Case No. 1400374/2019

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Mr G L Ford	**AND**	Alfresco Concepts (UK) Limited (1) and David Ezrine (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD BY VIDEO (Panel only – based on papers)	**ON**	16 December 2021
EMPLOYMENT JUDGE GRAY	**MEMBERS**	**MRS C DATE** **MR J EVANS**

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The unanimous judgment of the tribunal is that the Claimant's application for reconsideration is dismissed and the original decision is confirmed.

REASONS

1. The Claimant has applied for a reconsideration of the reserved judgment dated 4 July 2021 which was sent to the parties on 9 July 2021.

2. The Claimant's reconsideration application is attached to an email dated 23 July 2021 and consists of 16 numbered paragraphs.

3. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 (“the Rules”). Under Rule 71 an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The application was therefore received within the relevant time limit.

4. By correspondence dated 6 August 2021 the Respondents were asked for their comments on the Claimant’s application and both parties were asked for their views on whether the application can be determined without a hearing.

5. In response the Respondents provided their comments/submissions attached to an email dated 20 August 2021 and confirmed that their view was the matter could be determined without a hearing.

6. The Claimant by correspondence dated 12 October 2021 also confirmed that the matter could be determined without a hearing.

7. Having regard to these responses it was considered that a hearing was not necessary in the interests of justice, so by correspondence dated 19 November 2021 it was confirmed that the matter would be decided without a hearing and the parties were then given a reasonable opportunity (14 days) to make further written representations (so by 3 December 2021). The representative for the Respondents made a request for further time in case they wanted to make further written submissions and was permitted until the 15 December 2021 to do so. Further written submissions have not been received from the parties.

8. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.

9. The grounds relied upon by the Claimant are … “The Claimant contends that the Tribunal failed to deal with important issues before it and / or to give adequate reasons for its decision.”.

10. These matters are then set out in paragraphs 10 to 13 of the application.

11. The Claimant also refers to the following case authorities and legal principles:

    a. ***Williams v Ferrosan Ltd [2004] IRLR 607*** - *It is not necessary for there to be ‘exceptional circumstances’ for it to be in the interests of justice to reconsider a judgment.*

b. ***Wolfe v North Middlesex University Hospital NHS Trust [2015] ICR 960*** *- In reliance on Wolfe it is submitted that it is in the interests of justice for the Tribunal to reconsider the judgment in light of those points to avoid delay and expense if the Claimant appeals on those points only for them to be remitted to the Tribunal under the Burns-Barke Procedure.*

12. The Respondents submit about the Claimant's application that … "the Claimant's representative has not submitted any new evidence but rather sets out where she considers that the Tribunal has not dealt with a particularly point. We submit that the Tribunal reached conclusions that involved no error of law… Even if, which is not admitted, some matters of evidence were not referred to in the Judgment they did not have a material adverse effect on the Tribunal's conclusion.". Further, that it is not in the interests of justice to reconsider this matter, and that in their view… "the Tribunal considered all of the agreed issues in this case very carefully... We also note that the Judgment comments on the very helpful written submissions of Claimant's Counsel and the agreed legal summary was referred to at paragraphs 248- 301, and which was "supplemented by some additional clarification considered appropriate to complete the summary of relevant statutory provisions and legal considerations relevant to the matters in this claim". And … "As was referred to in the EAT decision in Wolfe v North Middlesex University Hospital NHS Trust [2015] ICR 960 … the Tribunal has directed itself as to the relevant law. The law as set out in the Judgment was both clear and comprehensive and was agreed by both Counsels. The Tribunal referred itself to the relevant statutory provisions and Guidance together with the relevant authorities. This has not been challenged by the Claimant in this Application.".

13. The Respondents then set out their responses to the specific points the Claimant's application addresses.

14. The Respondents refer to the following case authorities and legal principles:

    Outasight VB Ltd v Brown UKEAT/0253/14 - *the previous case law on the interests of justice category under the old Employment Tribunal rules of procedure remains relevant to the exercise of the Tribunal's discretion under the current Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 ("ET Rules). However, the Tribunal's discretion is not wider; the same basic principles apply. The Tribunal should have regard to the interests of the party seeking the reconsideration, the interests of the other party, and the public interest requirement that there should, where possible, be finality of litigation.*

Fforde v Black UKEAT/68/80 - *which held that the ground of interests of justice could only be successfully relied on in an application for reconsideration when something had gone wrong with the Tribunal's procedure, so that a party had been denied natural justice.*

And also … Wolfe v North Middlesex University Hospital NHS Trust [2015] ICR 960 *(as referred to above).*

15. We note that the earlier case law suggests that the interests of justice ground should be construed restrictively. In ***Fforde v Black EAT 68/80*** (where the applicant was seeking a review in the interests of justice under the former Rules which is analogous to a reconsideration under the current Rules) the EAT decided that the interests of justice ground of review does not mean "that in every case where a litigant is unsuccessful he is automatically entitled to have the tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in the even more exceptional case where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order".

16. More recent case law suggests that the "interests of justice" ground should not be construed as restrictively as it was prior to the introduction of the "overriding objective" (which is now set out in Rule 2). This requires the tribunal to give effect to the overriding objective to deal with cases fairly and justly. As confirmed in ***Williams v Ferrosan Ltd [2004] IRLR 607 EAT***, it is no longer the case that the "interests of justice" ground was only appropriate in exceptional circumstances. However, in ***Newcastle Upon Tyne City Council v Marsden [2010] IRLR 743***, the EAT confirmed that it is incorrect to assert that the interests of justice ground need not necessarily be construed so restrictively, since the overriding objective to deal with cases justly required the application of recognised principles. These include that there should be finality in litigation, which is in the interest of both parties.

17. In our judgment, these principles are particularly relevant here and when applying them to the grounds of reconsideration we find as follows in respect of the specific matters raised by the Claimant (our findings highlighted in bold italics):

18. "Issue 4.2 (and also relevant to Polkey) – unfair and pre-determined redundancy process" – at paragraph 10 the Claimant submits that the Tribunal appears to have failed to consider the evidence or to have explained the basis on which it concluded the matters set out in sub paragraphs a to i of the Claimant's paragraph 10:

a. that Mr Ezrine was arranging interviews for the Head of e-Commerce role prior to informing the Claimant he was at risk and his unclear and changing explanations for why those interviews took place; - ***We accepted the explanation of Mr Ezrine, that this was part of his restructure research and he wanted to see what was out there (see paragraph 128).***

b. the lack of any internal documents supporting that there was genuinely a new structure being planned; - ***We found that documents about the new structure were created and the Claimant was involved in the creation of something similar (see paragraph 129).***

c. the two and a half months that elapsed from Mr Doyan's email of 5 April 2018 to the change (during which the Claimant made a protected disclosure); – ***We accepted the Respondents evidence on this matter and that it was a process with a "long tail" (see paragraph 125).***

As stated in paragraph 130 and repeated at paragraph 355 we accepted the evidence of the Respondents on the restructure decision and that it appeared a genuine and externally informed trajectory to which the Claimant has contributed and who confirmed in evidence that he believed it made a lot of sense.

d. the announcement of the redundancy prior to any consultation; - ***As stated in paragraph 127 and repeated in paragraph 357 we accepted the Respondents explanation for this. We found that they acted the way they did to implement a genuine restructure process. We did not find that the Respondents actions were materially influenced by a protected disclosure potentially made at some point between March and May 2018 (see paragraph 367).***

e. the evidence that the Claimant had in fact been doing the Head of eCommerce role and Mr Ezrine's refusal to engage with that point during the consultation meetings and / or to slot him into that role; - ***We did not find as fact that the Claimant had been doing the Head of eCommerce role (see paragraphs 126 and 130).***

f. the failure to consider the points raised in the grievance prior to deciding on the redundancy; - ***This issue is addressed in paragraphs 363 to 367 and 370 to 375 of our judgment.***

g. the portrayal of the Technical Supervisor role to the Claimant as significantly more junior with a much lower salary during the consultation process (as confirmed by Ms Lewis in oral evidence) and / or the failure to slot him the Claimant into that role (in the context of Mr Ezrine's oral evidence that the salary would have been similar to the role C was in and

that it was not a more junior role); - ***The Claimant did not express an interest in applying for either vacant role but as we found the Respondents did keep the option open for him to do so, keeping the employment relationship alive at that point by him being given notice in time rather than being paid in lieu, re-iterating the vacant roles (see paragraph 166).***

h. the Respondents' pleaded position that the Claimant was not suitable for the Head of e-Commerce role (para 16 of the Response at p51 of the bundle), notwithstanding which the Tribunal found at paragraph 360 that it is not clear what the outcome would have been if the Claimant had applied for either vacancy; - ***It was our view that it was not possible to conclusively say what the outcome would have been from the evidence we were presented, save that the Claimant did not express interest in either role.***

i. no one being hired into the 'new' roles and an employee describing themselves as the eCommerce Manager from April 2019 onwards which suggests the restructure was not genuine. – ***This was a matter explored in oral evidence and it did not change our finding that the restructure process was genuine with the Claimant's dismissal to take place in November 2018. The Claimant was also not the only person doing e-commerce work for the Respondents at that time with some elements of it being outsourced (see paragraph 126 and 130).***

19. Dismissal for misconduct – at paragraph 11 the Claimant submits that the Tribunal appears to have failed to consider or explain the basis on which it concluded the matters set out in sub paragraphs a to f of the Claimant's paragraph 11:

a. the evidence of Ms Lewis (who, on the evidence of the Respondents, was responsible for and did respond to the DSAR), that she did not see a basis on which any of the allegations of misconduct could have arisen from that process; - ***The allegations concerning the dismissal for misconduct were against the person who dismissed, namely Mr Ezrine, and we accepted his explanation and reason. This is addressed in paragraphs 394, 395 and 403.***

b. Mr Ezrine's shifting and inconsistent evidence about the dismissal process – at one point suggesting that the allegations had arisen from a grievance investigation that had not been mentioned at all prior to his oral evidence; - ***The factual position concerning the dismissal process and the dismissal reason was clarified in oral evidence and resulted in the determinations we made as addressed in paragraphs 394 to 404.***

c. the fact that Mr Ezrine pursued and upheld allegations that certainly did not arise from the DSAR – from which the clear inference is that he was fishing for misconduct allegations; - ***The factual position concerning the dismissal process and the dismissal reason was clarified in oral evidence and resulted in the determinations we made as addressed in paragraphs 394 to 404.***

d. Mr Ezrine's oral evidence that at least some of the matters he dismissed for were innocuous and his participation in investigation meetings – even if the Tribunal's view is that Mr Ezrine could have fairly dismissed for one of the allegations which did not arise from a meeting that he attended (which is denied as a result of the other points on fairness raised above and in written submissions), the Tribunal has to consider what Mr Ezrine in fact dismissed for at the time when considering fairness and motivation – in this case he dismissed for matters which he later accepted in evidence should not have even been the subject of an investigation; - ***The factual position concerning the dismissal process and the dismissal reason was clarified in oral evidence and resulted in the determinations we made as addressed in paragraphs 394 to 404.***

e. that Mr Ezrine relied in dismissing the Claimant on evidence that the Claimant did not have a chance to comment on; - ***The factual position concerning the dismissal process and the dismissal reason was clarified in oral evidence and resulted in the determinations we made as addressed in paragraphs 394 to 404.***

f. the failure on Mr Wells' part to provide reasons for the appeal such as to say why he rejected the explanation the Claimant had given for the allegation he had previously overlooked – ***The appeal process is addressed in paragraph 405.***

20. Issue 4.1.5 – removal of Claimant's line management responsibilities - at paragraphs 12 and 13 the Claimant submits that the … "Tribunal appears to have failed to consider or take into account Ms Lewis' oral evidence on this point. It was put to her: 'Do you recall that at the end of June Mr Ezrine took over line management of Dan?' and she responded 'I do recall that, yes.'. … 13. The Tribunal says that it accepts the 'Respondent's evidence' that there was no removal of the Claimant's line management responsibilities but fails to deal with the conflict in the evidence put forward by the Respondents on this point." – ***We accepted the evidence of Mr Ezrine on this matter.***

21. For these reasons we do not find that we failed to deal with important issues before us and / or to give adequate reasons for our decision.

22. Accordingly, we dismiss the application for reconsideration as it is not in the interests of justice to do so.

Employment Judge Gray
Date: 16 December 2021

Judgment sent to Parties: 30 December 2021

For the Tribunal Office