



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4101656/22

Heard in Chambers on the 14 September 2022 on written submissions only

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Employment Judge Porter

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Mrs Cheryl Fairbairn & Others

**Claimants
Absent**

Easyjet

**Respondents
Absent**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the judgment of the Employment Tribunal to refuse the reconsideration
25 application made by the claimants on the 19 August 2022.

REASONS

Introduction

1. In these proceedings the claimants bring claims under the Part-Time Workers
30 (Prevention of Less Favourable Treatment) Regulations 2000. In terms of an
oral judgment of the 14 July 2022 the claimant's claims were dismissed for
want of jurisdiction. Written reasons were requested by the claimant's
solicitors and were intimated to the parties on the 9 August 2022.

2. The claimant's solicitors requested a reconsideration of the written reasons by correspondence of the 19 August 2022. This request was opposed by the respondents in terms of their correspondence of the 25 August 2022.
3. As both parties were in agreement that the application could be determined on written submissions only, a Hearing Date of the 13 September 2022 was listed to determine the application on those submissions. The Hearing Date was intimated to parties on the 29 August 2022. The parties thus had the opportunity to provide any additional submissions they chose to make in the timeframe between the 29 August 2022 and the 13 September 2022.

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"Interests of Justice"

4. In terms of Rule 70, a Tribunal will only reconsider a judgment where it is *"necessary in the interests of justice to do so."*
5. In **Outasight VB Ltd v Brown 2015 ICR D11 EAT**, Her Honour Judge Eady QC accepted that the words *"necessary in the interests of justice"* in Rule 70 allows employment tribunals a wide discretion to determine whether reconsideration of a judgment is appropriate in all the circumstances. However, the discretion 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."* (para 33)
6. A Tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases 'fairly and justly' in accordance with Rule 2. This includes: ensuring 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; and saving expense.

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30 The Application for Reconsideration

7. The claimant's application for reconsideration of the 19 August 2022 was made in two parts being firstly, the reason for the delay and secondly, the issue of prejudice.

Delay

- 5 8. The Tribunal considered firstly the issue of the reason for the delay. To this end, the claimant's solicitors state that *"From the reasons given for the decision, it did not appear to have been asked of Mrs Fairbairn why she believed the time limit ran from the lodging of the grievance, or what particular advice she had received about time limits. We therefore argue that*
- 10 *the decision has been made on the assumption that Mrs Fairbairn would have been advised on the specifics of the time limits and should have known time began to run from 1 October 2021: a matter which would not be obvious to her as a lay person."*
- 15 9. The Tribunal commenced its deliberations by observing that (i) at the PH on the 14 July 2022 the claimants had professional representation by Mr Simon Maisey of Cabin Crew Union UK; (ii) there are eight claimants in total in this action- it was the decision of Mr Maisey to call only one claimant to give evidence, namely Mrs Fairburn and (iii) in any event this overlooks the fact that at the material time the claimant had access to advice from two Trade
- 20 Unions.
10. The Tribunal concluded that the evidence on delay could well have been expanded; however it was the decision of the claimants' representative to predicate the case on the evidence which he led before the Tribunal.
- 25 11. After having regard to these observations, the Tribunal concluded that it is not in the interests of justice to reconsider the judgment on the grounds of the evidence on delay; and that in these circumstances the public interest requirement of finality of litigation must prevail.
- 30 12. In reaching this decision the Tribunal had regard to the fact that in any application for reconsideration the onus remains on the claimants to persuade a Tribunal that the extension should be granted (**Robertson v Bexley Community Centre (2003) IRLR 434; Adedeji v University**

Hospitals Birmingham NHS Foundation Trust (2021) EWCA Civ 23 – cf para **19** of the written reasons). To this end the Tribunal were entitled to conclude, as they did, that the evidence of Mrs Fairburn did not discharge that onus.

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Prejudice

13. In determining whether to exercise the ‘just and equitable’ discretion, the Tribunal was guided by the case of **Adedeji**. To this end, the Tribunal concluded that, from the caselaw, relevant factors to take into account are the length of and reasons for the delay; the prejudice which each party would suffer as a result of granting or refusing to grant an extension; and the potential merits of the claim (cf para **20** of the written reasons). The Tribunal noted that this approach does not appear to be challenged by the claimant’s representative.
14. The Tribunal observed that, following the approach taken in **Adedeji**, the issue of prejudice whilst of importance is not, in itself, determinative of whether the Tribunal should exercise their just and equitable discretion to extend time.
15. In the application for a reconsideration the claimants’ solicitors query para **22** of the written reasons and state that the phrase “*engage in detailed scrutiny of historic rotas which would involve considerable manpower*” is an overestimation of the prejudice that the respondents would face due to the fact that similar claims have been raised by colleagues of the claimants in Glasgow and also due to the fact that the claimants had raised a collective grievance prior to the inception of these proceedings. The Tribunal noted that these assertions are disputed by the respondents in their submissions in that they say that the claims for less favourable treatment under the Part-Time Worker Regulations 2000 require detailed analysis of the working time for each individual claimant and that to refute these claims it is necessary to consider the individual circumstances of each claimant.

16. The Tribunal observed that this disputed issue in fact was not explored in evidence or submissions by the claimants at the PH on the 14 July 2022 and that the claimants were content that this reconsideration be determined by written submissions only. Against that background the Tribunal considered that they were entitled to accept the submissions of the respondents on this point at the PH on the 14 July 2022 and that principle of finality of litigation must prevail.
17. In the application for reconsideration, the claimant also raises the point that esto this exercise requires to be carried out, the respondents are a FTSE 250 company with in excess of 10,000 employees and that the prejudice to them in carrying out this exercise is minimal compared to the prejudice to the claimants in not being able to carry out their claims. For their part, the respondents state that size and listing of the respondents does not mean it has indefinite resources to conduct this exercise.
18. The Tribunal noted that the resources of the respondents was not an issue that was raised in evidence or submissions by the claimants at the PH on the 14 July 2022. Against that background it is not for the Tribunal to presume that a FTSE 250 company would have indefinite resources to scrutinize historic rotas for refuting Tribunal claims. In these circumstances the Tribunal were entitled to accept the submissions of the respondents on this point at the PH on the 14 July 2022. Again, the principle of finality of litigation must prevail.
19. The claimants' solicitors submit that the failure to properly articulate their claim should be "*given less weight with regard to the issue of time bar.*" From this, the Tribunal noted that it is not in dispute that this is a factor that can be taken into consideration. The failure on the part of the claimants to properly articulate their claim was considered by the Tribunal as one of several relevant factors in refusing to extend time in this case. To this end the Tribunal observed that by the PH on the 14 July the claimants had had two opportunities to properly articulate their claim but had failed to do so and that throughout the proceedings, they had the benefit of representation by Mr Maisey (cf para **25** of the reasons).

20. Finally, the Tribunal noted that the claimants submit that the level of prejudice suffered by the claimants in not being allowed to advance their claims is significantly greater than the prejudice suffered by the respondents. The Tribunal observes that if this were a determinative factor then every application for reconsideration by a claimant would succeed. To this end, the Tribunal noted that such an outcome would be inconsistent with the public interest requirement that there should be finality of litigation.

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21. It is for all these reasons that the claimants' application for reconsideration is refused.

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Employment Judge: Jane Porter
Date of Judgment: 14 September 2022
Entered in register: 14 September 2022
and copied to parties

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Multiple Schedule

Multiple: 4100203 - Easyjet Airline Company Limited

Case Number	Case Name
4101656/2022	Mrs Cheryl Fairbairn -v- Easyjet Airline Company Limited
4101657/2022	Miss Claire Bartlett -v- Easyjet Airline Company Limited
4101658/2022	Mrs Nicola Mann -v- Easyjet Airline Company Limited
4101659/2022	Miss Julie Finlayson -v- Easyjet Airline Company Limited
4101660/2022	Mrs Andrea Milne -v- Easyjet Airline Company Limited
4101661/2022	Mrs Julie Shaw -v- Easyjet Airline Company Limited
4101662/2022	Mr Mark Priestley -v- Easyjet Airline Company Limited
4101663/2022	Mrs Hazel Samson -v- Easyjet Airline Company Limited