EMPLOYMENT TRIBUNALS

Claimant: **Miss N Hasumat**

Respondent: **EE Ltd**

JUDGMENT FOLLOWING RECONSIDERATION

1. The application for a reconsideration of the decision sent to the parties on 23 February 2021 was received on 9 March 2021 with an addendum or further grounds received on 10 March 2021 more than 14 days after the date on which the decision was sent to the parties. However, having considered the applications, Employment Judge Lewis considers that it is in the interests of justice to consider the application in the round and to extend time in respect of the second application.

2. The Claimant's application dated 9 March 2021 with addendum dated 10 March 2021, for reconsideration of the judgment sent to the parties on 23 February 2021 is refused. There is no reasonable prospect of the original decision being varied or revoked.

REASONS

1. Following the full merits hearing that took place on the 5 and 6 November 2020 by CVP September 2019 the Tribunal reserved its decision and sat in Chambers on 1st and 15th December 2020. The written judgment and reasons which were dated 23 February 2021 were sent to the parties on 23 February 2021.

2. The Respondent's application for reconsideration cited six grounds, the five grounds set out at paragraphs 2 a-e of the email dated 9 March 2021 and a further ground set out in the email dated 10 March 2021

3. I have carefully considered the grounds raised. Given the length and detail of the application I consider that it is disproportionate to address each point raised on a line by line basis.

4. Rules 70 to 73 of the Employment Tribunal's Rules of Procedure 2013, make provision for the reconsideration of Tribunal Judgments as follows:

*"**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.

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.

Process
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(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.

Relevant authorities

5. In *Outasight VB Ltd v Brown UKEAT/0253/14* the EAT held that the Rule 70 ground for reconsidering Judgments, (the interests of justice) did not represent a broadening of discretion from the provisions of Rule 34 contained in the replaced 2004 rules, (at paragraphs 46 to 48). HHJ Eady QC explained that the previous specified categories under the old rules were but examples of where it would be in the interests of justice to reconsider. The 2014 rules remove the unnecessary specified grounds leaving only what was in truth always the fundamental consideration, the interests of justice. This means that decisions under the old rules remain pertinent under the new rules.

6. The key point is that it must be in the interests of justice to reconsider a Judgment. That means that there must be something about the case that makes it necessary to go back and reconsider, for example a new piece of evidence that could not have been produced at the original hearing or a mistake as to the law. It is not the purpose of the reconsideration provisions to give an unsuccessful party an opportunity to reargue his or her case. If there has been a hearing at which both parties have been in attendance, where all material evidence had been available for consideration, where both parties have had their opportunity to present their evidence and their

arguments before a decision was reached and at which no error of law was made, then the interests of justice are that there should be finality in litigation. An unsuccessful litigant in such circumstances, without something more, is not permitted to simply reargue his or her case, to have, "a second bite at the cherry", (per Phillips J in *Flint v Eastern Electricity Board [1975] IRLR 277*).

7. The expression 'necessary in the interests of justice' does not give rise to an unfettered discretion to reopen matters. The importance of finality was confirmed by the Court of Appeal in *Ministry of Justice v Burton and Anor [2016] EWCA Civ 714* in July 2016 where Elias LJ said that:

> *"*the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (*Flint v Eastern Electricity Board [1975] ICR 395*) which militates against the discretion being exercised too readily; and in *Lindsay v Ironsides Ray and Vials [1994] ICR 384* Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review*."*

8. In *Liddington v 2Gether NHS Foundation Trust EAT/0002/16 the EAT per Simler P,* held at paragraph 34 that*:*

> "a request for reconsideration is not an opportunity for a party to seek to re- litigate matters that have already been litigated, or to reargue matters in a different way or by adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered."

Decision

In respect of grounds 2 a and b

9. The ambit of the claim is defined in the claim form and not in the list of issues. The claimant brought a claim for constructive dismissal and set out in the claim form that, "prior to leaving I attempted to be relocated to another store, but during my enquiries I found Abu Hassan had spread malicious and slanderous comments about my work ethics. On that basis two stores rejected my request for transfer."

10. At the Preliminary Hearing before Regional Employment Judge Taylor the issues were identified in summary form, the particular issue in question includes the following statement "the Claimant relies on this ***behaviour*** as being the last straw" . After the Preliminary Hearing, following the provision

of further particulars by the Claimant, who was acting in person throughout the proceedings, the Respondent wrote to the tribunal in the following terms on 20 September 2020, under the heading constructive dismissal,

"We ask for clarification that the only information we need to address from the "last straw" document and the" resignation letter" are that Mr Hassan spoke to other store managers about the Claimant, in effect badmouthing her."

The central thrust of the Claimant's allegation was clear to the Respondent.

11. Although identified at the preliminary hearing as a "final straw", the Tribunal found this conduct to be a fundamental breach in its own right.

12. The Respondent is to referred to paragraphs 4.37, 4.38 and 4.39 of the Judgment, in particular the finding of fact at 4.37 as to what it was that prompted the Claimant to resign.

13. The Respondent will be aware that, as is made clear in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978,** the breach of contract need not be the only reason for the resignation providing the reason for the resignation is at least in part because of the breach **Nottinghamshire County Council and Meikle [2004] IRLR 703T.**

Grounds 2 c-e

14. The grounds at 2 c-e are in essence an invitation for the Tribunal to revisit the evidence that we heard and come to different conclusions; they are also points that the Respondent, represented by Counsel, had an opportunity to address in submissions at the hearing. The Respondent asks the Tribunal to reach different case management decisions in respect of admitting evidence, reach different findings of fact, and to reject evidence that we found to be credible. The application for reconsideration amounts to detailed submissions on key points on the evidence and the issues, asking the tribunal to take a different view to that which we took in our original deliberations. The application amounts to a request that the Tribunal allow the Respondent to re-argue his case.

The 6th ground – addendum

15. In respect of the Claimant's leaving for other employment (ground 6, contained in the addendum), the Respondent is referred to paragraph 6.1 of the Judgment which addresses the fact that the Claimant had secured alternative employment and would have left in any event. This was the basis for the 100% **Polkey** reduction and was clearly taken into consideration by the Tribunal.

16. The interests of justice are that there be finality in litigation, absent any good reason for a decision to be reconsidered. That a party does not like the conclusions reached by a tribunal and would like a second chance to present his arguments, is not such a reason.

17. There is no reasonable prospect of the Tribunal reaching a different decision on reconsideration. The application for reconsideration is refused.

Employment Judge Lewis
Date 21 April 2021