EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4118198/2018

Hearing Held at Aberdeen on 12 April 2019

Employment Judge: Mr A Kemp (sitting alone)

Mr M Bocian	**Claimant Written representations**
Millers of Speyside Limited	**Respondents Written representations**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Claimant's application for reconsideration is refused.

REASONS

Introduction

1. The Claimant claimed unfair dismissal, notice pay and holiday pay. The Respondents challenged whether the Tribunal had jurisdiction on the issue

of time-bar. On 1 March 2019 I issued a Judgment holding that the Tribunal did have jurisdiction.

2. The Claimant seeks a reconsideration of that Judgment by email dated 14 March 2019, which attached a detailed application for reconsideration under rule 71.

3. The Claimant's representatives provided his comments attached to an email dated 28 March 2019. Correspondence occurred between the Tribunal and the Respondents' representative on 29 March 2019 and 4 April 2019, and the parties confirmed that they were content for the issue to be determined on the basis of written submissions.

Submissions for Respondents

4. The Respondents invited the Tribunal to amplify its written reasons and then to reverse its decision. It argued that the scope of reconsideration is extensive enough to allow such a reversal under reference to ***Stonehill Furniture Limited v Phillippo [1983] ICR 556*** and that it may include issues of law under reference to ***Bansi v Alpha Flight Services (Note) [2007] ICR 308.*** It was further argued that the subject matter of the application was fit for reconsideration in the first instance under reference to ***Wolfe v North Middlesex University [2015] ICR 960.*** The application then argued that there had been unjustified conclusions, a misdirection as to evidence, and a failure to give reasons. Further clarification of the Respondents' position was given by email dated 4 April 2019.

Submissions for Claimant

5. The Claimant made his own points in response to the application, which did not address in detail the arguments made, but argued that he would like to proceed to a final hearing.

The Law

6. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 set out the Rules of Procedure in Schedule 1, and those in relation to the reconsideration of judgments are at Rules 70 – 73. The provisions I consider relevant for the present application are as follows:

> **"70 Principles**
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> 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.
>
> **71 Application**
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> 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 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary."

7. When considering such an issue regard must also be had to the overriding objective set out in Rule 2.

8. In ***Serco Ltd v Wells [2016] ICR 768***, the EAT conducted a review of authority and observed that the Rules of Procedure must be taken to have been drafted in accordance with the principles of finality, certainty and the integrity of judicial orders and decisions, which usually means that a challenge to an order should take the form of an appeal to a higher tribunal rather than being reconsidered by another Employment Judge "save in

carefully defined circumstances". Under the heading of "The fundamental principle" the following was stated:

> "24….. I need to recognise that the topics of certainty and finality in litigation and of the integrity of judicial orders and decisions are both antique and far reaching. Even in the relatively narrow statutory jurisdiction of the employment tribunal the topic covers all kinds of orders and directions; examples are to be found in the context of strike out, reconsideration (formerly review) and what is nowadays called 'relief from sanction', all of which might involve variation of previous directions and orders, as well as in cases, like the present, which might be described as 'set-aside cases', where the only issue is variation of a previous direction and order."

9. The issue of reconsideration was specifically in contemplation. The EAT held that a Tribunal should interpret the words 'necessary in the interests of justice' in what is now Rule 70 as limiting reconsideration to where:

> (a) there has been a material change of circumstances since the order was made;
> (b) the order was based on a misstatement or omission; or
> (c) there is some other 'rare' and 'out of the ordinary' circumstance.

10. In ***Bansi v Alpha Flight Services (Note) [2007] ICR 308***, the EAT stated that, if it is considered that there has been a material omission in the tribunal's findings of fact or in its consideration of the issues of fact and law before it, the party should ask the tribunal to amplify its reasoning either at the time that oral reasons are given or as soon as possible after written reasons are received. He pointed out that 'it is much easier for tribunals to deal with requests for clarification when they are fresh in their minds and the amplification of insufficient reasons and findings will save the parties time and expense and may in some cases obviate the need for an appeal and subsequent remission of the case'. Such an approach was, he said, wholly

consistent with the overriding objective, and had the approval of the then President of the EAT, Burton J. It was an approach endorsed by another constitution of the EAT in ***Royle v Greater Manchester Police Authority [2007] ICR 281.***

11. In ***Wolfe v North Middlesex University [2015] ICR 960*** the EAT considered a case of disability discrimination, and made the following comments:

> "72 The most significant issue raised by the appeal is whether the provision I have just quoted in relation to the likelihood of recurrence of an adverse effect was raised at the employment tribunal, and whether it needed to be raised at all and whether the employment tribunal was bound to deal with the point in the absence of submissions by the parties. It is important to ascertain whether the point was considered by the employment tribunal and whether it came to a conclusion on the point, and if so what. I accordingly made an order on 16 January 2015 in accordance with the Burns-Barke procedure directed to the employment tribunal to answer certain questions on this point.
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> 73 I wish to say something at this point in time about the failure of the parties to refer this point to the employment tribunal, rather than bring it straight to the appeal tribunal with a view to having the matter remitted to the employment tribunal if the point is made out.
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> 74 It is most unfortunate and has resulted in an unnecessary expenditure of the parties and the appeal tribunal's resources that the matter has been dealt with in this way and was not referred to the employment tribunal once its judgment was made available.
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> 75 There is now a long line of authority to the effect that where a would-be appellant believes there has been a material omission on the part of a court or an employment tribunal to deal with a significant issue

> or to give adequate reasons in respect of significant findings, the proper course is not to lodge a notice of appeal, but to go straight back to the employment tribunal and ask that the omission be repaired. If reasons are given orally, this should be done as soon as practicable on the completion of delivery of the judgment, and if written reasons are later handed down as soon as practicable after the judgment is received. I would like to make clear that it is the duty of advocates to adopt this course in litigation in the employment tribunal."

12. ***Stonehill Furniture Limited v Phillippo [1983] ICR 556*** concerned what was then Rule 10 of the then rules of procedure, and the EAT commented in the following terms:

> "The first point raised in the appeal depends upon the construction of rule 10 of Schedule 1 to the Industrial Tribunals (Rules of Procedure) Regulations 1980 and what are the powers of an industrial tribunal when conducting a review. Rule 10(1) provides:
> 'A tribunal shall have power to review and to revoke or vary by certificate under the chairman's hand any decision on the grounds that — …
> (d) new evidence has become available since the making of the decision provided that its existence could not have been reasonably known of or foreseen;' …"

13. It then added the following:

> "The submission by Mr Grey for the employers is that the alternative variation or revocation, is a single one. In this case what the tribunal did was to change its order from a finding that the applicant was not unfairly dismissed to a finding that he was unfairly dismissed. That, says Mr Grey cannot be a 'variation' because it involves a revocation of the original decision, and the rule, by contrasting 'vary the decision' and 'revoke the decision' means that if you are going completely in the

> opposite direction to that in which you started that cannot be a 'variation'. Well, clearly, as *559 a matter of simple English, the word 'vary' can embrace a change of either the slightest or the greatest degree. In our judgment, the dichotomy is more apparent than real. An industrial tribunal, faced with an application for a review, may take one of two courses — bearing in mind, of course, that in the normal event, as would have been the case here but for Mr Jukes' death, the application for review would be heard by the same tribunal as dealt with the original case. That tribunal can either decide that at the original hearing the decision it came to was wrong, and the right answer is so obvious that it can go straight to that right answer; or it may take the view that the original decision that it came to was wrong but the tribunal does not have the material before it, or does not necessarily feel able, to say what the right answer is. It is in the latter case that it may well want to exercise the second alternative in rule 10(4), namely, to revoke the decision and order a rehearing. But if the tribunal takes the view that the application for the review succeeds and the effect of that success is so clear to it that it wants to go straight to its result without the extra delay and expense of a further hearing, we can find nothing in the rule as drawn which prevents that being done. Accordingly, on the point as to jurisdiction we rule that what the industrial tribunal did in this case on September 2 was within its jurisdiction."

Discussion

14. The Respondents first invited the Tribunal to amplify its reasons. Whilst I do not consider that that is necessary, I will in providing my response to the three points that are made respond to the arguments put forward, and that may provide some amplification. Whilst the wording of what is now Rule 70 is not the same as that of the former Rule 10 as considered in ***Stonehill,*** I accept that in an appropriate case the reconsideration can lead to the reversal of a decision. I also accept that the reconsideration can be on a matter of law.

15. In my judgment, the case of ***Serco*** provides a limitation to the extent to which there can be reconsideration, and although ***Wolfe*** was not cited in that case its circumstances were rather different. I consider that ***Serco*** is binding upon me.

16. There is no argument as to material change of circumstances, but is as to misstatement or omission, and possibly of a rare or other unusual occurrence. I consider the application made in that context.

(i) Unjustified conclusions

17. The first issue is an argument that there was an error in concluding that it was not reasonably practicable for the Claimant to have presented his claim timeously, and disregarded evidence. I do not accept the argument made. The Respondents refer to paragraph 49. The Claimant had given evidence that he had sought legal advice from a solicitor locally to him. He had later telephoned and emailed her but had not received a reply, referred to at paragraph 21 of the Judgment. He also gave evidence that he was not able to afford legal representation. I drew an inference that the reason for the lack of reply from the solicitor referred to was that inability to pay, but whatever the reason the fact was that the solicitor did not reply and did not therefore give him advice. There was no contradiction in the evidence, as alleged. The Claimant is not properly described as having “engaged” with the solicitor latterly as she did not respond to his approach. He attempted to engage, but that is not the same as engaging when he did not receive a response.

(ii) Evidence

18. During the course of evidence by the Claimant the issue of the call to ACAS was raised. The Claimant, who was giving his evidence with the assistance of an interpreter, had not himself made the call. It was made by his representative, being the person appearing for him at the hearing, and he said that it had been reported to him by her. He did not know when that was. She interjected during his evidence to state that it was late June or early July

2018. Whilst it is true that she did not herself give evidence, in light of the fact that that remark was made during his evidence on a matter he himself did not conduct, but which he in effect endorsed I consider, and in the absence of any further evidence on the issue, I held that there had been such contact with ACAS. In doing so I refer to the terms of Rule 41.

19. The precise date of the call was not given in evidence. The position was considered in paragraph 53 of the Judgment.

20. For completeness I shall also address the argument that in his response to the application for reconsideration the Claimant gave detail that is inconsistent with the evidence he gave to the Tribunal, in that it suggests that he contacted more than one solicitor. I do not accept that. The English used is indicative of his limited command of that language. His evidence at the Tribunal was that he had not been able to obtain legal advice following his initial advice from a local solicitor referred to at paragraph 17 of the Judgment.

(iii) Failure to give reasons

21. The reasons for concluding that the claim was presented within a reasonable period of time after the expiry of the primary limitation period are set out in paragraph 56 and included his limited command of English, his belief that he required to await receipt of the written decision on the appeal, the difficulties he had experienced in seeking legal advice also described earlier in the Judgment, and the ACAS advice reported to him which are referred to earlier in the Judgment. I consider that sufficient explanation of the reasons was there given.

Conclusion

22. I do not consider that the test set out in ***Serco*** is met, and I refuse the application.

Employment Judge: **Alexander Kemp**
Date of Judgment: **16 April 2019**
Entered in Register: **17 April 2019**
Copied to Parties