EMPLOYMENT TRIBUNALS

Claimant: **Mr Adrian Gheorghe Badita**

Respondents: **(1) Mo Sys Engineering Limited**
(2) Safestay Plc
(3) Zachary Daniels Limited
(4) Robert Dyas (Holdings) Limited
(5) Delice De France (UK) Limited

JUDGMENT FOLLOWING RECONSIDERATION

1. The Claimant's application made by e-mail on 21 December 2022 for a reconsideration of the tribunal's judgment dated 6 December 2022 and sent to the parties on 7 December 2022 has no reasonable prospects of success and is dismissed. It is totally without merit.

REASONS

Recusal

1. In his application for a reconsideration of my judgment the Claimant suggests that that I recuse myself from any further dealings with his case including the application for a reconsideration.

2. Below I set out the rules of procedure that apply to an application for a reconsideration. They provide that where practicable, the consideration of whether any application for a reconsideration has no reasonable prospects of success shall be by the Employment Judge who made the original decision. It would clearly not be right for me to determine the application if there were proper grounds for me to recuse myself.

Recusal: Legal Principles

3. It is settled that where a judge has any actual bias towards a party then there is no question that they should recuse themselves from any further part of any case see ***R v Gough*** **[1993] AC 646**. Bias may be conscious or sub-conscious. In ***Re Medicaments and Related Classes of Goods*** **(No. 2) [2001] WLR 700** Phillips LJ said:

> *"37. Bias is an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve. A judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He*

may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him."

4. It is not necessary to show actual bias before a judge is obliged to recuse themselves. It is sufficient to show that there is apparent bias. The threshold is much lower.

5. In ***Bubbles & Wine Ltd -v- Lusha*** **[2018] EWCA Civ 468**, Leggatt LJ summarized the applicable principles where a Judge is considering whether to recuse themselves because of apparent bias. I cannot improve on that summary so I reproduce it here.

[17] The legal test for apparent bias is very well-established. Mr Faure reminded us of the famous statements of Lord Hewart CJ in R -v- Sussex Justices ex parte McCarthy [1924] 1 KB 256 at 259 that 'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done;' and that 'nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.' These principles remain as salutary and important as ever, but the way in which they are to be applied has been made more precise by the modern authorities. These establish that the test for apparent bias involves a two stage process. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased: see Porter -v- Magill [2002] 2 AC 357 [102]-[103]. Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case: see Flaherty -v- National Greyhound Racing Club Ltd [2005] EWCA Civ 1117 [28]; Secretary of State for the Home Department -v- AF (No2) [2008] 1 WLR 2528 [53].

[18] Further points distilled from the case law by Sir Terence Etherton in Resolution Chemicals Ltd -v- H Lundbeck A/S [2014] 1 WLR 1943 [35], are the following:

(1) The fair-minded and informed observer is not unduly sensitive or suspicious, but neither is he or she complacent: Lawal -v- Northern Spirit Ltd [2003] ICR 856 [14] (Lord Steyn).

(2) The facts and context are critical, with each case turning on 'an intense focus on the essential facts of the case': Helow -v- Secretary of State for the Home Department [2008] 1 WLR 2416, [2] (Lord Hope).

(3) If the test of apparent bias is satisfied, the judge is automatically disqualified from hearing the case and considerations of inconvenience, cost and delay are irrelevant: Man O' War Station Ltd -v- Auckland City Council (formerly Waiheke County Council) [2002] UKPC 28 [11] (Lord Steyn).

[19] In Helow, Lord Hope observed that the fair-minded and informed observer is not to be confused with the person raising the complaint of apparent bias and that the

test ensures that there is this measure of detachment: [2]; and see also Almazeedi -v- Penner [2018] UKPC 3 [20]. In the Resolution Chemicals case Sir Terence Etherton also pointed out that, if the legal test is not satisfied, then the objection to the judge must fail, even if that leaves the applicant dissatisfied and bearing a sense that justice will not or may not be done: [2014] 1 WLR 1943

6. Where an application for recusal of a judge is made in the course of proceedings it falls to the judge to decide whether or not the application is made out - ***Locabail (UK) Ltd v Bayfield Properties Ltd*** **[2000] IRLR 96 CA.**

Discussion – recusal

7. The Claimant does not set out any arguable basis for why I should recuse myself other than his misguided suggestion that I was instructed by the UK Government to strike out his claim. I was not. I decided the Respondents application on its merits. The fact that I did not accede to the Claimant's arguments does not provide any basis for me to recuse myself. I have no actual bias towards the Claimant and a reasonable informed observer would not have concluded that there was a real possibility of bias.

8. The fact that the Claimant has referred to me throughout his application as a scumbag changes nothing. A party cannot create a possibility of bias simply by insulting the tribunal in terms likely to give rise to some irritation.

The Substantive Application

The rules

9. The Employment Tribunal Rules of Procedure 2013 as amended set out the rules governing reconsiderations. The pertinent rules are as follows:

> *"Principles*
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> *70. - 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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> *Application*
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> *71 - 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.*
>
> *Process*
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> *72.—(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.

10. The expression 'necessary in the interests of justice' does not give rise to an unfettered discretion to reopen matters. The importance of finality was confirmed by the Court of Appeal in ***Ministry of Justice v Burton and Anor*** **[2016] EWCA Civ 714** in July 2016 where Elias LJ said that:

"the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Ironsides Ray and Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."

11. In ***Liddington v 2Gether NHS Foundation Trust*** **EAT/0002/16** the EAT chaired by Simler P said in paragraph 34 that:

"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 by 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."

12. Any preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay.

13. In accordance with the Employment Tribunal Rules of Procedure I must reconsider any judgment where it is in the interests of justice to do so. Further, if I considered that there is no reasonable prospect of the original decision being varied or revoked I must refuse the application for reconsideration.

Discussion and Conclusions

14. The Claimant says, wrongly, that he was entitled to a judgment on liability. He misunderstands the rules of procedure. He is simply wrong for the reasons I gave for my judgment.

15. The Claimant repeats his suggestion that the Tribunal had no jurisdiction give any judgment in his case because he says a referral to the CJEU was compulsory. I have already explained in my judgment that (1) the CJEU was never a court of first instance and (2) that, since Brexit, the Tribunal is unable to make a referral as to the CJEU and rule 100 of Schedule 1 of the Employment Tribunals Constitution and Rules of Procedure Regulations 2013 has been repealed.

16. The Claimant tells me I am wrong. At paragraph 19 he lifts a passage from a textbook, The Law and Practice of the Ireland-Northern Ireland Protocol, edited by Christopher McCrudden (although the Claimant does not acknowledge that source). The Claimant relies on that passage in support of his arguments. The passages the Claimant refers to deal with the means by which persons can enforce rights conferred by/relating to the Northern Ireland protocol. There is nothing in those passages that supports the Claimant's argument that an individual (whether an EU Citizen or not) can seek a reference to the CJEU in respect of a domestic employment dispute.

17. The Claimant does not deal with the more straightforward point that there was never a right for a referral to the CJEU nor was any such referral ever compulsory.

18. The remainder of the Claimant's application is essentially a selection of insults principally aimed at me (I assume I am usually the scumbag he refers to). He tells me that *'When Hitler spoke about inferior people, he was not crazy at all, this island being the strict evidence of his truthful statements'*. He tells me I suffer from schizophrenia and delirium (I do not think I do).

19. I struck out the claims in part because the way the Claimant had conducted himself was unreasonable. I decided that a fair trial was not possible because there was no prospect of the Claimant modifying his behaviour in the future. That assessment was of course speculative. The nature of the Claimant's application reinforces my view that the Claimant will never accept any of the necessary restraints on his insulting, racist and misogynistic behaviour to permit a fair hearing of his claims. The application speaks for itself. He repeats some of his previous racist and sexist remarks. It is unnecessary for me to reproduce them here. As the Claimant has appealed my decision the Employment Appeal Tribunal can make its own assessment of the correspondence.

20. I have concluded that there are no reasonable prospects of success in persuading the Tribunal to reconsider its judgment.

21. I go further I declare that the Claimant's application is totally without merit. The application is appallingly rude. The points taken by the Claimant were all raised at the hearing before me and were all dealt with by me. The Claimant has used his application

to rehash those arguments. He has been told that he is wrong in respect of the EU point by other judges. His application was bound to fail on each of the points he has raised.

22. I apologise for the time taken dealing with this application it was the result of a heavy workload.

Employment Judge Crosfill
Dated: 27 March 2023