EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103399/2020

Decision on written submissions on 15 February 2022

10 **Employment Judge A Kemp**
Tribunal Member F Parr
Tribunal Member A Perriam

Ms D Fitzpatrick — **Claimant**
15 **In person**

The Scottish Ministers — **Respondent**
Represented by:
Dr A Gibson
20 **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's application for reconsideration is refused under Rule 72(1)
25 **of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.**

REASONS

Introduction

30 1. A Judgment in this case was issued on 13 January 2022.

2. The claimant seeks reconsideration of that Judgment, by email dated 27 January 2022, which attached a detailed argument extending to 21 pages, and also seeking to found on new evidence which was provided separately and received by the Tribunal on 11 February 2022 together
35 with a further letter in support. The Final Hearing took place before a full

Tribunal constituted as above. The decision set out in this Judgment was made by me alone, for the avoidance of doubt.

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

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."

4. In ***Shaw v Intellectual Property Office UKEAT/0186/20*** the EAT described the first stage in Rule 72 as a 'sift' stage of the reconsideration application, akin to the sift process which is applied to appeals to the EAT. The test is in Rule 72 itself and is whether the Judge considers that there is no reasonable prospect of the original decision being varied or revoked. If so the application may be refused. The power in the rule is to be exercised having regard to the overriding objective in Rule 2. It states as follows:

"**2 Overriding objective**

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

5. 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. 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.

6. Some of the case law on the predecessor provisions was based on the test 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), for example ***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***).

7. 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.

8. 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".

9. There is little practical difference between the approaches in each jurisdiction, in my opinion, but they are not identical.

5 10. 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"

10 11. In the latter of those two cases 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."

12. The *res noviter* principle was referred to more recently in ***Ramsden v*** 15 ***Santon Highlands Ltd [2015] CSOH 65***, a decision of Lord Kinclaven, as follows:

> "*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 20 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."

13. The EAT in ***Outasight*** acknowledged that there might be cases where the interests of justice would permit fresh evidence to be adduced, 25 notwithstanding that the principles in ***Ladd*** 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.

14. The facts of ***Outasight*** are that the Tribunal, having dismissed the 30 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.

15. 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

16. I shall deal first of all with the presentation of what is said to be new evidence. It was accompanied by a letter in support extending to three pages. Twelve documents are then produced. There is nothing said as to why that evidence could not, with reasonable diligence and care, have been before the Tribunal at the Final Hearing. It was referred to shortly after the Judgment was issued, and then produced shortly after that. It appears to me that if the documents and related arguments were relevant for the Final Hearing they could have been produced with reasonable diligence and care, and that that is the position although the claimant is a

party litigant. She produced a large amount of documentation, and gave evidence for a lengthy period.

17. Having read the letter sending the documents comprising the new evidence, and the attachments, it does not appear to me in any event that they are relevant to the Claim itself to any material extent. At the very best they are matters of background or which are tangential to the facts material to the issues in the case. I do not consider that it is in accordance with the terms of the overriding objective to allow such new evidence to be received.

18. I turn to address the arguments for reconsideration, which are lengthy. I consider that to a significant extent the application either rehearses arguments that were made before the Tribunal and did not succeed, or makes the same general arguments in a different manner, or makes similar arguments partly on allegations of fact not the subject of evidence to the Tribunal which could have been before the Tribunal at the Final Hearing. The claimant argues that there should be reconsideration of procedural flaws as she refers to, including the role of Human Resources, but there is nothing in those arguments that would, in my opinion, affect the outcome having regard to the terms of the Judgment and the reasons given for it. The claimant seeks to argue on a number of occasions that the Tribunal got the detail and outcome wrong, as she sees it. She makes arguments briefly in relation to the appeal before Mr Rennick. Her arguments were however rejected at the Final Hearing and the application adds nothing material to those arguments, in my judgment, nor does any point of detail make any difference to the analysis of the outcome. She maintains her position that the event in relation to her being taped to a chair occurred on 16 December 2010, but what is stated in relation to that does not address the weight of evidence to the contrary as set out in the Judgment, or the fact that for the claim of unfair dismissal the test is one of reasonableness of the employer's belief, as referred to in the Judgment. The claimant further refers to an authority that does not add to those referred to in the Judgment, in my opinion. She refers to the ACAS Code of Practice, account of which was taken in the Judgment. Despite the length of the application and the industry with which the claimant has prepared it, I do not consider that it passes the first stage of the process.

Conclusion

19. The application for reconsideration is refused as I consider that there is no reasonable prospect of the Judgment being varied or revoked, and that it is in accordance with the overriding objective to refuse the application, under Rule 72(1) having regard to the terms of Rule 2.

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Employment Judge **A Kemp**

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Date of Judgement **16 February 2022**

Date sent to parties **16 February 2022**