EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: Y

JUDGMENT

The respondent's application dated 16 April 2024 for reconsideration of the judgment sent to the parties on 21 March 2024 is refused and the respondent's application dated 3 May 2024 for reconsideration of the judgment and reasons sent to the parties on 19 April 2024 is refused.

REASONS

1. I have undertaken preliminary consideration of the respondent's applications for reconsideration of the judgment and written reasons. That application is contained in emails dated 16 April 2024 and 3 May 2024. The respondent then made further submissions in emails dated 8 and 31 May 2024. I have also considered comments provided from the respondent in an email dated 8 May 2024. References in square brackets (e.g. [25]) are references to paragraph numbers from the reasons promulgated with the judgment.

The Law

2. 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).

3. 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.

4. 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."**

5. 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."**

6. In **Ebury Partners UK Limited v David [2023] EAT 40** the EAT put it this way in 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."**

7. 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.

The Applications

8. The majority of the points raised by the respondent 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 respondent wishes it had gone in its favour.

9. That broad principle disposes of almost all the points made by the respondent. However, there are some points the respondent makes which should be addressed specifically.

10. The respondent submits that as notice pay and holiday had already been paid to the claimant before the proceedings were started, these matters were not in issue to be considered by the Tribunal at the final hearing. The issues for determination were discussed with the parties at the outset of the final hearing and were agreed as the issues for the Tribunal to consider as recorded in the written reasons. Whilst the claimant accepted a payment had been made to her on 31 August 2023, she said she did not know exactly what the payment was in respect of and how it was comprised. At the final hearing the notice pay element of that payment was considered and the claimant then confirmed she had received her notice pay of £1,666.67 which she was entitled to. Holiday pay remained in issue, both parties having calculated the number of days of holiday pay due differently. It was only during the final hearing that this issue was resolved with the number of days holiday pay found due being different to those contended for by each party. These were issues agreed by the parties to be for determination by the Tribunal at the final hearing. The claims were determined in the claimant’s favour and accordingly the judgment wording stands.

11. The respondent's application email dated 3 May 2024 states the written reasons suggest Y1, Director of the respondent, is guilty of sexual misconduct and that “This cannot be allowed to stand”. The respondent in their further email dated 8 May 2024 requests that any reference to sexual misconduct is removed from the written reasons on the basis that “They submit this is not true.” The written reasons make no findings as to the truth or otherwise of the allegations made by the claimant. The written reasons record the finding of fact that the allegations were made by the claimant which informed the method by which the respondent communicated with the claimant during the redundancy consultation process, this being relevant to the issue of fairness. The relevant emails

between the parties in this regard are referenced at [26].

Conclusion

12. Having considered all the points made by the respondent I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The points of significance were considered and addressed at the hearing. The application for reconsideration is refused.

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Employment Judge Fearon

DATE: 7 June 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON

10 June 2024

FOR THE TRIBUNAL OFFICE