EMPLOYMENT TRIBUNALS

Claimant: **Mr M Janulevicius**

Respondent: **Ballymore Asset Management Limited**

JUDGMENT

The Respondent's application for reconsideration of the judgment orally delivered to the parties on 30 September 2021 is refused because there is no reasonable prospect of the original decision being varied or revoked.

REASONS

Introduction

1. The Claimant presented a claim for unfair dismissal. I heard the claim by CVP on 30 September 2021, at which hearing the Claimant represented himself and the Respondent was represented by Ms Omotosho from Citation.

2. The Claimant's claim for unfair dismissal was successful, the Respondent had not dealt with the Claimant's request for an appeal of the decision to dismiss. I gave reasons orally at the conclusion of the hearing. On 4 October 2021, the Respondent applied for reconsideration of the oral judgment.

The applicable legal principles

3. The tribunal's powers concerning reconsideration of judgments are contained in rules 70 to 73 of the Employment Tribunals Rules of Procedure 2013. A judgment may be reconsidered where "*it is necessary in the interests of justice to do so*."

4. Applications are subject to a preliminary consideration. They are to be refused if the judge considers there is no reasonable prospect of the decision being varied or revoked. If not refused, the application may be considered at a hearing or, if the judge considers it in the interests of justice, without a hearing. In that event the parties must have a reasonable opportunity to make further representations.

Upon reconsideration the decision may be confirmed, varied or revoked and, if revoked, may be taken again.

5. Under rule 71 an application for reconsideration must be made within 14 days the date on which the judgment (or written reasons, if later) was sent to the parties. I accept that this application was made in time.

6. The approach to be taken to applications for reconsideration was considered in the case of *Liddington v 2Gether NHS Foundation Trust* UKEAT/0002/16/DA in the judgment of Simler P. The tribunal should:

   (a) identify the Rules relating to reconsideration particularly the provision enabling a Judge, who considers that there is no reasonable prospect of the original decision being varied or revoked, to refuse an application without a hearing at a preliminary stage;

   (b) address each ground in turn and consider whether there is anything in each of the particular grounds relied on that might lead a tribunal to vary or revoke the decision; and

   (c) if this leads to the conclusion that there is nothing in the grounds advanced by that could lead to the decision being varied or revoked, give reasons for that conclusion.

7. In paragraphs 34 and 35 of the judgment Simler P gave the following guidance:

> **"***A request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered. Tribunals have a wide discretion whether or not to order reconsideration.*
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> *Where … a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application."*

The Respondent's ground for reconsideration

8. The Respondent's ground for reconsideration is set out in its email of 4 October 2021. It states that based on the Tribunal's findings (i) that the Claimant's dismissal for gross misconduct (sleeping on duty) led to a breach of trust and breakdown in the relationship and (ii) that the compensatory award was reduced to nil as the Respondent would have reasonably upheld the dismissal even if an appeal had been heard, that the appeal would have been futile.

9. The Respondent referred to ***Moore v Phoenix Product Development Ltd*** **UKEAT/0070/20/00** where the EAT held that the appeal in that case would have been futile and as such the dismissal was found to be fair in the circumstances.

The Respondent states that in Moore, it was held that the Tribunal was entitled to conclude, in the circumstances of the case, that an appeal would have been futile. Although an appeal would normally be part of a fair procedure, that will not invariably be so, as to take that fixed approach would be to disregard the clear term of section 98(4) Employment Rights Act 1996, which dictates that the circumstances are to be taken into account.

10. The Respondent states that the Tribunal should take the circumstances of the case into account in determining unfairness and that based on the oral findings of the Tribunal, the circumstances could not have been considered as otherwise there would have been a finding that the failure to deal with the appeal did not render the dismissal unfair.

11. The Respondent states that the relevant circumstances were that the Claimant had raised several grievances and appeals to delay the process, that following raising an appeal to his dismissal, the Claimant stated that he was unable to participate in the process and that most of the contents of the appeal were matters he was aware had previously been addressed. On this basis, the Respondent says dealing with the appeal would not only have been pointless but not changed the outcome.

12. The Respondent further refers to ***Jefferson Commercial LLP v Westgate*** **UKEAT/1028/12** which was referred to in **Moore** (ibid). At paragraph 25 of Jefferson**,** the EAT stated that 'it is not part of a fair procedure to be conducted for the sake of it, if the procedure is truly pointless'. The Respondent submits in its reconsideration application that this is the position in this case. It states that a finding of unfair dismissal on the basis that the Respondent failed to provide an outcome to the Claimant's appeal is requiring a procedure for the sake of a procedure which would have been pointless, in light of the Tribunals' findings.

The Claimant's request for an appeal

13. The Claimant was dismissed by letter on 11 June 2019 following a disciplinary hearing which was conducted on 17 May 2019. The Claimant was informed of his right to appeal in that letter and in a letter dated 17 June 2019 sent at 00.02 18 June 2019, the Claimant exercised that right (page 182 bundle). In that letter the Claimant raised eleven points for consideration on appeal. It is not in dispute that throughout the process the Claimant had raised several grievances in relation to process. The Respondent, however, accepts in its application for reconsideration that not all of the matters raised on appeal had been previously addressed. Amongst the matters raised as concerns, the Claimant queries the personnel involved in the investigation/disciplinary process, questions the severity of the sanction to dismiss as oppose to warn or suspend, questions the still photos of the CCTV footage and whether they reflect statements made as to his movements during the relevant time and asks for his fob movements to be compared with other team members.

14. In an email on 18 June 2019, there was further email correspondence between the parties. The Respondent acknowledged the Claimant's request for an appeal and began to arrange an appeal hearing. By return, the Claimant said he had been unwell and would be out of the country from 20 June to 9 July. He asked to be told of the dates in advance. There followed more correspondence between the parties. On 15 July 2019, the Respondent gave the Claimant some options

as regarding attending meetings or providing a further statement given his ill-health. On 12 and 17 July 2019, the Claimant asked how he could sort the dismissal appeal as soon as possible. In the 12 July 2019 letter, the Claimant referred to his ongoing ill health and stated that time was the very important thing in this case. On 21 July 2019, the Claimant repeated his request for an appeal and asked for an outcome in the next 5 working days.

15. There is no further evidence in the bundle or the witness statements about what happened to the Claimant's appeal. Ms Omotosho surmised in closing submissions that the Claimant's appeal was not dealt with as the Respondent received notification as regards the claim in the employment tribunal.

Jefferson

16. In this case, the Claimant was employed from 2002. He was paid by a mixture of salary and bonus. Such were the employer's economic circumstances that from December 2007 there were discussions about whether bonus could continue and, if so, at what level. By September 2010 the employer had reason to speak to the Claimant about what were described as performance issues. A week later, on 24 September he began a period of sick leave from which he was never to return, but three days later issued a grievance complaining about several aspects of the behaviour of the Respondent toward him, which he was later to say were fundamental breaches of its obligations to him.

17. Whilst sick, the employer sought information from the Claimant's medical practitioner, which the Tribunal found that the Claimant had agreed to provide. Though later the Claimant was to argue that it was a fundamental breach by the employer of is contract of employment for the employer to contact his general practitioner to make enquiries as to his health, on the findings of fact that was precisely what the Claimant had indicated the employer was at liberty to do. When the employer found that it could not get the information it wished as to the continuing state of ill health of the Claimant, it restricted the level of sick pay which it was paying to the Claimant.

18. These events led to a meeting on 12 January 2011. The employer wished at that meeting to discuss the Claimant's state of health and the grievance letter with him, to deal with the issues which were outstanding about the Claimant's performance and the return of the company car which he had kept.

19. In that meeting it was recorded that the Claimant's manager said the following to him 'that you considered your relationship with Jeffersons to be broken. This was not our view but I accept that you cannot be dissuaded from this and on reflection when we consider the tone and nature of your recent communications, including the tone you adopted at our meeting, we reluctantly accept that our trust and confidence in you has totally broken down."

20. Despite a dispute as to the reason for the breakdown of trust and confidence, there was no issue between the parties that there had been such a breakdown.

21. Following the meeting on 12 January the Respondent wrote to the Claimant and terminated the relationship. The Tribunal recorded in its reasoning that; 'there was no further meeting; no further discussion and that cannot be a fair dismissal'.

22. The EAT considered this reasoning when coming to its conclusion in Jefferson. In paragraphs 24 and 25 it stated:

> *'The need for a further meeting and why a further meeting should be an essential aspect of fairness in the present case is, however, not spelt out by the Tribunal. By using the words: "There was no further meeting, no further discussion and that cannot be a fair dismissal", the Tribunal appears to be stating a proposition of law. If so it was wrong to do so. The law is contained in section 98(4). Section 98(4) does in terms require a given or any procedure involving further meetings. That is not to say that in most contexts a decision would not be unfair if there were no such meetings. It is plain that what is unreasonable or reasonable may often depend upon such a meeting or meetings, but as we have already pointed out, all depends upon the particular circumstances of the case to which section 98 makes explicit reference.*
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> *'Here it was requisite that the Tribunal should have considered what purpose in fairness such a further meeting would have had. The Tribunal does not explain that. It says that there were no further meetings with the Claimant: "At which he had an opportunity to put forward his position."*
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> *'But his position had already been to state that he would not return to work and that he had totally lost confidence in the employer. The Judgment is to the effect that there had been a mutual and irreparable breakdown of confidence. To have a further meeting to restate that position, which on the findings of fact would be all it could achieve, would be to require the parties to go through a meaningless charade simply for the sake of it. It is no part of a fair procedure to be conducted for the sake of it if the procedure is truly pointless'.*

Moore

23. In Moore, the EAT held that the Tribunal at first instance, in concluding that the Respondent did act reasonably in not providing an appeal, did not err in law. It had explored whether the appeal would serve any purpose and concluded that it would not. Due to the Claimant's behaviour, at the time of the decision to dismiss, all four of the directors had lost trust and confidence in the Claimant. At paragraph 44 it stated:

> *'In my judgment, it was open to the Tribunal to conclude, in these circumstances, that an appeal would have been futile; this was not the kind of organisation where the Claimant's shortcomings and the consequent threat to the Respondent's future could be addressed through some sort of re-training programme, or where different managers might be found to work with him more effectively.'*

ACAS Code of Practice 2015

24. The opportunity to appeal is dealt with at paragraphs 26-29 of the Code. They provide as follows:

'Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for appeal in writing.'

'The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case.'

'Workers have a statutory right to be accompanied at appeal hearings.'

'Employees should be informed in writing of the results of the appeal hearing as soon as possible.'

Conclusions

25. I do not consider there is a reasonable prospect of the original decision being varied or revoked on the basis of the circumstances as set out by the Respondent nor would it be in the interests of justice to reconsider the decision:

26. The Respondent suggests that an appeal would have been futile in the Claimant's case and that the Tribunal failed to take the circumstances into account. The Respondent seeks to rely on the EAT decisions in Moore and Jefferson and says that because the Claimant (i) had raised several grievances and appeals to delay the process, (ii) after raising the appeal was unable to participate in the process and (iii) was aware that most of the contents of his appeal were matters which had previously been addressed, dealing with the appeal would not only have been pointless but would not have changed the outcome.

27. In Jefferson, there was a breakdown of trust and confidence on both sides such that the Claimant. The possibility of an appeal was never raised. The Claimant in that case had made it clear he would never return to work and that he had totally lost confidence in the Respondent. An appeal hearing in these circumstances to simply restate that position would have been 'requiring procedure for the sake of procedure'. In Moore, no appeal was offered to the Claimant. In that case, all four directors of the Respondent had lost trust and confidence in the Claimant.

28. The lack of an appeal is a serious procedural omission in any unfair dismissal case but, as per Jefferson (ibid) has to be considered in the circumstances of the case as a whole. The Claimant's case is very different to that of Jefferson and Moore. In the instant case, notwithstanding that the Claimant had raised a number of grievances along the process, he had been offered the right to appeal and had, almost immediately, availed himself of that right. The Claimant notified the Respondent that he was ill and asked for the appeal to be heard at a slightly later date.

29. The Claimant submitted detailed written grounds of appeal which were repeated in later correspondence. I have set these out in general terms at paragraph 13 above. The Respondent, in its application for reconsideration, accepts that not all these grounds had been the subject of earlier complaints. It therefore follows, that the Claimant, in his grounds for appeal raised new matters for further consideration by the Respondent. Notwithstanding, this tribunal's finding that the Claimant was dismissed for gross misconduct for sleeping at work which led to an associated breakdown in trust and confidence on the part of the Respondent,

at the time the Claimant raised his appeal, both parties were willingly engaging in the process in order to bring the matter to a conclusion and presumably address those concerns in accordance with ACAS guidance and company procedure. There was no suggestion at the time the appeal was submitted, that the relationship had broken down between the parties to such an extent to make continuing with the disciplinary process pointless or futile. In fact, given the Claimant's ill health, the Respondent sent correspondence attempting to deal with the appeal in a number of different ways. It is evident, that there was nothing about the parties' relationship at that stage of the process which would have made continuing with the appeal meeting futile or 'procedure for procedure's sake'.

30. The Respondent suggest that the Tribunal's finding that the Claimant's dismissal would have been upheld at the appeal meeting in any event demonstrates that the circumstances could not have been taken into account. Had they been so, then the tribunal could not have found that the failure to have an appeal meeting was unfair.

31. In considering what purpose in fairness a further meeting would have had, all the circumstances must be considered. Notwithstanding the finding of this Tribunal, that, on balance, the Claimant's dismissal would have been upheld at the appeal meeting based on the evidence, it does not follow that a finding that a failure to hold an appeal meeting was unfair means that the circumstances could not have been considered. Those conducting the appeal meeting would not have pre-judged the evidence or formed that conclusion in advance of the meeting. Those conducting the meeting would have further reviewed the evidence as part of a fair procedural process transparent to the Claimant before making their final decision.

32. Further, the appeal meeting would have provided an opportunity to consider the concerns which the Respondent accepts were outstanding at the time the Claimant raised his appeal and decide them. Such a meeting would have further demonstrated that the Respondent was conducting itself in accordance with the ACAS code, to address those concerns in a procedurally fair way which would have been evident to the Claimant at the time his employment relationship was ended by the Respondent. These are all factors which must be considered when looking at the circumstances of the case alongside what the Tribunal considered, on balance, would be the likely outcome, at the appeal. All these circumstances were therefore considered by the Tribunal.

33. To conclude, for the reasons set out above, an appeal meeting would not have been futile in the Claimant's case. Further, the tribunal took into account all the circumstances of the case in making its decision. The application for reconsideration of the decision is therefore refused.

Employment Judge Cheunviratsakul
Date: 24 March 2022