EMPLOYMENT TRIBUNALS

Claimant: Mr A Jutrzenka

Respondent: 17 Clarges Street RTM Company Limited

JUDGMENT

The claimant's application of 13 September 2021 for reconsideration of the reserved judgment which was sent to the parties on 31 August 2021, is refused under rule 72(1) of the Employment Tribunals Rules of Procedure 2013.

REASONS

1. Under the Employment Tribunal Rules of Procedure 2013 an application for reconsideration may be made within 14 days of the judgment being sent to the parties. By rule 70 a tribunal may "reconsider any judgment where it is necessary in the interest of justice to do so" and upon reconsideration the decision may be confirmed, varied or revoked.

2. Rule 72 provides that an Employment Judge should consider the application to reconsider, and if the judge considers there is no reasonable prospect of the decision being varied or revoked, the application shall be refused. Otherwise it is to be decided, with or without a hearing, where practicable, by the tribunal which heard it.

3. Under the 2004 rules prescribed grounds were set out, plus a generic "interests of justice" provision, which was to be construed as being of the same type as the other grounds, which were that a decision was wrongly made as a result of an administrative error, a party did not receive notice of the hearing, the decision was made in the absence of a party, or that new evidence had become available since the hearing provided that its existence could not have been reasonably known of or foreseen at the time. In Outasight VB Ltd v Brown UKEAT/0253/14/LA the EAT confirmed that the 2013 rules did not broaden the scope of the grounds for reconsideration (formerly called a review).

4. The Court of Appeal in Ministry of Justice v Burton [2016] EWCA Civ 714 has since provided the following guidance on the approach to be taken by a tribunal when exercising its discretion under rule 70 on the

ground of 'interests of justice': (1) the discretion must be exercised in a principled way; (2) there must be an emphasis on the desirability of finality, which militates against the decision being exercised too readily; (3) it is unlikely to be exercised because a particular argument was not advanced properly; and (4) it is unlikely to be exercised if to do so would involve introducing fresh evidence, unless the strict rules on admissibility are satisfied (see Outasight; Ladd v Marshall [1954] 3 All ER 745, CA; and also Flint v Eastern Electricity Board [1975] ICR 395, QBD).

5. The importance of finality in litigation was also emphasised by Underhill J, as he then was, in Council of the City of Newcastle-Upon-Tyne v Marsden [2010] ICR 743, EAT:

> "The weight attached in many of the previous cases to the importance of finality in litigation…seems to me to be entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final (subject, of course to appeal)."

6. The claimant made this application by email on 13 September 2021. Having considered the claimant's submissions, I find that there is no reasonable prospect of the judgment being varied or revoked.

7. The claimant says that I was biased. He refers, in part, to the reserved judgment of the tribunal which set out the unanimous decision of the tribunal. I infer from this that the claimant alleges that the tribunal was also biased.

8. The claimant has made a number of assertions in relation to the tribunal's fact-finding, the weight given to the findings and the credibility of witnesses. In my view this amounts to an attempt to relitigate the case on the merits and does not provide any basis for reconsideration.

9. As to bias, I am satisfied that the tribunal acted with impartiality and without prejudice, we had no interest in the outcome of these proceedings or in relation to the outcome which resulted from the way in which we conducted these proceedings and that a fair-minded and informed observer would not conclude that there was a real possibility of bias (see Locabail (UK) Ltd v Bayfield Properties Ltd [2000] IRLR 96, CA).

10. The claimant refers to the following matters which are said to illustrate bias which I shall deal with in turn:

    (1) That "on many occasions, Judge Khan stopped my line of questioning of the Respondent's Witnesses". I intervened when it was necessary to remind the claimant of his pleaded case, the issues we were required to determine, the need to ask relevant questions and the importance of conducting his cross-examination in a manner which allowed witnesses to give their best evidence. The claimant cites one example when he says

that I "abruptly stopped" him from questioning Ms Chong in relation to a complaint made by her about him to the police. During the afternoon session on day five of the hearing, the claimant asked Ms Chong a question about the documents she had provided to the police in relation to this complaint. I upheld the respondent's objection to this line of questioning because it related to an allegation which the claimant had applied to add to his claim that we refused earlier that day.

(2) That the judgment failed to record that Ms Sacks agreed in evidence that the claimant had "never suggested or implied that any sexual activity might take place between ourselves". At the start of the claimant's cross-examination of Ms Sacks during the afternoon session on day two, this witness agreed that the claimant had not said or suggested that they have sexual intercourse. We did not record this in our judgment because we did not find it to be relevant to our evaluation of the nature and effect of the texts and emails sent by the claimant to Ms Sacks. We explain why we concluded that Ms Sacks found this material to be sexual harassment at paragraphs 30, 37, 40 and 122 of our judgment.

(3) That in relation to the alleged assault of Mr Hewitt-Lee, there was no conclusive evidence. At paragraph 19 of our judgment, we reminded the parties that the standard of proof we applied was the balance of probabilities. Conclusive evidence is not required. Our relevant findings are at paragraphs 76, 82 and 143. The absence of any injuries, which Mr Hewitt-Lee confirmed he did not sustain did not preclude these findings. In relation to the allegation that Mr Hewitt-Lee falsified his evidence, we explain why we did not find this at paragraph 80 of our judgment.

(4) That I "asked very few questions and rarely cross-examined" the respondent's witnesses. It is not the role of a tribunal to cross-examine witnesses and nor did we. Rather, we asked questions of the witnesses when necessary to clarify the case being advanced and / or the evidence being put.

(5) That I "did not adequately, fairly or fully question" Ms Sacks. I have dealt with this above.

(6) That we preferred Ms Chong's evidence over the claimant's. We set out our reasons for this at paragraph 26 of our judgment.

11. For these reasons, the claimant's application for reconsideration has no reasonable prospects of success and it is refused under rule 72(1).

Employment Judge Khan

06.10.2021

JUDGMENT SENT TO THE PARTIES ON

06/10/2021.

FOR THE TRIBUNAL OFFICE