EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103321/2020

Hearing on application for reconsideration held at Glasgow remotely by Cloud Video Platform on 7 October 2022

Employment Judge A Kemp
Tribunal Member G Doherty
Tribunal Member S Singh

Mr K Ferguson	**Claimant** **Represented by:** **Ms K Hosking, Counsel** **Instructed by:** **Mr T Ellis, Solicitor**
Kintail Trustees Ltd	**First Respondent** **Represented by:** **Ms C Aldridge, Solicitor**
Agnes Lawrie Addie Shonaig MacPherson	**Second respondent** **Represented by:** **Ms C Aldridge, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that the claimant's application for reconsideration is refused.

E.T. Z4 (WR)

REASONS

Introduction

1. A Judgment on remedy in this case was issued on 20 May 2022 ("the Judgment").

2. On 3 June 2022 the claimant's solicitor sought an extension of time to make an application for reconsideration. That was opposed by the respondents. 3 June 2022 was a public holiday for the Queen's Jubilee. The Tribunal stated that the issue would be considered when an application for reconsideration was made.

3. The claimant's solicitors sought reconsideration of the Judgment by email dated 9 June 2022. In doing so an extension of time to make that application was made under Rule 5. The application was opposed by the respondents, firstly on the basis that it was out of time, and secondly on the basis that in any event it should not be granted.

4. The present hearing was arranged to consider the parties' submissions, both on the application to extend time and on the merits of the application made. Date listing letters had been sent, but after the date was identified the claimant asked for a change as his counsel was not available. That was refused, and Ms Hosking appeared at this hearing.

5. In advance of the hearing each had prepared a written argument, and provided authorities. Oral submissions were made in addition. They were of a high standard, and the Tribunal was grateful to both representatives for the care with which each submission had been prepared and was given.

The claimant's submission

6. The following is a very basic summary of the claimant's written and oral submission, the full extent of which the Tribunal considered. Not all authorities referred to are set out in this summary.

7. The delay in presenting the application was very short. The claimant had notified the Tribunal of the inability to comply with the 14 day limit on

3 June 2022. Reference was made to the overriding objective, and to the time an appeal would take. It would be unjust to penalise the claimant for that fact that the issuing of the Judgment coincided with school holidays and the Jubilee. The appeal was three days late as 3 June 2022 was a public holiday.

8. The first ground argued was that not to reflect the uncertainties that existed by a percentage reduction, and doing so by stopping compensation at a set date, was an error of law. To limit compensation to a date required 100% certainty, which there was not in this case. There should be continuing losses after September 2021, the date chosen by the Tribunal to which losses were calculated, to which a 51% reduction should be applied. The claimant founded in particular on ***O'Donoghue v Redcar and Cleveland Borough Council [2001] EWCA Civ 701***. In the absence of certainty that employment would have ended, the appropriate calculation of loss was by a percentage to reflect the risks involved. Reference was further made to ***Zebrowski v Concentric Birmingham Ltd UKEAT/0245/16.***

9. The second ground related to the reduction for contributory negligence under the 1945 Act. The respondent's case had been that the only reason for dismissal was performance, and the claimant argued that he had not been at fault within the terms of the 1945 Act. It was not appropriate to make any reduction (although it was not argued that there could not be reduction for contributory negligence in a discrimination case as a matter of principle). The cautious approach referred to in ***Waiyego*** should be followed. If there had been fault, the contribution at 50% was wrong in law. It could not be at such a level. There were six reasons for the decision from the Liability Judgment, so the figure for one of them on a pro-rata basis was 16.7%. 10% would be an appropriate figure given the circumstances. Calculations were suggested were each or either of the two grounds to be successful

The respondents' submission

10. The following is again a very basic summary of the written and oral submission for both respondents, the full extent of which was considered.

Not all authorities referred to are set out here. The respondents argued that time should not be extended. There was no good reason for the delay. The application could have been prepared before counsel was on holiday, or another counsel or the solicitors themselves could have prepared it. The respondents would be prejudiced were the late application to be received. They had paid the award on 31 May 2022, and had been put to further expense. The principle of finality of litigation operated. The reason did not equate to those given in ***Software Box Ltd v Gannon UKEAT/0433/14***.

11. In relation to ground 1, the respondents argued that the Court of Appeal case of ***Thornett v Scope [2007] ICR 236*** clarified that determining future loss always involved a consideration of uncertainties, that Tribunals had a broad discretion and that it was not necessary to use a percentage to assess future employment. Reference in ***Lawless v Print Plus UKEAT/0333/09*** had been made to "practical certainty", and in ***Software 2000 Ltd v Andrews [2007] IRLR 568*** the EAT had referred to making an assessment with sufficient confidence about what is likely to have happened. A safe date by which there would have been a fair and lawful dismissal had been chosen, which was permissible.

12. On ground 2 the respondents argued that the Tribunal had a broad discretion once it is established that a person had suffered damage partly by his own fault. That was the position here. Reference was made to ***Hollier v Plysu Ltd [2983] IRLR 260,*** and to the issue of blameworthiness in ***Stapley v Gypsum Mines Ltd [1953] 2 All ER 478.*** It was open to the Tribunal to make a reduction for contributory fault, and to do so at the level it did, having heard the evidence.

The Law

13. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 set out the Rules of Procedure in Schedule 1, and those in relation to the reconsideration of judgments are at Rules 70 – 73. The provisions I consider relevant for the present application are as follows:

> **"70 Principles**

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.

71 Application

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 Process

(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."

14. Rule 5 states

"**5 Extending or shortening time**

The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules……"

15. The power in the rule is to be exercised having regard to the overriding objective in Rule 2. It states as follows:

"**2 Overriding objective**

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

16. In ***Serco Ltd v Wells [2016] ICR 768***, the EAT observed that the Rules of Procedure must be taken to have been drafted in accordance with the principles of finality, certainty and the integrity of judicial orders and decisions.

17. In ***Liddington v 2Gether NHS Trust EAT/0002/16*** the extent to which reconsideration was appropriate was addressed by the EAT which stated that "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."

18. The law in relation to the issues raised in the merits of the reconsideration application is addressed further below.

Discussion

(i) Extension of time

19. The first part of the application for reconsideration is to seek to invoke the terms of Rule 5 and to extend time to receive it. This is a matter for the exercise of discretion by the Tribunal.

20. The Judgment was emailed to parties on 20 May 2022 before 1pm. The last date for a timeous application for reconsideration was 3 June 2022, but that was a public holiday and under Rule 4 the date is in effect extended to Monday 6 June 2022. The claimant accepts that it has not been timeously presented. It is three days late, when the period within the rules is of 14 days.

21. There were competing arguments with regard to whether the discretion conferred by Rule 5 should be exercised or not. An important factor is the explanation for the lateness. The Tribunal did not consider that the

explanation for the lateness as put forward by the claimant was a good one. Firstly, and importantly, the claimant was represented by solicitors and counsel. Solicitors had received the Judgment by email on 20 May 2022. They knew or ought to have known of the 14 day period within the Rules. Secondly, counsel for the claimant had not departed on holiday until 28 May 2022. There was therefore an initial period between the afternoon of 20 May 2022 and 27 May 2022 available for work on an application for reconsideration to have been undertaken. No explanation as to why that was not, or could not, have been done was provided. Thirdly, if counsel instructed in the case was not able to carry out the work in time, one would expect solicitors either to have done the work themselves, or to have instructed alternative counsel in good time to do so, unless an application for extension had earlier been made and granted. That appears not to have been addressed, or if it was no submission was made with regard to it other than to the effect that it was reasonable for the claimant to wait for his counsel to be available. Fourthly, in fact the work appears to have taken no more than three days, as counsel returned from his holiday on or by 6 June 2022 and the application was made on 9 June 2022. Fifthly whilst it is understandable that the claimant would wish his counsel to advise on reconsideration, having the same counsel who had conducted the two hearings was not essential. It was perfectly practicable for other counsel to have been instructed to do so timeously.

22. When considering the exercise of discretion, it was held in ***Selkent Bus Co Ltd v Moore [1996] IRLR 661*** that the discretion was to be exercised in accordance with “the requirements of relevance, reason, justice and fairness inherent in all judicial decisions”. It is also to be exercised having regard to the terms of Rule 2***.***

23. In ***Baisley v South Lanarkshire Council [2017] ICR 365*** the EAT held that the balance of prejudice was a key factor when deciding whether or not to exercise the discretion under Rule 5. It stated that 'The importance of addressing the balance of prejudice is, as the expression demands, to balance the relative fairness and unfairness, convenience and inconvenience and consequences to each party of the decision to be made in the exercise of the tribunal's discretion.'

24. There is prejudice to the respondents, firstly in the cost of responding to the application, including dealing with it later than the rule permitted, and secondly as it has paid the sum awarded by the Judgment, which it did on 31 May 2022. The finality of litigation is affected where late applications for reconsideration are made. There is we consider materially less prejudice to the claimant. In that regard, one factor is the extent to which there is any merit in the arguments made. We have addressed them below. If there is an error of law, the party considering that has the opportunity to consider appeal as an alternative method of addressing matters.

25. We also take account that if the application is allowed, that is bound to lead to further delay and expense, which is contrary to aspects of the overriding objective.

26. Having regard to all the circumstances, including in particular what we consider to be an absence of a good reason for the lateness, the application to extend time under Rule 5 is refused. The application for reconsideration having been made outwith the period under Rule 71 is refused.

(ii) Ground 1

27. The following comments are made on the hypothesis that we are wrong not to extend time, and to address the merits of the arguments eloquently placed before us by Ms Hoskins. The Tribunal has a discretion on whether or not to reconsider the Judgment.

28. The reasons for the decision are set out in the Judgment, and the earlier judgment on liability to which it refers. The reasons given in that decision are as there stated, but to address the arguments before us we have added some commentary below.

29. The first ground was that the Tribunal fell into error of law in its assessment of a period of time by which the claimant's losses would cease. The Tribunal was not persuaded by the claimant's arguments in this regard. They were made in the written application largely in the form of submissions on appeal, raising as they did what were said to be points of

law. Those points had not however been taken initially, at least as they were put before us. We address the arguments despite that initial observation.

30. The starting point is, in our view, the words of the statutes. The key part of those words is what is just and equitable. To suggest that what is required, before being able to find that losses would end on a given date, is some form of certainty is, we consider, asking for the impossible. The task is to make as good a prediction as one can, from the evidence led, of what might have happened. By its nature it is dealing with uncertainties, and making its assessment of what is likely to have happened. We did not consider that ***O'Donoghue*** should be read as the claimant urged on us. We did not consider that it sought to be prescriptive or to limit the methods by which the assessment of what was just and equitable should be made. That is, we consider, apparent from its comments, for example, that "whether it is appropriate to assess the particular chance in percentage terms will depend on the circumstances" and "where the question is, or may be, whether there was a chance of the employee being fairly dismissed in the future, the percentage chance is likely to vary according to the timescale under consideration…..it may not be possible to identify an overall percentage risk. All will depend on the facts of the particular case. The crucial factor is that what is being assessed is a chance".

31. That is also made clear, we consider, in ***Thornett***. All that a Tribunal can do is to make a prediction as to events that did not take place, and consider likelihoods or possibilities. In this context what is likely can have many different shades of meaning, from just above 50% to just under 100%, and all points between those. There are some cases where Tribunals considered that it was appropriate to determine the matter using percentages. That is not the only way to do so.

32. In the present case there were a number of matters that required to be considered, including the impact of the New Evidence, the assessment of how a fair procedure for that is likely to have been conducted, as well as future issues as to performance, and how a fair procedure of that is likely to have been conducted. The Tribunal did not consider that doing so by using percentages either generally, or for particular periods of time, was

appropriate. It assessed what was just and equitable having regard to the totality of evidence.

33. Different cases have different facts, and ***O'Donoghue*** and ***Zebrowski*** have facts that are not at all similar to those in this case. Neither is authority for a proposition that the method used in that case is the only one permissible.

34. In ***O'Donoghue*** it was argued that the Tribunal had been wrong to reject the percentage risk approach. It was held that "In many circumstances it may well be sensible to assess that chance in terms of a percentage…..On the other hand… chances cannot always be assessed in those terms."***.*** In ***Zebrowski*** there was considered to be ambiguity between two findings, one a probability, the other a date when loss ceased. It referred to a situation where the chance of continued employment could be "sufficiently stated". That was similar language to that in ***Lawless*** of there being a "sufficient chance". We consider that those comments support our view of the breadth of discretion available to us.

35. If we are wrong in that, however, and the Court of Appeal should be read as the claimant urged on us, we respectfully disagree with that proposition. Decisions of the Court of Appeal are not binding on us, although they can be highly persuasive.

36. The position in the case before us was of particular complexity. There were different potential timings and reasons for the potential for loss of employment separately to that which did occur. One was when the New Evidence came to light. There was a chance of termination, fairly and lawfully, after a disciplinary process for it. If not then, a separate and later performance process would, we concluded, have led to a fair and lawful termination. Precisely when and on what basis one could not know for certain for any of those matters. The Tribunal considered it just and equitable to allow for all the uncertainties that there were in the case by setting the date that it did by which the losses would end, but with full compensation for those losses, not reduced by a percentage, up to that point. The reasoning is found within the Judgment, particularly at paragraph 98. That was of course a broad approach, but the Tribunal

considered, and considers still, that the method it adopted was within the statutory terms.

37. The Tribunal was not persuaded that there had been any error of law in its assessment of these issues, or that there was any basis on which to reconsider its decision more generally, with regard to this ground.

(iii) Ground 2

38. The second ground argued was that the assessment of contribution was in error of law. The Tribunal did not accept that argument. This was not a point initially argued as it was before us. Indeed, the parties had accepted that the issue of contribution was the same for the case of discrimination as for unfair dismissal, and the argument was on the extent if any of contribution. We consider that this argument also goes beyond the proper extent of an application for reconsideration, but have dealt with it.

39. Firstly the Tribunal did have in mind both the authorities referred to, they are cited at paragraph 75 of the Judgment. Secondly it sought to take a cautious approach as indicated in ***Waiyego***. Thirdly however this case was very different on its facts from that authority, and had two separate strands. One was tainted by discrimination. The other was not. The latter included conduct issues, in respect of the conflict of interest point, and capability issues in regard to performance. That was so although the respondent denied that the conflict of interest issue affected the decision to dismiss. We did not consider that it could be right that we disregarded what had been a factor in the decision simply as the respondents had taken that position. Once there was a finding that the conflict of interest issue was a significant factor in the decision to dismiss it was we considered relevant to the issue of contribution.

40. The Tribunal considered that this case was one where it was just and equitable to reduce compensation because of the level of contribution to the dismissal by the claimant. There was fault, in the sense of blameworthiness as explained in ***Hollier*** and ***Stapley,*** on the part of the claimant. That fault contributed to his dismissal. Part of it related to his failure to appreciate and act on the conflict of interest that there was, on which he had not been candid. Another part of it was his performance,

which was legitimately criticised by the respondents. Whilst dismissal for performance in the manner that took place was not fair what may be summarised as his under- performance was found as a fact, and was also a contributory factor to the dismissal, addressed at paragraph 128.

41. In assessing the extent of that contribution, again a broad approach was followed. It was not an exercise in mathematics, as the claimant sought effectively to argue as part of the submission. It was a matter of assessing the relative extents of contributions from the claimant and the respondents from the evidence as a whole on the basis of the statutory terms and authorities set out in the Judgment. The circumstances of this case could not amount to an issue of mitigation. The kind of concerns referred to in ***Waiyego*** do not arise in this case, in our view, as there is a separation of treatment between the discriminatory and non-discriminatory reasons for dismissal.

42. The Tribunal was not persuaded that there had been any error of law in its assessment of these issues, or that there was any basis on which to reconsider its decision more generally in relation to this ground.

43. Had the application been submitted timeously, accordingly, the Judgment would have been confirmed. If an error of law has been made in the Judgment, that is a matter for the Employment Appeal Tribunal.

Conclusion

44. The application for reconsideration is refused as being out of time under Rule 71, but even had time been extended the Judgment would have been confirmed under Rule 70. The Tribunal decision is unanimous.

Employment Judge: A Kemp
Date of Judgment: 18 October 2022
Entered in register: 19 October 2022
and copied to parties