EMPLOYMENT TRIBUNALS

Claimant: **Mr W. Sigismund**

Respondent: **Financial Conduct Authority**

JUDGMENT ON CLAIMANT'S APPLICATION FOR RECONSIDERATION

The Claimant's application for reconsideration of the judgment on liability, sent to the parties on 30 September 2022, is refused.

REASONS

1. By letter dated 14 October 2022, the Claimant made an application for reconsideration of the Tribunal's judgment on liability, sent to the parties on 30 September 2022.

The law

2. Rules 70 to 73 of the Employment Tribunal's Rules of Procedure 2013, make provision for the reconsideration of tribunal judgments 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.**
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> **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.**
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> **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 considered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that 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. There is a general power to extend time in Rule 5:

> **The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired.**

4. The Tribunal thus has discretion to reconsider a judgment if it considers it is in the interests of justice to do so.

5. Under rule 72(1), I must dismiss the application if I consider that there is no reasonable prospect of the original decision being varied or revoked. It is a mandatory requirement for a judge to determine whether there are reasonable prospects of a judgment being varied or revoked before seeking the other party's response and the views of the parties as to whether the matter can be determined without a hearing, potentially giving any provisional view, and deciding how the reconsideration application will be determined for the purposes of rule 72(2): *T.W. White & Sons Ltd v White*, UKEAT/0022/21.

6. If I consider there are reasonable prospects, I must (under rule 72(2)) consider whether a hearing is necessary in the interests of justice to enable the application to be determined. A hearing would, unless not practicable, be a hearing of the full tribunal that made the original decision (rule 72(3)). If, however, I decide that it is in the interests of justice to determine the application without a hearing under rule 72(2), then I must give the parties a reasonable opportunity to make further written representations.

7. In *Outasight VB Ltd v Brown* UKEAT/0253/14 the EAT held (at [46-48]) that the Rule 70 ground for reconsidering Judgments (the interests of justice) did not represent a broadening of discretion from the provisions of Rule 34 contained in the replaced 2004 rules. HHJ Eady QC (as she then was) explained that the previous specified categories under the old rules were only examples of where it would be in the interests of justice to reconsider. The 2014 rules remove the unnecessary specified grounds, leaving only what was in truth always the fundamental consideration: the interests of justice. This means that decisions under the old rules remain pertinent under the new rules.

8. The key point is that it must be in the interests of justice to reconsider a judgment. That means that there must be something about the case that makes it necessary to go back and reconsider, for example a new piece of evidence that could not have been produced at the original hearing or a mistake as to the law. It is not the purpose of the reconsideration provisions to give an unsuccessful party an opportunity to reargue his or her case. If there has been a hearing at which both parties have been in attendance, where all material evidence had been available for consideration, where both parties have had their opportunity to present their evidence and their arguments

before a decision was reached and at which no error of law was made, then the interests of justice are that there should be finality in litigation. An unsuccessful litigant in such circumstances, without something more, is not permitted to simply reargue his or her case, to have 'a second bite at the cherry' (*per* Phillips J in *Flint v Eastern Electricity Board* [1975] IRLR 277).

9. The expression 'necessary in the interests of justice' does not give rise to an unfettered discretion to reopen matters. The importance of finality was confirmed by the Court of Appeal in *Ministry of Justice v Burton and anor [2016] EWCA Civ 714* in July 2016 where Elias LJ said that:

> **'the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (*Flint v Eastern Electricity Board* [1975] ICR 395) which militates against the discretion being exercised too readily; and in *Lindsay v Ironsides Ray and Vials* [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review.'**

10. In *Liddington v 2Gether NHS Foundation Trust* EAT/0002/16 the EAT, *per* Simler P (as she then was), held at [34] 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 by 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.'**

Assessment of the application under Rule 72(1)

11. The application runs to 25 pages. Most of it consists of passages in which the Claimant simply disagrees with the conclusions which the Tribunal reached. That is not a good reason for the Tribunal to reconsider its judgment. I have not dealt with each and every point in the application because it is not proportionate to do so, in circumstances where the application is fundamentally flawed for the reasons set out below.

12. Rather than structure his application by reference to the pleaded issues, the Claimant has posed two 'exam questions' (for example, para 3 onwards, para 55 onwards), which he considers have not properly been answered by the Respondent and/or the Tribunal: 'is he [the Claimant] right about these faults?'; 'is he right about that MGC [management, governance and culture] failure?' These were not the questions the Tribunal had to decide in its judgment. Our task was to determine whether the Claimant made the pleaded public interest disclosures and, if he did, whether the Respondent subjected him to the pleaded detriments and/or dismissed him because of them.

13. Nor was it the Tribunal's function to conduct a public enquiry into alleged failings by the FSA/FCA, as the Claimant appears to believe (for example, at paras 10 and 16); nor to determine whether there was misfeasance in public office by the Respondent (for example, para 43 onwards), a cause of action in respect of which the ET has no jurisdiction.

14. The Claimant is throughout quite explicit that he is seeking 'a second bite of the cherry', inviting the Tribunal (for example para 10 onwards, para 38 onwards) to order further disclosure, permit further preparation, list more hearing days and admit new expert evidence. In my judgment, the Claimant has not identified any reasonably arguable basis for the Tribunal to do so: there were no outstanding disclosure applications as at the date of the trial; there was no submission on the Claimant's behalf that the case should not proceed because it was inadequately prepared; it was open to the Claimant, at an appropriate stage, to seek permission to adduce expert evidence, but he did not do so.

15. In some passages the Claimant seeks to advance new arguments on specific points, which differ substantially from the way his case was advanced at the hearing, for example the section dealing with his understanding of s.73 of the 2012 Act (at para 198 onwards), and the suggestion (at para 65) as to how a 'rolled-up appraisal' might properly be achieved. That is not a sound basis for reconsideration.

16. In other passages, the Claimant goes further and proceeds as though it were open to him to replead his case, for example the passage at para 34 onwards, which begins: 'here is an attempt at a new and perfected rolled-up disclosure'. He is not entitled to do so.

17. At several points in the application an even bolder argument is made: that the question of whether he made public interest disclosures and was subjected to detriments because of them was a mere 'preliminary issue' (for example, paras 3, 17 and 39). It was not, it was the central substantive question at the hearing on liability, which the Tribunal has now determined at length and in detail.

18. Insofar as the Claimant argues that there is inconsistency as between the Tribunal's conclusions as to ostensibly similar protected disclosures (para 30 onwards), the Tribunal explained in its judgment (for example, at para 231) that it would not adopt a 'one-size-fits-all' analysis of the alleged disclosures. Moreover, we were clear that our focus would be on the specific documents to which we were taken in the course of the hearing, their content and context (for example, para 511). We considered each alleged disclosure on its own merits - taking into account, where appropriate, arguments made by Mr Kemp as to aggregation - and reached our conclusions accordingly. There is nothing in the Claimant's application which persuades me that there is a reasonable prospect of our varying or revoking those conclusions. I note that the Claimant accepts that pursuing these points 'may require another round of standard disclosure'.

19. Finally, the section dealing with the question of time limits (para 75 onwards) advances arguments which are, in my judgment, misconceived. It was plainly reasonably practicable (in the sense of reasonably feasible) for the Claimant to issue proceedings earlier. He elected not to do so for personal reasons.

Overall conclusion

20. I have concluded that there is no reasonable prospect of the Tribunal varying or revoking its judgment, whether in relation to its primary findings of fact, or its conclusions as to both substantive and jurisdictional issues.

21. The interests of justice are that there be finality in litigation, absent any good reason for a decision to be reconsidered. The fact that a party does not agree with the conclusions reached by a Tribunal and would like a second chance to present his arguments is not such a reason.

22. For all these reasons, the application for reconsideration is refused pursuant to rule 72(1). Because I have dismissed it at the first stage of process, I have not invited the Respondent to comment on the application.

Employment Judge Massarella
Date: 2 November 2022