EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: **Miss Emily Andrews**

Respondent: **Mr. Martin Peter Byrne**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held in Chambers at: Bristol ET **On:** 28 January 2023

Before: Employment Judge G. King

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 has applied for a reconsideration of the reserved judgment dated 8 December 2022 which was sent to the parties on 14 December

2022 ("the Judgment"). The grounds are set out in her representative's email dated 19 December 2022 which was received at the Tribunal office on the same day. The Respondent was asked for their comments and had until 16 January to reply.

2. This has been a remote hearing on the papers. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred are contained in the Claimant's representative's email of 19 December 2022. The order made is described at the end of these reasons.

3. 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 71 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. The application was therefore received within the relevant time limit.

4. Under Rule 5 the Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in the Rules or in any decision, whether or not (in the case of an extension) it has expired.

5. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.

6. The grounds relied upon by the Claimant are as below, copied from the Claimant's representative's email:

> *1) Mr Byrnes document shows that in week 35 (30.11.21) Miss Andrews was paid 12.5 hrs holiday (£112.50) , in fact Miss Andrews payslip shows that she was paid just £29.70*
>
> *2) From week 1 to week 17 Miss Andrews holiday was based on just 87 hours a month. In fact she was furloughed during that time and as per Mr Byrnes own admission her furlough pau was 104 hrs per month, therefor Miss Andrews should have been accruing holiday pay on 104 hours during those months. I have redone the calculations on that basis and it changes the average hours significantly and in line with Miss Andrews claim*
>
> *3) on the second part of the table submitted by Mr Byrne,. which is for the previous year we would like to make the following observations:*
> *- Miss Andrews started working for Mr Byrne on 20th December 2019, therefor her average hours in the column under week 39 should not have been divided by 4 weeks to give average hours for*

December as she only worked for 11 days that month. As a result the average hours her furlough is worked out on is in fact incorrect and should have been 114hrs rather than 104 hours. If this was applied correctly it would again support Miss Andrews claim
- there appears to be unused/ unpaid holiday from that year that Miss Andrews was unaware of, which could easily have been applied to her first months furlough

7. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.

8. The ground relied upon by the Claimant is that she now has new challenges to the evidence put forward by the Respondent's accountant. This did not form part of the Claimant's original case.

9. The matters raised by the Claimant were considered in the light of all of the evidence presented to the Tribunal before it reached its decision.

10. Rule 70 of the Rules provides a single ground for reconsideration, being the interests of justice. This replaced the previous test, which gave five grounds for reconsideration; one of these was that new evidence had become available since the conclusion of the Tribunal hearing to which the decision related, the existence of which could not have been reasonably known of or foreseen at that time. However, it is clear that, following *Outasight VB Ltd v Brown* [2015] ICR D11 EAT that the interests of justice test can be viewed through that lens. The EAT confirmed in that case that the test set out by the Court of Appeal in *Ladd v Marshall* 1954 3 All ER 745, CA.

11. In that case, the Court of Appeal established that, in order to justify the reception of new evidence, it is necessary to show three separate matters – that the evidence could not have been obtained with reasonable diligence for use at the original hearing, that the evidence is relevant and would probably have had an important influence on the hearing and, finally, that the evidence is apparently credible.

12. Applying the *Ladd v Marshall* test, I find that all the arguments that the Claimant now wishes to put forward could have been done so at the original Tribunal hearing. The Claimant chose not to do so, and instead challenged the validity of the document that had been produced by the Respondent. The document was found to be a genuine one, and so the Tribunal accepted its contents. The Claimant had opportunity to dispute the calculations as part of her case, but did not do so.

13. Accordingly, I do not find that the determination in this case should be reconsidered by virtue of the purported new evidence or argument as this does not pass the tests in *Ladd v Marshall*. I do consider that it is in the

interests of justice to allow the Claimant a second attempt to present her case because she did not bring to the Tribunal's attention evidence and argument that was available in support of her case at the original hearing. Furthermore, there are important public policy reasons for the rule of finality in litigation. Importantly, reconsideration is not an opportunity to improve upon original submissions and/or to expand upon the same once the case has concluded. Nor is it an opportunity to continue to press the extent to which a Claimant feels that they have been treated unfairly by a Respondent.

14. The earlier case law suggests that the interests of justice ground should be construed restrictively. The Employment Appeal Tribunal ("the EAT") in *Trimble v Supertravel Ltd* [1982] ICR 440 decided that if a matter has been ventilated and argued then any error of law falls to be corrected on appeal and not by review. In addition, in *Fforde v Black* EAT 68/80 (where the applicant was seeking a review in the interests of justice under the former Rules which is analogous to a reconsideration under the current Rules) the EAT decided that the interests of justice ground of review does not mean "that in every case where a litigant is unsuccessful, he is automatically entitled to have the Tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in the even more exceptional case where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order".

15. More recent case law suggests that the "interests of justice" ground should not be construed as restrictively as it was prior to the introduction of the "overriding objective" (which is now set out in Rule 2). This requires the Tribunal to give effect to the overriding objective to deal with cases fairly and justly. As confirmed in *Williams v Ferrosan Ltd* [2004] IRLR 607 EAT, it is no longer the case that the "interests of justice" ground was only appropriate in exceptional circumstances. However, in *Newcastle Upon Tyne City Council v Marsden* [2010] IRLR 743, the EAT confirmed that it is incorrect to assert that the interests of justice ground need not necessarily be construed so restrictively, since the overriding objective to deal with cases justly required the application of recognised principles. These include that there should be finality in litigation, which is in the interest of both parties.

16. Taking the above into account, I do not consider it is in the interests of justice to reconsider the original judgment and continue the litigation beyond the final hearing of the case.

17. Accordingly, I refuse the application for reconsideration pursuant to Rule 72(1) because there is no reasonable prospect of the Judgment being varied or revoked.

Employment Judge King
Date: 31 January 2023

Reasons sent to the Parties: 15 February 2023

FOR THE TRIBUNAL OFFICE