EMPLOYMENT TRIBUNALS

Claimant: **Parus Bhardwaj**

Respondent: **Insultec Ltd**

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The claimant's application for reconsideration of the tribunal's judgment of 28 April 2021 (written reasons produced on 16 July 2021) is refused under rule 72(1) of the Employment Tribunals Rules of Procedure Regulations 2013 on the basis that there is no reasonable prospect of the judgment being varied or revoked.

REASONS

Background

1. The claimant in these proceedings, Mr Parus Bhardwaj, made an application on 26 August 2021 for reconsideration, which was sent to me on 18 October 2021. This was in regard to my reasoned written judgment of 16 July 2021 (sent to the parties on 12 August 2021), which followed my oral judgment at the Final Hearing (26-28 April 2021) and brief written record. The lengthy application was accompanied by four attached exhibits (PBR-1 to PBR-4) and a separate document, 'Annexure 1' which contained exhibit PBR-A1. The exhibits contain new documents.

2. The issues decided in the judgment were whether the claimant had been unfairly dismissal and/or wrongfully dismissed and whether there had been an unlawful deduction from wages. I found that the complaints were not well founded.

3. The claimant was represented by counsel at the hearing. However, he confirmed in his email of 3 September 2021 that he presently acts as a litigant in person. I will therefore set out the law and the reasons for refusing his application in some detail to make clear to him how I have reached my decision.

Law

The Employment Tribunals Rules Of Procedure Regulations 2013

4. Rule 70 provides that a tribunal may reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the original decision may be confirmed, varied or revoked and if revoked, it may be taken again.

5. Rule 71 sets down a timescale of 14 days from the written decision for the application to be made, unless it is made at the hearing.

6. Rule 72(1) states that 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, the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise rules 72(1) and (2) set out the procedure for determining the application on notice to the other parties.

7. The application should, where practicable, be considered by the Employment Judge who made the original decision.

8. The Judge must give effect to the overriding objective in rule 2 of the regulations to deal with the case fairly and justly.

Case Law

9. The following principles have been set down by caselaw and are relevant to my decision on whether or not to allow a reconsideration.

Reasonable Prospects Of Variation Or Revocation

10. In ***T W White & Sons Limited v White*** (UKEAT/0022-23/21/VP), 26 March 2021, The Employment Appeal Tribunal held that there is a mandatory requirement pursuant to rule 72(1) for an employment judge to determine whether there are reasonable prospects of a judgment being varied or revoked.

11. If there are no such reasonable prospects, the application should be refused.

Interests Of Justice

12. The 'interests of justice' ground relates to the interests of both sides. In ***Redding v EMI Leisure Ltd*** EAT 262/81 it was said that justice means justice to both parties.

13. In ***Outasight VB Ltd v Brown*** 2015 ICR D11, EAT, Her Honour Judge Eady QC referred to exercising the discretion judicially, 'which means 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'.

14. Reconsiderations are therefore best seen as limited exceptions to the general rule that employment tribunal decisions should not be reopened and

relitigated. There is an underlying public policy principle in all proceedings of a judicial nature that there should be finality in litigation.

15. In ***Ministry of Justice v Burton*** [2016] ICR 1128, CA,[20] the importance of the finality of litigation was emphasised. A mere failure by a party (in particular, but not only, a represented party) or the Tribunal to raise a particular point is not normally grounds for review.

New Evidence Available

16. In the case of ***Ladd v Marshall*** 1954 3 All ER 745, CA, the Court of Appeal established that, in order to justify the reception of fresh evidence, it is necessary to show:
    - That the evidence could not have been obtained with reasonable diligence for use at the original hearing;
    - That the evidence is relevant and would probably have had an important influence on the hearing; and
    - That the evidence is apparently credible.

17. ***Outasight VB Ltd v Brown*** **2015** ICR D11, EAT, it was held that the law regarding reconsideration of a judgment in the light of new evidence did not change with the introduction of the Tribunal Rules 2013. If the ***Ladd v Marshall*** tests were not met, reconsideration may be permitted on the basis of fresh evidence.

18. The Employment Tribunal will refuse an application for reconsideration on the "interests of justice" ground unless the new evidence is likely to have an important bearing on the result of the case.

19. In ***Wileman v Minilec Engineering Ltd*** 1988 ICR 318, EAT, it was said that the reason for this requirement is that, unless the new evidence is likely to influence the decision, then "a great deal of time will be taken up by sending cases back to an [Employment] Tribunal for no purpose.

Evidence Available But Not Used

20. An application will normally be refused if the evidence was available, though deliberately or inadvertently not used. In ***Flint v Eastern Electricity Board*** 1975 ICR 395, QBD it was held that it was only possible to obtain a review under the "interests of justice" ground in order to introduce evidence, in exceptional circumstances.

21. In ***Stevenson v Golden Wonder Ltd*** 1977 IRLR 474, EAT, Lord McDonald said of the old review provisions that they were "not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before'.

Incomplete Or Inadequate Reasons

22. In ***AB v Home Office*** *EAT 0363/13,* the EAT clarified the correct approach to be taken to applications for reconsideration where an Employment Tribunal had failed to determine an issue, or where an issue had been determined but

the tribunal's reasons for the decision were inadequate. It held that there was a distinction between a) overlooking an issue altogether and therefore not deciding it, and b) deciding an issue and giving reasons for it which were inadequate or incomplete. Where an issue had been overlooked, the tribunal should normally reconsider the judgment. If the reasons were incomplete or inadequate, but there were no reasonable prospects of the judgment being varied or revoked, the judge must not order reconsideration.

Discussion and Conclusion

Broad Considerations

23. The broad discretion of the Employment Judge to reconsider a judgment must be exercised judicially. This means having regard not only to the interests of the party seeking the reconsideration, but also the interests of the other party, and to the public interest requirement that there should, so far as possible, be finality of litigation. If the Employment Judge considers there is no reasonable prospect of the Judgment being varied or revoked, the application will be refused.

24. The basis upon which the claimant makes his application is, what he describes as "[the tribunal's] consistent disregard for the proper application of the evidential test of balance of probabilities based on the actual evidence before it."

Application Details

25. Turning to the specifics of the application, I do not propose to rehearse the detail of the claimant's submissions, but to simply provide the gist of his comments with reference to various paragraph numbers.

26. In paragraph 4 he says it is essential to record that Mr Sharma, the dismissing officer, did not give evidence at the Final Hearing. Also, that the tribunal should have taken into account that Sharma made a complaint to the employment tribunal himself. He references new Exhibit PBR-1 in support. However, whilst the exhibit was not considered by the tribunal, the matters referred to were taken into account at the time.

27. The claimant proceeds to question the tribunal's reasoning as follows:

    27.1. In paragraph 5 he says it is unclear what evidence the tribunal considered to arrive at the finding that Sharma was his line manager (Judgment paragraph 7). This evidence was given orally at the hearing.

    27.2. In paragraph 6 he says there is no evidence to support the finding that the respondent company was small (judgment paragraph 8). He then refers to new Exhibits PRB-2 and PRB-3 to support the contention that the respondent company was bigger than the tribunal found. Again, the tribunal relied on oral evidence to support the finding.

    27.3. In paragraph 7 he says there is no evidence that he was sent a warning letter in April 2009 (judgment paragraph 9). However, there was oral and written evidence to support the finding.

27.4. In paragraph 8 he refers to paragraph 10 of the judgment where it states the minutes of a meeting on 14 December 2015 recorded that the claimant confirmed all issues had been dealt with. He challenges this finding by saying it was clear from the evidence that he did not wholly agree with all the contents of these minutes. Again, the finding was based on both written and oral evidence.

27.5. In paragraph 9 he says it is unclear how paragraph 14 of the judgment arrives at the finding the respondent sent the claimant a warning letter with respect to timekeeping in March 2018. Again, the finding was based on both written and oral evidence.

27.6. In paragraph 10 he proceeds to discuss another warning on June 2018, which he says was retracted. This, he agues, when considered with his submissions in paragraphs 7 and 9, demonstrates that he had not been issued with any official warnings prior to the disciplinary action.

28. The claimant continues by discussing other findings within the judgment and expanding on the background evidence and context. The gist of his comments are as follows:

28.1. In paragraph 11 he refers to judgment paragraph 12, which finds that he called two employees disparaging names. He proceeds to seek to justify this by reiterating that they were only names of musical artists. He submits new evidence in support in the form of Exhibit PBR-4.

28.2. In paragraph 12 he refers to judgment paragraph 17, which finds that he used inappropriate language, and he seeks to add context to his actions in an attempt to justify his words.

28.3. In paragraph 13 he refers to judgment paragraph 54, where it states that “the claimant contended a number of the documents were falsified or backdated”. He argues that it is unclear which documents the tribunal is referring to, and seeks to provide further evidence about what he believes to be falsification.

28.4. In paragraph 14 he refers to judgment paragraph 94, which concludes that there was no evidence to demonstrate that his dismissal was due to his grievance. He then revisits this matter in some depth by repeating and elaborating on evidence produced at the hearing in an attempt to demonstrate a causal connection.

28.5. In doing so, he contends at paragraph 15(i) that his evidence refutes the tribunal’s findings at judgment paragraph 24. It is unclear, however, in what way. Judgment paragraph 24 simply refers to some of his grievance complaints and the overlap of issues at the grievance and disciplinary hearings.

28.6. At paragraph 15(iii) he refers to judgment paragraph 103, which concludes that “the claimant had a long a history of misconduct”. He alleges that no credible evidence was referred to in support of this finding. However, the tribunal based its findings on the written and oral evidence before it.

28.7. At paragraph 16 he notes that the judgment does not state that the grievance investigation was fair. He then he proceeds to attempt to demonstrate that it was unfair by drawing on evidence already considered at the hearing.

29. The claimant then submits a number of additional arguments as follows:

29.1. In paragraphs 17 and 18 he attacks the respondent's credibility and integrity, largely by seeking to demonstrate discrepancies in evidence at the hearing. His "Annexure 1" goes into further detail.

29.2. At paragraphs 19 and 20 he refers to judgment paragraphs 109 and 111. These find a defect in the procedure due to having Mr Sharma as the disciplinary officer, whilst also finding the overall procedure to be fair, and Mr Sharma's attitude to be measured, professional and not unfair. He argues this is logically inconsistent and the issue is whether the proceedings were unfair, not whether Mr Sharma was unfair. However, by drawing on this one isolated finding, the claimant fails to consider the judgment as a whole, which deals with the overall disciplinary procedure and its strengths and weaknesses.

29.3. In paragraph 21 he refers to his understanding of the tribunal's finding that there was perceived bias with regard to Mr Sharma's involvement (judgment paragraph 108). He continues by complaining that it was irrational for the tribunal to conclude that dismissal was within the band of reasonable responses in these circumstances. However, he does not refer to other parts of the judgment which deal with the overall process and how any procedural defects were cured on appeal.

29.4. He also complains that it was not open to the tribunal (judgment paragraph 108) to find that, because of the way the grievance was handled "…this somewhat militated against the prospect that Mr Sharma might have held a grudge."

29.5. At paragraph 22 the claimant refers to judgment paragraph 118 and complains that the tribunal failed to give reasons as to how the perceived lack of fairness was overcome. Again, when the judgment is read as a whole, the reasons are made clear.

Conclusion

30. Most of what the claimant says relates to evidence that was available at the hearing, and what he is generally doing is revisiting and elaborating on that evidence. Furthermore, in his exhibits, he seeks to introduce additional documents relating to matters already aired at the hearing. He gives no reasons as to why these documents were not provided previously but, in any event, they do not raise any new issues. The application is largely a restatement of his original case with some variation in emphasis.

31. The claimant complains that some of the tribunal's findings were made in the absence of any credible evidence, and so were unsubstantiated. He also seems to be saying that there were some factual inaccuracies. However, the tribunal's findings were based on the evidence presented at the time and full

reasons were given for them.

32. On occasions the claimant criticizes specific elements of the judgment in isolation, without considering the wider reasoning. The judgment needs to be read as a whole to appreciate how the findings were arrived at and how the conclusions flowed from them.

33. I have had regard to the possibility of there being matters raised in the claimant's application that were not considered at the original hearing. Having considered the claimant's comments carefully in the context of the tribunal's decision as a whole, it does not appear that the tribunal overlooked any issues altogether, if at all. The tribunal deliberated on all issues and produced a detailed written judgment.

34. If the judgment's written reasons contained any factual inaccuracies of the nature put forward by the claimant, they were not of such significance as to change the outcome of the case. Similarly, even if the findings were inadequate or incomplete in the way the claimant suggests, this would not be sufficient to have a bearing on the outcome.

35. The claimant had an opportunity at the Final Hearing to present this evidence and, bearing in mind the strong public interest in the finality of litigation and the need to do justice to both parties, I consider that it would not be in the interests of justice to give him a further opportunity to present his case.

36. In so far as the application restates what was presented at the Final Hearing, I have not detected any error of law or any failure to take into account a material consideration. There is nothing in what the claimant submits that would convince me that there were reasonable prospects of the tribunal's judgment being varied or revoked.

37. Taking account of the overriding objective in rule 2, I therefore conclude that, in accordance with rule 72(1), the application should be refused.

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Employment Judge Liz Ord

Date 12 February 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE