a solicitor. What I have said therefore isn't factually incorrect.

33. To the extent that paragraph included reference to neighbours, I make no specific reference to any specific neighbour complaints, their cause or what they resulted in. This paragraph in no way determines any point about the merits of any of the live claims. It was not material to my decisions; I was simply setting the general background so that any reader could understand the neighbourhood of the judgment.

34. I then move to the third and final point of the reconsideration application, namely, the legal challenge to the striking out of the s53 claims. This is essentially a legal argument and therefore I only comment briefly about it.

35. In my judgment, the law is already clear about s53 (3). It only protects a person from conduct complained about *in relation to conferment* which, in my view, is deciding whether to register the Claimant as a barrister, renew/continue her registration or decline the registration or continuation of registration.

36. The Respondent was not acting in that capacity when considering, investigating and/or deciding any of the complaints made against the Claimant by others. It was instead acting in its investigation and enforcement capacity. Its conduct alleged to be harassment, was therefore *in relation to investigation, standards and enforcement* - not conferment.

37. The Claimant comments that there would therefore be no other avenue for her to pursue the complaint. I make no comment about that because the Tribunal's jurisdiction is about Part 5 - Work and not any of the other parts of the Equality Act 2010 that may apply to this situation because the nature of the parties, the allegations or otherwise.

38. The EAT is the correct forum for airing any arguments that I have applied the law incorrectly.

Conclusion

39. 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. It is not in the interests of justice to do so. The points of significance were considered and addressed. The application for reconsideration is refused.

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Judgment approved by:

Employment Judge G Smart

On: **11 March 2025**