EMPLOYMENT TRIBUNALS

Claimant: Mr A Brown

Respondent: Nodewell Farm Partners

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 original decision of 3 January 2023 being varied or revoked.**

REASONS

1. The claimant applied for a reconsideration of the judgment dated 3 January 2023, written reasons for which were sent to the parties on 24 February 2023 ("the Judgment"). That judgment dismissed the claimant's claims on the basis that:

    a. the claimant's claims were presented outside the normal time limit (albeit only by one day); and
    b. it was, however, reasonably practicable for him to have presented his claims within that time limit.

2. The claimant's reconsideration grounds are set out in a document attached to his email to the Tribunal dated 8 March 2023.

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. Rule 72(1) states as follows (emphasis added):

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…*

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.

The specific grounds relied upon by the claimant

6. The grounds relied upon by the claimant are as follows (in summary). The claimant says that:

    a. he was disadvantaged by the format of the hearing (video), and states that the hearing was disrupted, which affected his ability to concentrate;
    b. he was disadvantaged by the late stage at which the respondent raised various arguments for the hearing;
    c. his health conditions were relevant to why he did not submit his claim on time and he could have submitted further evidence on this issue ("a disability witness statement and supporting evidence" from a previous employment tribunal claim). He has an anankastic personality disorder, OCD and experienced significant anxiety following the end of his employment;
    d. the fact that he had been through a previous tribunal claim was not relevant;
    e. he used a Royal Mail Special Delivery Service which he says should have guaranteed next day delivery on Saturday 21 May 2022 (which would have been in time as the deadline was 22 May 2022); and
    f. there may have been staff shortages at Royal Mail due to COVID which caused the "late" delivery of his ET1 form.

The relevant law - reconsideration

7. 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.

8. 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".

9. 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.

10. 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.

11. In *Outasight VB Ltd v Brown* [2015] ICR D11, EAT, Her Honour Judge Eady QC accepted that the wording 'necessary in the interests of justice' in rule 70 allows the tribunal a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially, *'which means 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'*.

Consideration of the claimant's grounds

12. In line with Rule 72(1) and the case law above, I considered whether any of the grounds set out by the claimant had **any reasonable prospect** of leading to me deciding to vary or remove my original decision because it would be necessary in the interests of justice to do so.

(a) Disadvantage caused by the hearing format

13. The claimant did experience some issues with his video connection during the hearing (three disconnects noted at around 11.35am). The hearing was paused accordingly on each occasion and the Tribunal's notes record that the claimant and respondent were content for the claimant to re-join the hearing by telephone.

14. By that stage, the claimant was aware that the preliminary issue of whether or not his claim was submitted in time needed to be decided, before his substantive claims could be determined, as this had been discussed and agreed with the parties during the earlier part of the hearing.

15. The claimant was then sworn into evidence. He was subsequently able to consider and clearly answer a series of questions from me and then from the respondent's counsel about the issue of why he submitted his claim when he did (his responses are reflected in the findings of fact in the previous Judgment). Both parties then made oral submissions and the

hearing was paused at 12.35pm for my deliberation on the preliminary issue, with oral judgment and reasons given later that day. There was no noted disruption to those stages or any reason to indicate that the claimant was not able to properly participate in them.

16. There is therefore no evidence that the connection issues experienced by the claimant on 3 January 2023 had any material impact on the evidence or submissions which were heard by me on the time limit issue. I was able to hear evidence from the clamant on, and make findings on, the relevant matters.

(b) Disadvantage due to the late stage at which the respondent raised various arguments for the hearing

17. Once the time limit issue became apparent, it was inevitable that this needed to be addressed before the claimant's substantive case could be considered (given the jurisdictional nature of time limits in the tribunal). I considered the lateness of the time limit issue being raised in my original decision and set out the relevant chronology in the earlier reasons.

18. It was regrettable that the time limit issue was not picked up sooner in the proceedings, either by the tribunal or the respondent, but the claimant was aware of this point before the start of the hearing on 3 January 2023.

19. It had been raised by the respondent's counsel on 26 December 2022, in a skeleton argument sent to the claimant. The claimant had then sought to address the time limit issues in his document dated 2 January 2023, prepared in response to the skeleton argument. He was able to give evidence at the hearing and expand on what he had mentioned in the 2 January 2023 document.

20. The reason why he submitted the claim late was very clear from his evidence, namely his mistaken belief about how long he had to do so. That reason would not have been any different had the claimant had more time to prepare for the hearing.

(c) The relevance of his health conditions and limited evidence available about the same at the hearing on 3 January 2023

21. The claimant's health issues were explored during evidence at the hearing and referred to in the reasons. I was aware that he had an anankastic personality disorder/OCD and a history of depression and anxiety. I considered and accepted both the claimant's evidence about this and the evidence in the OH report which was before me.

22. In short, that evidence did not indicate to me that his underlying health issues had caused or contributed to his mistaken belief that he had more time in which to submit his claim – that mistaken belief was the reason why his claim was late. The claimant's evidence on this was clear: he said, candidly, that if he had known that the correct time limit was 22 May, he could and would have submitted the claim sooner.

23. This was therefore not a case in which the claimant had been medically incapable, because of his health, of submitting his claim in the period between the issue of the Acas certificate on 22 April 2022 and the extended deadline on 22 May 2022.

24. The claimant refers in his application for reconsideration to not having had the opportunity to submit a disability impact statement and supporting evidence which he had prepared for a previous tribunal claim. I cannot see how that evidence would have been relevant to his mistaken belief in the present claim or to his candid acceptance during his oral evidence that he could (and would) have submitted the claim sooner had he not been mistaken.

25. This was not a case in which the claimant's health conditions caused his claim to be presented late or prevented him from submitting it within the time limit. The cause was the claimant's mistake, which was separate to his health conditions.

(d) Was the fact that he had been through a previous tribunal claim relevant?

26. This was a relevant factor and was raised at the previous hearing. It was certainly not, however, determinative of my decision.

27. The position of a party who has previous experience of submitting a tribunal claim, and of tribunal process and procedure, is different to that of a party who has no prior experience of the same. The claimant had evidently made a time-limited application or reconsideration in those earlier proceedings and so had some awareness of the importance of time limits.

(e) Did the claimant use a Royal Mail Special Delivery Service which guaranteed next day delivery on Saturday 21 May 2022 (which would have been in time as the deadline was 22 May 2022) and/or was there an error or delay on the part of Royal Mail which caused the claim to arrive late?

28. The issues about the posting and receipt of the ET1 were considered at the previous hearing.

29. The claimant used a Royal Mail "Next Day" delivery service to post his claim on Friday 20 May 2022. He produced evidence of this and the item was delivered on Monday 23 May 2022, the next working day.

30. The claimant suggests that the ET1 should have been delivered on Saturday 21 May. Whilst there was seemingly a *possibility* that the ET1 may have been delivered (or a delivery attempt made if the delivery address was closed) on Saturday 21 May, via the service which the claimant used, there was no evidence that the claimant had used a Royal Mail guaranteed Saturday delivery service (as opposed to merely guaranteeing delivery on the next working day). There was of course no reason for him to have used a Saturday-specific delivery service for 21 May, because he mistakenly believed at that time that he had until Saturday 28 May to submit the claim.

31. There was no evidence of any failing on the part of by Royal Mail in delivering the ET1 on Monday 23 May 2022. It turned out that the delivery was too late for the claimant but it was delivered on the next working day from the day on which the claimant posted the claim.

Conclusion

32. None of the points raised on behalf of the claimant disclose any basis upon which I consider that it would be **necessary** to reconsider the earlier judgment in the interests of justice or in other words there is **no reasonable prospect** of the earlier judgment being varied or revoked on this basis.

33. The reason why the claimant submitted the claim late was because of his mistaken understanding of the time limit and the evidence on that issue was clear at the original hearing.

34. Accordingly, I **refuse** the application for reconsideration pursuant to Rule 72(1).

Employment Judge Cuthbert
Dated 25 March 2023

Judgment sent to the Parties: 04 April 2023

FOR THE TRIBUNAL OFFICE