EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107699/2020

Hearing Held remotely on 29 November 2021

10 **Employment Judge A Kemp**
Tribunal Member W Canning
Tribunal Member J Burnett

15 **Mr D Hiddleston** **Claimant**
In person

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Highland Country Buses Ltd **Respondent**
Represented by:
Mr A Hardman
25 **Advocate**
Instructed by
Mr S McLaren
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's application for reconsideration is refused.

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REASONS

Introduction

1. A Judgment in this case was issued on 15 July 2021.

2. The claimant seeks reconsideration of that Judgment, by email dated 27 July 2021, seeking to found on having new evidence. The respondent provided a written response.

3. A hearing to address the application was arranged to take place remotely by Cloud Video Platform.

Submissions for claimant

4. The following is a basic summary of the claimant's position as set out in his email and supplemented orally. He sought to provide new evidence that had not been available to him at the time of the Final Hearing. He had recorded the disciplinary hearing with Mr Ferguson on a mobile telephone. He goes through about three or four mobiles each year. He had thought that the mobile he had used to record that conversation was a larger one by about 1.5cm than it turned out he had used. He had a collection of about seven old mobiles in a cupboard. He did not think that the one that he had used to record the meeting was there. After the Judgment was issued his partner had found an email which was from O2 which indicated that the phone used at that time was a Samsung Galaxy. That was one of the phones in his cupboard. It had a cracked screen and he could not get it to work. He took it to the mobile phone shop, and the assistant there had been able to extract the recording from it. This was a different phone to the one referred to in the email to the Tribunal on 5 April 2021.

5. He further argued that the admission of the new evidence was vital for fairness. Mr Ferguson he argued had been lying on oath in a number of respects. Matters he had raised at that hearing had been omitted from the minutes. This would show the full extent of that hearing, and the issues that he had raised, and that was crucial evidence that would have an important effect on the outcome.

Submissions for respondent

6. The following is again a basic summary of the submission made both in writing and orally. The claimant could with due diligence have found the mobile telephone. It was in his possession. It was not credible that it was not the same phone as referred to in the email to the Tribunal on 5 April

2021. The Tribunal had referred to providing all evidence at the commencement of the hearing at paragraph 4 of the Judgment and that new evidence could be admitted only in exceptional circumstances. The claimant had not at that stage raised any matter about the recording of the hearing, nor had he mentioned that in his evidence or cross-examination of the claimant. The claimant did not meet the first principle of the ***Ladd v Marshall*** test. If he did, he did not meet the second principle of that test. The material would not have affected the outcome. It would not have changed the reason for the dismissal. It raised irrelevant issues as to health and safety matters the claimant sought to mention. In any event there had been a reconsideration on appeal by Mrs McCluskie, who had a hearing with the claimant. Reference was made to the cases of ***Stevenson*** and ***Outasight,*** and to the term of Rule 34 of the 2004 Rules. The new evidence even if received would not affect the outcome, and should be refused.

The Law

7. 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

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."

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

9. In ***Serco Ltd v Wells [2016] ICR 768***, the EAT observed that the Rules of Procedure must be taken to have been drafted in accordance with the principles of finality, certainty and the integrity of judicial orders and decisions, which usually means that a challenge to an order should take the form of an appeal to a higher tribunal rather than being reconsidered by another Employment Judge "save in carefully defined circumstances". Under the heading of "The fundamental principle" the following was stated:

> "24….. I need to recognise that the topics of certainty and finality in litigation and of the integrity of judicial orders and decisions are both antique and far reaching. Even in the relatively narrow statutory jurisdiction of the employment tribunal the topic covers all kinds of orders and directions; examples are to be found in the context of strike out, reconsideration (formerly review) and what is nowadays called 'relief from sanction' all of which might involve variation of previous directions and orders, as well as in cases, like the present, which might be described as 'set-aside cases', where the only issue is variation of a previous direction and order."

10. The issue of reconsideration was therefore specifically in contemplation. The EAT held that a Tribunal should interpret the words 'necessary in the interests of justice' in what is now Rule 70 as limiting reconsideration to where:

> (a) there has been a material change of circumstances since the order was made;
> (b) the order was based on a misstatement or omission; or
> (c) there is some other 'rare' and 'out of the ordinary' circumstance.

11. The EAT also held that the issue of whether or not an order should be varied or set aside was a matter of jurisdiction and not an exercise of discretion by the Tribunal. The question of whether there has been a material change of circumstances was to be decided

> "from an objective standpoint … not from the point of view of a band of reasonableness but from the point of view that either the factual matrix can support that view or it cannot".

12. 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***).

13. 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.

14. The principle in Scotland is *res noviter veniens ad notitiam*, usually referred to as the *res noviter* rule. There is one authority on the former provisions as to review being in ***Stevenson v Golden Wonder Ltd [1977]*** IRLR 474 in which the EAT stated that those provisions were not intended to provide parties with the opportunity for "further evidence [to be] adduced which was available before".

15. We consider it appropriate to consider how this principle is applied in the Scottish courts, as well as considering matters from the perspective of the ***Ladd v Marshall*** test which has been the subject of caselaw. There is little practical difference between the two approaches, in our opinion, but they are not identical.

16. 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"

17. 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. 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."

18. 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."

19. 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.

20. 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.

21. 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

22. The Tribunal was unanimous in its decision. In our judgment the claimant does not meet the standard required for a *res noviter* argument, and in so far as there is any difference between the position in Scotland and England, does not pass the first part of the test under the principles established in ***Ladd v Marshall***. We consider that the ***Outasight*** authority is at the least highly persuasive though based on English civil procedure, and the facts of that case, whilst naturally different to those in the present case, have some significant similarities. There, like here, there was a factual dispute. There the claimant could with due diligence have discovered what he said was new evidence prior to the hearing that took place. We consider that the claimant in the case before us could also with

due diligence, meaning with reasonable care and diligence under the *res noviter* principle, have done so. He had the mobile telephone on which he had recorded the meeting in his possession. It was in a cupboard with other mobiles he did not then use. He was mistaken when he thought that it had been recorded on a different one, larger in size, than those in that cupboard. It was an error of recollection, but with due diligence he could easily have had all seven mobile telephones checked in the same manner as he did after finding that one of them was the mobile which had the recording on it. He could have done so at a time when Covid-19 restrictions did not prevent that. Not only could he have done so with due diligence, but checking all the mobiles he had in his possession to seek evidence for his case was an obvious thing to do if he wished to lead the recording as evidence. He was aware of what position the respondent was taking, and had seen the minutes of the meeting and decision letter. He was aware that he had recorded the meeting on his mobile.

23. Separately, as paragraph 4 of the Judgment makes clear, at the commencement of the hearing it was explained that the Final Hearing was the opportunity to put forward his case, and that it was only in exceptional circumstances that further evidence would be admitted. He did not at that stage say that he had made a recording of the meeting, nor did he ask for an adjournment or similar at that point.

24. The case of ***Outasight*** and other authorities referred to above stress the significance of the principle of finality of litigation. We consider that that authority provides strong support for the conclusion that the present application should be refused, as the recording he seeks to have admitted could have been obtained with due diligence prior to the Final Hearing. The application made by the claimant does not meet the test in Scotland, or the first principle of the ***Ladd v Marshall*** test in so far as that is any different.

25. We unanimously consider in light of the foregoing that it is not in accordance with the terms of the overriding objective to grant the application for reconsideration.

Conclusion

26. The application is refused.

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10 **Employment Judge:** **A Kemp**
Date of Judgment: **30 November 2021**
Date sent to parties: **30 November 2021**