Case No: 2200556/22

EMPLOYMENT TRIBUNALS

Claimant: Ms A. Perry

Respondent: Vespertine Holidays Ltd

UPON APPLICATION made by letter dated **24 October 2022** to reconsider the judgment dated **10 October 2022** under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing, the application for reconsideration is refused.

JUDGMENT

1. The respondent made an application under Rule 71 of the Employment Tribunal Rules of Procedure 2013 on 24 October 2022. That application was for a reconsideration of the decision dated 10 October 2022 that the Claimant was unfairly dismissed and was entitled to redundancy pay, notice pay, and compensation for unlawful deductions of wages, unpaid holiday pay and pension contributions.

2. Rule 72 provides that an Employment Judge shall consider an application under Rule 71 and if the Judge considers that there is no reasonable prospect of the original decision being varied or revoked the application shall be refused. Rule 70 provides that a judgment will only be reconsidered where it is necessary in the interests of justice to do so. The question for me is whether there is a reasonable prospect of the judgment of 10 October 2022 being varied or revoked, because it is necessary in the interests of justice to do so.

3. The respondent makes a number of assertions that the judgement of 10 October 2022 contains errors of law and facts. Much of the content of the respondent's application is simply disagreement with the original decision or an attempt to raise issues that have already been determined in that judgment. There are a number of submissions and I have attempted to summarise them as follows.

Procedural fairness

4. The respondent alleges that the hearing was not fair for a number of reasons. These include i) that the Tribunal ignored his technical issues, ii) that the Tribunal truncated the hearing from 2 days to 1.5, iii) that the length of the hearing was not appropriate given the respondent's disabilities, iv) that the respondent was not given sufficient time to resolve his high or low sugar levels, v) that the Tribunal mistakenly labelled his behaviour as aggressive, vi) that the respondent was placed on mute and ignored the respondent raising his hand. Finally, the respondent claims that he was treated in a discriminatory manner because of his diabetes and dyslexia.

5. As set out in paragraph 3 of the decision, the Tribunal made adjustments for the claimant's dyslexia and diabetes. The respondent was given a break whenever he asked for one. On one occasion the respondent asked for an early lunch break, which the Tribunal could not accommodate because of a commitment during the lunch break, but the respondent was still given a short break in addition to the regular lunch break. At no point was any request for a break from the respondent refused. The claimant is correct that on one occasion he was asked not to eat during the hearing. This was before I was aware of his diabetes. The respondent's message to the clerk before the hearing began was unfortunately not passed on to me. However, as soon as I realised that the respondent had diabetes, I directed that he was entitled to eat during the hearing and he did so. In addition, the Tribunal and the claimant parties slowed down at points throughout the hearing so that the respondent could take notes on key matters. The respondent was placed on mute for much of the hearing, save for when he was giving evidence, cross examining, making submissions or being asked to speak, because of his constant interruptions which were themselves prejudicing a fair hearing. The respondent often raised his hand whilst on mute. On a handful of occasions, I did not immediately see the respondent's hand raised but it was brought to my attention by the claimant. The respondent was regularly able to pause proceedings notwithstanding being placed on mute. These adjustments made namely regular breaks, permission to eat during the hearing, written submissions and slowing down key points to allow the claimant to take notes are in line with recommendations in the Equal Treatment Bench book. I am satisfied that the respondent had a fair opportunity to present his case notwithstanding his disabilities.

6. A number of the respondent's assertions about the hearing are incorrect. I was able to hear the respondent throughout, save for one issue with my headphones on the second day in which I paused proceedings and which took only a minute or two to resolve. The hearing was not truncated. It

commenced at 10am on the first day and finished at 3pm on the second day. This was because the respondent had requested submissions be made in writing because of his dyslexia, after the claimant hade made her oral submissions. The tribunal allowed written submissions and consequently a reserved judgment was necessary, and time set aside for submissions and judgment was not needed. The respondent did not raise concern that two days was insufficient time for this claim at the hearing. The respondent was placed under time restraints in the usual manner of timetabling hearings, but his request for further time to cross examine the claimant was accepted, and he was given notice shortly before his time was up.

7. In addition, the respondent alleges that the hearing was unfair because the claimant's partner was in the room with her, although not visible on screen. I addressed this in the hearing itself and informed the respondent that the claimant was entitled to have her partner in the room for support and did not require permission (this is consistent with the Equal Treatment Bench Book). The claimant's partner did not intervene in any way when she was giving evidence.

8. As set out in paragraph 5 of the decision the respondent's behaviour during the hearing, namely the constant interruptions and arguing with the Tribunal, was inappropriate and disruptive. It exacerbated an already traumatic experience for the claimant. The measures put in place were a consequence of the respondent's unnecessary interruptions and were necessary to ensure the hearing could proceed fairly.

Application for specific disclosure

9. The respondent disagrees with the scope of the order made in his favour to direct specific disclosure of Whatsapp messages. This is an attempt to reopen a case management decision, addressed in paragraph 7 of the judgment. The respondent asserts that he was not given sufficient time to consider the documents ordered to be disclosed and he says he was only given the documents on the second day of the hearing. This is incorrect. He received the disclosed Whatsapp messages at the end of the first day of the hearing. Before the Tribunal rose at the end of the first day I checked that the respondent had indeed received the disclosed documents and he confirmed that he had. Accordingly the respondent had the disclosed documents overnight, in advance of his cross-examination of the claimant the next day.

Combination with case 2202277/22

10. The respondent is also the respondent another claim 2202277/22 in which judgment was given by Employment Judge A. Jack on 3 August 2022 and in which that claimant's claim for unfair dismissal was similarly upheld.

11. During the course of those proceedings the respondent made an application to join the present case with case 2201177/22, which was refused by Regional Employment Judge Wade on 6 May 2022. The respondent renewed that application before EJ Jack at the hearing of 2201177/22 on 5 July 2022, but that was refused for the reasons given in the judgment of 3 August 2022 at paragraphs 7 and 8. The respondent feels strongly that if the two cases had been heard together that the context of the claims would have been realised by the Tribunal. But this is mere disagreement with the decisions of REJ Wade and EJ Jack. By the time of this hearing 2201177/22 had already been heard. The claims were not heard together but the respondent nevertheless had a full opportunity to present all relevant evidence to this Tribunal. I note that the respondent complains about his inability to adduce evidence which he says was in control of the claimant, but I disagree. If the respondent wasn't able to produce the necessary evidence for the Tribunal, then that is a failure of the respondent to properly maintain its own business records and is not the fault of the claimant.

Substitution

12. A number of assertions were made throughout the application that the Tribunal substituted its own views for those of the employer. However, it is important to note that the decision that the claimant was unfairly dismissed was based on the failure of the respondent to discharge the burden of establishing that the reason for the dismissal was one of the potentially fair reasons for dismissal. The respondent alleged that it was a gross misconduct dismissal but I found that it was in fact a redundancy situation and that the misconduct claims were not genuine (paragraphs 37 to 49). I concluded that the respondent did not have a genuine belief on reasonable grounds that the claimant was guilty of misconduct. It was not an assessment based on whether the dismissal was within the band of reasonable responses. Accordingly, the allegation that the Tribunal had substituted its own views for the employers on whether a dismissal was reasonable, is misplaced.

Disagreement with findings of fact

13. The respondent's application contains references to numerous findings of fact in numerous paragraphs that the respondent disagreed with. I have considered them as part of this decision but have not addressed them all here because the submissions amount to mere disagreement with the findings.

14. There is one finding that caused particular concern to the respondent which he says amounts to an error of law and which I will address, and that is the finding at paragraphs 39 and 40 that "this was a small business with a relaxed working culture where jokes were commonplace." This is in the context of the finding that I accepted the claimant's explanation that the references in the emails of 5 and 6 September 2021 were representative of that culture. Even if I had not found that the emails must be seen in light of a relaxed and joking work culture, a finding in the respondent's favour on this point would not have affected my conclusion that there were no genuine misconduct proceedings. The key point is that even if the emails were offensive and grounds for disciplinary proceedings, the claimant was never informed of any proceedings, was not able to take part in proceedings in order to defend herself and she was not even notified of her dismissal. Whether the emails were jokes or not does not change my conclusion that the respondent has failed to establish that the reason for dismissal was misconduct.

15. In relation to the respondent's submissions about overreliance on the letters being sent when the company's correspondence with employees had always been by email, I note that this was addressed at paragraph 27. It was the failure of the respondent to either send a letter by post to the claimant's proper address or to communicate with her by her home email or phone number, when this is how they had been communicated when she went on maternity leave, that led me to conclude that the respondent had not genuinely intended to contact the claimant about the disciplinary proceedings.

Failure to make a *Polkey* reduction

16. The respondent claims that the Tribunal failed to address his submissions on *Polkey*. He says that the Tribunal failed to consider a "*Polkey defence*" in relation to the claimant's conduct, and failed to make *Polkey* reductions. The respondent says that no reasonable employer would have continued with the claimant's employment in light of the Whatsapp communications (disclosed during the hearing). I note that the Whatsapp communications weren't in the respondent's knowledge at the time of the alleged grievance procedure or at the time of dismissal so could not have formed part of that decision.

17. This submission is a misunderstanding of the *Polkey* principle, which applies when the Tribunal is assessing the compensatory award payable in respect of the unfair dismissal, to consider whether a reduction should be made on the ground that the lack of a fair procedure would have made no difference to the decision to dismiss.

18. I refer to paragraph 67 of the judgment in which I decided not to award the claimant any compensatory damages in relation to the reduced salary she is being paid in her new role on the basis that she would have been dismissed for redundancy in any event. I found that it was just and equitable in the circumstances that the claimant only be compensated until the end of the notice period she would have received had the redundancy been procedurally fair. This was an application of the *Polkey* principle, which meant that no compensatory award was made against the Respondent.

Conclusion

19. I reject the application to reconsider the judgment because it is not in the interests of justice to do so. The respondent has adduced no new evidence or argument that was not already considered at the hearing, nor pointed to any error of procedure, fact or law. Rather the application for reconsideration consists of a large number of disagreements with Tribunal's findings which are not a sufficient reason for reconsideration notwithstanding the respondent's strong views. The principle of finality in litigation is important. The claimant is entitled to consider this decision as final.

Employment Judge **Leonard-Johnston**
16 December 2022

JUDGMENT SENT TO THE PARTIES ON

.16/12/2022

FOR THE TRIBUNAL OFFICE