EMPLOYMENT TRIBUNALS

Claimant: Mr T Charlesworth

Respondents: (1) Dolphin School Ltd
(2) Dolphin School 1970 LLP

JUDGMENT

The Claimant's application dated **12 January 2023** for reconsideration of the judgment sent to the parties on **30 December 2022** is refused.

REASONS

Introduction

1. On 28 November 2022 I conducted a preliminary hearing in respect of the Claimant's claims that he was unfairly dismissed and that he was subject to detriments for making protected disclosures. At the conclusion of that hearing, I dismissed the Claimant's claims on the basis that they were brought out of time, and that the Tribunal accordingly did not have jurisdiction to hear them. Written reasons for this decision were sent to the parties on 30 December 2022.

2. By an e-mail sent on 12 January 2023, the Claimant applied for a reconsideration of my decision, on multiple grounds, which are set out below.

3. The Claimant's e-mail of 12 January 2023 was not copied to the Respondents' solicitors until 1 February 2023. On 10 February 2023 the Respondents' solicitors e-mailed the Tribunal, opposing the application for reconsideration on the basis that, because it was not copied to them until 1 February, it should be treated as not having been made until that date, and accordingly the application for reconsideration had been made outside the period of fourteen days specified in rule 71 of the Employment Tribunal Rules of Procedure 2013. They accordingly contended that the Tribunal lacked jurisdiction to hear the reconsideration application.

4. The Claimant responded to this e-mail with a further e-mail of his own on 23 February 2023, in which he argued, by reference to rule 92 of the

Employment Tribunal Rules of Procedure in particular, that the Tribunal should not refuse to consider his reconsideration application simply because it had not initially been copied to the Respondents.

5. Unfortunately, the above correspondence was not brought to my attention until 27 March 2023. I have dealt with it as swiftly as possible, but there has still been some further delay in light of my other commitments. I apologise to the parties for the delay that they have experienced in the Tribunal dealing with the reconsideration application.

Relevant law and procedure rules

6. The Employment Tribunal Rules of Procedure make provision for parties to apply for reconsideration, and for the approach that the Tribunal should adopt to a request for reconsideration. The key points are as follows:

   (1) Rule 70 provides that:

   > *A Tribunal may, either on its own initiative…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.*

   (2) Rule 71 provides as follows:

   > *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.*

   (3) Rule 72(1) then provides that:

   > *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…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.*

7. When the Tribunal considers an application for reconsideration, the key question is the interests of justice (see rule 70). In ***Outasight VB Limited v Brown*** (2014) UKEAT/0253/14, Her Honour Judge Eady QC (as she then was) said, at paragraph 33:

> *The interests of justice have thus long allowed for a broad discretion, albeit one that 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.*

8. It is axiomatic that a party is not entitled to have a judgment reconsidered simply because that party does not like the result that has been reached, or wishes with the benefit of hindsight that it had framed its arguments differently, or put different or better evidence before the Tribunal. The reconsideration procedure is not an opportunity for a party to have multiple bites of the same cherry.

9. Where a party wishes, as part of a reconsideration application, to put forward fresh evidence which it did not put forward at the original hearing, the Tribunal should ordinarily apply the test set out by the Court of Appeal in ***Ladd v Marshall*** [1954] 1 WLR 1489. That case established a three-stage test for the admissibility of fresh evidence, namely that it must be shown that:

    (1) The new evidence could not have been obtained with reasonable diligence for use at the original hearing.

    (2) The new evidence is relevant and would probably have had an important influence on the result of the case.

    (3) The new evidence must be apparently credible.

    These requirements are cumulative – in other words, they must all be met.

10. ***Outasight VB Limited v Brown*** establishes that the ***Ladd v Marshall*** test generally applies when an application for reconsideration is made under the Employment Tribunal Rules of Procedure 2013, albeit that in some rare cases the particular circumstances may mean that it would be in the interests of justice to permit the adducing of fresh evidence even where the ***Ladd v Marshall*** test is not met.

Analysis and Decision

11. At this stage, I am, in accordance with rule 72(1) concerned to determine whether there is a reasonable prospect of my original decision being varied or revoked. Only if I find that there is no reasonable prospect of variation or revocation should I dismiss the application at this stage.

12. I note the Respondents' argument that the failure to copy the original reconsideration application to them within 14 days of the date on which the written judgment was sent to the parties means that the Tribunal lacks jurisdiction to hear the reconsideration application. It seems to me that this is not a jurisdictional issue. The Employment Tribunal Rules of Procedure

are, by definition, not jurisdictional. They are procedural rules. I am not inclined to accept that a failure by a party to comply with a procedural requirement means that the Tribunal is deprived of the power to reconsider its own judgments.

13. Rather, the question is whether, as a matter of procedure, the failure to copy the application to the Respondents means that it should be refused (or, since I am at this stage only concerned with the question of whether there is a reasonable prospect of the original decision being varied or revoked, whether the failure to copy the application to the Respondents means that the application has no reasonable prospect of success). It seems to me that there are strong arguments that this should not be the effect of the Claimant's failure to copy his application to the Respondents' solicitors. In particular:

    (1) Rule 2 provides that the overriding objective which the Tribunal must seek to implement when applying the Rules is to deal with cases fairly and justly. I do not consider that it will commonly be fair and just to refuse to consider a reconsideration application which was presented to the Tribunal in time, but which happened not to be copied to the other party until later. There is no suggestion here that there was any prejudice to the Respondents from the three-week delay in copying the application to them.

    (2) Rule 6 provides in terms that a failure to comply with any provision of the Rules (with some exceptions, which do not include rule 71) does not of itself render void any step taken in the proceedings. It seems to me that the effect of this provision is that the Claimant's reconsideration application remains valid, notwithstanding the incomplete compliance with rule 71.

    (3) Rule 5 permits a Tribunal to extend any time limit specified in the Rules, whether or not the time limit has already expired. It would be open to the Tribunal in this case to extend the time for the Claimant to serve his application on the Respondent. That would be a question that the Tribunal would be obliged to consider as part of the question of whether to grant the reconsideration application: ***TCO In-Well Technologies UK Ltd v Stuart*** (2017) UKEATS/0016/16. However, it seems to me that, in light of the matters that I have set out above, the Claimant would have a strong case for an extension of time.

14. As I have emphasised, I am at this stage only concerned with whether the reconsideration application has a reasonable prospect of success. I do not, therefore, make any final determination as to the significance of the delay in copying the application to the Respondent. But I am certainly of the view that that delay does not mean that the application has no reasonable prospect of success. It would be a matter for argument at a hearing of the application, but it is not something that should lead me to refuse the application at this stage.

15. Unfortunately for the Claimant, I consider, however, that his application should be dismissed at this stage on its merits. Looking simply at the contentions advanced by the Claimant in support of his application, and

putting to one side the question of the delay in copying it to the Respondents, I do not consider that there is any reasonable prospect of my original decision being varied or revoked.

16. The Claimant's application for reconsideration consists of nine sections, lettered 'A' to 'I'. These are:

> A: Misunderstandings with regard to evidence.
> B: What is the correct test for the Tribunal to apply?
> C: Why did [the Claimant] not proceed until November 2021?
> D: Misunderstanding of evidence relating to threats made by the Respondent.
> E: Was it 'reasonable' to have expected [the Claimant] to have submitted an ET1 in the summer of 2020?
> F. Objection to paragraph 34 [of my original judgment].
> G. Equality before the law.
> H. Lack of written evidence at the 28th November hearing.
> I. When considering whether or not the Tribunal has jurisdiction.

17. I will take these points in a different order from that in which the Claimant set them out, and will address them in the order that seems to me to be most logical. I begin, therefore, with point B, because (as set out below) the points in relation to this ground contend that I made a fundamental error of law in applying the incorrect test to the question of whether time for bringing the Claimant's claims should be extended. If it were correct that I had made such an error, or if it were even arguable that I had made such an error, then it would plainly be wrong for me to dismiss the reconsideration application under rule 72(1).

18. By point B, the Claimant contends, in essence, that I have applied the wrong legal test to the extension of time, and that rather than applying the 'not reasonably practicable' test set out in the **Employment Rights Act 1996**, I should have applied the 'just and equitable' test set out in the **Equality Act 2010**. The Claimant advances this contention on the basis that his case 'is, at its heart, a discrimination case'.

19. This argument is unsustainable. The Claimant's claims were ones of unfair dismissal (whether because he had made a protected disclosure, or on 'ordinary' principles) and of detriment for making one or more protected disclosures. These are claims which arise under the **Employment Rights Act**, and they do not arise under the **Equality Act**. The Claimant has never advanced any claim that does arise under the **Equality Act** – he does not, for example, contend that he has been subjected to harassment or a detriment because of any of the protected characteristics listed in Part 2, Chapter 1, of that Act. Accordingly, it is the test set out in the relevant sections (48 and 111) of the **Employment Rights Act** that applies to the Claimant's claims. As explained in my original decision, the test under both sections is the 'not reasonably practicable' test. I am satisfied that in my judgment I not only identified the correct legal test, but that I applied it properly. As such, there is no reasonable prospect of the reconsideration application succeeding based on an argument that I identified or applied an incorrect test.

20. I add that the Claimant, in his application, relied on the judgment of the Supreme Court in ***Gilham v Ministry of Justice*** [2019] UKSC 44, particularly at paragraphs 28 to 37, in support of his contention that the 'just and equitable' test for an extension of time applied to his case. I do not consider that anything in ***Gilham*** supports the Claimant's case in this regard. ***Gilham*** was concerned with the particular question of whether a District Judge was an office holder entitled to bring a claim of detriment under the **Employment Rights Act**. The Supreme Court were in no way concerned with identifying the correct test for an extension of time for bringing a claim, and said nothing to support the contention that the 'just and equitable' test would apply, either in Judge Gilham's case, or in this case.

21. I now turn to a series of points (namely, points A, C, D, E, F, and H) in which, in my view, the Claimant seeks to either reargue the case so as to persuade me to take a different view of the evidence that I heard on 28 November 2022, or put forward evidence which is different from or additional to that which he advanced during the hearing before me on 28 November 2022. In light of my conclusions in respect of point B, I approach these arguments on the basis that I applied the correct test for an extension of time, namely the 'not reasonably practicable' test.

22. I begin with points A and D. In respect of each of these points, the Claimant contends that I have misunderstood the evidence that he gave in relation to certain matters. In considering the Claimant's reconsideration application, I have reviewed my notes of the hearing on 28 November 2022, and my written reasons for my decision. I am satisfied that my written reasons accurately summarise the evidence that I heard, insofar as it was material to my decision. I have also reviewed the Claimant's ET1 and the Respondents' ET3, and I am satisfied that there is nothing in either document which I misunderstood in setting out my factual findings.

23. At paragraph 1 of his reconsideration application, relating to his point A, the Claimant says that he did not become aware of the possibility of bringing a Tribunal claim until he became aware of the judgment of the Supreme Court in ***Gilham***. Having checked my notes, this is not the evidence that the Claimant gave during the hearing. It is also not set out in the Claimant's ET1. ***Gilham*** itself is mentioned in the ET1, but there is no suggestion that knowledge of this case was a prerequisite for bringing the claim. The ET1 contains a section dealing with time limits, in which the Claimant does not refer to ***Gilham*** at all. Similarly, the suggestion that the delay in bringing the claim was due to ignorance of ***Gilham*** is not mentioned in an e-mail that the Claimant sent to the Tribunal on 21 November 2022, which contains a section dealing with time limit points. The reconsideration procedure is not an opportunity for a party to improve upon the evidence that was given during the hearing, or to advance evidence that with the benefit of hindsight that party would like the Tribunal to have heard, and I do not consider that there is any reasonable prospect of my decision being varied or revoked on the basis of evidence that the Claimant could have given, but did not give. For the avoidance of doubt, I do not consider that there is anything to suggest that the first limb of the ***Ladd v Marshall*** test summarised at paragraph 9 above is met, and there is no proper basis for me to consider this proposed further evidence.

24. At paragraph 10 of his reconsideration application, relating to his point D, the Claimant contends that my judgment '*does not appear to consider the evidence given in the ET1 and orally concerning the referral to the local children's services department, or the full extent of the threats that were made against my family*'. He then, at paragraph 11 of his application, proceeds to set out further evidence and argument relating to the alleged threat of a referral to children's services. However, I dealt with this matter, as it was put before me at the hearing, at paragraphs 28, 30, and 45 of my judgment, and I do not see that there is any reasonable prospect that the points now advanced by the Claimant would mean that it would be in the interests of justice for me to change my decision. Once again I emphasise that the reconsideration process is not an opportunity for a party to simply reargue a matter that has been considered and decided against him.

25. It is convenient next to consider the Claimant's point C, since in my view that gives rise to the same response as points A and D. By his point C, the Claimant seeks to contend that he did not become aware of the Supreme Court's judgment in ***Gilham*** until November 2021, and that as such it would not have been reasonably practicable to bring the claim prior to that point. However, as I have set out above, this is simply not the evidence that the Claimant gave during the hearing before me. As such, point C seems to me to be another attempt to reargue the matter using evidence and arguments which were not advanced at the time (but which the Claimant would have been entirely able to advance at the time, had he so wished). I do not, accordingly, consider that there is any reasonable prospect of the reconsideration application succeeding on this basis.

26. I deal next with point E, because once again this seems to me to be an attempt by the Claimant to improve upon the evidence that he gave during the hearing. In support of this point in his application, the Claimant provides a long list of factors that he contends are relevant to the question that arose under the second limb of the 'not reasonably practicable' test, namely, if it was (as I found) not reasonably practicable for the Claimant to bring his claim within the primary time limit, what was the further period within which he should have brought his claim?

27. In my view, the various matters set out by the Claimant fall into one or both of the following two categories: (i) attempts to put forward further evidence that was not put forward at or before the hearing on 28 November, and (ii) attempts to reargue matters that were considered at that hearing. As an example of the former category, I refer to subparagraphs 12(c), 12(d), 12(e), 12(h) and the timeline provided by the Claimant (which was not before me on 28 November), 12(i) (at least insofar as it related to evidence about a meeting between the Claimant's wife and the head of Dolphin School in November 2019), and 12(j). These all set out evidential details that were simply not put before me on 28 November. I see no basis upon which the Claimant would not have been able to put this evidence before me at the hearing, and as such, in my view, the evidence does not satisfy the first limb of the test in ***Ladd v Marshall***. I do not consider that there is any reasonable prospect that my judgment would be varied or revoked based on evidence which does not satisfy the ***Ladd v Marshall*** test, where nothing has been put before me to suggest that this is one of those rare cases where I might

admit fresh evidence that does not satisfy the ***Ladd v Marshall*** test.

28. The other matters raised in respect of the Claimant's point E seem to me to be attempts to persuade me to apply a different analysis to the case from that which I in fact applied. In other words, where the Claimant is not overtly seeking to put forward fresh evidence, he is nonetheless seeking to reargue matters that have already been argued over and adjudicated upon. I reached my decision on this matter having considered the evidence and arguments that both sides put before me, and I do not consider that there is any reasonable prospect that further argument would persuade me to reconsider that decision. Nor, in my view, would it be consistent with the strong public interest in the finality of litigation to allow the Claimant now to seek to reopen my decision by advancing further argument and evidence on matters that I have already decided against him.

29. I now turn to the Claimant's point F. The Claimant records an objection to a finding that he believes that I have made, namely that he was not suffering from any mental health problems prior to May 2022. This is not the finding that I made – the findings at paragraph 34 of my previous judgment record that I accepted that the Claimant suffered from mental health problems, and that he began taking medication in May 2022, and not before. None of this appears (or is said to be) factually incorrect; certainly it accurately reflects the evidence that the Claimant gave. I did not make a finding that the Claimant was not suffering from mental health problems before May 2022, but simply recorded that the evidence was that it was at that point that he began taking medication. I accept that the Claimant suffered from mental health problems for some time prior to May 2022, but this does not undermine the factual findings recorded at paragraph 34, nor does it undermine the reasoning I applied in respect of these mental health problems, as they affected the matters before me (my reasoning is set out at paragraph 44 of my previous judgment).

30. I add that I reject the Claimant's assertion, in support of his point F, that he was asked 'a deliberately misleading question' by the Respondent's counsel, Mr Ali. I found Mr Ali's conduct of the hearing, including his cross-examination of the Claimant, to be entirely proper. Had it been otherwise, I would have intervened.

31. By his point H, the Claimant seeks to explain his failure to put forward documentary evidence prior to the 28 November 2022 hearing. Much of the material set out at paragraph 17 of the Claimant's application appears to me to be subject to without prejudice privilege, since it relates to attempts to settle the dispute between the parties.

32. In any event, I do not accept that the Claimant's explanations mean that he could not with reasonable diligence have put before me the evidence upon which he now relies. This evidence was clearly available to the Claimant. He knew that the hearing was listed for 28 November, and he should not have assumed that it would be adjourned. I add that, while the Claimant, at paragraph 17 of his application, refers to his request for an adjournment of the 28 November hearing, that adjournment request did not rely upon any suggestion that the Claimant needed additional time to prepare evidence for the 28 November hearing. Rather, the Claimant suggested that the

hearing should be adjourned to allow time for the Solicitors Regulation Authority to investigate a complaint that he had made about the Respondent's solicitors. The application put on this basis was considered and refused by Employment Judge Anstis.

33. But in any case, I fail to see how the matters raised by the Claimant mean that there is any reasonable prospect of my decision being varied or revoked. The matters raised by the Claimant did not, in my view, affect the outcome of the hearing. I allowed the Claimant to give evidence, notwithstanding the absence of a witness statement. He therefore had the opportunity to put before me all the factual matters upon which he wished to rely, including all the matters set out in the timeline that he has produced. The principal document now produced by the Claimant is a letter from the headmaster of Dolphin School to the Claimant and his wife, dated 25 October 2019. However, this letter is referred to in my judgment, and, notwithstanding the fact that I had not seen it, I relied upon it (and other threats that the Claimant told me were made) in the Claimant's favour in concluding that it would not have been reasonably practicable for him to bring his claim within the three-month primary time limit (see paragraphs 37 and 38 of my judgment). Having now seen the letter, I do not consider that seeing it would have made any difference to my decision on any point in issue before me. Against this background, I do not consider that the explanation for the absence of documentary evidence would give rise to any reasonable prospect that I would vary or revoke my original decision.

34. Having dealt at length with the various points that, in my view, amount to attempts to reargue the case and/or improve upon the evidence given, I turn to two final points, namely point G and point I.

35. By point G, the Claimant emphasises the disparity in resources between himself and the Respondents. I fully accept that the Claimant is likely to have been at a disadvantage as a litigant-in-person, compared to the Respondents, which were represented by specialist solicitors and counsel. However, I consider that ample adjustments were made during the hearing to account for this. These included (i) allowing the Claimant to give oral evidence without a witness statement, and (ii) questioning by me, both before and after cross-examination by Mr Ali, designed to ensure that evidence relevant to the matters before me had been elicited. In my view, these adjustments sufficiently compensated for the inequality of arms that might otherwise have existed, and I am satisfied that the Claimant had a full opportunity to advance his case during the hearing.

36. I add that the questions before me were whether (i) it was not reasonably practicable for the Claimant to present his claim within the primary time limit; and (ii) he presented his claim within a further reasonable period. I resolved the first question in the Claimant's favour, but not the second question. The fact that the first question was, relatively unusually in a case such as this, resolved in favour of the Claimant might tend to suggest that the inequality of arms has not disadvantaged him. But in any case, both of the questions that I had to consider were matters of fact and/or judicial judgement, and nothing in what the Claimant has put forward under point G leads me to believe that there is any chance that I would have reached any other conclusion had these matters been put forward on 28 November 2022, or

that there is any reasonable prospect that the decision that I did reach would be varied or revoked.

37. I turn finally to the Claimant's point I. In support of this point, the Claimant advances a series of arguments concerning what he considers to be the merits of his case and of the cause of protecting children that he seeks to advance. However, while I do not doubt the strength of the Claimant's feeling, it does not seem to me that any of what the Claimant says in respect of point I has any bearing on the issues that were before me. Nothing that he says leads me to consider that I applied an incorrect approach to those narrow and specific questions or that it would be in the interests of justice for me to reconsider my decision.

General Review

38. In the preceding paragraphs I have considered each of the nine grounds advanced by the Claimant. However, before concluding this judgment, I take a step back, and consider the points advanced in their totality to see whether, taken as a whole, they persuade me that the reconsideration application has any reasonable prospect of success. But taken together, they seem to me no stronger than when taken individually.

Summary

39. Having reviewed everything that the Claimant has written and produced in support of his application, I do not consider that I made any error in my analysis of the law, in my assessment of the facts as they were put before me at the hearing on 28 November 2022, or in my application of the law to those facts. Insofar as the Claimant now seeks to rely on evidence that was not before me on 28 November, I do not consider that any of this evidence satisfies the ***Ladd v Marshall*** test, nor that there is any other compelling reason for me to admit any of this evidence. I add that I also consider that the hearing on 28 November was conducted fairly, and that the Claimant had a full and sufficient chance to advance his case.

40. As I have already commented, the bulk of the Claimant's application consists of an attempt to put forward evidence that was available to him on at the hearing before me but which he did not then advance, or to seek to reargue matters that have already been decided against him. But I do not consider this to be remotely sufficient for the reconsideration application to have a reasonable prospect of success. In the intellectual property case of ***FAGE UK Limited v Chobani UK Limited*** [2014] EWCA Civ 5, Lord Justice Lewison said evocatively (at paragraph 114) that '*the trial is not a dress rehearsal. It is the first and last night of the show*'. Putting that in plain language, parties ordinarily get one chance – and one chance only – to put their case before a judge. The hearing on 28 November 2022 was not a trial, but Lord Justice Lewison's point still applies. The Claimant had his opportunity to put his case before me at that hearing. I considered his case as he then presented it, and ultimately decided the matter against him. That was the first and last night of the show – nothing in the Claimant's application persuades me that there should be an encore.

Employment Judge **Varnam**

27 April 2023

JUDGMENT SENT TO THE PARTIES ON

29.4.2023

GDJ
FOR THE TRIBUNAL OFFICE