THE EMPLOYMENT TRIBUNALS

Claimant: **Mr A Hargreaves**

Respondent: **EE Limited**

Heard at: **North Shields Hearing Centre** **On:** **Monday 25th February 2019**

Before: **Employment Judge Arullendran**

Members:

Representation:

Claimant: **Attendance not required**
Respondent: **Attendance not required**

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The application for reconsideration is refused and dismissed pursuant to rule 72 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, because there is no reasonable prospect of the original decision being varied or revoked.

REASONS

1. The claimant submitted an application for a reconsideration of the judgment promulgated on 5th January 2019, the application itself consisting itself of ten pages plus fifteen pages of documents, all of which was copied by the claimant to the respondent.

2. The main argument put forward by the claimant for the reconsideration is that he is now able to produce e-mails between himself and his trade union which proves that delays were caused by the trade union and the respondent which, he claims, led to his claim being submitted out of time.

3. The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, provides as follows:

"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 interest 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.

71 Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within fourteen days of the date in which the written record, or other written communication, of the original decision was sent to the parties or within fourteen days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

72(1) an employment judge shall reconsider any application made under rule 71. If the judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused 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 to the application by the other parties and seeking the view of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.
(2) if the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under (1), thus a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations."

4. The previous Employment Tribunal Rules (2004) provided a number of grounds on which a judgment could be reviewed (now called a reconsideration). The only ground in the 2013 rules is that the judgment can be reconsidered where it is necessary in the interests of justice to do so. However, it was confirmed by Justice Eady in Outasight VB Limited v Brown UKEAT/0253/14/LA that the guidance given by the Employment Appeal Tribunal in respect the previous Rules is still relevant guidance in respect of the 2013 Rules and, therefore, I have considered the case law arising out of the 2004 rules.

5. There is a public policy principal that there must be finality in litigation and reviews or reconsiderations are a limited exception to that principal. In the case of Stephenson v Golden Wonder Limited 1977 IRLR474 it was made clear that a review (now a reconsideration) is not a method by which a disappointed litigant gets a "second bite of the cherry". Lord Macdonald said that the review provisions were "not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence produced which was available before". Employment Appeal Tribunal went on to say in the case of Fforde v Black EAT68/80 that this ground

does not mean "that in every case where a litigant is unsuccessful is automatically entitled to have the Tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in even more exceptional cases where something has gone radically wrong with the procedure involving the denial of natural justice or something of that order.".

6. "In the interests of justice" means the interests of justice to both sides. The Employment Appeal Tribunal provided further guidance in Reading v EMI Leisure Limited EAT262/81 where it was stated "when you boil down what it said on [the claimant's] behalf it really comes down to this: that she did not do herself justice at the hearing so justice requires that there should be a second hearing so that she may. Now, "justice", means justice to both parties. It is not said, and, as we see it, cannot be said that any conduct of the case by the employers here caused [the claimant] not to do herself justice. It was, we are afraid, her own inexperience in the situation.".

7. The arguments and documents submitted by the claimant have been considered on an ex parte basis without inviting any comments from the respondent, in accordance with Rule 72, as set out above. Thus, I have taken the claimant's application at its highest as revealed by the document sent in by the claimant.

8. I note that the claimant's submitted his ET1 form on 12th September 2018 and the Employment Tribunal sent a notice of hearing and Case Management Orders on 2nd October 2018. The parties were required to exchange lists of documents by 13th November 2018 and agree the Tribunal bundle by 27th November 2018. Copies of e-mails between the claimant and the respondent are present on the Employment Tribunal file with respect to the exchange of list of documents and the requests for copies of documents to be provided and these e-mails date from 7th November 2018 to 19th November 2018 and from 14th January 2019 to 17th January 2019. I note from the record of proceedings that the claimant stated at the preliminary hearing on 22nd January 2019 that he did not fully understand the process for the exchange of documents but had brought some of his documents to the preliminary hearing that morning. The documents provided by claimant at the preliminary hearing were from the Newcastle upon Tyne Hospitals NHS Foundation Trust dated 16th May 2018, 16th August 2018 and 10th December 2018. The claimant has now produced copies of correspondence between himself, the respondent and his trade union as part of his application for a reconsideration. These consist of a document entitled "grounds of resistance" which is undated, an e-mail from the claimant to the trade union dated 28th August 2018, the reply from the trade union dated 31st August 2018 and the appeal outcome letter dated 23rd August 2018. Looking at the dates of these documents, it is clear that they were all available to the claimant prior to the preliminary hearing which was held on 22nd January 2019 and, therefore, these are not new documents which have come to light after the conclusion of the hearing and there is no evidence that the existence of these documents could not have been reasonably known or foreseen at the time of the preliminary hearing, bearing in mind that exchange of lists and documents had already taken place between the parties. In all the circumstances, this appears to be an attempt by the claimant to relitigate the preliminary hearing with a different emphasis

because the claimant did not do himself justice due to his inexperience and/or lack of preparation which is not the purpose of the Rules regarding reconsideration, as set out above. However, even taking the claimant's arguments at their highest, I note that there is no obligation upon a respondent to inform an employee of the three-month time limit for submitting a claim to the Employment Tribunal and there is no evidence here of the respondent deliberately misleading the claimant as to the existence of the three-month time limit from the date of dismissal. It was always for the claimant to find out what his rights were and the existence of a three-month time limit for submitting a claim to the Employment Tribunal. It appears from the documents produced by the claimant in the application for a reconsideration that he was not a member of the trade union at the time of his dismissal and, as such, the trade union cannot be blamed for not advising the claimant about the three-month time limit at the date of his dismissal.

9. Taking the claimant's application for a reconsideration at its highest, and even if I accept that the claimant was disabled at the time of his dismissal, no evidence has been forwarded as to why it would be in the interests of justice to reconsider the finding that there was insufficient evidence that the claimant was prevented by factors outside of his control to either contact ACAS himself or instruct a third party to contact ACAS on his behalf within the initial three-month time limit. Further, no reasons have been provided as to why such medical evidence could not have been provided at the preliminary hearing.

10. It is self-evident that, in the majority of Employment Tribunal cases, the unsuccessful party will not agree with the findings and will consider that it is in the interests of justice that the judgment be reconsidered. However, that is not the purpose of a reconsideration rule. The claimant has not referred to any procedural errors, nor has he linked any of the criticisms raised in his application for a reconsideration to the prospect of the original decision being varied or revoked.

11. More importantly, my original decision is as set out at paragraph 23 of the Reserved Judgment on Preliminary Issue and all the other matters that I have considered from paragraph 24 onwards are in the alternative. However, I note that the claimant has not sought to argue that the finding at paragraph 23 of the Judgment should be reconsidered. As such, even if I was to accept all the arguments put forward by the claimant in his application for a reconsideration, there would still be no prospect of the original decision being varied or revoked as he has not set out any grounds to suggest that I was incorrect in finding that his claim was a nullity from the start and, as it was struck out, there were no further claims which the Employment Tribunal had jurisdiction to hear and, therefore, there were no claims left after the strike out which were capable of being amended. This finding has not been challenged by the claimant and therefore it must stand and I have no option but to find that it is not in the interests of justice to allow the reconsideration because there is no reasonable prospect of the Judgment being varied or revoked and, therefore, the application for reconsideration is refused and dismissed.

EMPLOYMENT JUDGE ARULLENDRAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
.....13 March 2019.....

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