



EMPLOYMENT TRIBUNALS

Claimant: Mr J Carpenter

Respondent: Nortim Precision Engineering Ltd

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 issued a claim against the Respondent on 27 June 2022, for constructive unfair dismissal, age discrimination and unlawful deduction from wages/breach of contract. The Respondent filed its response on 4 August 2022.
2. On 15 August 2022 Employment Judge Midgley directed that the case would be listed for a one-day Preliminary Hearing by video, to consider whether the Claimant's claims were presented within the relevant time limits. He set out the relevant legal test the Tribunal would apply, in the form of a short list of issues. He further directed that:
 - a. The Claimant send to the Respondent a witness statement limited to 1,500 addressing the time limit point (he set out in detail what information that statement would need to contain).
 - b. The Claimant disclose to the Respondent any documents in his possession or control relating to the time limit point.
 - c. The parties must agree a bundle of documents for use at the Preliminary Hearing.
3. The letter containing EJ Midgley's directions concluded as follows:

“The claimant will be required to give evidence by oath or affirmation at the hearing and to confirm that the contents of the statement are true. The respondent will be able to ask questions of the claimant in relation to the matters at 2.1.1 to 2.1.4 above.”

4. The numbering in that paragraph did not match the numbering in the list of issues. However, it was plainly obvious, in context, what matters were being referred to.
5. I conducted the Preliminary Hearing on 17 November 2022. I concluded that the claims were brought outside the relevant time limits, and that the Tribunal accordingly did not have jurisdiction to consider them. I gave an oral judgement. Written reasons were requested by the Claimant and were sent to the parties on 16 January 2023.
6. The Claimant now applies for a reconsideration of that judgment. The grounds are set out in the Claimant’s emailed letter of 29 January 2023. In summary, the Claimant says that:
 - a. The lack of case law regarding the COVID-19 pandemic and the impact of furlough on the employment relationship means that it would be in the interests of justice for his claim to be allowed to proceed to a full hearing.
 - b. The impact of the COVID-19 pandemic was a mitigating factor in terms of the delay in issuing the claim.
 - c. He and his representative had not anticipated that evidence would be heard at the Preliminary Hearing. In particular, they had not anticipated that the Claimant would be asked questions about his evidence, and they would have adduced additional medical evidence had they known that evidence would be considered.
7. 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 70 of the Rules, the Employment Tribunal may, either on its own initiative or on the application of a party, reconsider a decision where it is necessary in the interests of justice to do so. On reconsideration, the decision may be confirmed, varied or revoked.
8. Rule 71 provides that 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.
9. The process by which the Tribunal considers an application for reconsideration is set out in Rule 72. Where the Judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application shall be refused. Otherwise, the Tribunal shall

send a notice to the parties setting out 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.

10. Rules 71 and 72 give the Tribunal a broad discretion to determine whether reconsideration of a decision is appropriate. Guidance for Tribunals on how to approach applications for reconsideration was given by Simler P in the case of *Liddington v 2Gether NHS Foundation Trust* UKEAT/0002/16/DA. Paragraphs 34 and 35 provide as follows:

“34. [...] a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered. Tribunals have a wide discretion whether or not to order reconsideration.

35. Where [...] a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application.”

11. The Claimant’s application was received within the relevant time limit. I therefore consider it under Rule 72.
12. The first of the Claimant’s points relates to the lack of (impliedly) appellate case law regarding the impact of COVID-19 and furlough on the employment relationship. The Claimant’s case was not argued in that way before me. It was not suggested in the application that there was any reason why that argument could not have been run at the Preliminary Hearing. Even if it had been argued in that way before me, I do not consider that it would have changed my conclusion on the balance of prejudice as between the parties. This was not a case where the Claimant could not have reasonably known of the existence of his cause of action until some appellate authority was handed down. The mere likelihood that cases regarding the implications of the pandemic will be working their way through the Employment Appeals Tribunal and higher courts for some time to come does not impact on the time limit for the Claimant to have brought his claim.

13. In respect of the second point, there was no evidence before me to suggest that the impact of the COVID-19 pandemic at the relevant time impeded the Claimant's ability to bring his claim in time. If there was evidence to support that contention, that evidence should have been put before the Tribunal. It was not suggested, in the application for reconsideration, that there was relevant evidence which was not previously available to the Claimant.
14. The Claimant's final point is in two parts. The first, that he was unaware of the nature of the hearing before me, is entirely untenable in light of EJ Midgley's directions. They made it abundantly clear that any relevant evidence should be disclosed, that the Claimant would need to give sworn evidence, and that he would be asked questions about that evidence.
15. The second part is that the Claimant would have adduced additional medical evidence, and evidence that he was on holiday at around the same time as the issuing of the claim. The application for reconsideration does not suggest that the evidence referred to would have been unavailable to the Claimant at that hearing. If the evidence had been available to him prior to the last hearing, it ought to have been adduced at that hearing. An application for reconsideration is not an opportunity to rerun the case with additional, previously available, evidence.
16. Having carefully considered the Claimant's application, and bearing in mind the importance of finality in litigation and the interests of both parties, I am not satisfied that there is any reasonable prospect of the Judgment or any part of it being varied or revoked. The application for reconsideration is therefore refused.

Employment Judge Leith

Dated 27 February 2023

Judgment sent to the Parties on 10 March 2023

For the Tribunal Office