EMPLOYMENT TRIBUNALS

Claimant: Mr I McMahon

Respondent: ASE plc

UPON APPLICATION made by email dated 10 November 2022 to reconsider the judgment dated 12 September 2022 under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing:

JUDGMENT

On reconsideration, the original decision is confirmed.

REASONS

1. At a preliminary hearing on 12 September 2022 the Tribunal recorded that the claimant's application to amend his claim was withdrawn.

2. Upon the respondent's application under rules 76(1)(a) and 76(1)(b) for its costs in connection with that application and its withdrawal, the Tribunal refused that application at the hearing. Written reasons for that refusal were signed by the judge on 15 October 2022 and sent to the parties on 28 October 2022.

3. The Tribunal notes that that costs decision was recorded as an Order rather than a Judgment, as it should have been. For the purposes of the present application, reconsideration has proceeded on the basis that the costs decision is a Judgment rather than an Order.

4. A timely written application for reconsideration of that refusal was made by the respondent on 10 November 2022 under rule 71. In support of that application, emails dated 14 March 2022 and 28 March 2022 between the parties were provided. The application for reconsideration was opposed by the claimant in writing on 17 November 2022. The application and the response to it are incorporated into these reasons by reference.

The respondent's application for reconsideration

5. The application is on the basis that it is necessary in the interests of justice to reconsider the judgment on costs (rule 70).

6. The respondent's position is that the main thrust of the claimant's argument at the costs hearing was that having received the respondent's costs application on 6 September 2022 and having no prior indication that he was at risk of costs the claimant reflected on his position and reasonably withdrew his application to amend the claim on 6 September 2022 in order to mitigate the risk of costs against him. It was suggested that he had not been aware of the potential costs risks before the respondent's formal application on 6 September 2022, apart from this being "intimated" the week before In an email of 2 September 2022. It was therefore submitted that the claimant's conduct was not unreasonable in withdrawing his application the working day before the hearing in the circumstances given the late warning that he was at risk of costs.

7. The respondent suggests that these representations were incorrect. The respondent's position is that the parties exchanged many emails between the date of the application to amend the claimant's claim in November 2021 and the hearing in September 2022. Many of these emails dealt with an extensive dispute between the parties about whether the new claims should be included in the list of issues. Reliance is placed upon "at least two" of these emails dated 14 March 2022 and 28 March 2022 that the respondent considered the claimant's application to introduce new claims to be unreasonable and misconceived; and that it intended to apply for costs once the matter proceeded to a preliminary hearing.

8. Despite the existence of these emails, the respondent asserts, the claimant's position gave the distinct impression that the claimant had no prior knowledge before September 2022 that he was at risk of costs and that the respondent's costs application on 6 September 2022 was made without any prior warning. The respondent referred to the claimant's submissions as to the chronology. It is said that no reference was made to the emails of 14 March 2022 and 28 March 2022. These emails were not in the format of a formal costs warning letter. However, the emails in the context of the exchanges between the parties at the time made it clear that the respondent considered the claimant's conduct to be unreasonable and that it intended to apply for costs in respect of the claimant's application to amend the claim. See also the email of 2 September 2022.

9. The respondent's position is that the claimant's submissions were material in the decision by the Tribunal not to award costs. The judge made reference in his oral judgment to the chronology in determining the reasonableness of the claimant's actions. The judge indicated that had a costs warning been given earlier it might have changed the outcome. Further reference is made to the written reasons at paragraphs 39 and 41.

10. It is not suggested that the Tribunal was deliberately misled.

11. The respondent appreciates that the emails are not "new evidence", and that the Tribunal might consider that the emails should have been made available during the preliminary hearing on 12 September 2022. It also appreciates that there should normally be finality in litigation. However, the respondent

contends that it was taken by surprise by the claimant's incorrect submissions at the hearing that he had not been put on notice of the costs risks of his application to amend before September 2022; and that the respondent's application on 6 September 2022 was thus the reason for him withdrawing his application so late in proceedings. Had the respondent been aware that this argument would be advanced it would have ensured that the emails from March 2022 were available to the Tribunal during the hearing.

12. The respondent and the claimant were both represented by counsel at the hearing. The respondent's solicitor was also present. It was a relatively short hearing. There had been extensive emails between the respondent's solicitor and the claimant's solicitor in the 10 months between the claimant making his application in November 2021 and the hearing in September 2022. There was not enough time during this hearing for the respondent's solicitor to go through all of these emails to check whether the respondent had ever put the claimant on warning of costs. It was only after the hearing and checking through the email exchanges that the respondent's solicitor found the relevant emails.

13. The respondent emphasised that the importance of receiving accurate submissions based on the facts so that a Tribunal can make sound judgments is essential to justice. It is in the interest of justice, and in accordance with the overriding objective, to vary the judgment by ordering that the claimant be liable for the respondent's costs.

The claimant's response to the application for reconsideration

14. The claimant's response to the application for reconsideration is dated 17 November 2022. It is not necessary to set out that response here in the same detail as the application for reconsideration itself. The following points emerge from the response.

15. First, if the respondent intended to advance an application for costs based upon unreasonable conduct in not withdrawing the application to amend sooner then that argument should have been advanced in addition to the argument based upon the application to amend having no reasonable prospect of success.

16. Second, it follows from that first point that the respondent should have ensured that all relevant information should be available to the Tribunal in the hearing bundle. The email material upon which the respondent now relies is not "new evidence".

17. Third, as the respondent was represented at the hearing by both counsel and solicitor, they could have sought to introduce that evidence or to seek an adjournment in order to allow them to do so or to clarify the position.

18. Fourth, as found in paragraphs 29 and 36 of the written reasons for the original decision, there was no formal costs application prior to that of 6 September 2022. The claimant has not misled the Tribunal or misrepresented material facts.

19. Fifth, even if the emails had been considered, they would not have affected the decision. It was a sensible litigation decision for the claimant to withdraw

his application to amend. Reliance is also placed on paragraphs 33 and 41 of the written reasons.

Relevant legal principles

20. The overriding objective in rule 2 of the Tribunal's procedural rules enables the Tribunal 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. The Tribunal shall seek to give effect to the overriding objective in interpreting or exercising any power given to it by the procedural rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and shall co-operate generally with each other and with the Tribunal.

21. Rule 70 provides that a Tribunal may on the application of a party reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the original decision may be confirmed, varied or revoked. If it is revoked it may be taken again. Rule 71 requires the application to set out why a reconsideration is necessary.

22. Rule 72(1) requires an Employment Judge to 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, 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.

23. If the application has not been refused at that stage, the original decision shall be reconsidered at a hearing, unless the Employment Judge considers, having regard to any response to the notice provided under rule 72(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. Where practicable, the reconsideration shall be by the Employment Judge who made the original decision (rule 72(3)).

24. Rules 70-73 replace the individual grounds for review that existed prior to the introduction of reconsideration in 2013. The test now is simply whether the interests of justice require that a decision be reconsidered. However, as the EAT has emphasised in *Outasight VB Ltd v Brown* UKEAT/0253/14 (21 November 2014, unreported) the existing case law on review has not been replaced by the new rules on reconsideration. In particular, the relatively stringent rules as to when reconsideration will be granted on the basis of evidence not available at the initial hearing will continue to apply.

25. Drawing upon the commentary in *Harvey on Industrial Relations and Employment Law* and the IDS Employment Law Handbook on *Employment Tribunal Practice and Procedure*, under the pre-2013 procedural rules the power of review on the interests of justice ground might only be used in "exceptional circumstances". However, that pre-dated the introduction of the overriding objective in what is now rule 2. The exceptional circumstances

approach might be said to be relaxed as a result: *Williams v Ferrosan Ltd* [2004] IRLR 607 EAT. However, in *Newcastle-upon-Tyne CC v Marsden* [2010] ICR 743 the EAT said that the existence of the overriding objective was not to be used to overturn all the existing principles on this ground. See also: *Outasight VB Ltd v Brown* (above).

26. The Court of Appeal in *Ministry of Justice v Burton* [2016] EWCA Civ 714, [2016] ICR 1128 held that: (1) the discretion must be exercised in a principled way; (2) there must be an emphasis on the desirability of finality, which militates against the discretion being exercised too readily; (3) it is unlikely to be exercised because a particular argument was not advanced properly; and (4) it is unlikely to be exercised if to do so would involve introducing fresh evidence, unless the strict rules on such admission are separately satisfied. In general, the failings of a party's representative will not be a good reason to grant a review on the grounds of the interests of justice.

Discussion and conclusion

27. Having set out the detail of the application and the response to it, together with the content of the relevant rules and the case law, the Tribunal can be relatively briefer in discussing the application and reaching its conclusion.

28. This is not an application in which the judge considers that there is no reasonable prospect of the original decision being varied or revoked. The Tribunal would not therefore refuse the application at the first stage. The parties are agreed that the application can be determined without a hearing and on the papers. They have not suggested that further representations are required. The Tribunal therefore proceeds to consider the application for reconsideration on its merits.

29. At the costs hearing the Tribunal was clear that, whatever the emphasis on one point or another was being made by the parties, it was considering both rule 76(1)(a) (unreasonable conduct) and rule 76(1)(b) (no reasonable prospect of success). In the event, the application under rule 76(1)(b) could not succeed because it was the Tribunal's view that that rule applied only to a claim itself and not to an application to amend a claim. Although not cited to it or by it at the hearing, the Tribunal recorded in its written reasons that that interpretation was supported by recent case law authority.

30. The application for costs in the Tribunal's analysis therefore focused upon the question of unreasonable conduct. Does the existence of email evidence from March 2022 now support a suggestion that the claimant's withdrawal of his application to amend amounted to unreasonable conduct?

31. The email of 14 March 2022 records: "Unfortunately we consider it likely that a further preliminary hearing will be needed to determine your application. We remind you that we will seek to recover our client's additional costs in this regard". The email of 28 March 2022 records: Over a month later [that is, after the case management hearing] … you sought to include 2 brand new significant claims which were clearly out of time. Not only do we consider these 2 new claims to be misconceived; we consider that it amounts to unreasonable conduct to seek to introduce such claims after the Case Management Hearing".

32. The first and crucial point to make is that this is not new evidence. It existed at the time of the costs hearing and some time before it. The respondent's solicitor was aware of it in general terms even if she could not turn her hand to it immediately. The Tribunal is surprised that such material was not in the costs hearing bundle. It was clearly potentially relevant material. It should have been placed before the Tribunal. If it was not, and its relevance began to dawn on the respondent's solicitor at the hearing, then an application for an adjournment should have been promptly made during the hearing. Although the hearing was conducted via CVP and was a relatively short hearing (it lasted from 2.15pm to 3.10pm), it was not impracticable for the solicitor to pass a message to counsel or to the hearing clerk to ask for an adjournment, either for instructions to be given or to look for or to introduce such evidence.

33. This was evidence that might be relevant and might have had an important influence on the hearing. It is apparently credible evidence. However, it could have been obtained with reasonable diligence for use at the original hearing. The well-known principles in *Ladd v Marshall* would point to a conclusion that an application for reconsideration based upon such evidence should be refused. See *Outasight VB Ltd v Brown* (above).

34. However, the interests of justice might still allow fresh evidence to be adduced where some additional factor or mitigating circumstance has the effect that the evidence in question could not have been obtained with reasonable diligence at an earlier stage. This might apply where, for example, a party was ambushed by the introduction of evidence at the hearing or was incorrectly refused an adjournment.

35. The Tribunal does not consider that there is some additional factor or mitigating circumstance in the present case. The way in which the claimant's counsel put the claimant's case and the chronology that was relied upon does not amount to such. It was capable of being challenged there and then. That it was not in all probability was a consequence of the earlier failure to include all relevant material in the hearing bundle.

36. In any event, the Tribunal is not persuaded that had those emails been before it at the original hearing it would have made any difference to the original decision. The 14 March 2022 "warning" makes a rather lightweight reference to seeking to recover costs if a further preliminary hearing is required, although the legal basis for such is not mentioned. The 28 March 2022 email refers to "unreasonable conduct", but it makes no reference to costs. Even reading the two emails together – in the context of what looks to be typically robust correspondence between litigation solicitors – they do not amount to a costs warning.

37. Of course, a costs warning in whatever shape or form is not a pre-condition of a successful application for costs. However, its presence is more likely to impress itself upon a Tribunal considering whether to award costs for alleged unreasonable conduct of proceedings in what is otherwise generally a costs-neutral jurisdiction. These emails issued in these terms some 6 months before a formal application for costs is actually made do not impress themselves upon the Tribunal in the way that might lead it to reconsider its costs decision.

38. This is a case where the interests of finality in litigation are not to be set aside lightly; where new evidence is being introduced that could and should have

been in the hearing bundle; and where the respondent's case on costs was not advanced in the way that it should have been at the hearing. The respondent was represented by counsel and solicitor at the hearing. The emails would have been unlikely to have changed the Tribunal's view of the matter as explained in the written reasons. They would not have caused the Tribunal to have exercised its discretion differently even if the threshold for an award of costs had otherwise been met. The respondent is simply trying to have a second bite of the cherry when its case should have been brought before the Tribunal fully formed at the original hearing.

39. In all these circumstances, applying the overriding objective in tandem with rules 70-73, it is not necessary in the interests of justice to reconsider the costs decision. The original decision is confirmed.

Judge Brian Doyle
22 November 2022

JUDGMENT SENT TO THE PARTIES ON
28 November 2022

FOR THE TRIBUNAL OFFICE