EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms O Odutayo	v	**Compass Group UK and Ireland Limited**

JUDGMENT ON RECONSIDERATION APPLICATION

The claimant's application dated 14 September 2022 for a reconsideration of the judgment dated 18 August 2022 is refused because there is no reasonable prospect of the original decision being varied or revoked.

REASONS

1. In a judgment dated 18 August 2022, the Employment Tribunal determined that the claim be dismissed on the ground that the claimant did not have the necessary qualifying period of employment.

2. In a letter to the Tribunal dated 14 September 2022, the claimant commented on the judgment and these comments are treated as an application for reconsideration of the 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 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*'.

6. 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".

7. 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.*'

8. 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.

9. For the purpose of the judgment, the Tribunal reviewed the evidence provided. As narrated in paragraph 1, material was provided by the claimant. This consisted of at least six separate emails from the claimant with varying numbers of attachments. Whilst a large number of references to various wrongs made to the claimant are made, there is no reference to making a protected disclosure. That, in itself, does not mean there is no such claim. The Tribunal examined the grievance of 13 March 2021 and its outcome and considered whether the claimant made a qualifying disclosure of information to the respondent that, in the reasonable belief of the claimant, tended to show one of the instances in section 43B of the Employment Rights Act 1996 has taken place or is likely to take place. The Tribunal also asked itself the same question in relation to the date of dismissal relied on by the claimant which is described as arising from a request for flexible working. The dismissal is said to have occurred in a 1 minute 21 second telephone conversation with Ms Spillane on 11 June 2021.

10. The Tribunal also noted that the ET1 claim made by the claimant claimed unfair dismissal based on bullying and harassment, unfair treatment and goes on to incorporate her email to the respondent headed unfair dismissal/constructive dismissal and dated 9 July 2021. The Tribunal particularly considered point 10 of the email which the claimant relies on to claim that she was dismissed. Although that was her claim, the Tribunal also considered whether if viewed from the standpoint of constructive dismissal, any different decision would be reached and concluded that it would not.

11. As the claimant insisted that she had been dismissed, and the Tribunal could not identify that the dismissal was causatively linked to any complaints made by the claimant that would amount to a protected disclosure, she requires to have the qualifying service for unfair dismissal which she did not. It does bring about the odd state of affairs where the respondent still considers her to be employed but parties do not seem to be able to agree a work pattern.

12. The Tribunal considered the letter of 14 September 2022, to see if it contained any material which would cause it to reconsider the judgment, it did not.

13. In paragraph 7, the Tribunal commented that the claim was out of time in any event. This is not correct. Because of the involvement with ACAS, the period for lodging the claim is extended and the claim is in time. This does not affect the judgment of the tribunal that the claimant has insufficient service to claim unfair dismissal.

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 18 August 2022 is refused because there is no reasonable prospect of the original decision of the Tribunal being varied or revoked.

Employment Judge Truscott KC

Date 3 October 2022