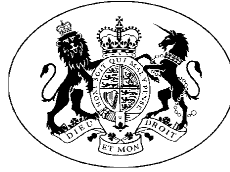

EMPLOYMENT TRIBUNALS

Claimant: Ms F Jenkins

Respondent: Interactive Resorts Ltd
(now known as Vespertine Holidays Ltd)

JUDGMENT

The respondent's application of 18 August 2022 for reconsideration of the judgment sent to the parties on 4 August 2022 is refused.

REASONS

1. Rule 70 of Schedule 1 to the Employment Tribunals (Constitution and Rules or Procedure) Regulations 2013 provides that an Employment Tribunal may, either on its own initiative or on the application of a party, reconsider any judgment where it is necessary in the interests to do so. On reconsideration the original decision may be confirmed, varied or revoked.

2. Rule 71 states that an application for reconsideration shall be presented in writing within 14 days of the date on which the written record of the original decision was sent to the parties. In this case, the Reserved Judgment was sent to the parties on 4 August 2022. The respondent emailed the Tribunal on 18 August 2022 applying for a reconsideration, and giving detailed reasons for the application in a 14 page document entitled "Application for Reconsideration". This was presented within 14 days of the date on which written reasons were sent.

3. The respondent emailed the Tribunal again on 9 September 2022, with new evidence, and a covering letter dated 9 August 2022 (which was, as I have said, in fact sent on sent on 9 September 2022). I received this further submission on 21 September 2022.

4. Under rule 70, a judgment will only be reconsidered where it is necessary in the interests of justice to do so. This allows a Tribunal a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. The discretion must be exercised judicially. This means having regard not only to the interests of the party seeking the 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 in litigation. Reconsideration is not a means by which a disappointed party to proceedings can get a second bite of the cherry.

5. The procedure upon an application for reconsideration is for the Employment Judge who heard the case to consider the application and determine if there are reasonable prospects of the judgment being varied or revoked. There must be some basis for reconsideration. It is not sufficient that a party disagrees with the decision. If I consider that there is no reasonable prospect of the judgment being varied or revoked, then the application must be refused: rule 72.

6. A large number of the respondent's points were argued at the hearing in July 2022, and I consider that to a large extent the respondent is attempting to reargue the case that I have already heard. It is clear that the respondent disagrees with the decision and with my assessment of the evidence. However that is not a good reason for a reconsideration.

7. The respondent also seeks to reargue a case management decision made at the hearing, not to adjourn so that this case was heard together with another case against the same respondent (case 2200556/2022). It is clear that the respondent disagrees with the case management decision made. However that is not a good reason for a reconsideration.

8. One of the respondent's submissions is in substance that the hearing was unfair, and that it is necessary in the interests of justice to have a reconsideration due to the unfairness of the hearing. I do not consider that the respondent was unable to present its case: Mr Morgan did not use all of the time allotted to him to question the claimant and her witness (Mr Jenkins) in their evidence in chief; and he made very full written closing submissions, after having seen the claimant's closing submissions in writing. (See paragraphs 9 & 10 of the Reasons: paragraph numbers in this document are references to paragraphs of the Reasons given for the Reserved Judgment.) His camera did not work for much of the first day of the hearing, so he participated on the phone, without apparent difficulty. Mr Morgan told me at the start of the hearing on the first day that he was able to see the bundle. The hearing was paused when he later said that he was unable to see the bundle, and when the hearing resumed, he confirmed that he was able to see the bundle. Mr Jenkins was in the same room as the claimant, but I saw no evidence of his handing her a note. On the afternoon of 5 July 2022, Mr Morgan objected that Mr Jenkins was providing the claimant with questions to ask him in examination in chief, however I saw and heard no evidence of this myself, and when I questioned the claimant she told me that she had not been receiving questions from her father. I do not consider that the hearing was unfair. I therefore do not accept the respondent's submission that, because of the unfairness of the hearing, it is necessary in the interests of justice to have a reconsideration.

9. The respondent argues that the Reasons for the Reserved Judgment contain an error of law regarding substitution, and relies on paragraphs 50, 71, 79 and 80 of the written reasons. The respondent considers that the tribunal substituted its own view of whether the claimant was lying about whether Mr Morgan had said "iglu scum", rather than accepting Mr Morgan's view that she was, and that this is unlawful. I will not summarise my original reasons. However there was a claim for unfair dismissal. I set out the law relevant to this claim at paragraphs 45 to 54, and reached my conclusions about this claim at paragraphs 69 to 72. The claim for unfair dismissal succeeded on the basis that the respondent had failed to prove the reason for the dismissal (paragraph 71). There was also a claim for a redundancy payment. I set out the relevant law at paragraphs 55 to 59, and reached my conclusions about this claim at paragraphs 73 to 84. Paragraphs 79 and 80 concern the email containing the words "iglu scum" in the context of the claim for a redundancy payment, and not in the context of the claim for unfair dismissal. I do not consider that there was an error of law, or that the tribunal needs to reconsider these matters.

10. I will clarify one other matter. The respondent submits that a *Polkey* defence should have been successful. A reduction in the compensatory award may be made under *Polkey* where the unfairly dismissed employee could have been dismissed fairly, if a proper procedure had been followed. Although I did not accept the respondent's submissions as to why a *Polkey* reduction should be made, I did make a *Polkey* reduction on the basis that the claimant would have been dismissed by reason of redundancy by the end of the notice period had a fair process been followed, and that in all the circumstances I considered it just and equitable not to make a compensatory award (paragraph 110). The complaint that I did not make a *Polkey* reduction is therefore mistaken, and cannot be a reason for a reconsideration.

11. The respondent submits that when considering the respondent's counterclaim for breach of contract, I should have mentioned what the claimant accepted on this issue. The claimant accepted that there was a practice that commission paid in respect of holidays subsequently cancelled was offset against the following month's commission only, but argued that the written contract did not give the respondent a right to recover commission properly paid (claimant's written final submissions, second bullet point under the heading 'Commission'). I do not consider that there is a reason to reconsider the conclusions I reached on this matter (paragraphs 100 to 101).

12. The respondent sought on 9 September 2022 to introduce new evidence. When considering whether it is in the interests of justice to reconsider a judgment because of new evidence not considered at the original hearing, the approach laid down in *Ladd v Marshall* will, in most cases, encapsulate what is meant by the "interests of justice": *Outasight VB Ltd v Brown* [2015] ICR D11 [49]. The principles of *Ladd v Marshall* are that leave to adduce further evidence after judgment has been given will be only granted if: (i) the evidence could not have been obtained with reasonable diligence for use at the original hearing; (ii) the further evidence would probably have an important influence on the outcome of the case; and (iii) the evidence is apparently credible: *Ladd v Marshall* 1954 3 All ER 745. However, reconsideration may be permitted on the basis of fresh evidence

not meeting the *Ladd v Marshall* test where it is in the interests of justice to do so: *Outasight* [31].

13. The documents produced by the respondent include a Whatsapp discussion in which Mr Morgan is described in very derogatory terms by one of the participants. But the claimant was not part of this chat. The other document is a record of phone calls said to be between the claimant in case 2200556/2022 and the claimant in this case. It has no bearing on any of the important factual issues in the current case. Mr Morgan alleges that the claims in these two cases are fabricated and that this phone contact shows collusion between the two claimants. However I considered the case before me on the evidence presented, and it will be clear that I did not consider the claimant's case to be fabricated. I am satisfied that these documents would *not* have had an important influence on the outcome of the case, and that it would not be in the interests of justice to admit them as evidence now.

14. The respondent's submission states that Ms Perry's evidence in case 2200556/2022 (at a hearing which took place after the hearing in the instant case) was that Ms Perry and Ms F Jenkins, the claimant in the instant case, were rude about Mr Morgan within the office in front of staff. However, even assuming that this statement correctly summarises Ms Perry's evidence, and taking that evidence at its highest, it would not support the respondent's case that it dismissed the claimant because of unsavory emails, illicit payments, and a failure to return to work after furlough (paragraph 36). The respondent does not say that it was part of the reason for dismissal of the claimant that she was rude about Mr Morgan within the office in front of staff. This evidence would not affect my conclusion that the respondent had failed to prove the reason for the dismissal (paragraph 71). Nor would it affect my conclusion that the real reason for the dismissal was redundancy (paragraph 77). It would be relevant to whether the claimant's conduct would have *entitled* the respondent to dismiss the claimant for gross misconduct even though it in fact dismissed her because of redundancy. However there is no detail as to how serious the rudeness was or how often it took place. The incident or incidents were plainly historic by the time the claimant was dismissed, as she had not worked in the office since going on maternity leave on 6 July 2020. I am therefore satisfied that this evidence would probably *not* have had an important influence on the outcome of the case, and that it would *not* be in the interests of justice to admit this as evidence in the instant case.

15. I therefore do not consider that the new evidence gives reason to reconsider this case.

16. The respondent points out, correctly, that the dates of the hearing given on the Reserved Judgment are incorrect. The dates given are 5 and 7 July 2022. The hearing in fact took place on 5 and 6 July 2022.

17. In the respondent's submissions in support of the application for reconsideration the name of the respondent is now given as Vespertine Holidays Ltd. In her subsequent email to the tribunal, the claimant has used the same name. Interactive Resorts Ltd has been known as Vespertine Holidays Ltd since 15 July 2022, shortly after the hearing on 5 and 6 July 2022, but before the Reserved Judgment of 3 August 2022.

18. I will therefore correct the Reserved Judgment sent to the parties on 4 August 2022, under rule 69, so that the dates of the hearing are correct, and so that the respondent is correctly referred to as “Interactive Resorts Ltd (now known as Vespertine Holidays Ltd)”.

19. I have considered all of the points raised by the respondent in its submissions. I consider that there is no reasonable prospect of the original judgment being varied or revoked. I have also taken into account the interests of *both* parties, and the public interest in there being, so far as possible, finality in litigation. I consider that it is not necessary in the interests of justice for there to be a reconsideration. I therefore refuse the application for reconsideration.

Tribunal Judge A Jack,
acting as an Employment Judge

Date 10/11/2022

JUDGMENT SENT TO THE PARTIES ON

11/11/2022

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FOR THE TRIBUNAL OFFICE