EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105346/2017 (P)

Hearing Held at Aberdeen on written submission on 1 July 2020

Employment Judge A Kemp

Mr Lee Cox	**Claimant** **In person**
Bluebird Buses Limited	**Respondent** **Represented by:** **Mr S McLaren** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's application for reconsideration is refused.

REASONS

Introduction

1. The claimant claimed unfair dismissal in respect of his dismissal by the respondent on 29 June 2017. The final hearing took place on 30 and 31 July 2018. On 8 August 2018 I issued a Judgment dismissing the Claim.

2. The claimant seeks a reconsideration of that Judgment, this being the third such application that he has made. The previous two applications were dismissed on8 October 2018 and 10 January 2019.

3. The present application was made by email to the Tribunal dated 10 June 2020 in which the claimant refers to discovering allegations that have been made of bullying by his former line manager, who gave evidence against him at the Tribunal hearing but who did not decide to dismiss him nor was involved in the appeal thereafter.

4. The respondent replied to the application by letter dated 23 June 2020 sent by email, to which the claimant made a further response on the same day.

5. The claimant has a new address, noted above.

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.

72 Process

(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.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part."

7. When considering such an issue regard must also be had to the overriding objective in Rule 2, which was quoted in the original Judgment. I note

initially that the application is made outwith the statutory period, but the reason given for that is that new information came to the attention of the claimant and whilst there has been a considerable period of time from the date that the Judgment was issued that does not of itself prevent the application being made and considered, having regard to the terms of the overriding objective.

8. In ***Serco Ltd v Wells [2016] ICR 768***, the EAT 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 therefore 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. The EAT also held that the issue of whether or not an order should be varied or set aside was a matter of jurisdiction and not an exercise of discretion by the Tribunal. The question of whether there has been a material change of circumstances was to be decided

> "from an objective standpoint … not from the point of view of a band of reasonableness but from the point of view that either the factual matrix can support that view or it cannot".

11. The previous statutory formulation of the terms of Rule 70 was based on the test laid down in ***Ladd v Marshall [1954] 3 All ER 745***, for determining the admissibility of fresh evidence in the Court of Appeal, and the substance of the ***Ladd v Marshall*** test has been held to be applicable to what had been a review procedure in employment tribunals in **Wileman v Minilec Engineering Ltd [1988] IRLR 144**. Following the implementation of the 2013 Rules, the EAT held that the ***Ladd v Marshall*** test (in conjunction with the overriding objective) continues to apply where it is sought to persuade a tribunal, in the interests of justice, to reconsider its judgment on the basis of new evidence (***Outasight VB Ltd v Brown UKEAT/0253/14*** and ***Dundee City Council v Malcolm UKEATS/0019/15***).

12. The ***Ladd v Marshall*** test has three limbs. It must be shown:

> (a) that the evidence could not have been obtained with reasonable diligence for use at the original hearing;
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> (b) that it is relevant and would probably have had an important influence on the hearing; and
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> (c) that it is apparently credible.

13. Whilst these are the principles that are normally to be applied, the EAT in ***Outasight*** acknowledged that there might be cases where the interests of justice would permit fresh evidence to be adduced notwithstanding that the principles were not strictly met. What is not permitted under the 2013 Rules, the EAT held, is the adoption of an altogether broader approach whereby fresh evidence may be admitted regardless of the constraints to be found in the established test.

14. The facts of ***Outasight*** are I consider instructive. The Tribunal, having dismissed the claimant's claims for wrongful dismissal and breach of contract, revoked its decision on a reconsideration after it allowed the claimant to introduce new evidence of the fact that the respondent's director and sole witness had previous convictions for dishonesty. In permitting the new evidence to be given, the Tribunal acknowledged: (a) that the claimant had had some awareness, but no actual proof, of the director's criminal past at the date of the liability hearing; (b) that he could at that stage have carried out the same due diligence test (searching the Internet) that he carried out after judgment had been given; and (c) that, consequently, the strict test for the admissibility of new evidence had not been met. Notwithstanding this, it considered that the 2013 Rules gave it a wider discretion to admit the evidence and hence to reconsider its original decision in the light of it. As that decision had been finely balanced and the credibility of the claimant had been central to it, the Tribunal revoked its decision mainly on the ground that the decision might have been different if it had had the evidence of the convictions at the time of the hearing.

15. On appeal the EAT set aside the revocation and restored the tribunal's original decision. It held that not only had the Tribunal been wrong to admit the new evidence when the test for admissibility had not been met, but also that the claimant had sufficient knowledge of the director's criminal past to initiate an inquiry, seeking if necessary an adjournment to pursue it, if he considered that the convictions were relevant to the issue of the director's credibility. Even though the claimant was unrepresented at the hearing, there were no grounds for the Tribunal bypassing the ***Ladd v Marshall*** test and interfering with the original decision.

16. I consider in the case now before me that at the very least the second limb of the test set out above is not met by the claimant. The evidence led by the respondent from the former manager was not the material evidence in the case, which came from the dismissing officer and the appeal officer. In assessing the fairness of a dismissal, what matters is what was known to the employer at the time of the decision. What is now raised are

allegations made against a person who was a witness, and I consider that there is no prospect of that matter having had any influence on the Judgment that I made. I do not consider that there is any basis for allowing this evidence on any other basis, as was referred to in ***Outasight.*** The new evidence the claimant refers to is not I consider evidence that is liable to have been relevant to the fairness of the dismissal. The circumstances of the claimant's case and that of his former manager are far too different to allow arguments as to consistency. I appreciate that the claimant is a lay person, and that he does not consider his dismissal to have been fair, but the circumstances were set out in the Judgment I made, and they included firstly a final written warning and secondly a further example of misconduct on the part of the claimant.

17. I have considered matters in light of what is now put forward, and the authorities set out above, but conclude that the application must be refused.

Conclusion

18. I have decided firstly that a hearing for the application is not required in the interests of justice and that a decision can be taken on the written representations from the parties, and secondly that the new evidence which the claimant seeks to put forward by his application would not probably have had an important influence on the hearing that was held prior to the Judgment, and would not have been relevant to whether or not the claimant was fairly dismissed.

19. The application is accordingly refused.

Employment Judge	**Sandy Kemp**
Date of Judgement	**2 July 2020**
Date sent to parties	**3 July 2020**