EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113572/2019

Hearing Held on written submissions on 20 October 2021

Employment Judge A Kemp

Mr S Cusick	**Claimant** **In person**
Alba Orbital Limited	**Respondent** **Represented by:** **Mr W Lane** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's application for a reconsideration of the Judgment of the Tribunal is refused.

REASONS

Introduction

1. The Tribunal issued a Judgment to the parties on 28 September 2021 in which the claimant's claims were dismissed.

2. The claimant has applied to reconsider that, by email dated 12 October 2021.

The law

3. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 set out the Rules of Procedure in Schedule 1, and those

in relation to the reconsideration of judgments are at Rules 70 – 73. The provisions I consider relevant for the present application are as follows:

> "**70 Principles**
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> 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.
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> **71 Application**
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> 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.
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> **72 Process**
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> (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.
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> (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."

4. When considering such an issue regard must also be had to the overriding objective in Rule 2, which was quoted in the original Judgment.

5. The previous statutory formulation of the terms of Rule 70 was based on the test laid down in ***Ladd v Marshall [1954] 3 All ER 745***, for determining the admissibility of fresh evidence in the Court of Appeal (therefore a matter of English law and practice), and the substance of the ***Ladd v Marshall*** test has been held to be applicable to what had been a review procedure in employment tribunals in ***Wileman v Minilec Engineering Ltd [1988] IRLR 144***. Following the implementation of the 2013 Rules, the EAT held that the ***Ladd v Marshall*** test (in conjunction with the overriding objective) continues to apply where it is sought to persuade a tribunal, in the interests of justice, to reconsider its judgment on the basis of new evidence (***Outasight VB Ltd v Brown UKEAT/0253/14***).

6. The ***Ladd v Marshall*** test has three parts. It must be shown:

   (a) that the evidence could not have been obtained with reasonable diligence for use at the original hearing;
   (b) that it is relevant and would probably have had an important influence on the hearing; and
   (c) that it is apparently credible.

7. The principle in Scotland is *res noviter veniens ad notitiam*, usually referred to as the *res noviter* rule. I have not found a case in the EAT or above that relates to an application to lead new evidence and is Scottish, but it is I consider appropriate to consider how this principle is applied in the Scottish courts given the authorities above on how Rule 2 is to be applied, as well as considering matters from the perspective of the ***Ladd v Marshall*** test which has been the subject of caselaw. There is little difference between the two approaches, in my opinion, but they are not identical.

8. MacPhail on ***Sheriff Court Practice*** states the following

> "The court may also receive a minute of *res noviter* and allow additional evidence to be heard in very exceptional circumstances: see ***Coul v Ayr CC, 1909 S.C. 422***; ***Mitchell v Sellar, 1915 S.C. 360*** at 361"

9. In the former of those cases, the action was one of adherence and aliment where the pursuer had stated in evidence that she had not had a relationship with any other person bar the defender. The new evidence that the defender sought to introduce after proof was of relationships with two other men, and the application to do so was accepted.

10. The latter of those two cases concerned a claim following a collision between two vessels. One of the owners of the vessel owned by the pursuers approached the defenders after the proof to state that the action had been commenced without his knowledge and that he had been the sole witness to all that had happened. In allowing that new evidence to be received, the Lord President said this:

> "This is one of a class of cases in which the Court has certainly a very wide discretion—at the same time, a discretion which is only exercised under very exceptional circumstances."

11. The *res noviter* principle was referred to more recently in ***Ramsden v Santon Highlands Ltd [2015] CSOH 65***, a decision of Lord Kinclaven, as follows:

> "76 – *Res noviter* must refer to some fact which was not known and which could not, with reasonable care and diligence, have been known before. The pursuer requires to aver circumstances showing that he was excusably ignorant of how matters stood. He must give particulars of its discovery and of the circumstances which bear upon the possibility of his having acquired earlier knowledge of it."

12. The EAT in ***Outasight*** acknowledged that there might be cases where the interests of justice would permit fresh evidence to be adduced notwithstanding that the principles were not strictly met. What is not permitted under the 2013 Rules, the EAT held, is the adoption of an altogether broader approach whereby fresh evidence may be admitted regardless of the constraints to be found in the established test.

13. The facts of ***Outasight*** are that the Tribunal, having dismissed the claimant's claims for wrongful dismissal and breach of contract, revoked its decision on a reconsideration after it allowed the claimant to introduce new evidence of the fact that the respondent's director and sole witness had previous convictions for dishonesty. In permitting the new evidence to be given, the Tribunal acknowledged: (a) that the claimant had had some awareness, but no actual proof, of the director's criminal past at the date of the liability hearing; (b) that he could at that stage have carried out the same due diligence test (searching the Internet) that he carried out after judgment had been given; and (c) that, consequently, the strict test for the admissibility of new evidence had not been met. Notwithstanding this, it considered that the 2013 Rules gave it a wider discretion to admit the evidence and hence to reconsider its original decision in the light of it. As that decision had been finely balanced and the credibility of the claimant had been central to it, the Tribunal revoked its decision mainly on the ground that the decision might have been different if it had had the evidence of the convictions at the time of the hearing.

14. On appeal the EAT set aside the revocation and restored the tribunal's original decision. It held that not only had the Tribunal been wrong to admit the new evidence when the test for admissibility had not been met, but also that the claimant had sufficient knowledge of the director's criminal past to initiate an inquiry, seeking if necessary an adjournment to pursue

it, if he considered that the convictions were relevant to the issue of the director's credibility. Even though the claimant was unrepresented at the hearing, there were no grounds for the Tribunal bypassing the ***Ladd v Marshall*** test and interfering with the original decision.

Discussion

15. I do not consider that there is a reasonable prospect of the original decision being varied or revoked, I do not consider that reconsideration is in accordance with the overriding objective, and in accordance with the terms of Rule 72 I refuse the application.

16. I consider that that is the case as there is nothing within the application to reconsider that is, in my judgment, a sufficient basis in law to do so. Firstly in light of the case law set out above I do not consider that any basis has been set out to admit new evidence. It was, or ought to have been, known about or possible to secure it with reasonable care and diligence for the Final Hearing. In the event that documents are not produced voluntarily a party can seek an order for them to be produced under Rule 31. The allegations regarding two of the witnesses before the Tribunal are not the assessment of the evidence heard by the Tribunal, as set out in the Judgment. The claimant did not seek at any stage any adjournment of the Final Hearing. Whilst he was acting for himself that does not provide a basis to seek reconsideration for the reasons set out in authority.

17. There is I consider no basis for a reconsideration and the application is accordingly refused.

Employment Judge: Sandy Kemp
Date of Judgment: 20 October 2021
Entered in register: 22 October 2021
and copied to parties