Case Number: 3312550/2022

EMPLOYMENT TRIBUNALS

Claimant: Ms A Lovell

Respondent: National Highways Limited

JUDGMENT

The claimant's application dated **29 and 31 July 2025** for reconsideration of the judgment sent to the parties on **24 July 2025** is refused.

REASONS

1. The claimant has applied for a reconsideration of the reserved judgment sent to the parties on **24 July 2025** under r.68 of the Employment Tribunal Procedure Rules 2024. Having considered the application under r.70(2), the employment judge considers that there is no reasonable prospect of the judgment being varied or revoked on those grounds. The application for a reconsideration is rejected.

2. The procedure for an application for a reconsideration is set out in r.70 Procedure Rules 2024. It is a two stage process. If the employment judge who chaired the tribunal panel which made the judgement considers that there is no reasonable prospect of the original decision being varied or revoked the application shall be refused under rule 70(2) and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response and seeking the views of the parties on whether the application can be determined without a hearing. That notice may set out the Judge's provisional views on the application. Unless the judge considers that a hearing is not necessary in the interests of justice, if the application is not rejected under rule 70(2), then the original decision shall be reconsidered by the full tribunal who made the original decision.

3. Therefore, in response to the claimant's request of 12 August 2025, the decision recorded in this Judgment is a decision of Employment Judge George alone under rule 70(2) because that is the standard procedure.

4. The power to reconsider a judgement under rule 70 can only be used if it is necessary to do so in the interests of justice. That is apparent from the wording of the rule itself and, as it was held, by HH Judge Shanks in Ebury Partners UK Limited v Acton Davies [2023] IRLR 486 EAT 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 has been denied a fair and proper opportunity to present his case, the jurisdiction should not be invoked to correct to suppose that 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." (Para 24 of the judgement of HHJ Shanks).

5. By our reserved judgment, the Tribunal unanimously upheld two complaints, dismissed three complaints by a majority (the employment judge being in the minority) and dismissed the other complaints unanimously. The claimant's reconsideration application is contained in her application dated 29 July 2025 and further submissions dated 31 July 2025; both have been taken into account in this decision.

6. The basis on which the claimant argues that it would be in the interests of justice to reconsider the reserved judgment in respect of the majority decision are:

   6.1. Potential collusion and bias between the two lay members affecting the judgment;

   6.2. Evidence given by the respondent's witness, Ms Webber, was misleading and (in one respect) inconsistent with contemporaneous documentary evidence;

   6.3. A passage in her own statement (i.e. the claimant's) had been misinterpreted;

   6.4. (in the letter dated 31 July 2025) that insufficient weight had been given to her explanations for late completion of work on the M27 project and to evidence in the hearing file that Ms Webber had had a negative attitude towards her from the outset.

7. The 3 points set out in para.6.2 to 6.4 above are points which either were or could have been argued at the original hearing. There was no procedural mishap or other reason why they could not have been raised (if, in fact, they were not). It is not necessary for the Tribunal to set out in their reasons all evidence in the case and all of their findings, only the principle findings which allow the parties to understand the reasons why the complaints have succeeded or failed. These arguments do not raise an arguable case that there should be a reconsideration.

8. By the argument which I set out in para.6.1 above, the claimant argues that she has not had a fair determination of her case on the evidence because of apparent bias on the part of the majority non-legal members. The question I have to consider at this initial stage under rule 70 is whether there are no reasonable prospects of the original decision being varied of revoked on that ground. If I conclude that there are reasonable prospects of the judgment being varied, then a hearing before the original full panel (including the non-legal members) would have to be convened and, if the reconsideration application were successful at that stage, the full panel of the Tribunal would have to consider whether it was necessary for the non-legal members (or, potentially, the entire panel) to recuse itself. I only outline that by way of explanation that I am not considering a recusal application but am consideration whether the claimant has raised an arguable case that the judgment in her case was flawed because of apparent bias on the part of Mr Hough and Mr Wharton.

9. The test to be applied in determining bias is as stated by Lord Hope in Porter v Magill [2002] 2 AC 357, at para 103 and recited by Pill LJ in Lodwick v London Borough of Southwark at para 18: whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased.

10. The right of litigants to a fair hearing before an impartial arbiter is fundamental: Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451 CA. At para.25 of that case, the court said this about what might amount to a justifiable basis for an objection on grounds of apparent bias,

> "We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (…). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (…); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal."

11. The reasons she puts forward do not meet even the modest threshold of an arguable case that the fair-minded and informed observer would consider there was a real possibility of bias. I say that for the following reasons:

    11.1. The expressed concern that "bias – whether explicit or implicit – can affect judicial processes where non-legal people are involved in key decisions" at its height seeks to extrapolate from publically available research that the decision of specific non-legal members was tainted with bias against "a British-born woman of colour" when they are not alleged to have said or done anything during the tribunal hearing or otherwise from which unconscious bias could be inferred. It is clear from Locabail that this is not a soundly based argument.

    11.2. The analysis that the non-legal members agreed with each other and supported the respondent's position and disagreed with mine is not at all suspicious when the reserved judgment set out to explain where our respective findings on the evidence differed and how that fed into our different conclusions. Majority decisions may be less common than unanimous decisions and it may be the case that where there are majority decisions it is more common for one of the non-legal members to be in the minority. However, as explained in detail in the reserved judgment, the different members of the tribunal reach different findings of fact on the evidence. That is no basis for an argument that they did not carry out their primary function of deciding the case on the evidence applying the law in accordance with their respective judicial oaths.

    11.3. Furthermore, the claimant appears to overlook that there were other complaints on which the panel unanimously found in her favour and yet others on which the panel unanimously rejected her claim. That suggests that the several members of the panel approached their tasks conscientiously and objectively and were not affected by collusion or bias.

    11.4. The quotation from Locabail also makes clear that the professional backgrounds of the lay members is not, in general, a sound basis for an allegation of bias. The particular points made are that the employee-side non-legal member was previously a former police chief superintendent and the employer-side non-legal member was a parish councillor sitting on his council's Highways Committee at the time of the period covered by the events in question. Mr Hough has been approved to sit as an employee-side non-legal member and there is nothing in what the claimant says which would cause a fair-minded and informed observer to think that his impartiality was undermined given the issues in the present case. As to Mr Wharton, Parish Councils do not have responsibility for motorways. Even if the area for which Datchet Parish Council is responsible is near to the M4 motorway, which was upgraded to a Smart Motorway in a scheme for which Ms Webber handled communications, no fair-minded observer would think that gave rise to any concerns about the possibility of bias on the part of one of the parish councillors. It is not at all clear what is suggested here – had Mr Wharton known Ms Webber then, no doubt, he would have declared that. It is a basic conflict check the members of the panel are always alert to. The communications on the M4 motorway were entirely peripheral to the issues and it was common ground that there had been problems.

12. For those reasons, the allegation of bias does not cause me to think that there are reasonable grounds to think that the judgment would be varied or revoked. The reconsideration application is refused under rule 70(2).

Date: 9 November 2025

Approved by

Employment Judge George

JUDGMENT SENT TO THE PARTIES ON
10 November 2025

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FOR THE TRIBUNAL OFFICE