EMPLOYMENT TRIBUNALS

Claimant:	**Mr G Wade**
Respondent:	**Loomis UK Limited**
Heard at:	Tribunals Hearing Centre, 50 Carrington Street, Nottingham, NG1 7FG
On:	4 January 2023
Before:	Employment Judge Adkinson sitting alone
	Considered on the papers

JUDGMENT

Upon considering the claimant's application for reconsideration dated 16 December 2022, and the respondent's application for reconsideration dated 17 December 2022

And upon considering **rule 72** of the Tribunal's rules of procedure

It is ordered that

1. The claimant's application is dismissed because there is no reasonable prospect that the judgment will be varied or set aside, and
2. The respondent's application is dismissed because there is no reasonable prospect that the judgment will be varied or set aside.

REASONS

Introduction

3. This relates to my judgment and reasons for that judgment dated 1 December 2022 and sent to the parties on 3 December 2022 (the judgment). For simplicity and brevity I will use the same terminology that I used in the original judgment and reasons.
4. In his application dated 16 December 2022, the claimant seeks reconsideration of the judgment under **rule 71** insofar as it relates to the breach of contract claim.
5. In their application of 17 December 2022, the respondent seeks reconsideration of the judgment under **rule 71** insofar as it relates to the **Polkey** reduction.

6. In coming to my decision I have considered the detailed applications; the Tribunal's file and I have also considered the original bundles and witness statements, and notes of hearing.

7. I have not heard any oral submissions at this stage.

Reconsideration, process and the law

Reconsideration

8. **Rule 70** provides that a Tribunal can reconsider a judgment where it is necessary in the interests of justice to do so. I may confirm, revoke or vary the decision: **rule 70**. Clearly neither party is applying for me to confirm my decision.

Process

9. **Rule 71** allows the parties to apply for a Tribunal to reconsider its judgment. Nothing else turns on this rule.

10. The process I must follow is set out in **rule 72.** That provides:

"**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.

11. I have highlighted the first stage because this is the stage at which I am considering the applications. It is imperative I go through this stage first: **TH White and Sons Ltd v White UKEAT/0022/21 EAT**.

Law

12. The following principles are in my view relevant to deciding if there is a prospect of success.

12.1. The words "necessary in the interests of justice" mean the Tribunal a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially, which means having regard not only to the interests of the party seeking the review or 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: **Outasight VB Ltd v Brown 2015 ICR D11 EAT**. See also **Flint v Eastern Electricity Board [1975] IRLR 277 QBD; Newcastle Upon Tyne City Council v Marsden [2010] ICR 743 EAT; Ministry of Justice v Burton [2016] ICR 1128 CA**.

12.2. There is no need for exceptional circumstances: **Williams v Ferrosan Ltd [2004] IRLR 607 EAT**, and each decision is unique to its own facts. However the discretion must be exercised in accordance with recognised principles and judiciously: **Sodhexo Ltd v Gibbons [2005] IRLR 836 EAT**.

12.3. Though in reference to the old procedures, the EAT said in **Stevenson v Golden Wonder Ltd [1977] IRLR 474 EAT** that the reconsideration process is

"not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before".

I see no reason why that principle does not apply to the current provisions either.

12.4. Because the reconsideration relates to my findings and conclusions, rather than to legal argument or new evidence, for example, I have reminded myself that I can expect my reasons to be read as a whole; I am not obliged to identify every piece of evidence put before me; and there is no assumption I have not considered something or an argument simply because a particular piece of evidence has not been referred to, or specifically dealt with: **DPP Law Ltd v Greenberg [2021] IRLR 1016 CA**. The case relates to appeals and how appellate courts should approach appeals, but I see no reason why the same cannot be expected of parties seeking reconsideration of conclusions reached.

The claimant's application

13. In summary the claimant's application asserts that I did not take into account Mr McNamara's evidence in cross-examination that supported Mr Wade's case he was present at the meeting at which the respondent allegedly issued the claimant with a letter amending his contract of employment, the consequence of which was that he would be entitled to an ERP if he were made redundant. He consequently seeks to argue in effect that if I do so, I would conclude Mr Wade was entitled to ERP.

14. Having considered the matter I conclude the claimant's application has no reasonable prospect of persuading the Tribunal that it should vary or revoke the judgment on ERP. My reasons are as follows:

14.1. As I confirmed at paragraphs 8 and 9, I have taken into account all the oral evidence, including that of Mr McNamara. His evidence was just one part of the picture.

14.2. The reasons read as a whole show, I am satisfied, that I have taken into account Mr McNamara's evidence and it is apparent I have rejected it. As I said, it was in my view vague and, when compared to the vagueness of Mr Wade's own evidence about whether he was there, cannot be accepted.

14.3. The claimant's own reference to paragraph 63 is out of context. Paragraph 63.1 also says:

"The evidence about his attendance at the meeting in 1996 is poor. His own evidence-in-chief was ambiguous on the issue, in comparison to his other evidence."

I short the claimant invites me to overlook the fact he cannot recall the meeting in an unambiguous way (even though it is his case) and rely on the evidence of Mr McNamara recalling him being there. Nothing elsewhere in the reasons, or in the application, presents any arguable basis to do that.

15. However even if I were to conclude that Mr Wade were at the meeting, there is no reasonable prospect that it would make any difference to my conclusion that Mr Wade was not entitled to ERP. My reasons are as follows:

15.1. I have plainly considered the totality of Mr McNamara's evidence. For example at paragraph 24.1 I remarked:

"Mr Wade's witnesses cannot confirm that Mr Wade was actually told he was entitled to ERP. In short their evidence was based on supposition that he must have been because he was a manager." Therefore even Mr McNamara cannot show the respondent awarded an entitlement to ERP to Mr Wade. This derives from Mr McNamara's own evidence to the Tribunal at the start of his cross examination between about 11:55 and 12:01 or thereabouts on the day he gave evidence when he gave evidence that

"Can't help with the claimant's ERP letter…

"Managers received a letter from the CEO…

"Never seen a copy of the claimant's letter…

"How know claimant received letter? Do not remember seeing letter. I know from talking to CEO. He said everyone received letter. Said it confirmed to everyone."

15.2. I remarked that the claimant's recollection was vague and imprecise (paragraph 24.1.2)

15.3. In paragraph 39 I also noted as follows:

"Mr Wade says that at that meeting, letters were handed out to employees to confirm that they would receive an enhanced redundancy payment (ERP) in the event that they were made redundant. He cannot however tell me whether or not he received a letter, how they were distributed at that meeting. He

also cannot tell me what was written in the letter except that it provided that he would receive 3 weeks' pay for every year that he had been an employee capped at 20 years. He does not otherwise remember the text. Mr Wade's witnesses also do not help. The tenor of their evidence was that he must have received the letter and base their belief also on vague recollections of what appear to be generic discussions people had about the enhanced rights."

Mr McNamara's presence at the meeting makes no difference to the fact that the claimant who relies on a contractual term cannot tell me what the contract said, how he came by the ERP letter or even if he received such a letter.

15.4. At paragraph 45 I found:

"There is, however, no evidence that I have seen that anybody in the operational side of the business, yet alone at Mr Wade's level of seniority was offered these ERP terms. The only evidence I have been given that might point to it is from Mr Tarrant. However that is based on his belief that all managers had been included. It is an assertion, not a report of fact." Mr Wade's presence does not resolve this difficulty.

15.5. The fact that the operational side was not awarded ERP is supported throughout, and not challenged by the claimant in his application for reconsideration. It is summarised in the following paragraphs of the judgment which the claimant has seemingly skipped over and which Mr Wade's presence at the meeting does not address:

15.5.1. 63.4 (respondent did not assess Mr Wade as having been awarded ERP in 1996)

15.5.2. 63.5 and 63.9 (claimant did not query redundancy calculation)

15.5.3. 63.6 (He did not query the change in terms of his contract vis-à-vis redundancy entitlement in 2020)

15.5.4. 63.7 (only people claimant cited in texts with Mr Ketteringham were branch management side)

15.6. Further at paragraph 64 I said:

"The only factor is that there is evidence of one person whose personnel file lacked the ERP letter. He was initially offered statutory pay only. On production of the letter the respondent paid ERP. It shows the records are not necessarily perfect. I do not believe however this possibility of existence of a letter neither side has is enough to undermine the other factors that point to the factual conclusion the respondent did not give Mr Wade an entitlement to ERP."

16. Therefore it would make no difference even if I did conclude Mr Wade were at the meeting in 1996. It would not prove he was awarded ERP – Mr

McNamara cannot confirm he was – and Mr Wade cannot produce the letter or tell me its terms. Other evidence supports my conclusion that he was not, such as the lack of queries about redundancy pay or the fact the only people cited by Mr Wade himself who it is common ground were entitled to ERP, were in a different business stream to him.

17. The application therefore appears to me to be no more than an attempt to seek to reargue the claimant's submissions but emphasising different parts of the evidence. It is not in the interests of justice to permit that to happen. It undermines the principle of finality. Besides, it there is no reasonable prospect that the judgment on ERP will be varied or set aside when the judgment and reasons are read as a whole.

The respondent's application

18. The respondent seeks to have me reconsider the **Polkey** reduction. The reduction was 67%. They seek to change that to 100%, as they argued for at the hearing.

19. The respondent relies on the conclusions at paragraph 133 of my reasons. In this paragraph I concluded the dismissal fell without the range of reasonable responses.

20. In their application, the respondent has sought to highlight the following passages in those paragraphs:

"133.1 The moment that Loomis removed the PDA recommissioning work from Mr Loomis and transferred it to the branches, Mr Wade became redundant. …

"133.2 Even if April 2020 were too early a date, [the change], which as I have found as a fact was not temporary in the sense it would come to an end and revert back to prior arrangements…"

"133.3 If therefore Mr Wade's role was being eliminated, the reasonable employer would have commenced the process of meaningful consultation with him before making the permanent change. That would have been in April 2020, or in August 2020 - on any case not in September 2020.

"133.4 …His job had gone. That decision had been taken and implemented. Realistically, no consultation could have therefore resulted in him retaining his role. It was too late."

21. None of it in my opinion demonstrates any reasonable prospect of the judgment being varied or set aside. My reasons are as follows:

21.1. The respondent has glossed over the following words in paragraph 133.4 which put the finding they relied on in context [my emphasis]:

"Commencing it in September 2020 was meaningless. His job had gone. That decision had been taken and implemented. Realistically, no consultation could have therefore resulted in him retaining his role. It was too late. **No reasonable employer removes someone's job, and then asks them what they think should happen and what alternatives there may be to**

their proposals. It should be the other way around. To use Mr Wade's words in closing, it had become a fait accompli."

The context of this paragraph highlights the problem is the complete lack of meaningful consultation. It ignores the purpose of consultation which is to ensure the right person is selected, to investigate alternative solutions and to see if the employee can be redeployed. Each of these purposes is cited in the case law quoted in paragraphs 125 onwards as expected in a fair process in general.

There is no finding of fact that the consultation would have been utterly pointless whenever it would have taken place, let alone in April or August 2022. The respondent advances no contention that seeks reconsideration of the absence of that fact.

21.2. The application ignores paragraphs 138 to 142. They explain my reasoning for the reduction. In particular in paragraph 142, I said:

"As to the size of the reduction, I do not believe that it is reasonable for me to conclude that it would have been 100% reduction since that does not reflect the possibility that something could have been found that would have enabled Mr Wade's employment to have continued in some way. It also does not reflect that, whatever the long-term aim, nothing appeared to have been done to implement it."

In my view nothing in the reasons as a whole or respondent's application undermines that conclusion.

21.3. The respondent's argument in my view is flawed. The respondent appears to rely on the situation at the time of dismissal. The respondent ignores though that the unfairness actually started sometime back (April 2020 or August 2020 – see paragraph 133.1) when they de facto made him redundant. What followed was a fait accompli. There is no evidence to show his dismissal for redundancy (rather than redeployment or some step to avoid redundancy) were 100% inevitable then. It became so only because of the flawed process – as paragraph 133.4 makes clear.

21.4. However as the case law to which I referred makes clear (paragraph 130 – the parties do not argue the law is wrong), I have to speculate what would have happened if a fair procedure were followed by this employer. There is no finding of fact of conclusion supports the stark conclusion that he would have been dismissed when he was, because a number of possibilities were not explored in April 2020 or August 2020. In summary the evidence does not show the dismissal was inevitable no matter what happened.

22. In my opinion the respondent has done no more than select parts of the judgment, ignoring the whole, and is attempting to reargue the case by emphasising different points. It is not in the interests of justice to facilitate

that. Besides read as a whole, I see no reasonable prospect of the respondent persuading me to vary or set aside the judgment on **Polkey**.

Employment Judge Adkinson

Date: 4 January 2023

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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