EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr S Arens		Forest Garden Limited

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The judgment of the Tribunal is that the claimant's application for reconsideration is refused because there is no reasonable prospect of the decision being varied or revoked.

REASONS

1. The claimant's employment came to an end of 15 December 2020 by reason of redundancy. By a claim form presented on 31 January 2021 the claimant brought a claim for automatically unfair dismissal for a reason connected to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE/TUPE regulations").

2. For the reasons set out in my judgment dated 3 April 2022 (the "Judgment") I held that the claimant's claim for automatically unfair dismissal failed and was dismissed.

3. By an email dated 19 April 2022 the claimant sought a reconsideration of the Judgment on the following grounds:

   3.1 the impact that the decision may have on other cases in the future in relation to TUPE and/or where employers change the reasons for dismissal;
   3.2 that he believed that the decision to dismiss was unfair as the initial redundancy letter sent to the claimant indicated that all software development and support of bespoke application would be outsourced which the claimant asserted amounted to a TUPE transfer;

3.3 That the Tribunal accepted the explanation of the respondent that only Support work was being outsourced and that were also using boxed off-the shelf products to replace bespoke applications and that development had ceased altogether which was very different to what had been communicated to the claimant at the first two consultation meetings and it was only when the claimant raised the issue of TUPE did the respondent change their reasons;

3.4 A contract with Blueberry for Software Development and Support was signed just days before his redundancy. The respondent had asserted that this was for supporting existing applications only but that the respondent was free to take on other services for Software Development;

3.5 He could not understand why a lot of emphasis was put on what percentages his role was broken down. The respondent had asserted that 60% of the claimant's claim role was software development, that he had unwittingly given a higher percentage of his role to software development but that that this was used against him as the respondent claimed that they were only outsourcing Support work;

3.6 that if the original reasons given by the respondent for his redundancy were correct this would increase the need for Software Development – not decrease it;

3.7 If the respondent had planned to buy off-the shelf products and for all development to cease in its entirety why did the respondent not indicate this in his notice of redundancy letter?

4. By an email dated 12 May 2022 the Tribunal wrote to the parties and asked the respondent to provide a response to the claimant's application for reconsideration. The parties were also asked to provide their views as to whether the application for reconsideration could be determined without a hearing. In this letter I also indicated my provisional view that the claimant's application for reconsideration did not set out further information that was likely to lead to the original decision being varied or revoked as the claimant had not produced any new evidence nor had he pointed to any error of law. The matters to which the claimant had referred in his reconsideration application were all considered as a part of the original decision making process and were dealt with in the findings of fact. Furthermore, the claimant was advised that the decision of the Tribunal in this case was not binding on other TUPE cases not least because each case is particular to its own facts and due to the fact that decision of the Employment Tribunal can only be persuasive on another Tribunal and not binding.

5. The claimant replied to the Tribunal's email of 12 May 2022 the following day indicating that he had initially been told by the respondent that his job was being outsourced in its entirety to a single third party provider. At this stage neither the claimant nor the respondent were aware of TUPE. The claimant also argued that the respondent had failed to provide any evidence to prove that they were not seeking full software development services from the third party outsource provider. The claimant acknowledged that I asked the respondent about this change in position during the hearing but that I

accepted the respondent's explanation that the claimant's at risk letter was "badly worded".

6. By an email dated 19 May 2022 the respondent provided its comments on the claimant's application for reconsideration. The respondent took the view that the claimant's application for reconsideration was fundamentally based on the fact that the claimant disagreed with he Judgment. However, all of the material points included in the claimant's application were raised during the Tribunal hearing and addressed in the Judgment largely as findings of fact. Further, and crucially the claimant's application did not contain any new or further information which suggested that a reconsideration was necessary in the interests of justice. In particular, the claimant had not referred to any new available evidence nor had he referred to any defect or default of the Tribunal's procedure which had denied the claimant natural justice and/or which had resulted in an incorrect decision. The respondent submitted that the claimant had not referred to any grounds on which the Tribunal was likely to vary or revoke the Judgment.

7. The respondent agreed that the Judgment was not binding on any other Tribunal or any other legal action. As such, the claimant's comments in this regard did not satisfy the interests of justice requirement for a reconsideration. Finally, the respondent confirmed that the claimant's application could be dealt with on papers and should be rejected.

8. The claimant responded to the comments made by the respondent on 20 May 2022. In his email the claimant indicated that he not only disagreed with the Judgment but that it was biased. The assertions made by the respondent had been unsubstantiated but had been accepted as findings of fact. The claimant asked for each finding of fact to scrutinised and to ask the question "can this be substantiated". The claimant also asked for the law regarding TUPE to be looked at more closely. Finally, the claimant indicated he did not accept that the letter advising him that he was at risk of redundancy was simply "badly" worded.

9. On 18 October 2022 the claimant sent a further email to the Tribunal in which he referred to a new appointment made by the respondent. The claimant indicated that a Mr Daniel Mycock who was employed by the respondent in October 2020 as IT Business Analysis Manager but had now been appointed to the role of Group Head of Systems Development. The claimant queried how this appointment had been made if the respondent no longer required new software systems and all applications were to be bought off the shelf? The claimant re-iterated that he thought that he had such a strong case as the letter informing him that his role was at risk of redundancy had referred to his role being outsourced. As such, he believed that the TUPE regulations applied.

10. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). Under Rule 70 of the Rules, the Employment Tribunal may, either on its own initiative or on the application of a party,

reconsider a decision where it is necessary in the interests of justice to do so. On reconsideration, the decision may be confirmed, varied or revoked.

11. Rule 71 provides that an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties.

12. The process by which the Tribunal considers an application for reconsideration is set out in Rule 72. Where the Judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application shall be refused. Otherwise, the Tribunal shall send a notice to the parties setting out 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.

13. Rules 71 and 72 give the Tribunal a broad discretion to determine whether reconsideration of a decision is appropriate. Guidance for Tribunals on how to approach applications for reconsideration was given by Simler P in the case of **Liddington v 2Gether NHS Foundation Trust UKEAT/0002/16/DA**. Paragraphs 34 and 35 provide as follows:

"*34. […] 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. Tribunals have a wide discretion whether or not to order reconsideration. 35. Where […] a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application*."

14. The claimant's application was received within the relevant time limit. I therefore consider it under Rule 72. I am satisfied based upon the representations made by the parties that a reconsideration hearing is not necessary in the interests of justice.

15. The claimant's application and subsequent emails as detailed above are based on the premise that the claimant does not agree with the findings of fact made by the Tribunal having heard two days of oral evidence and consideration of the documentation presented to it. The claimant relies heavily on the fact that the claimant was initially told that the respondent was considering moving all application development and support to a third party. This alone is not enough to amount to a TUPE transfer. The Tribunal has to

consider the reality of the situation in order to consider whether there was, indeed, a service provision change under Regulation 3 (1) (b) of the TUPE Regulations. The Tribunal carefully considered the evidence before it before determining that there was not been a TUPE transfer.

16. The claimant has in his email of 18 October 2022 referred to the recent appointment of Mr Mycock to the role of role of Group Head of Systems Development but has provided no details of the work undertaken by Mr Mycock. In any event an internal appointment made by the respondent, almost 2 years after the claimant's dismissal, would not result in a service provision change.

17. I have carefully considered the claimant's application for reconsideration, his subsequent emails and the representations made by the respondent. Bearing in mind the importance of finality of litigation and the interests of justice, I am not satisfied that there is any reasonable prospect of the Judgment or any part of it being revoked or varied. The claimant's application for reconsideration is therefore refused.

Signed by 13 November 2022
Employment Judge Choudry