EMPLOYMENT TRIBUNALS

Claimant: **Mr J Beeley**

Respondent: **Outokumpu Stainless Ltd**

Heard at Sheffield (on the papers) **On: 1 September 2021**

Before: **Employment Judge Brain**

JUDGMENT UPON RECONSIDERATION

The Judgment of the Employment Tribunal is that there is no reasonable prospect of the Reserved Judgment promulgated upon 22 July 2021 being varied or revoked. Accordingly, the claimant's application for reconsideration fails and stands dismissed.

REASONS

1. The Reserved Judgment in this case was promulgated on 22 July 2021. (I shall now refer to this as '*the Judgment'*).
2. On 6 August 2021 the Tribunal received an application from the claimant for reconsideration of the Judgment. The application is dated 5 August 2021 but was sent to the Tribunal by an email which is dated 6 August 2021 timed at 00:00.
3. Rule 70 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides an Employment Tribunal with a general power to reconsider any judgment where it is necessary in the interests of justice to do so. This power can be exercised either on the Tribunal's own initiative or on the application of a party. Rules 71 to 73 set out the procedure by which this power is to be exercised.
4. Rule 70 only provides for a single ground for reconsideration – namely, where it is necessary in the interests of justice. This contrasts with the position under the 2004 Rules where there were five grounds upon which a Tribunal could

review a judgment. One of those grounds was that the interests of justice required a review. The other four were:

- *That the decision was wrongly made as a result of an administrative error.*
- *That a party did not receive notice of the proceedings leading to the decision.*
- *That the decision was made in the absence of a party.*
- *That new evidence had become available since the conclusion of the Tribunal hearing to which the decision related, the existence of which could not have been reasonably known of or foreseen at the time.*

5. When the current Tribunal rules were introduced in 2013, it was widely presumed that, since parties routinely cited the interests of justice in addition to one of the four specific grounds, the change was a matter of simplification and did not alter the substantial legal principles. This was confirmed by the Employment Appeal Tribunal in **Outasight VB Ltd v Brown** [2015] ICR D11, EAT. In that case, her Honour Judge Eady QC explained that the specific grounds in the 2004 Rules were unnecessary because any consideration of an application under one of the specific grounds would in any case have taken the interests of justice into account. At least one of the specific grounds referred to above in paragraph 4 is relevant to the claimant's application for reconsideration (that being the final one listed).

6. Under Rule 70, a judgment will only be reconsidered where it is *"necessary in the interests of justice to do so".* This does not mean that in every case where a litigant is unsuccessful, they are automatically entitled to reconsideration. Instead, a Tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases fairly and justly and the Tribunal should be guided by the common law principles of natural justice and fairness. In **Outasight**, HHJ Eady QC said that the wording of Rule 70 vests Tribunals with a broad discretion but that must be exercised judicially which means having regard not only to the interests of the party seeking the reconsideration but also 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.

7. Reconsideration of a judgment may be necessary in the interests of justice if there is new evidence that was not available to the Tribunal at the time it made its judgment. The underlying principles to be applied by Tribunals in such circumstances are the same as those which apply in civil litigation by virtue of **Ladd v Marshall** 1954 (3 All ER 745, CA). There, the Court of Appeal established that, in order to justify the reception of fresh evidence, it is necessary to show:

    - That the evidence could not have been obtained with reasonable diligence for use at the original hearing;
    - That the evidence is relevant and would probably have had an important influence on the hearing and;
    - That the evidence is apparently credible.

8. Under the 2004 Rules, it was held (in **Flint v Eastern Electricity Board** [1975] ICR 359 QBD), that it was possible to obtain a reconsideration (or 'review' as it was known under the 2004 Rules) under the interests of justice ground in order to introduce evidence that was available but not used at the hearing though only in exceptional circumstances. This means that it may be possible to argue that it is in the interests of justice to reconsider a judgment where evidence was available but not used. There must be some mitigating factor relating to the failure to produce the evidence. It is not enough that the new evidence (or, at any rate, unused evidence available but not used) would have won the day for the complainant.

9. An application for reconsideration must be presented in writing and copied to all other parties within 14 days of the date upon which the written record of the decision was sent to the parties. In this case, the relevant date from which time runs is the promulgation date which is 22 July 2021. This is the date upon which the Judgment was promulgated and sent to the parties.

10. By Rule 4(3) of the 2013 Rules, where any act is required to be done within a certain number of days or from an event, the date of that event shall not be included in the calculation. Therefore, for the purposes of the claimant's reconsideration application, time started to run on 23 July 2021. Time for the claimant to make his application for reconsideration expired on 6 August 2021. It follows therefore that the application for reconsideration was presented in time as it was received by the Tribunal upon the stroke of midnight of 5 and 6 August 2021.

11. However, the claimant has failed to comply with Rule 71 of the 2013 Rules as the application for reconsideration, while presented to the Tribunal in writing, was not copied to the respondent. By Rule 6 of the 2013 Rules, the Tribunal may waive or vary this provision.

12. Rule 72 of the 2013 Rules sets out the procedure that an Employment Tribunal will follow upon receipt of an application for reconsideration. Firstly, the application will be put before the Employment Judge who heard the case or who chaired the panel hearing the case. If the Employment Judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application will be refused, and the Tribunal will inform the parties accordingly.

13. If the application is not refused, the Tribunal will send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the parties' views on whether the application can be determined without a hearing. That notice may also set out the Judge's provisional views on the application although it does not have to do so. The matter will then proceed to a hearing, unless the Employment Judge considers – having regard to any response to the application – 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. It is clear that the policy intention underlying Rule 72 is that reconsideration applications will be dealt with on the papers wherever possible, thereby saving time, expense and resources.

14. The EAT has recently emphasised the importance of following the Rule 72 procedure in the correct order in **T W White and Sons Ltd v White** (EAT) 0022/21. The EAT said that the procedure does not allow for the Employment

Judge to decide that a hearing is necessary before he or she takes the decision under Rule 72(1) as to whether there is no reasonable prospect of the original decision being varied or revoked. This aspect of the procedure provides an important protection to the party opposing the application, in that the other party should not be put to the time and expense involved in responding to the application if the Employment Judge does not consider that there are reasonable prospects of the Judgment being varied or revoked. As I have reached the conclusion that there is no reasonable prospect of the Judgment being varied or revoked, it is in my judgment just that the Tribunal waives the procedural failure upon the part of the claimant to copy the respondent in to the reconsideration application. In my judgment, pursuant to Rule 6, it is just to waive that requirement. I was able to consider the application upon the papers without the respondent's input.

15. The claimant's reconsideration application is confined to a request for the Tribunal to reconsider its decision contained in paragraph 236 of the reasons for the Judgment that Mr Rodrigo's conduct was not unfavourable treatment for something arising in consequence of disability. The claimant seeks reconsideration of the Tribunal's factual findings in paragraph 236 of the reasons for the Judgment.

16. Upon this basis, the claimant's reconsideration application is unfortunately misconceived. Rule 70 provides the Tribunal with a general power to reconsider any judgment where necessary in the interests of justice to do so. A judgment is defined in Rule 1(3)(b) as a decision made at any stage of the proceedings which (amongst other things) finally determines a claim. It is not open to a party to seek reconsideration of the reasons for the judgment as opposed to the judgment itself.

17. This accords with the position regarding appeals to the Employment Appeal Tribunal against Employment Tribunal judgments and decisions. In **Waterman v AIT Group Plc** (UK EAT/0358/05) the appellant accepted the correctness of the judgment in question but disputed the Tribunal's reasoning. The appeal was dismissed as an appeal only lies against an Employment Tribunal's decision and not its reasons for the decision. The same practice applies when seeking reconsideration of an Employment Tribunal judgment.

18. The claimant has not sought reconsideration of the Judgment that his complaint of unfavourable treatment for something arising in consequence of disability fails and stands dismissed. He has simply taken issue with the Tribunal's factual finding that Mr Rodrigo made a compensating adjustment to the claimant's scores in the redundancy exercise to take account of the impact of the claimant's disability upon him in the scoring exercise that was undertaken.

19. The Tribunal held that the claimant was unfavourably treated for something arising in consequence of disability by Mr McCubbin. We determined that the claimant was not treated unfavourably by Mr Rodrigo. We found that even if we were wrong to reach that conclusion and Mr Rodrigo did treat the claimant unfavourably for something arising in consequence of disability then his actions were a proportionate means of achieving a legitimate aim (as were those of Mr McCubbin). There is no challenge in the reconsideration application by the claimant to that conclusion.

20. I am satisfied therefore that the conclusion reached by the Tribunal that the claimant was not unfavourably treated for something arising in consequence of disability was a legally sound decision open to the Tribunal upon the basis of the evidence presented to us. The respondent's justification defence in answer to that complaint was made out. Therefore, even if (which I do not accept) the Tribunal reached an incorrect factual finding upon Mr Rodrigo's conduct of the redundancy marketing exercise, the claimant's claim fails in any case. There is no application for a reconsideration of the Tribunal's findings upon the justification defence (and there appears to be no reasonable prospect of a challenge to the Tribunal's conclusions upon that issue).

21. I now turn to deal with several issues raised by the claimant in his reconsideration application. The first of these concerns his health and capabilities during the Tribunal hearing. Essentially, the claimant contends that the presentation of his case was impaired due to his ill health.

22. It is not in dispute that the claimant was a disabled person for the purposes of section 6 of the 2010 Act at all material times with which the Tribunal was concerned. The medical evidence produced by him in support of his reconsideration application supports the view that he continues to suffer from the relevant mental impairment. The Tribunal has little doubt that this has a profound effect upon the claimant's abilities and his functioning.

23. All this being said, there was no application made on behalf of the claimant at the hearing for an adjournment of the case upon the grounds of his ill health. Ordinarily, it will not be in the interests of justice to reconsider a judgment because of any tactical error made by a party.

24. The next issue raised by the claimant upon which I wish to comment is around the omission of a letter sent to Mr Rodrigo by the claimant's general practitioner dated 4 November 2019. The claimant says that this letter was missing from the bundle. It is not clear at what point it was realised that this evidence was missing and was not before the Tribunal. However, on any view, by application of the test in **Ladd v Marshall**, it is evidence which could have been obtained with reasonable diligence and placed before the Tribunal. The claimant knew of it prior to the hearing. That is enough to dispose of the application in so far as the claimant seeks to rely upon the letter.

25. Applying the **Ladd v Marshall** test further, there is no issue that the evidence in the letter of 4 November 2019 is relevant and apparently credible. The difficulty for the claimant however is demonstrating how adducing that letter would have had an important influence upon the hearing. As has been said, I am satisfied that proper findings were made that Mr Rodrigo made appropriate adjustments to the redundancy scoring and in any case there is no challenge to the respondent's successful justification defence.

26. In the circumstances, I am satisfied that there is no reasonable prospect of the claimant's reconsideration application succeeding.

27. As a postscript, the claimant sent to the Employment Tribunal a medical report from his general practitioner dated 12 August 2021 in support of his application. Plainly, this was material not before the Employment Tribunal when it heard the case or before the respondent when it dealt with the matters in question. It was lodged after the reconsideration application and supplemented it.

28. The claimant's general practitioner questions the ability of the claimant to prove (at around the time of his dismissal) why his mental health problems prevented him from performing any of the duties adequately. Upon the complaints brought under the Equality Act 2010 (in particular, the complaint of unfavourable treatment which is a subject of the reconsideration application) I am satisfied the Tribunal made proper findings that Mr Rodrigo adjusted the scores upwards to compensate for the impact of the disability upon the claimant. The Tribunal's consideration of matters under the Equality Act 2010 is an objective one focusing upon the outcomes (as opposed to the procedure followed by the employer). Even if it is the case that the employer should have commissioned medical evidence to ascertain the impact of the claimant's disability upon his performance (as opposed to putting the burden upon the claimant to do so) I am satisfied that a sound factual finding was made that the outcome of the process was that Mr Rodrigo made a compensating adjustment and did not unfavourably treat the claimant accordingly. At the risk of repetition, even if this conclusion is wrong, there was no discernible legal error in the finding that respondent had made out its justification defence in any case.

29. The claimant's reconsideration application therefore fails and stands dismissed.

Employment Judge Brain

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Date: 09 September 2021

Date: 13 September 2021