EMPLOYMENT TRIBUNALS

Claimant: Mr A Murphy

Respondent: Delice de France Ltd

JUDGMENT

The claimant's application dated **15 December 2021** for reconsideration of the judgment, sent to the parties on **2 December 2021** is refused as it has no reasonable prospects of success.

REASONS

1. Rules 70-72 of the Tribunal Rules provides 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.

2. The Tribunal has discretion to reconsider a judgment if it considers it in the interests of justice to do so. Rule 72(1) requires the judge to dismiss the application if the judge decides that there is no reasonable prospect of the original decision being varied or revoked. Otherwise, the application is dealt with under the remainder of Rule 72.

3. In deciding whether or not to reconsider the judgment, the tribunal has a broad discretion, which must be exercised judicially, having regard not only to the interests of the party seeking the 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.

4. Under the current version of the rules, there is a single ground for reconsideration — namely, *"*where it is necessary in the interests of justice*".* This contrasts with the position under the 2004 rules, where there specified grounds upon which a tribunal could review a judgment.

5. When deciding what is "necessary in the interests of justice", it is important to have regard to the overriding objective to deal with cases fairly and justly, which includes: ensuring that the parties are on an equal footing; dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense.

6. In Outasight VB Ltd v Brown 2015 ICR D11, the EAT explained that the revision to the rules had not been intended to make it more easy or more difficult to succeed in a reconsideration application. In the new version of the rules, it had not been necessary to repeat the other specific grounds for an application because an application relying on any of those other arguments can still be made in reliance on the "interests of justice" grounds.

7. The situation remains, as it had been prior to the 2013 rules, that it is not necessary for the applicant to go as far as demonstrating that there were *exceptional* circumstances justifying reconsideration. There does, however, have to be a good enough justification to overcome the fact that, when issued, judgments are intended to be final (subject to appeal) and that there is therefore a significant difference between asking for a particular matter to be taken into account before judgment (even very late in the day) and after judgment.

The Claimant's application

8. The Claimant submitted an email dated 15 December 2021, within the relevant time limit, seeking reconsideration.

9. The first point the Claimant makes is about the email of 22 September 2017,

which he says was without prejudice, and the tribunal decided was not.

10. He repeats the same arguments that were rejected at the hearing for asserting that: (a) there was a without prejudice ("WP") dialogue; (b) this email was part of that dialogue; (c) a decision that the email is admissible is impermissibly extracting a non-WP portion from a WP communication. We assumed that proposition (a) was true when determining that proposition (b) was not. The Claimant's arguments in his 15 December 2021 document are not new.

11. However, and in any event, the purpose of reconsideration is to apply to have the actual outcome changed, not simply to challenge the reasoning, where that reasoning does not affect the outcome.

12. The relevance of the 22 September 2017 email was that, if admissible, it was evidence that the Claimant had received two documents which were not themselves WP, being notes of 8 September meeting, and a letter dated 14 September (which had been sent by post on that date, but incorrectly addressed, and not received by post).

13. However, our decision was that the Claimant's employment terminated on 15 September (not later) because of the events of 8 September. Our decisions on those points did not depend on our findings about the Claimant's receipt (or otherwise) of the notes of the 8 September meeting, and the 14 September letter, on or around 22 September.

14. The next point is that the Claimant argues that, based on our findings, we should have decided that there was a breach of contract when the company car was taken back on 8 September 2017, and we should have awarded damages for the Claimant's being without the car from the afternoon of 8 September 2017 until last day of employment, being 15 September.

15. We decided the case based on the evidence presented to us, which included the documents in the bundle, the witness statements, and the answers given during oral evidence. The statement of terms included: "*Subject to the requirements of your role and the terms and conditions of the company vehicle policy, you will be entitled to the benefit of a company leased car. Details of which can be found in the Car policy.*" The full policy was not in the bundle, just one extract, included in a screen shot in an email sent by Ms Sandhu to the Claimant during the dispute over whether the Claimant was liable to the Respondent for car fines incurred while he was using the car. The Claimant did not prove that he complied with the requirements of the Car Policy and did not accept he was bound by the requirements stated in that extract. Our decision was that the Respondent's position was correct, and the Claimant's was incorrect; it did have the entitlement to make deductions from his wages for the car fines. The Claimant purported to insist during his employment that such deductions would be unlawful, and he refused to sign the declaration accepting that it would be done.

16. Further, from 8 September to 15 September, the requirements of his role did not require him to use a company vehicle to perform his duties, because he had no duties. The Claimant has not proved that he was entitled to retain

the car during such a period of notice.

17. Furthermore, the Claimant provided no evidence of the losses which he had allegedly incurred as a result of not having the company vehicle for those days. He provided no evidence that he had actually hired a car, or spent money on fuel, or insurance, vehicle recovery policy, etc.

18. The third point that the Claimant makes is that the Tribunal misinterpreted the 1999 Act, when deciding that the Respondent was not in breach. There is no reasonable prospect of the Tribunal deciding that - because the Claimant was not told the purpose of the meeting in advance (and/or because the Respondent deliberately concealed the purpose, according to the Claimant) – there was a breach of the Employment Relations Act 1999. The Claimant's arguments in the email were already considered, and rejected, at the hearing.

19. The next point is about PILON and Geys. The Claimant says that the tribunal preferred Robert Cort & Son Ltd v Charman to Societe Generale, London Branch v Geys [2012] UKSC 63. That is not correct, because both decisions are binding on us, and deal with different points, and we discussed, and attempted to apply, each of them when making our decision and giving our reasons.

20. The Claimant seeks reconsideration on the basis that a correct application of the Supreme Court's decision in Geys would have led to a decision that his contract ended later than 15 September 2017. However:

    20.1. The tribunal did not decide that the Claimant's contract terminated because the Respondent had exercised a PILON. We decided that it terminated because the Respondent had given notice.

    20.2. We did not decide that the Claimant was unable to affirm the contract after a repudiatory breach of contract by the Respondent (instead of being obliged to accept that the repudiation had brought the contract to an end). We decided that the Claimant waived the requirement for the Respondent to give written notice, by his conduct after the oral communication of one week's notice given on 8 September 2017.

21. Therefore, there is no reasonable prospect of the decision about the contract end date changing based on a further analysis of Geys.

22. The next point in the Claimant's 15 December 2021 email mentions the Respondent's failure to give written notice. For the reasons mentioned above, that was taken into account when we decided the termination date was 15 September 2017. The Claimant's email is simply repeating the arguments he made at the hearing.

23. The Claimant's next point refers to section 15(2) of the Equality Act 2010 and to hidden disabilities.

    23.1. To the extent that he is suggesting that the tribunal should disapply section 15(2), on the basis that subsection is inconsistent with underlying the purposes for which the Equality Act (and/or its predecessors and/or EU

legislation) were created, he has no reasonable prospect of persuading us to do that.

23.2. To the extent that he implies that a person with certain disabilities will always fail to prove disability discrimination within the definition in section 15 (because of the s15(2) defence,) that is not accurate. However, in any event, we were not considering hypothetical scenarios, but the actual case presented to us.

23.3. On the facts, the defence succeeded. There is no reasonable prospect of the tribunal changing its decision that the Respondent had proved the defence.

24. The Claimant makes reference to The Employment Tribunals (Interest) Order. The tribunal dismissed all of his complaints, and (therefore) made no award to him to which this order might apply.

25. For the reasons stated above, having considered the Claimant's application, I am satisfied that there is no reasonable prospect of the original decision being varied or revoked, and the application is refused.

Employment Judge Quill

Date: 22 February 2022

JUDGMENT SENT TO THE PARTIES ON

10/3/2022

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FOR THE TRIBUNAL OFFICE