EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr F Ogunnote	v	**Abellio London Limited**

JUDGMENT ON RECONSIDERATION APPLICATION

The claimant's application dated 24 May 2022 for a reconsideration of the judgment dated 11 April 2022 is refused because there is no reasonable prospect of the original decision being varied or revoked.

REASONS

1. In a judgment dated 11 April 2022, the Employment Tribunal determined that the claim be struck out under Rule 37(1)(d) on the ground that it is not being actively pursued.

2. In a letter to the Tribunal dated 24 May 2022, Mr D Ibekwe applied late for a reconsideration of the Tribunal judgment. Any application for the reconsideration of a judgment must be determined in accordance rules 70 to 74 of the Employment Tribunal Rules of Procedure 2013.

Rules

3. The relevant employment tribunal rules for this application read as follows:

RECONSIDERATION OF JUDGMENTS

Principles

70. 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.

Application

71. 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.

Process

> 72.— (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 accordance with rule 70, a tribunal may reconsider any judgment "*where it is necessary in the interests of justice to do so*". On reconsideration, the decision may be confirmed, varied or revoked. If it is revoked it may be taken again.

5. The application makes reference to errors of law by the Tribunal, these are matters for the Employment Appeal Tribunal. The Tribunal considered the application within the confines of the Rules.

6. The case authorities remind Tribunals that there is no automatic entitlement to reconsideration for any unsuccessful party. On the contrary, there is an underlying public policy principle in all proceedings of a judicial nature that there should be finality in litigation. Reconsideration of a judgment should be regarded as the exception to the general rule that Tribunal decisions should not be reopened and relitigated. In reference to the antecedent review provisions, in **Stevenson v. Golden Wonder Ltd** [1977] IRLR 474 EAT, Lord McDonald said that the (exceptional) process was '*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*'.

7. When dealing with the question of reconsideration a Tribunal must seek to give effect to the overriding objective to deal with cases 'fairly and justly'. The Tribunal should also be guided by the common law principles of natural justice and fairness. Her Honour Judge Eady QC (as she then was) gave guidance as to the approach to be taken in **Outasight VB Ltd v. Brown** [2015] ICR D11 EAT. Although a tribunal's discretion can be broad, it must be exercised 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".

8. The requirement to consider the interests of justice to both sides is neither new nor novel. By way of illustration, in **Redding v. EMI Leisure Ltd** UKEAT/262/81, the claimant argued that it was in the interests of justice to undertake a [reconsideration] because she had not understood the case against her and had failed to do herself justice when presenting her claim. When rejecting the claimant's appeal, the EAT observed that: '*When you boil down what is said on [the claimant's] behalf, it really comes down to this: that she did not do herself justice at the hearing, so justice requires that there should be a second hearing so that she may. Now, justice means justice to both parties. It is not said, and, as we see it, cannot be said that any conduct of the case by the employers here caused [the claimant] not to do herself justice. It was, we are afraid, her own inexperience in the situation.*'

9. Earlier guidance as to the approach of Tribunals to the matter of reconsideration remains equally pertinent. In **Trimble v. Supertravel Ltd** [1982] ICR 440, the EAT made the following observations:

a. it is irrelevant whether a tribunal's alleged error is major or minor;

b. what is relevant is whether or not a decision has been reached after a procedural mishap;

c. since, in that case, the tribunal had reached its decision on the point in issue without hearing representations, it would have been appropriate for it to hear argument and to grant the review if satisfied that it had gone wrong;

d. if a matter has been ventilated and properly argued, then any error of law falls to be corrected on appeal and not by review.

10. The application of 24 May 2022 is made by Daniel Ibekwe, "Trade union member". The union referred to is taken as the PTSC although the letter does not say so. If the Tribunal proceeded on the basis that the claimant and Mr Ibekwe are members of the same trade union, this does not mean that Mr Ibekwe necessarily has the right to represent the claimant. Notwithstanding this concern and the fact that the application might be out of time, the Tribunal considered the application.

11. Ground 1 narrates that the Tribunal came to its judgment "despite or irrespective that apparent/active evidence abounded of the conduct of proceedings by the Claimant and his representative J Neckles". The ground does not specify what the evidence is. The Tribunal has set out the information it proceeded upon.

12. Grounds 1 and 2 in essence say that the Tribunal ought to have determined the issue in the absence of the claimant on the material it had available to it. It is correct that the issue might have been capable of determination in this way as narrated in paragraph 2 of the judgment. Paragraph 3 of the judgment notes that the respondent sought a hearing. It was this hearing the claimant did not attend. At no point in the application does the claimant explain why there was no attendance at the hearing.

13. The claimant takes issue with the decision of the Tribunal and makes reference to fairness and the overriding objective of the Tribunal but to deal with the claim in the

manner suggested by the claimant is not fair as between the parties and cannot be supported by the overriding objective.

14. The claimant is dissatisfied with the outcome but the facts and the relevant issues were fully explored and the legal tests applied. There is nothing in what is now said which indicates that it is in the interests of justice to re-open matters. The Tribunal considers that there are no grounds for revisiting the judgment within the scope of its powers of reconsideration under Rule 70 of the Employment Tribunal Rules of Procedure 2013.

15. The claimant's application for reconsideration of the judgment dated 11 April 2022 is refused because there is no reasonable prospect of the original decision of the Tribunal being varied or revoked.

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Employment Judge Truscott QC
Date 28 June 2022