



EMPLOYMENT TRIBUNALS

Claimant: Mr Matthew Warren

Respondent: Mr Jonathan Bailey

Heard at: Bristol (via vhs) **On:** 30.09.2022

Before: Employment Judge David Hughes

Representation

Claimant: In person

Respondent: Not appearing and not represented

JUDGMENT

The respondent's application dated 06.10.2022 for reconsideration of the judgment sent to the parties on 06.10.2022 is refused.

REASONS

1. There is no reasonable prospect of the original decision being varied or revoked, because;
 - (a) The Respondent's application is substantially the same application as was considered by Employment Judge Bax on 29.09.2022;
 - (b) There are no special circumstances identified, and;
 - (c) The Respondent's criticism of the substance of the Tribunal's judgment is addressed to an element of the Claimant's claim which was, in fact, dismissed.

The Rules

2. 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 received on the same date the decision was sent out, and therefore was received within the relevant time limit.
3. 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.
4. Rule 71(1) provides that an Employment Judge considering an application for reconsideration shall refuse the application if the Judge considers that there is no reasonable prospect of the original decision being varied or revoked. Otherwise, the Tribunal is to notify the parties, setting a time limit for any response to the application, and seeking the parties’ views on whether it can be determined without a hearing.
5. The precise words of Rule 72 are as follows:

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.

6. In considering this application, I am mindful of the guidance provided by the Employment Appeal Tribunal in Outasight VB Ltd -v- Brown¹. In that case, the EAT expressly referred to the position where a party has not had a fair hearing². It also referred to Newcastle upon Tyne City Council -v- Marsden³, in which the EAT (considering earlier rules) referred to the importance of finality in litigation: it is in the interests of justice that a successful party should be entitled to regard a Tribunal's decision on a substantive issue as final (subject, of course, to appeal).
7. I am also mindful of the Overriding Objective provided for by Rule 2, which reads:

2. Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) ensuring that the parties are on an equal footing;*
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) saving expense.*

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

8. Rule 47 provides as follows:

47. Non-attendance

If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.

Background

9. In this case, the Claimant claimed for unfair dismissal, notice pay and arrears of pay. His Claim Form was submitted on 07.03.2022. He said that he had been employed from 02.02.2021 to 26.12.2021.

¹ UKEAT/253/14 [2015] I.C.R. D11

² @ para 38.

³ UKEAT/393/09 [2010] I.C.R. 743

10. On 27.04.2022, the Tribunal wrote to the claimant, pointing out that was not able to bring a claim for unfair dismissal unless he had two years' service or more, which did not appear to the case. He was given until 04.05.2022 to give reasons in writing why his case should for unfair dismissal should not be struck out. Although there were communications from the Claimant after that date, they did not address the question of whether he has the requisite service to bring an unfair dismissal claim, or whether any of the exceptions apply. At the hearing, the Claimant did not contend that any exception applied, and his claim for unfair dismissal was struck out.
11. The ET3 is dated 12 April 2022.
12. On 22.06.2022, the parties were advised that this case would be listed for a hearing on 30.09.2022, starting at 10:00hrs.
13. On 28.09.2022, the Tribunal canvassed with the parties whether they would be able to accommodate a hearing with a later starting time on 30.09.2022, either at 12:00hrs or 14:00hrs. The Claimant said that he could attend the hearing at either time. The Respondent replied on 29.09.2022, by an email sent at 13:49hrs, saying:

Dear Sir,s⁴

I have just found out that there is a hearing tomorrow in relation to a former employee Matthew Warren.

I do apologise but I will not be able to attend.

All correspondence has gone to my old email , which was hacked a few months ago and the server is no longer communicating with us. We had to switch all emails to Wabisabibay but due to the server issue we were also unable to put a divert on as we cant even gain access to our website.

On top of this , I have been in Dorset now for 5-6 weeks and don't expect to leave for some time as my Uncle is in a critical state in ICU Dorchester so I have been forced to move into his home, look after the dog & house as well as visiting the hospital every day to check on progress and allow him to know someone is there who is looking after him , even though extremely unresponsive.

His name is Nicholas Morrell if you needed to check on this.

Should I have known about the hearing in time I of course could have prepared myself for the event but unfortunately today '29th September 2022' is the first I have heard about it and I actually thought that matter was closed some time ago.

I am extremely sorry about this and hope that we can resceudle and all documents about the event can be sent to this email address

Thanks

Jonathan P W Bailey

⁴ The spelling and punctuation are the Respondent's own.

14. At 14:09hrs on 29.09.2022, Employment Judge Bax directed the Tribunal to respond to the Respondent's email in the following terms:

The time for the hearing has been changed to 2pm. The hearing will be by video. The Respondent has sought a postponement of the case, however it should be able to attend by video and there was no suggestion that it could not. Further the Respondent was under a duty to keep the Tribunal informed as to changes to its correspondence address. The practicalities for the hearing can be discussed at the start.

15. The Tribunal office emailed both parties with Employment Judge Bax's direction at 16:06hrs on 29.09.2022. The email address used for the Respondent was the same as that from which he emailed the Tribunal earlier that afternoon, and the same as that from he emailed the Tribunal on 06.10.2022.
16. No response to this communication was received from the Respondent. I considered it right to hear the case in the absence of the Respondent. The Respondent had sought a postponement, which had been refused. No further representations had been received from the Respondent. Not to hear the case would have been to grant the postponement that Employment Judge Bax had refused. I did not consider that that would be consistent with the Overriding Objective.

The Respondent's Application

17. On 06.10.2022, the Respondent emailed the Tribunal, in the following terms:

*Hello,
As mentioned I was unable to attend the hearing due to family circumstances
I can not see how he was dismissed unfairly as it was clearly gross misconduct
This hearing should not have happened as explained to the person who called as you had the incorrect email for me.
Please can someone get back to me as a matter of urgency
Thanks
Jonathan*

18. In substance, this appears to be a request to reconsider my judgment, and I treat it as such.
19. I have referred above to the precise wording of Rule 72. Rule 72(1) indicates that, where an application is substantially the same as has already been made and refused, then, unless there are special reasons, there is no reasonable prospect of it being varied or revoked.
20. In this case, Employment Judge Bax considered a request for a postponement from the Respondent. He refused the postponement. The Respondent's contention is, in substance, that Employment Judge Bax was wrong to do so, and should instead have postponed the final hearing. The first reason for asking that I reconsider my judgment is, in reality,

inseparable from a criticism of Employment Judge Bax's decision: I was wrong to hold the hearing in the absence of the Respondent, which happened because Employment Judge Bax refused the request for a postponement.

21. I consider that the Respondent's application is substantially the same one as he made, for a postponement. It is therefore one which, unless there are special reasons, has no reasonable prospect of success.

22. No special reasons are identified in the Respondent's application.

23. Rule 47 specifically contemplates that the Tribunal may hear a case in the absence of a party. I am mindful that parties must be given a fair opportunity to present their case to the Tribunal. But, in this case, the Respondent had the chance to present his case. He was advised of Employment Judge Bax's direction. He did not respond to it. Even in his email of 06.10.2022, the Respondent does not explain why he could not take part as directed by Employment Judge Bax. The assertion of "*family reasons*" was before Employment Judge Bax when he made his direction.

24. The Respondent's second identified ground is that;

I can not see how he was dismissed unfairly as it was clearly gross misconduct

25. The Claimant's claim for unfair dismissal was struck out. It seems highly improbable that the Respondent genuinely wishes me to reconsider an element of the case on which the Claimant failed. Given that the Claimant did not have 2 years' service, and did not say that any exception to this requirement applied, I see no reasonable prospect of my decision to strike out the unfair dismissal claim being varied or revoked.

Employment Judge Hughes
Date: 18 March 2023
Judgment sent to the Parties on 29 March 2023

For the Tribunal Office