EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mrs R L Gouvianakis		Blackberry UK Limited

JUDGMENT

The Claimant's application for reconsideration of 10 February 2023 is dismissed.

REASONS

1. By an application sent to the Tribunal on 10 February 2023 the Claimant seeks reconsideration of the liability judgment in this matter sent to the parties on 27 January 2023 following the final hearing that took place between 18 and 21 October 2022 and, in chambers, on 16-18 January 2023.

2. I apologise for the delay in dealing with the Claimant's application, which has been owing to pressure of work. I have considered the Claimant's application on the papers. There has been no need to seek representations from the Respondent.

The law

3. Rules 70-73 of the Tribunal Rules provides as follows:-

> **70. Principles**
> 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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> **71. Application**

> 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.
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> **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.
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> (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.
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> (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.
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> **73. Reconsideration by the Tribunal on its own initiative**
> Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).

4. The Tribunal thus has discretion to reconsider a judgment if it considers it in the interests of justice to do so. Under Rule 72(1), I must dismiss the application if I consider that there is no reasonable prospect of the original decision being varied or revoked. Otherwise, I must (under Rule 72(2)) consider whether a hearing is necessary in the interests of justice to enable the application to be determined. A hearing would, unless not practicable, be a hearing of the full tribunal that made the original decision (Rule 72(3)). If, however, I decide that it is in the interests of justice to determine the application without a hearing under Rule 72(2), then I must give the parties a reasonable opportunity to make further written representations.

5. In deciding whether or not to reconsider the judgment, the authorities indicate that I have a broad discretion, which *"must be exercised judicially … 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 v Brown* [2015] ICR D11). The Court of Appeal in *Ministry of Justice v Burton* [2016] ICR 1128 also emphasised the importance of the finality of litigation (ibid, [20]).

6. That said, if an obvious error has been made which may lead to a judgment or part of it being corrected on appeal, it will generally be appropriate for it to be dealt with by way of reconsideration: *Williams v Ferrosan Ltd* [2004] IRLR 607 at [17] *per* Hooper J (an approach approved by Underhill J, as he then was, in *Newcastle upon Tyne City Council v Marsden* [2010] ICR 743 at [16]).

7. It may also be appropriate for a judgment to be reconsidered if a party for some reason has not had a fair opportunity to address the Tribunal on a particular point (*Trimble v Supertravel Ltd* [1982] ICR 440, and *Newcastle-upon-Tyne City Council v Marsden* ibid at [19]).

8. However, a mere failure by a party (in particular, but not only, a represented party) or the Tribunal to raise a particular point is not normally grounds for review: *Ministry of Justice v Burton* (ibid) at [24]. Nor is wrong or incompetent conduct by a representative: *Newcastle-upon-Tyne City Council v Marsden* (ibid) at [19].

9. A reconsideration application cannot be used merely to challenge reasons rather than the substantive outcome: *Ms Y Ameyaw v Pricewaterhousecoopers Services Ltd* (EA-2019-000480-LA and 000503) at [44]-[46] *per* Matthew Gullick QC (Deputy Judge of the High Court).

10. Where a party wishes to rely on fresh evidence, the most appropriate way to do so is by way of an application for reconsideration of the tribunal's decision, rather than an appeal to the EAT, since the tribunal is better placed to decide whether the evidence would if available at the original hearing have made any difference to its conclusions: *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 and [9] of the *Practice Direction (Employment Appeal Tribunal - Procedure) 2018*. The same *Ladd v Marshall* test applies both on reconsideration and on appeal to the question of whether fresh evidence should be admitted, i.e. the question is whether the evidence have been obtained with reasonable diligence for use at the hearing; whether it is relevant and would probably have had an important influence on the hearing; and whether it is apparently credible: *Outasight VB Ltd v Brown* [2015] ICR D11 (approved by the Court of Appeal in *Ministry of Justice v Burton* [2016] EWCA Civ 714, [2016] ICR 1128). However, as the EAT made clear in *Outasight* ([31]), reconsideration may be permitted on the basis of fresh evidence not meeting the *Ladd v Marshall* test where it is in the interests of justice to do so.

11. The normal time limit for submitting a reconsideration application is 14 days under Rule 70. However, the Tribunal has power under Rule 5 to extend that time limit. This is a broad discretion to be exercised in accordance with the overriding objective: *Gosalakkal v University Hospitals of Leicester NHS Trust* (UKEAT/0223/18/DA) *per* HHJ Richardson at [10].

The Claimant's application

12. The Claimant's application raises a number of points which I deal with in turn.

13. First, she argues that the Tribunal's finding of fact at [89] that Mr Merton received the FY20 review is perverse. However, she does not identify why that finding is perverse, she just asserts that the Tribunal was in error. There is no arguable basis for asserting that finding was perverse. The Claimant has no personal knowledge of whether Mr Merton had been sent the review or not and the index to the hearing bundle is not itself evidence in the case. The Tribunal had to make its findings on the basis of the documents before us. We found that he had been sent the review because: (i) it was attached to the grievance email which we know was forwarded to him; (ii) he dealt with the review in the outcome letter that he signed; and (iii) it is highly unlikely that someone might investigate a grievance about a performance review without looking at the review. (I note the infelicitous word *"inconceivable"* was used in the judgment in that paragraph. That overstates the position, and does not properly capture the panel's view, which was that it was 'highly unlikely' that someone would do that.)

14. In any event, even if we were wrong about Mr Merton having seen the FY20 review, it would have no material bearing on the judgment that we as a Tribunal reached on the legal issues. If the Claimant is right, it would simply mean that it was Ms Johnson of HR who made the decision on her grievance rather than Mr Merton. We understood that the Claimant seemed to think that *"interference from HR"* was of importance to her case, but for the purposes of the legal claims she brought it would not have mattered if HR had wholly usurped the decision-making functions in relation to grievance and appeal. There is nothing in principle unlawful about that. An employer is not bound to keep HR out of dealing with grievances and appeals – indeed, many employers have HR deal with grievances and appeals. Even if Ms Johnson was the sole decision-maker on the grievance, the outcome for the Claimant on the legal claims would have been the same because, as we explained at [169] we accepted the Claimant's case that HR were decision-makers in this case because of the extent of their involvement in the grievance and appeal processes. We went on at [170] to consider whether either Ms Johnson or Mr Merton were materially influenced by her pregnancy or maternity leave and concluded that they were not.

15. The Claimant goes on in her application to complain about the Tribunal's finding of fact at [78], but she is just repeating arguments made at the hearing which we rejected because the facts as we found them to be were as set out in that paragraph. There is nothing arguably perverse in our conclusion.

16. The Claimant then complains about [208] and [209] and sets out again arguments and evidence given or made on her behalf at the hearing that we considered carefully but rejected for the reasons set out in the judgment.

17. Finally, the Claimant refers to [213] and complains that in that paragraph the Tribunal wrongly found that she got *"her"* job back when she returned from

her first maternity leave because she was asked to do different duties. However, as is apparent from the judgment, the Tribunal was well aware of that. At paragraph [41] we explained that while the Claimant was on maternity leave there was a genuine reorganisation of roles/duties within the department as a result of changes in the work the department was required to do. At [51]-[53] we set out the new duties that the Claimant was allocated on her return from maternity leave. However, a change in duties does not mean there has been a change in job. The Claimant's contract required flexibility in terms of role and duties. The Claimant remained a Senior Accountant, on the same terms and conditions (save for working part-time at her request). Hence, we continued to refer to her having got *"her job"* back although we understood there had been a change in duties.

18. The function of paragraph [213] about which the Claimant complains was to set out why, after careful consideration, we concluded that the recruitment of an additional senior accountant on a permanent basis while the Claimant was on her first maternity leave, which would have meant that if she had been made 'redundant' on return from her first maternity leave in April 2019 her dismissal would have been unlawful (as a result of failure to comply with reg 18 of the *Maternity and Parental Leave etc Regulations 1999*), did not render her dismissal for redundancy in 2021 unlawful despite being what is sometimes termed 'but for' cause of that redundancy situation. Nothing the Claimant says in her argument for reconsideration even arguably undermines that conclusion.

Conclusion

19. For these reasons, I consider that the Claimant's application for reconsideration stands no reasonable prospect of success and it is hereby dismissed.

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Employment Judge Stout

24 March 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

27/03/2023

FOR THE TRIBUNAL OFFICE