EMPLOYMENT TRIBUNALS

Claimant: S Wakeman

Respondents: Boys and Maughan Solicitors (1)
A Baker (2)

JUDGMENT

The Claimant's application dated 5 April 2022 for reconsideration of the Open Preliminary Hearing Reserved Judgment from 9 March 2022 and sent to the parties on 23 March 2022 is refused.

REASONS

1. Rule 72(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "Rules") enable an Employment Judge to refuse an application for reconsideration if they consider that there is no reasonable prospect of the original decision being varied or revoked. The test is whether it is necessary in the interests of justice to reconsider the judgment (Rule 70).

2. Preliminary consideration under Rule 72(1) must be conducted in accordance with the overriding objective which appears in Rule 2, namely that cases should be dealt with fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay. Achieving finality in litigation is part of a fair and just process.

3. The Preliminary Hearing on 9 March 2022 had been listed by EJ Manley during a Preliminary Hearing held on 18 October 2021 to decide:

> *"(I) Whether the unless order of EJ Wright of 5 May 2021 should be varied or set aside;*
>
> *(II) If not, whether to grant relief from sanction to the claimant to allow the claim to proceed…"*

4. Under the terms of the Unless Order the Claimant had until 21 May 2021 to provide his witness statement. On 21 May 2021 the Claimant made an application for three case management items under Rule 29, one of which was that the Unless Order should be set aside or varied. The Claimant's application for reconsideration dated 5 April 2022 argues that (I) above should have been decided under Rule 29 which provides that:

> *"Case management orders*
>
> *29. The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. The particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."*

5. In *Enamejewa v British Gas Trading Ltd and Centrica PLC* EAT 0347/14 the Employment Tribunal had considered an application to set aside an Unless Order under Rule 70 (reconsideration of Judgments). Per Mitting J:

> *"Since the coming into effect of the 2013 Rules, it is no longer necessary for an Employment Tribunal to approach an application to revoke an unless order which has the consequence that the claim or response respectively is struck out under Rule 70. Rule 38 now contains an express and simpler provision."* (para 14)

6. However, Mitting J decided that while the Tribunal was therefore in error in failing to address the application under Rule 38, that the error was immaterial because:

> "*although the wording of Rule 70 is not identical to that of Rule 38(2) (it refers to "necessary in the interests of justice" rather than simply "in the interests of justice"), the difference in wording, in my judgment, makes no difference*" (para 15).

7. Applying *Enamejewa,* the correct approach to determine whether an Unless Order should be varied or set side is therefore to apply Rule 38, regardless of whether the application is made prior to the expiry of the Unless Order. In any event, as in *Enamejewa,* it is immaterial as the test in Rule 29 is whether it is "necessary in the interests of justice" and the test of "in the interests of justice" was clearly applied in this case.

8. In *Liddington v 2Gether NHS Foundation Trust* EAT/0002/16 (para 34 per Simler P (as she then was):

> *"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, and the opportunity for appellate intervention in relation to a refusal to order reconsideration is accordingly limited."*

9. The other parts of the Claimant's application seeks to reargue facts already found and relitigate matters that have already been litigated. It is an attempt to have a second bite at the cherry which is contrary to the overriding objective, it would not be fair nor just to allow the Claimant to do so.

10. It is therefore not in the interests of justice for the decision to be reconsidered. There is no reasonable prospect of the original decision being varied or revoked.

EJ L Burge
25 April 2022