EMPLOYMENT TRIBUNALS

Claimant:	Mr Wayne Cummings
Respondent:	Fresh Property Group Limited
Heard at:	**Exeter Employment Tribunal**
On:	**30 April, 1 and 2 May 2025**
Before:	**Employment Judge Volkmer**

DECISION

The Claimant's application dated 13 June 2025 for reconsideration of the judgment sent to the parties on 31 May 2025 is refused because there is no reasonable prospect of the original decision being varied or revoked.

REASONS

1. There was a preliminary hearing for case management on 23 April 2024 before Employment Judge Roper. The Case Management Orders determined at that hearing, along with the List of Issues was sent to the parties on 23 April 2024 (the "April 2024 CMO"). The April 2024 CMO set out a List of Issues to be decided in the claim.

2. Following a strike out warning, complaints against seven Respondents were struck out by Employment Judge Roper on 9 May 2024.

3. A further public preliminary hearing took place on 12 and 13 June 2024 before Employment Judge Smail, who determined that the Claimant was not disabled at the relevant time (as set out in a judgment sent to the parties on 26 July 2024).

4. A further public preliminary hearing was listed to decide the Claimant's amendment application, strike out, a deposit order and to consider further case management. This took place on 29 August 2024 before Employment Judge Smail. The

Claimant's amendment applications were dismissed and the Claimant's claims of sex discrimination relating to August 2020 were found to be out of time. The judgment was sent to the parties on 11 September 2024. In a case management order sent to the parties on the same date (the "September 2024 CMO"), Employment Judge Smail stated that the unfair dismissal issues to be determined were set out in the April 2024 CMO of Employment Judge Roper.

5. The final hearing took place on 30 April, 1 and 2 May 2025. I reserved judgment and the reserved judgment and reasons were sent to the parties on 31 May 2025 (the "Reserved Judgment"). I dismissed the Claimant's unfair dismissal complaint.

6. It is noted that the Claimant points out a typographical error at paragraph 24 of the Reserved Judgement. The paragraph refers to "Mr Cronin". This is a typographical error and was intended to refer to Mr Cordin.

7. The Claimant sent an email to the Tribunal which he stated was a reconsideration application on 13 June 2025. There were no grounds for the reconsideration application set out in the email. The email attached the documents before the Tribunal as well as one additional document, document 85. This was a list of issues which the Claimant stated had been sent to the Tribunal on 20 June 2024. He also attached a 97 page document by way of reconsideration application. The format of the document is commentary on each paragraph of the reserved judgment. Where the Claimant simply expresses that he disagrees with a finding of fact, which he does at length, I will not deal with it as a ground of reconsideration.

8. It is not proportionate to provide a line by line response to the Claimant's 97 page document. I have summarised the extremely lengthy document into categories of challenge made by the Claimant as follows:

    a. he disagrees with findings of fact, writing at length about his own position regarding the relevant facts;
    b. he alleges there is some form of bias on the basis that:
        i. the Respondent's bundle is referred to as the Main Bundle and is used for most of the references, and that the Claimant's bundle was unfairly ignored;
        ii. the Respondent is described in language indicating that they were reasonable and the Claimant is not;
    c. he complains that without prejudice documents were disregarded. The Claimant says he did not agree to discussions being without prejudice. He describes settlement offers made by the Respondent as blackmail. He says ignoring information about conciliation attempts through ACAS makes the judgment unfair;
    d. he says that the timescale for the hearing was too short and he did not have enough time to prepare;
    e. the Respondent did not call all of the witnesses needed and this was unfair;
    f. not all of the facts/evidence the Claimant considered were relevant were considered by the judge and/or set out in the judgment;
    g. the Claimant should have had access to his laptop during witness evidence because the Respondent's barrister had access to hers throughout.

The law on reconsideration

9. Rules 68 to 70 of the Employment Tribunal Procedure Rules 2024, make provision for the reconsideration of tribunal judgments as follows:

> *"**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."*

10. Under these rules, the Tribunal therefore has discretion to reconsider a judgment if it considers it is in the interests of justice to do so. All case law set out below was determined in relation to previous versions of the Tribunal Procedure Rules, but I consider can be applied to the 2024 rules since the wording is substantially the same.

11. Under rule 70(2), the judge must dismiss the application if they consider that there is no reasonable prospect of the original decision being varied or revoked. It is a mandatory requirement for a judge to determine whether there are reasonable prospects of a judgment being varied or revoked before seeking the other party's response and the views of the parties as to whether the matter can be determined without a hearing, potentially giving any provisional view, and deciding how the reconsideration application will be determined: *T.W. White & Sons Ltd v White,*

UKEAT/0022/21.

12. In *Outasight VB Ltd v Brown UKEAT/0253/14* the EAT held (at [46-48]) that the Rule 70 ground for reconsidering judgments (the interests of justice) (which was the predecessor under the Employment Tribunal Rules of Procedure 2013) did not represent a broadening of discretion from the provisions of Rule 34 contained in the replaced 2004 rules. HHJ Eady QC (as she then was) explained that the previous specified categories under the old rules were only examples of where it would be in the interests of justice to reconsider. The rules removed the unnecessary specified grounds, leaving only what was in truth always the fundamental consideration: the interests of justice. This means that decisions under the old rules remain pertinent under the new rules.
13. The key point is that it must be in the interests of justice to reconsider a judgment. That means that there must be something about the case that makes it necessary to go back and reconsider, for example a new piece of evidence that could not have been produced at the original hearing or a mistake as to the law. It is not the purpose of the reconsideration provisions to give an unsuccessful party an opportunity to reargue his or her case. If there has been a hearing at which both parties have been in attendance, where all material evidence had been available for consideration, where both parties have had their opportunity to present their evidence and their arguments the interests of justice are that there should be finality in litigation. An unsuccessful litigant in such circumstances, without something more, is not permitted to simply reargue his or her case, to have 'a second bite at the cherry' (per Phillips J in *Flint v Eastern Electricity Board [1975] IRLR 277*).

14. The expression 'necessary in the interests of justice' does not give rise to an unfettered discretion to reopen matters. The importance of finality was confirmed by the Court of Appeal in *Ministry of Justice v Burton and anor [2016] EWCA Civ 714* 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.*"

15. Rule 70 gives the Tribunal a broad discretion to determine whether reconsideration of a decision is appropriate. Guidance for Tribunals on how to approach applications for reconsideration was given by Simler P in the case of *Liddington v 2Gether NHS Foundation Trust UKEAT/0002/16/DA*. Paragraphs 34 and 35 provide as follows:

> "*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 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.
35. 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."

Assessment of the application under Rule 70(2)

16. The Claimant has provided a historic list of issues (document 85). That was not relevant to the final hearing. It had been previously determined that the List of Issues to be determined at the final hearing was that set out in in the April 2024 CMO of Employment Judge Roper. Employment Judge Roper's List of Issues was the List of Issues set out in the Reserved Judgment and the basis of the determinations made.

17. The appropriate route for the Claimant to take, if he disagrees with findings of fact is to bring an appeal. The role of the Tribunal is to make a determination of its findings of fact, on the balance of probabilities, based on the evidence before it. A reconsideration is not an opportunity to re-open or re-argue the case. It is not an opportunity to have a second bite of the cherry.

18. The Claimant alleges there is some form of bias on the basis that the Respondent's bundle is referred to as the Main Bundle and is used for most of the references, and that the Claimant's bundle was unfairly ignored. There is no substantive basis for alleging that I, as the judge, would be biased against the Claimant. Use of the term "Main Bundle" to refer to a bundle of documents which was agreed between the parties, as opposed to the additional documents provided by the Claimant and which were not agreed by the Respondent is not evidence of bias. It was simply more practically convenient to refer to a bundle which had page numbers, than one that did not. For that reason, where a document was duplicated in both bundles, it was referred to by the "Main Bundle" reference.

19. The Claimant further alleges bias on the basis that the Respondent is described in language indicating that they were reasonable, and the Claimant was not. The task of the Tribunal in assessing the Claimant's unfair dismissal complaint was to assess and make findings as to whether the dismissal was within the reasonable range of responses. When the Tribunal determined the Respondent's conduct was reasonable and the Claimant's was not in each instance, that is a finding which the Claimant does not agree with, but it is not evidence of bias.

20. The Claimant complains that without prejudice documents were disregarded. The Claimant says he did not agree to discussions being without prejudice. He describes settlement offers made by the Respondent as blackmail. He says ignoring information about conciliation attempts through ACAS makes the judgment unfair. The policy reason behind "without prejudice privilege" is to allow parties to have frank settlement discussions about the case on the basis that it is "off the record", which is to say that they are not then referred to in open

proceedings. Even if a settlement offer is made and not accepted, and there has been no agreement from the Claimant that this interaction is without prejudice, it is nevertheless covered by without prejudice privilege. ACAS conciliation seeks to resolve the dispute between the parties and is as such covered by without prejudice privilege. Only if both parties consent, can this be put before the Tribunal. No exception to the without prejudice rule has been identified by the Claimant. A bare assertion that a settlement offer constitutes blackmail does not mean that it does from a legal perspective. It is entirely appropriate to disregard without prejudice documents or references to settlement discussions when one party has not consented to lift that privilege being raised. Whether parties engage in ACAS conciliation and attempt to resolve the dispute, or refuse to do so, does not affect the assessment of whether a dismissal was fair or unfair.

21. The Claimant says that the timescale for the hearing was too short, and he did not have enough time to prepare. The hearing length and dates were notified to the parties on 29 August 2024. Both the length of time to prepare and the length of the hearing were proportionate and reasonable for the matters in question.

22. The Claimant says that the Respondent did not call all of the witnesses the Claimant wanted to question, and this was unfair. It is for the Respondent to decide which witnesses to call. Ultimately, they called the dismissal decision maker and the appeal decision maker which appear to the Tribunal to be the relevant witnesses in relation to an unfair dismissal claim. It is the Respondent's decision which witnesses it calls to advance its own case.

23. The Claimant complains that not all of the facts/evidence the Claimant considered were relevant were set out in the judgment. Given the hearing length and volume of documentation, which vastly exceeded the original page limit given to the parties of 300 pages, I informed the parties that I would only be able to review those documents to which I was referred in the bundle. I did so. I did not refer in the judgment to all of the documents I read: only those I considered relevant to what I needed to determine as set out in the List of Issues. All of the relevant facts in relation to the unfair dismissal decision are covered in the judgment. Matters relating to historic matters were only covered to the extent that they are relevant. The Claimant is misconceived in his view regarding the relevance of those historic matters to his unfair dismissal complaint.

24. The Claimant complains that he should have had access to his laptop during witness evidence because the Respondent's barrister had access to hers throughout. The Claimant had access to his laptop at all times (if he wished) other than when he was on the witness stand, when he was only able to refer to a clean copy of the witness statements and bundles. That is the normal procedure. Witness evidence is intended to be the evidence a witness can give from their own recollection. There is no need to refer to a laptop in this regard. This does not affect the fairness of the hearing.

25. As set out in Liddington, a 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. Any asserted error of law is to be corrected on appeal.

26. Having carefully considered the Claimant's application and bearing in mind the importance of finality in litigation and the interests of both parties, I am not satisfied that there is any reasonable prospect of the Judgment or any part of it being varied or revoked.

Approved by
Employment Judge Volkmer
Date: 2 July 2025

SENT TO THE PARTIES ON
4th July 2025

Phoebe Hancock
FOR THE TRIBUNAL OFFICE