EMPLOYMENT TRIBUNALS

Claimants: **Miss P Genova**

Respondent: **Catatel Limited**

JUDGMENT FOLLOWING RECONSIDERATION

1. The Respondent's application made by e-mail on 16 July 2021 for a reconsideration of my judgment dated 5 July 2021 and sent to the parties on 7 July 2021 has no reasonable prospects of success and is dismissed.

REASONS

1. By an by e-mail on 16 July 2021 the Respondent seeks a reconsideration of my judgment dated 5 July 2021. The basis of the application is that the Respondent was unable to attend the hearing.

The rules

2. The Employment Tribunal Rules of Procedure 2013 as amended set out the rules governing reconsiderations. The pertinent rules are as follows:

> *"Principles*
>
> *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 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*
>
> *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.*

Process

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.

(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.

3. 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."

4. In ***Liddington v 2Gether NHS Foundation Trust*** **EAT/0002/16** the EAT chaired by Simler P said in 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."

5. Where an application for a reconsideration is made on the basis that the hearing had proceeded in the absence of that party it is necessary that the party had to have a good reason for his or her absence from the hearing **- *Morris v Griffiths* 1977 ICR 153, EAT.**

6. Any preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay. That principle militates against excusing a failure to attend if there was no good reason for that failure.

7. In accordance with the Employment Tribunal Rules of Procedure I must reconsider any judgment where it is in the interests of justice to do so. Further, if I considered that there is no reasonable prospect of the original decision being varied or revoked I must refuse the application for reconsideration.

Discussion and Conclusions

8. To properly consider this application it is necessary to review the entire procedural history of this matter. The Claimant presented her ET1 on 24 October 2020. Her claim was for 'arrears of pay'. The Claimant had named the Director of the Respondent Panayotka Semerdzhieva as her employer. She sat out a narrative which included details of the work that she had done and that she was claiming £710 as salary due in July 2020. She alluded to the fact that the Respondent had withheld those wages on the basis that the Claimant was responsible for some losses.

9. On 4 December 2020 an ET3 was presented by the Respondent Catatel Limited. The position taken in the ET3 was that the Claimant's contractual relationship was with that company. It is not disputed that the Claimant did work for the company. What is said, consistent with what the Claimant had said, is that the Respondent claimed sums it says it incurred as a consequence of the Claimant's work. The Respondent did not bring a counterclaim (nor could it have done in the circumstances as the Claimant's claim was not framed or identified as a breach of contract claim). The ET3 is written in English but with some minor difficulties in expression.

10. A notice of hearing had been sent to the parties on 12 November 2020. A final hearing was listed by telephone on 29 March 2021 at 12:00am. That notice included standard short track directions including a direction that the Respondent send the Claimant any evidence it sought to rely upon. The Respondent did not send any evidence or documents to the Claimant.

11. The hearing on 29 March 2021 took place via BT MeetMe. It was listed before EJ Barrett. EJ Barrett adjourned the hearing. Her reasons for doing so were recorded in a letter sent to the parties on 31 March 2021. She wrote:

> *'The Claimant attended the hearing in person and the Respondent was represented by Panayotka Semerdzhieva, Director. Ms Semerdzhieva joined the hearing late, having been contacted by the Tribunal staff and asked to dial in. She explained that she had not received the Notice of Hearing, was not prepared, and was not able to properly participate without a Bulgarian interpreter.*

> *In the circumstances the final hearing could not fairly take place and it was in the interests of justice to adjourn to the next available date. A Bulgarian interpreter will attend the re-listed hearing to assist Ms Semerdzhieva.'*

12. On 12 April 2021 a further notice of hearing was sent out. The hearing was relisted for 5 July 2021 at 2 PM. The notice of hearing included instructions as to how to join a BT MeetMe hearing. Those instructions included precise and clear instructions about stating the participant's name and which keys to press in order to join the hearing. The Respondent was informed that a Bulgarian interpreter would be in attendance. The Notice of Hearing specifically stated that if a party failed to attend the hearing may proceed in absence.

13. On 21 May 2021 Karen Bennett, a Legal Officer, wrote to the parties at the email addresses they had provided asking whether they were fully prepared for the hearing. In particular she reminded the parties of the need to comply with the orders set out in the letter of the tribunal dated 12 November 2021. This did not prompt the Respondent to file any evidence. On the same day Ms Semerdzhieva sent an e-mail to the Tribunal saying *'I have an official commitment, and I am preparing for the London Fashion Week show on June 12. It is not possible for me to prepare for this hearing.'*

14. The Respondent's email was put before Employment Judge Russell and her comments were included in a letter to the parties sent by email on 25 May 2021. She wrote:

> '*The hearing listed on 21st of March 2021 was adjourned because the Respondent was not prepared. Notice for the relisted hearing was sent on 12 April 2021. No application for a postponement has been received. The hearing will proceed. If a party does not comply with the case management orders, including sending copies of documents and exchange of witness statements by 21 June 2021, the Employment Judge may decline to admit any evidence from them.'*

15. I conducted the hearing on 5 June 2021. In accordance with my usual practice, I made several attempts to contact the Respondent before deciding to proceed in the absence of the Respondent. No message was received by the administration that the Respondent was trying to join the hearing.

16. The grounds upon which the application for reconsideration is made are that due to a language barrier the Respondent was unable to attend the hearing. I understand the suggestion that is made is that Ms Semerdzhieva was unable to connect because she did not understand the connection process due to language difficulties. I note that the application is written in English and shows a very high level of understanding of the process of seeking a reconsideration as opposed to an appeal to the Employment Appeal Tribunal. If this was not written by Ms Semerdzhieva it is clear to me that she is able to seek the assistance of somebody who is fluent in the English language.

17. In considering this application I start from the position that where a person is unable to participate in proceedings due to language difficulties the tribunal should do everything possible to facilitate participation. An apparent failure to attend a hearing because of language difficulties would in my view ordinarily provide a sufficient reason for listing a hearing to consider an application for a reconsideration. However, if it is apparent that the alleged difficulties were illusory that may not be the case.

18. I should ask whether the Respondent has a reasonable prospect of establishing a good reason for not attending the hearing. That could include a genuine mistake. I am not satisfied that the Respondent, has shown that there is any reasonable prospect of showing that there was a good reason not to join the telephone hearing. I do so for the following reasons:

18.1. If Ms Semerdzhieva was as she says aware of the hearing and intending to take part, she has provided no good explanation why she has not complied with any of the directions of the Employment Tribunal. She has suggested that she had some business commitments but that is no good reason for breaching an order made in November 2020. In particular, she has not disclosed any document which would evidence any right to withhold wages in the circumstances described in the ET3.

18.2. If Ms Semerdzhieva was as she says aware of the hearing and intending to take part she has provided no explanation why she did not contact the Employment Tribunal at the time of the hearing or shortly afterwards to explain that she had attempted to connect to the hearing but was unable to do so. Nothing was heard from her until she received the judgment.

18.3. The instructions sent to the parties in the notice of hearing are clearly written and set out precisely how to join the telephone conference. It is clear that Ms Semerdzhieva had received that document because she knew of the date of the hearing. It is also clear that she is able to seek assistance from individuals who speak and write excellently in English. I find that she would have had no difficulty whatsoever in the period between the notice of hearing being sent and the final hearing itself in seeking assistance to translate that Notice of Hearing and the instructions within it.

18.4. Ms Semerdzhieva has not explained why, if her ability to understand spoken English is as poor as she suggests, she did not seek assistance from a person who speaks English to initially assist her in connecting when she knew that the Tribunal had provided an interpreter to translate during the telephone conference.

18.5. I take into account the fact that Ms Semerdzhieva had joined a BT MeetMe conference on 29 March 2021 (albeit belatedly).

19. I conclude that the Respondent has no reasonable prospect of success in persuading me that there was any good reason for failing to attend the hearing.

20. I turn to the wider question of the interests of justice. On the information before me even at this stage of seeking a reconsideration it does not appear that the Respondent ever had a defence on the merits with any reasonable prospects of success. The claim is for unlawful deduction from wages. There appears to be no dispute that the Claimant worked for the Respondent. There is a suggestion in the ET3 that the Claimant was self-employed but for the purposes of a claim under section 23 of the Employment Rights Act 1996 the Claimant only needs to demonstrate that she was a ‘worker’. Given that the Claimant was a pattern cutter on her own account, and responsible for quality control on the Respondent’s account it seems to me unarguable that the Claimant was not a worker. On the evidence before me at the hearing the Claimant, who adopted her ET1 as her evidence, had established that that was the case.

21. There does not appear to be any dispute that the Claimant was not paid in July. If I am wrong about that then the Respondent has not provided any evidence to dispute what the Claimant says. The question therefore is whether or not the Respondent had any lawful right to withhold wages on the basis that the Claimant actions were negligent and had caused the Respondent loss. Sub-section 13(1) of the Employment Rights Act 1996 provides as follows (with emphasis added):

> *13 Right not to suffer unauthorised deductions.*
>
> *(1) An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> > *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a **relevant provision of the worker's contract**, or*
> >
> > *(b) the worker has previously signified **in writing** his agreement or consent to the making of the deduction.*

22. Sub-section 13(2) provides that where an employer relies upon the provision of a worker's contract the effect of that provision must have been notified to the worker in writing. It follows that unless there is a document which sets out the right to make a deduction from wages the employer of the worker may not lawfully refuse to pay wages when they fall due. The Respondent has not complied with the orders of the Tribunal to supply any evidence despite firstly an adjournment granted because they were not prepared for the hearing and secondly a reminder on two occasions that the parties needed to comply with the directions of the tribunal. Even at this stage the Respondent has not put forward anything that is remotely arguable as a defence to this claim.

23. I am not persuaded that the Respondent has demonstrated that the application for a reconsideration has any reasonable prospect of success. I reach that conclusion without relying upon my view of the merits of the case. Even if the Respondent's position was arguable I do not consider they have any reasonable prospects of persuading me that it will be in the interests of justice to set aside the judgment on the basis that they had a good reason for not attending the hearing. I do not accept that that the Respondent has any reasonable prospect of persuading me that there was any good reason for the Respondent not to attend. Given the stretched resources of the Employment Tribunal, given the fact that the Claimant has attended two hearings and is seeking payment for work done in the middle of 2020, and the effect of any delay to this case and two other court users the Respondent faces an insurmountable hurdle in showing that it would be in the interests of justice to set aside the judgment.

24. Were it necessary to consider the merits of the defence to the claim that provides a further compelling reason to refuse an application for a reconsideration. On the evidence provided, the Respondent's position was, and remains, hopeless. A deduction was made from the Claimant's wages in circumstances where the Respondent has not pointed to any lawful right to do so.

25. I conclude that the Respondent has no reasonable prospects of persuading me that its application for a reconsideration has any reasonable prospects of success. I therefor dismiss the application without a hearing.

26. I have also seen correspondence from the Claimant in an email sent on 26 July 2021 complaining that the Respondent has not paid the sum due under the judgment. The Respondent is reminded that neither an appeal nor an application for a reconsideration relieves it of the obligation to comply with the orders of the Tribunal. The Claimant is directed to the leaflet supplied with the judgment which informs her how she can enforce the award made. The Respondent is reminded that the award made will attract interest if it remains unpaid.

Employment Judge Crosfill
Dated: 30 July 2021