EMPLOYMENT TRIBUNALS

Claimant: Mr M Johnson

Respondent: DHL Services Ltd

JUDGMENT

The claimant's letter dated **5 November 2022** was not copied to all other parties.

To the extent that that letter can be seen as an application for reconsideration of the judgment sent to the parties on **12 May 2022**, it was not received within the time limit specified in Rule 71 of the Employment Tribunals Rules of Procedure and it is not in the interests of justice to extend time.

Had the letter been treated as a valid application for reconsideration of the judgment, it would have been refused in accordance with Rule 72(1), as the contents of the letter demonstrate no reasonable prospect of the original decision being varied or revoked.

REASONS

1. Rules 70-72 of the Tribunal Rules provides 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 reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (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. (3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

2. The Tribunal has discretion to reconsider a judgment if it considers it in the interests of justice to do so. Rule 72(1) requires the judge to dismiss the application if the judge decides that there is no reasonable prospect of the original decision being varied or revoked. Otherwise, the application is dealt with under the remainder of Rule 72.

3. In deciding whether or not to reconsider the judgment, the tribunal has a broad discretion, which must be exercised judicially, 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 of litigation.

4. Under the current version of the rules, there is a single ground for reconsideration. This is *"*where it is necessary in the interests of justice*"*. This contrasts with the position under the 2004 rules, where there were several specific grounds upon which a tribunal could review a judgment.

5. When deciding what is "necessary in the interests of justice", it is important to have regard to the overriding objective to deal with cases fairly and justly, which includes: ensuring that the parties are on an equal footing; dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense.

6. In Outasight VB Ltd v Brown 2015 ICR D11, the EAT explained that the revision to the rules had not been intended to make it more easy or more difficult to succeed in a reconsideration application. In the new version of the rules, it had not been necessary to repeat the other specific grounds for an application because an application relying on any of those other arguments can still be made in reliance on the "interests of justice" grounds.

7. The situation remains, as it had been prior to the 2013 rules, that it is not necessary for the applicant to go as far as demonstrating that there were *exceptional* circumstances justifying reconsideration. There does, however, have to be a good enough justification to overcome the fact that, when issued, judgments are intended to be final (subject to appeal) and that there is therefore a significant difference between asking for a particular matter to be taken into account before judgment (even very late in the day) and after judgment.

The Claimant's 5 November 2022 letter

8. The Claimant sent an email with attachment on 5 November 2022, and a follow up email dated 16 December 2022. Neither item appears to have been copied to the Respondent's representative. In general, as the Claimant has previously been reminded, correspondence which a party sends to the Tribunal must be copied to all other parties.

9. Furthermore, if a party seeks reconsideration of a judgment, then Rule 71 specifically states that the written application must be copied to all the other parties.

10. The Claimant's letter and covering email on 5 November 2022 (and the follow up on 16 December 2022) do not expressly state that they should be treated as an application for reconsideration. Rather the letter is said to be both "complaint about the handling of my case" and "a formal letter before action", which refers to Human Rights Act (specifically, right to a fair trial).

11. The mere fact that the Claimant did not expressly use the word "reconsider" (or similar), or refer to the relevant rules, would not, in itself, prevent the letter being treated as an application made under Rule 71. Since the letter expresses the view that the judgment was wrong, and gives some reasons for asserting it was wrong, it could have been treated as an application for reconsideration had it been made in time (and copied to the other parties).

12. Since written reasons were sent on Thursday 18 August 2022, the 14 day time limit expired on Thursday 1 September 2022. Therefore, the letter and email of 5 November 2022 was more than two months after the time limit had expired (even ignoring the fact that it was not sent to the other parties on 5 November 2022).

13. Under Rule 5, I have the power to "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." This is an exercise of judicial discretion that should be exercised in accordance with Rule 2, and I must decide whether, in all the circumstances, it is in the interests of justice to extend time.

14. In this case, I note that the Claimant's letter states: "*After seeking legal advice, I was instructed that …*". He does not mention the date on which he requested legal advice, or the date on which he received legal advice. He does not specifically say that the time to obtain legal advice has caused a delay, and that (therefore) he had been unable to send the letter by 1 September 2022.

15. Had I potentially considered that, in the particular circumstances of this matter, a delay to obtain legal advice was potentially a good enough reason to extend time, then I would have requested further information from the Claimant to enable me to decide whether (i) the Claimant had acted reasonably promptly to try to obtain the legal advice within the time limit and (ii) the Claimant had acted reasonably promptly to write to the Tribunal following receipt of that advice. However, the Claimant's letter contains no facts, information or argument (relevant to whether the Tribunal should

reconsider its decision) that the Claimant was unaware of during the litigation, during the oral judgment with reasons, or at the time the written judgment was sent, or the written reasons were sent. I do not consider that the Claimant's decision to obtain legal advice, and to wait until receiving that advice before sending his 5 November letter, is a good enough reason for me to extend time for the reconsideration application.

16. The Claimant's letter gives no other suggested reasons, expressly or by implication, that it could not have been sent by 1 September 2022.

17. My decision, therefore, is that to the extent (if at all) that the Claimant intended his 5 November 2022 letter to be an application for reconsideration, that application is out of time, and it is not in the interests of justice for time to be extended.

18. For that reason, none of the decisions contained in the judgement are varied or revoked.

Contents of letter

19. For completeness, I have considered the contents of the letter any way, even though, for the reasons stated above, I am not treating it as a valid application for reconsideration. Based on the contents of the letter, even had these arguments been raised by a valid application, made within the time limit, and copied to all other parties, I would have refused the application under Rule 72(1), because it would have had no reasonable prospects of success. My reasons for deciding this are as follows.

20. Numbered paragraph 1 of the 5 November letter mentions that the Claimant proved that Mr Price made the comment "I can get 10 of you for a penny". The Tribunal found that the Claimant had proved the fact that Mr Price used those words (or some variation of that) to the Claimant on the occasion alleged by the Claimant. We did not find (contrary to the implication in the Claimant's letter) that his witness, Mr Gardiner, had been a witness to the words being used on that occasion. As we said in our reasons, Mr Gardiner had been a witness to those words (or some variation of them) being uttered by Mr Price to other people. We discussed in the reasons why we did not decide that Mr Price's words to the Claimant were a contravention of EQA, even taking into account burden of proof provisions. We also discussed in the reasons why the allegation was out of time, and why we were not extending time. There is no reasonable prospect of any of those decisions being varied or revoked. Nothing in the Claimant's letter directly addresses the reasons we gave.

21. Numbered paragraph 2 of the letter is a reference to the document which is at page 245 to 248 of the bundle, and specifically the exchange recorded on page 247. In notes which Sivarajah Harriharan signed on 20 April 2020, following a meeting with Jonathan King, Mr Harriharan is reported as saying that (a) the Claimant had never made allegations of race discrimination or victimisation and (b) a job applicant who had been unsuccessful had suggested that Mr Price had turned them down on racial grounds (and that Mr Harriharan had not upheld that complaint). We discussed Mr Harriharan's

oral evidence to the Tribunal and his interview with Mr King in our written reasons. Nothing that the Claimant says in his letter of 5 November 2022 provides any reasonable prospect of the Tribunal reassessing its findings of fact about Mr Price's actions towards the Claimant, or the decisions about which complaints were out of time, or the decisions that time was not extended.

22. Numbered paragraph 3 of the letter is a reference to the "drug dealer" comment which, as the Claimant correctly notes, the panel was satisfied was made. The Claimant asserts that it "could only have happened before the drug tests incidents". The Claimant does not provide any fresh evidence that was not provided at the hearing, or give any reasons that he thinks that the Tribunal's reasons were wrong. He does not even comment on the Tribunal's reasons (paragraphs 34 to 36) for saying that we could not be more specific about the date, other than to say that it was later than the "ten a penny" comment (because that comment was made the first time that the Claimant met Price) and some time before Price or Gardener left the Respondent (whichever was earlier), and so December 2019 at the latest. The precise date of the remark was not particularly important given that it was not an allegation in its own right (and so no time limit issues arose). The Claimant wanted us to infer that it demonstrated Mr Price had racist attitudes and that, therefore, the burden of proof should shift in relation to the alleged contraventions of EQA. We addressed that argument fully in our reasons. Not only is there no reasonable prospect that we would change our decision about the date of this remark, but there is no reasonable prospect that, even if we did decide that the remark was made "before the drug tests incidents", a more specific finding in relation to the date of this remark would change our decisions about its relevance to the decisions we made in relation to the Respondent's liability for the alleged contraventions of EQA.

23. Numbered paragraph 4 of the letter seems to suggest that we made an incorrect finding of fact when we decided that the Claimant had not, as he alleged, made a complaint to Mr Harriharan (in 2018) that Mr Price had made comments related to race, or because of race. Our reasons for rejecting the Claimant's assertions that he did so are set out fully in our written reasons, and there is no reasonable prospect of our changing that finding. Furthermore, to the extent that paragraph 4 of the letter seems to suggest that the panel was deceived by a (successful) cover up by the Respondent, the panel made its own findings of fact about what happened (and when) based on the evidence presented to us. We discussed that evidence and those findings in our written reasons. Nothing which the Claimant says in this letter directly addresses the reasons which the panel gave for its findings. Furthermore, our reasons for not extending time were based, in part, on the lateness of the Claimant making the allegations, coupled with the fact that Mr Price had left the organisation by the time that they were made.

24. Numbered paragraph 5 of the letter discusses whether, in accordance with the Respondent's actual policies, the Claimant should have been subjected to the tests. We discussed the issues related to this thoroughly, including pointing out that the Respondent had failed to provide a copy of its policy to us. The respective tests in January 2019 and March 2019 had to be considered separately. In relation to the latter, we rejected an important part

of the Claimant's allegation (namely we decided that it was Mr Pottinger, and not Mr Price, who made the relevant decisions). Nothing which the Claimant says in this letter directly addresses the reasons which the panel gave for its decisions. Furthermore, our reasons for not extending time were not based on a decision that the Respondent had persuaded us that its policies had been correctly followed in relation to the Claimant and the respective colleagues for each incident.

25. Numbered paragraph 6 of the letter discusses issues and arguments which are not relevant for the reasons we mentioned in paragraph 123 of the liability reasons. We were not (directly) dealing with a complaint that the Respondent had been unfair or unreasonable to the Claimant (either in relation to inadequate training, or the disciplinary investigation). We were also not dealing with allegations relating to the termination of the Claimant's employment. We were dealing with the specific allegations of direct discrimination, harassment and victimisation as set out in the list of issues. There is no reasonable prospect that the points raised in paragraph 6 of the Claimant's letter would cause us to vary or revoke our judgment on any of those complaints.

26. Numbered paragraph 7 of the letter discusses the evidence which, as we said in paragraph 20 of the liability reasons, was attached as an appendix to the Claimant's witness statement. This was a statement signed by an individual named in the document. We took that document into account. The comments made in the previous paragraph (in relation to numbered paragraph 6 of the 5 November 2022 letter) apply equally to the contents of the TD statement.

27. For the reasons stated above, having considered the Claimant's communications, I am satisfied that there is no reasonable prospect of the original decision being varied or revoked.

Employment Judge Quill

Date: 29 December 2022

JUDGMENT SENT TO THE PARTIES ON

30 December 2022

GDJ
FOR THE TRIBUNAL OFFICE