EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr. M Handley	**v**	Tatenhill Aviation Limited

DECISION ON APPLICATION FOR RECONSIDERATION

Rules 70-73 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

1. The claimant's application for reconsideration of the judgment dated 11 June 2021 is refused.

2. Reasons for this decision are set out below.

REASONS

Background

1. By claim form dated 12 August 2020 the claimant brought claims of unfair dismissal and for a redundancy payment. The claim arose out of the respondent's decision to dismiss the claimant following a substantial loss of revenue due to the Covid 19 pandemic. All of the claims were resisted by the respondent.

2. At a preliminary hearing on 16 December 2020 the claimant asserted that his claims were for unfair dismissal, a redundancy payment and breach of contract in respect of notice pay. He acknowledged however that he had, by the time of that hearing, been paid his redundancy payment and notice pay. The claims for breach of contract and a redundancy payment were therefore dismissed upon withdrawal, and the claim of unfair dismissal proceeded to a final hearing.

3. Following the final hearing on 12th March 2021 the claim of unfair dismissal succeeded in a reserved judgment with reasons dated 2nd June 2021. The reserved judgment should be read alongside this decision.

4. The Tribunal found that the claimant's dismissal was procedurally unfair for two reasons – firstly, that the decision to select the claimant for redundancy was made prior to the start of the consultation process; and secondly that the appeal was conducted by the same person who made the decision to dismiss.

5. The Tribunal also found that following a different procedure would not have resulted in a different outcome and that there was a 100% chance that the claimant would have been dismissed had a fair procedure been followed. This conclusion was reached because the claimant's own evidence during the hearing was that, had he been making the redundancy selection decision, he would have chosen to retain the only other employee in the pool, rather than himself. The claimant accepted that the other employee in the pool had skills that the claimant did not have.

6. On 11 June 2021 the claimant applied for reconsideration of the judgment that he was unfairly dismissed but that he is not entitled to any compensation because there was a 100% chance that the claimant would have been dismissed had a fair process been followed.

7. The claimant argues, in his application, that had a fair process been followed from the start, it is impossible to conclude what the outcome out have been, and no way to express it as a percentage. As a result, the claimant argues it would be in the interest of justice for the Tribunal to reconsider its decision that no further compensation is payable.

8. The claimant also argues in his application for reconsideration that:-

    a. The respondent produced no evidence to the Tribunal that a reduction in the use of outside contractors had been considered;
    b. That the evidence of Mr Shelton, a witness for the respondent, was not truthful;
    c. The reason for the termination of his employment was someone other than redundancy;
    d. That a fair process must involve the consideration of all reasonable options; and
    e. Had there been a fair process from the start, it is impossible to conclude what the outcome would have been, and no way to express it as a percentage.

9. In reaching my decision on the claimant's application I have considered all of the above as well as the other issues raised by the claimant in his application for a reconsideration.

The relevant law

10. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provide as follows:-

    Rule 70 Principles

    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.

Rule 71 Application

…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…and shall set out why reconsideration of the original decision is necessary.

Rule 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…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…

11. The only basis upon which the Tribunal can reconsider a judgment is if it is necessary in the interests of justice to do so. There is a public policy interest in the finality of litigation. Reconsiderations should therefore be the exception rather than the rule and are not designed to be a means by which a party who is disappointed with the outcome of the hearing can get a 'second bite at the cherry'.

12. In Trimble v Supertravel Ltd [1982] ICR 440, the Employment Appeal Tribunal said that on an application for what was at the time a review (and is now reconsideration) if a matter has been ventilated and properly argued during the course of Tribunal proceedings, then any error of law falls to be corrected on appeal and not by way of review.

13. Her Honour Judge Eady QC held, in Outasight VB Ltd V Brown [2015] ICR D11 that the wording 'necessary in the interests of justice' in Rule 70 gives employment tribunals a broad discretion to decide whether reconsideration of a judgment is appropriate in all of the circumstances, but that the discretion must be exercised 'judicially' '*which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation'.*

14. In Stevenson v Golden Wonder Ltd [1977] IRLR 474 EAT, Lord Stevenson said that the old review 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'.

Decision

15. In his application for reconsideration the claimant does not suggest that new and relevant evidence has become available, nor that the decision was wrongly made as a result of administrative error. Rather the claimant sets out the

reasons why he disagrees with the decision reached and comments on the evidence submitted by the respondent at the final hearing. For example, the claimant suggests that the evidence of Paul Shelton (who appeared as a witness for the respondent) is not truthful. The claimant had the opportunity to challenge the evidence of Mr. Shelton in cross examination at the hearing, and an assertion that his evidence is untrue does not mean that it is in the interests of justice to reconsider the decision.

16. The claimant also suggests, in his application, that the statement by the respondent that he did not work weekends is untrue. He then goes on however to state that in the judgment the Tribunal found that he did work Sundays, which suggests that the Tribunal agrees with the claimant's position in relation to weekend working and did not accept the respondent's evidence.

17. I have considered carefully the arguments raised in the claimant's application. All of those arguments could quite properly have been made during the course of the final hearing. In my view, none of them indicate that it would be in the interests of justice to reconsider the decision.

18. The reconsideration process is not designed to allow a party a second chance to present their case if they are not happy with the way in which it was presented in the first place. I am satisfied that the claimant had ample opportunity to argue his case at the hearing and indeed he did so effectively, as evidenced by the fact that I found the dismissal to be unfair.

19. In these circumstances, there is in my view no reasonable prospect of the original decision being varied or revoked, and accordingly the claimant's application for reconsideration is refused.

Employment Judge Ayre

23 August 2021

Sent to the parties on:

26 August 2021

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For the Tribunal:

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