



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Mr P Cuthbert

Taylor Wimpey UK Limited

JUDGMENT ON CLAIMANT'S APPLICATION FOR RECONSIDERATION

Introduction

1. By emails dated 8 October 2020, timed at 12:37 and 12:50, the Claimant sought reconsideration of the judgment Employment Judge (EJ) Russell given orally at an Open Preliminary Hearing (OPH) on 6 October 2020 (but not sent to the parties until 12 October 2020) on the grounds that he had not been sent joining instructions for the video hearing. At that OPH EJ Russell gave judgment striking out his claim under Rule 37(1)(b) on the grounds that it stood no reasonable prospect of success because (among other things) the Claimant had validly compromised the claim by way of a settlement agreement with the Respondent.
2. By order of 23 October 2020 I informed the parties that, as it was not reasonably practicable for EJ Russell to deal with the application for reconsideration, Regional EJ (REJ) Wade had authorised me to deal with it. I gave directions which included the following:
 1. The Claimant's application has not been copied to the Respondent as required by Rules 71 and 92. He must now forward both emails to the Respondent so that they have sight of them. He must do that by 4pm, 29 October 2020.
 2. The joining instructions for the hearing were sent out by Gemma Carby on 2 October 2020 at 15.09 to the Claimant's email address (paul@wearekooshty.com). The Claimant by email of 5 October 2020, 17:58 emailed the Respondent and two Tribunal employees providing

what appear to be written submissions that he intended to provide “on account of not being able to phone in”, i.e. apparently in lieu of attending the hearing. The Claimant must by 4pm, 29 October 2020 provide an explanation in writing to the Tribunal (on londoncentralet@justice.gov.uk), copying in the Respondent, as to (i) whether he received the joining instructions sent on 2 October 2020 and, if not, why he thinks that was given that it was sent to the correct email address; and (ii) why his email of 5 October 2020, 17:58 could not reasonably have been understood as constituting written submissions and an indication that the Claimant would not be attending the hearing.

3. The Claimant did not comply with either order. He did send further correspondence, and there was considerable delay on the part of the Tribunal in dealing with that correspondence. Apologies have already been offered to the Claimant by REJ Wade, but I offer apologies again. The file should have been referred back to me nearly a year ago, but it has only today reached my desk.
4. I see from the file that on 23 July 2021 REJ Wade noted that the Claimant had not complied with my orders of 23 October 2020 and ordered him to provide responses again. He has still not done so.
5. Delay notwithstanding, it now falls to me to determine the Claimant's application for reconsideration on the basis of the material before me.

The law

6. Rules 70-73 of the Tribunal Rules provides as follows:-

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.

71. Application

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.

73. Reconsideration by the Tribunal on its own initiative

Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).

7. In deciding whether or not to reconsider the judgment, the authorities indicate that I have a broad discretion, which “*must be exercised judicially ... 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*” (*Outsight v Brown* [2015] ICR D11). The Court of Appeal in *Ministry of Justice v Burton* [2016] ICR 1128 also emphasised the importance of the finality of litigation (*ibid*, para 20).
8. That said, if an obvious error has been made which may lead to a judgment or part of it being corrected on appeal, it will generally be appropriate for it to be dealt with by way of reconsideration: *Williams v Ferrosan Ltd* [2004] IRLR 607 at para 17 *per* Hooper J (an approach approved by Underhill J, as he then was, in *Newcastle upon Tyne City Council v Marsden* [2010] ICR 743 at para 16).
9. It may also be appropriate for a judgment to be reconsidered if a party for some reason has not had a fair opportunity to address the Tribunal on a

particular point (*Trimble v Supertravel Ltd, Newcastle-upon-Tyne City Council v Marsden* *ibid*).

10. However, a mere failure by a party (in particular a represented party) or the Tribunal to raise a particular point is not normally grounds for reconsideration (*Ministry of Justice v Burton* (*ibid*) at para 24) – an application for reconsideration is not an opportunity to re-argue the merits.

This case

11. The key question here is whether the Claimant did have a fair opportunity to address the Tribunal on 6 October or not. If he did not, then the judgment ought to be reconsidered so that he can have that opportunity. If he did, then the judgment is unassailable as there is no error of substance in EJ Russell's judgment that I can see. He has properly considered the legal authorities and applied the law to the facts before him.
12. In my judgment, the Claimant plainly had a fair opportunity to address the Tribunal. He was sent on 7 August 2020 Notice of a Closed Preliminary Hearing (in-person) due to take place on 6 October 2020. On 24 September 2020 the Claimant sent the Tribunal a lengthy email in the course of which he acknowledged that he was aware of the hearing listed for 6 October 2020. On 27 September 2020 the Claimant sent the Respondent (copying in the Tribunal) his Schedule of Loss. On 28 September 2020 I ordered that the hearing be converted to an OPH by video for the purpose of considering the Respondent's strike-out application. Both my order and the revised Notice of Hearing were sent to the Claimant's correct email address.
13. In correspondence between the parties on 1 October 2020 the Claimant referred to "*our Public preliminary hearing on 6th October 2020 next week*" thus confirming that he had received the new Notice of Hearing.
14. As noted in my Order of 23 October 2020, on 2 October 2020 at 15:09 Miss Gemma Carby of the Tribunal sent both parties joining instructions for the OPH. The Claimant acknowledged Miss Carby's email on 4 October 2020 at 13:29 thanking her for the joining instructions. On the same day at 17:29 the Claimant forwarded the joining instructions to BBC News Watch.
15. On 5 October 2020 at 17:58 the Claimant emailed the Tribunal sending in written submissions apparently in lieu of attending the hearing on the basis that he would 'not be able to telephone in due to limited funds'. However, that is no explanation for not joining the hearing. The Claimant's use of email shows that he has access to the internet and with internet access it is then free to join a video hearing. In any event, if there was an issue with funding or access, the Claimant could have sought either an in-person hearing or assistance with video access or an adjournment. He did none of these things.

16. In the premises, I am satisfied that the Claimant had reasonable notice of the hearing, and a reasonable opportunity to attend, but chose not to. He did, however, submit written submissions which EJ Russell was able to take into account.
17. I consider that there is no reasonable prospect of EJ Russell's judgment being varied or revoked and the Claimant's application for reconsideration is therefore refused on the papers under Rule 72(1).

Employment Judge Stout

20 September 2021

SENT TO THE PARTIES ON

20/09/2021

FOR THE TRIBUNAL OFFICE