EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Mrs D Humble	**AND**	**Andrew Bird and Gillian Bird Trading as Birds Taxis (First Respondent)** **Gillian Bird Taxis (Second Respondent)**

Heard at: North Shields **On 24 May 2018**

Before: Employment Judge Shepherd

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The application is refused as there is no reasonable prospect of the original decision being varied or revoked.

REASONS

1. An oral judgment and reasons having been given at the conclusion of the hearing on 12 December 2017 and sent to the parties on 18 December 2017. That judgment followed a hearing in which Gillian Bird attended and gave evidence. There was no appearance or representation on behalf of Andrew Bird. Following consideration of the evidence provided at that hearing I concluded that there was no transfer of undertaking to the second respondent and, in those circumstances, the claim of failure to inform and consult pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 was dismissed and it was found that the claimant

was dismissed by the first respondent by reason of redundancy and was entitled to the sum of £2,592.00.

2. An application for a reconsideration has been made by Julie Kirkley on behalf of Andrew Bird. It is stated in the application that Andrew Bird had been advised that he need not attend the hearing as he had not employed the claimant “under Birds Taxis Ltd”

3. The application for a reconsideration refers to a judgment on the case submitted by another employee, case number 2500179/2018 in which Employment Judge Garnon had found that there had been a transfer of undertaking to Gillian Bird. Andrew Bird attended the hearing before Employment Judge Garnon and provided a full witness statement to which he attached several documents. In the reasons for the judgment in that case, Employment Judge Garnon stated that Andrew Bird did not appear before me and the sole reason for his decision being diametrically opposed to my decision was, as the parties agreed, that I was not told all the information which was given to Employment Judge Garnon as to what Mrs Bird did in the week commencing 3rd April and that I did not see the large number of documents produced by Mr Bird. It was stated that, if I had the same facts, I would have decided as Employment Judge Garnon had. It was also stated “Mr Bird has only himself, or his advisers, to blame for not attending the earlier hearing.”

4. The Employment Tribunals (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) 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.
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> 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 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.
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> 72 (1) An Employment Judge shall consider 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 views 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 paragraph (1), that 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."

5. The previous Employment Tribunal Rules (2004) provided a number of grounds on which a Judgment could be reviewed The only ground in the 2013 Rules is that a Judgment can be reconsidered where it is necessary in the interests of justice to do so. I consider that the guidance given by the Employment Appeal Tribunal in respect of the previous Rules is still relevant guidance in respect of the 2013 Rules. It was confirmed by Eady J **in Outasight VB Ltd v Brown UKEAT/0253/14/LA** that the basic principles still apply.

6. There is a public policy principle that there must be finality in litigation and reviews are a limited exception to that principle. In the case of **Stevenson v Golden Wonder Limited [1977] IRLR 474** makes it clear that a review (now a reconsideration) is not a method by which a disappointed litigant gets a "second bite of the cherry". Lord McDonald said that the review (now reconsideration) 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 adduced which was available before".

In the case of **Fforde v Black EAT68/80** where it was said 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".

7. In the interest of justice means the interest of justice to both sides. The Employment Appeal Tribunal provided guidance in **Reading v EMI Leisure Limited EAT262/81** where it was stated:

> "When you boil down what is 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".

8. The application for reconsideration refers to Andrew Bird not receiving the judgment. It appears from the file that the judgment was sent to Gillian Bird and her representative, Mr Hallam but not to Andrew Bird. The judgment was against Andrew Bird and Gillian Bird trading as Birds Taxis, the first respondent. This had been a

partnership and that the former partners are jointly and severally liable for the judgment.

9. The application for a reconsideration is substantially out of time. The judgment was sent to one of the former partners of the first respondent. In view of the circumstances surrounding the sending of the judgment I have also considered the application as if it was made within the appropriate time limit.

10. I note from the Tribunal file that there had been correspondence from a firm of solicitors prior to the hearing on 12 December 2017. That firm of solicitors indicated that their client was Birds Taxis Ltd, a company which was not a party to the case. It was indicated that Bird's Taxis Ltd was not the transferor or or transferee and had never employed the claimant. That correspondence was copied to the parties in this case who provided their comments. Neither the claimant nor the representative for Gillian Bird made an application to join a further respondent.

11. The application for a reconsideration appears to be on the basis that Andrew Bird wishes to provide further evidence. The judgment was reached based on the evidence given at the hearing on 12 December 2017. Andrew Bird did not attend the hearing, he had been aware of the hearing and had chosen not to attend. The evidence he may wish to provide to the Tribunal was evidence that was, in fact, available though deliberately, or inadvertently, not used at the hearing. In the circumstances, it is not in the interests of justice for the judgment to be reconsidered. The application is seeking "a second bite at the cherry" on behalf of Mr Bird. He knew of the hearing and chose not to attend and provide the evidence he now wishes to adduce.

12. I have considered this case carefully. I have reached the view that a hearing is not necessary in the interests of justice. There is no reasonable prospect of the judgment being varied or revoked and the application for a reconsideration is refused.

Employment Judge Shepherd

24 May 2018.