THE EMPLOYMENT TRIBUNALS

BETWEEN

Mr Seungbeom Roh ***Claimant***

AND

Grandline Studio Ltd ***Respondent***

DECISION OF THE EMPLOYMENT TRIBUNAL
UPON THE RESPONDENT'S APPLICATION FOR RECONSIDERATION OF THE JUDGMENT OF 24 SEPTEMBER 2018

1. At a hearing conducted on 24 September 2018, I ordered the Respondent to pay to the Claimant a total of 3 months' net pay. The annual gross salary amounted to £35,000 so that the gross salary for 3 months was £8,750. However, there was no reliable indication as to what should have been the net pay so I provided for the Respondent to have its accountants certify the correct net pay for 3 months but for the Respondent to pay an interim payment within 14 days and the balance when its accountants had certified what the net sum properly should be. The interim payment was to be £6,600 with credit being given for £2,107 which the Respondent had paid to Smith Stone Walters, UK Immigration Practice, upon providing to the Claimant's solicitors proof that such sum was paid to that firm in satisfaction of its quotation number 2659 and dated 26 April 2017.

2. The judgment was sent to the parties on 3 October 2018. By a communication received by the Employment Tribunal on 17 October 2018, the Respondent applied for that judgment to be reconsidered. The application was made within time but, for reasons that in no way reflect on the Respondent, the application is only being dealt with now. I apologise to the parties for the delay in dealing with the same.

3. The application is made on the grounds "of new evidence becoming available that alters the total amount of monies owed to the claimant". The "new" evidence comprises:

    a) The Respondent's sickness policy;

    b) Two invoices from Smith Stone Walters;

    c) Two copies of bank statements from the Respondent showing that these invoices were paid.

4. Separate explanations were given for the late production of the Sickness Policy and the invoices plus bank statements for the payments to Smith Stone Walters. In respect of the sickness policy, the Respondent makes reference to the fact that they had explained at the Hearing that they had a policy in place but had not been able to bring it. The reason given in their application for their inability to produce it at the Hearing is as follows:

> *Due to our inexperience, we were not able to locate the physical copy in time as we had recently downsized our office and the digital copy was inaccessible due to our computer server being down, the claimant was responsible for maintaining our computer systems, and they have been down since he left the company.*

5. It should be noted that the Claimant's employment ended on 31 March 2018. That means the Respondent is asserting that, at the date of the Hearing, their computer systems had been down for 6 months less 6 days.

6. In respect of the payments made to Smith Stone Walters, it is said that:

> *… after consulting with Metric Accountants in regards to the payslips, after a full review of our accounts, we were made aware of additional payments that were made in relation to the claimant's Visa and Sponsorship that are liable to be deducted from the claimant as stated in employment contract, section 15 and accepted by the claimant and Judge at the tribunal.*

7. The Claimant through his solicitors offered his observations on the application. He began by referring to the direction given by Employment Judge Elliot on 6 September 2018:

> *On or before 11 September 2018 the parties are to send to each other (not to the Tribunal) copies of all documents they intend to rely on at the hearing. If they fail to do so, they may only rely on a document if the [Claimant] gives permission at the hearing.*

The reason for the word [Claimant] being placed in square brackets in that quotation may have something to do with the fact that the letter from the Tribunal dated 6 September 2018 informing the parties of the directions made by Employment Judge Elliot failed to identify the person who might give permission at the hearing for a party to rely on a document not disclosed to the other. However, the original handwritten direction of Employment Judge Elliot, which was typed leaving out a work, had the person giving permission to be the judge. I can only assume that some mischievous gremlin is at work not only causing the word "judge" to be omitted in the typed direction sent to the parties but also causing both the word "Claimant" to be inserted instead of "judge" in the square brackets and that word and the highly fanciful proposition of one party having the power to permit reliance by either party on undisclosed documents not be noticed by the signatory of the letter!

8. The Claimant then asserts that one of the requirements to succeed on the ground of availability of new evidence is that the new evidence must not have been obtainable with reasonable diligence for use at the original hearing. He goes on to argue that no reasonable diligence had been applied by the Respondent.

9. The Claimant perhaps is a little brief in his assertion. There is but one principle to be applied that permits a Tribunal to reconsider its judgment and that is set out in Rule 70 of the Rules to be found in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:

> *70. A 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. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.*

10. The previous Rules did provide five grounds on which a Tribunal could review its decision and one of those was, indeed, 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.

11. However, in the EAT case of Outasight VB Limited v Mr L Brown x Appeal No. UKEAT/0253/14/LA, HH Judge Eady QC commented on the new test in the following manner:

> 28. The test for reconsideration under the **2013 Rules** is thus straightforwardly whether such reconsideration is in the interests of justice. This can be contrasted with the rather more complex system laid down by the provisions of Rules 34 to 36 of the 2004 ET Rules, which governed the review of Judgments and other decisions; in particular, Rule 34(3):
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> > *"Subject to paragraph (4), decisions may be reviewed on the following grounds only —*
> > *(a) the decision was wrongly made as a result of an administrative error;*
> > *(b) a party did not receive notice of the proceedings leading to the decision;*
> > *(c) the decision was made in the absence of a party;*
> > *(d) new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time; or*
> > *(e) the interests of justice require such a review."*
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> 29. I note in passing that the ET refers to this provision as Rule 34(4) . That seems to be a simple error of transcription and I cannot see that anything turns on that mistake.
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> 30. Rule 34(3)(d) of the **2004 Rules**, "New evidence", reflected the well-known principles for the admission of new evidence on appeal in civil litigation set down by the Court of Appeal in Ladd v Marshall. Under the **2013 Rules**, instead of the five possible grounds for holding a review, there is only one ground on which a Judgment can be reconsidered: the interests of justice. That said, as can be observed, Rule 34(3)(e) also allowed for the interests of justice to stand as a ground for a review. There would not seem to be any immediately obvious reason why cases decided on that basis — the interests of justice — under the old Rules would not still be relevant to cases under the new. Moreover, although there were formally specific grounds in the previous roles as well as the more general interests of justice ground, I cannot see why one of the former, specifically identified grounds, should not form the basis of an application for a reconsideration of a Judgment in the interests of justice. That is indeed what happened in respect of some of the new evidence cases under Rule 34(3)(d) (or its predecessors) to which I have been referred in argument; see, for example, *Flint v Eastern Electricity Board [1975] ICR 395* QBD and *General Council of British Shipping v Deria [1985] ICR 198* EAT.
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> 31. Under the previous Rules, the "interests of justice" ground was described as "a residual category of case designed to confer a wide discretion on [Employment] Tribunals", Flint per Phillips J at page 401. It was seen as possibly allowing evidence to be adduced in circumstances where the requirements of paragraph (d) of Rule 34(3) were not strictly met, where there might be some special additional circumstance or mitigating factor.
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> 32. As for what the interests of justice might be, in Flint Phillips J stated as follows:
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> > *"... First of all, they are the interests of the employee. Plainly from his point of view it is highly desirable that the evidence should be given, because it follows, from what I have already said, that there is at least some, perhaps good, chance that if it is given his case will succeed. One also has to consider the interests of the employers, because*

> *it is in their interests that once a hearing which has been fairly conducted is complete, that should be the end of the matter. Although this is a case where one's sympathy is with the employee, because it is his claim for a redundancy payment and the employers have more money than he has, it has to be remembered that the same principles have to be applied either way because one day a case may arise the other way round. So, plainly, their interests have to be considered.*
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> *But over and above all that, the interests of the general public have to be considered too. It seems to me that it is very much in the interests of the general public that proceedings of this kind should be as final as possible; that is should only be in unusual cases that the employee, the applicant before the tribunal, is able to have a second bite at the cherry. It certainly seems to me, hard though it may seem in the instant case, that it would not be right that he should be allowed to have a second bite at the cherry in cases which are perfectly simple, perfectly straightforward, where the issues are perfectly clear and where the information that he now seeks leave at a further hearing to put before the tribunal has been in his possession and in his mind the whole time. It really seems to me to be a classic case where it is undesirable that there should be a review." (page 404E — 405A)*

> 33. The interests of justice have thus long allowed for a broad discretion, albeit one that must be exercised judicially, which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation.

12. Guided by these principles, I take the view that nothing that has been advanced by the Respondent goes anywhere close to persuading me that the evidence it wishes me to review and thus reconsider my judgment was evidence which could not, with reasonable diligence, have been known of or foreseen at the time of the Hearing. The sickness policy was known about and mentioned at the Hearing as was the contractual provision requiring the Claimant to repay "any and all fees associated to Visa sponsorship and other related costs paid by" the Respondent in the event that he left the company, as he did, before his two year Tier 2 Visa expired.

13. I echo the words of HH Judge Eady QC in paragraph 33 of her judgment quoted above.

14. I refuse the application for reconsideration.

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EMPLOYMENT JUDGE STEWART
On: 9 January 2019

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DECISION SENT TO THE PARTIES ON

10 January 2019

FOR SECRETARY OF THE TRIBUNALS