EMPLOYMENT TRIBUNALS

Claimant: Mr E Sereteanu

Respondent: Panel UK Ltd.

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The application for reconsideration is refused as there is no reasonable prospect of the original decision being varied or revoked.

REASONS

1. The judgment in this case sent to the parties on 26 May 2022. Written reasons were sent to the parties on 14 June 2022. The unanimous judgment of the Tribunal was that claims of race discrimination and unfair dismissal were not well founded and were dismissed.

2. The Tribunal found that the respondent had established that there was a redundancy situation. The respondent's monthly turnover had dropped as a result of the substantial reduction in orders. The respondent's managing director, Nigel Mitchell gave clear and credible evidence that there had been a substantial reduction in orders due to the Covid-19 pandemic. Although the turnover had increased it was not at the level that the respondent would break even in February 2021.

2. The claimant applies for a reconsideration of the judgment in respect of the claim for unfair dismissal. It is submitted that the claimant believes judgment must be varied or revoked because of the availability of new evidence directly contradicts Tribunal's finding that there was a redundancy situation.

3. The claimant has acquired the unaudited financial statements of the respondent for the three years ending 2016 – 2020 from the Companies House website.

4. It is contended on behalf of the claimant that this evidence could not have been obtained with reasonable diligence for use at the original Tribunal hearing.

5. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, provides as follows:

"70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) 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. 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 (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."

6. The previous Employment Tribunal Rules (2004) provided a number of grounds on which a Judgment could be reviewed The only ground in the 2013 Rules is that a Judgment can be reconsidered where it is necessary in the interests of justice to do so. I consider that the guidance given by the Employment Appeal Tribunal in respect of the previous Rules is still relevant guidance in respect of the 2013 Rules. It was confirmed by Eady J **in Outasight VB Ltd v Brown UKEAT/0253/14/LA** that the basic principles still apply.

7. There is a public policy principle that there must be finality in litigation and reviews are a limited exception to that principle. In the case of **Stevenson v Golden Wonder Limited [1977] IRLR 474** makes it clear that a review (now a reconsideration) is not a method by which a disappointed litigant gets a "second bite of the cherry". Lord McDonald said that the review (now reconsideration) provisions were

> "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".

In the case of **Fforde v Black EAT68/80** where it was said that this ground does not mean:

> "That in every case where a litigant is unsuccessful is automatically entitled to have the tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in even more exceptional cases where something has gone radically wrong with the procedure involving the denial of natural justice or something of that order".

8. In the interest of justice means the interest of justice to both sides. The Employment Appeal Tribunal provided guidance in **Reading v EMI Leisure Limited EAT262/81** where it was stated:

> "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".

9. Mr Cross, on behalf of the claimant, referred The case of **Ladd v Marshall [1954] 1 WLR1489.** In which the question of new evidence was considered. The claimant must show that the new evidence:

> a) Could not have been obtained with reasonable diligence use at the original Tribunal hearing.
>
> b) was relevant and would probably have had an important influence on the hearing.
>
> c) was apparently credible.

13. It is submitted that the evidence could not been obtained with reasonable diligence for use at the original Tribunal.

14. The claimant did not provide evidence of the respondent's financial situation in the hearing. The only evidence that the Tribunal heard on the matter was the Nigel Mitchell, the Managing Director's evidence. In his witness statement it was stated:

> "In November 2019, monthly turnover was as high as £748,460 whereas, by a 2020, monthly turnover had dropped to £119,410. Whilst turnover increased in the months following May 2020, the figures began to drop again reaching lows of £300,925 in January 2021 and two £263,45 in February 2021."

15. When giving oral evidence, Mr Mitchell clarified the monthly turnover £380,000 was needed to break even and that the company was losing money.

16. The claimant did not provide evidence to contradict Mr Mitchell's claims regarding the company's finances, as the claimant had no personal involvement in the company's finances.

17. Mr Cross submitted that the claimant believes that Nigel Mitchell misled the Tribunal when giving evidence of the company's financial situation. It is submitted

that it was not anticipated that Nigel Mitchell would do so; therefore, evidence to contradict Nigel Mitchell's account was not sought before the hearing.

18. Mr Cross submitted that there was nothing stopping Mr Cross or the claimant from getting his evidence for the hearing, they merely didn't think to. However, the standard expected is reasonable diligence and it would have been extreme diligence to anticipate that Nigel Mitchell would mislead the Tribunal.

19. Since the hearing the claimant has sought the documents to contradict Nigel Mitchell's account. It is acknowledged that it is possible to obtain the documents before the hearing; they were available online at the time. However, it is submitted that it would be more than reasonable diligence to have thought to obtain the evidence before the hearing.

20. Whether the respondent was in a redundancy situation was central to the claimant's claim for unfair dismissal.

21. The documents provided show that the net assets had increased between 2016 and 2020. It is submitted that this directly contradicts Nigel Mitchell's evidence that the company was losing money monthly and it was consistent with the claimant's claim that work had been busy all year. It was also stated that, in the year before the claimant was made redundant, when the company was supposedly Covid, the number of employees increased from 39 to 46.

22. It is submitted that, although the evidence was theoretically available, the Tribunal should allow for the extreme diligence expected of the claimant to seek this evidence in advance of the hearing, especially considering the claimant was not professionally represented.

23. I have considered the submissions carefully. I do not accept that the position changed significantly after Nigel Mitchell's oral evidence before the Tribunal. The witness statement of Nigel Mitchell had been disclosed. The claimant knew what Nigel Mitchell was going to say to the Tribunal in his evidence in chief.

24. The reason put forward for not obtaining this evidence is that the claimant believes that Nigel Mitchell misled the Tribunal when giving evidence of the company's financial situation. It was not anticipated that Nigel Mitchell would do so and, therefore, evidence to contradict this account was not sought before the hearing.

25. The Tribunal accepted Nigel Mitchell's evidence that the turnover of the respondent company had dropped significantly. It was found that the evidence was clear and credible that there had been a substantial reduction in orders and the business case for a reduction in headcount was clear. This was not challenged by the claimant and it was not put to Mr Mitchell that the number of employees had increased.

26. It appears that the claimant has reached the view that Nigel Mitchell had misled the Tribunal as a result of finding the evidence that was readily available online. The claimant could have challenged the evidence at the time and is looking for "a second bite of the cherry".

27. The claimant was aware of the evidence Nigel Mitchell was to give to the Tribunal and he has decided to challenge it by seeking out further information after the hearing. This is an example of the claimant seeking to reopen the evidence based on evidence that was available at the time but only obtained by the claimant followed the hearing.

28. The evidence had been available before the Tribunal hearing and could have been found by reasonable diligence. I do not accept the submission that it would have required extreme diligence to anticipate that Nigel Mitchell would mislead the Tribunal. The evidence of Nigel Mitchell did not vary in substance from his written witness statement and I do not accept the submission that it was not anticipated that Nigel Mitchell would mislead the Tribunal. The evidence was available in advance of Tribunal hearing, it was not challenged, and, as the evidence was readily available on the government website, it was available prior to the hearing.

29. It is clear that the claimant now wishes to have another chance to challenge the evidence given at the Tribunal. The substance of the evidence the claimant now seeks to challenge was within the written statements that had been exchanged. He had that chance at the hearing and I do not think that it is in the interests of justice for the claimant to be allowed a second chance to challenge the evidence, the substance of which of which he was aware, by producing evidence that was available and could been obtained with reasonable diligence at the time of the original hearing.

30. There is nothing raised by the claimant that would provide a reasonable prospect of the judgment being varied or revoked and the application for a reconsideration is refused.

Employment Judge Shepherd

22 July 2022