EMPLOYMENT TRIBUNALS

Claimant: Mrs A Yeates

Respondent: G T Plumbing Heating Ltd

Before: Employment Judge A Frazer

UPON a reconsideration of the judgment sent to the parties on 29th March 2023 on the Claimant's application under rule 71 of the Employment Tribunals Rules of Procedure 2013

DECISION

The Claimant's application is rejected under rule 72(1) of the Employment Tribunal Rules of Procedure 2013 as there is no reasonable prospect of the original decision being varied or revoked.

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REASONS

The Law

1. The Tribunal's power to reconsider judgments are contained within Rules 70 to 73 of the Employment Tribunal Rules of Procedure 2013. Rule 70 provides it may confirm, vary or revoke the judgment where it is necessary in the interest of justice. The process is contained with Rule 72. 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.

2. The Tribunal must follow Rule 72 in the order provided for within that rule **(TW White & Sons Ltd v White UKEAT 0022/21).** In exercising the power the Tribunal must do so in accordance with the overriding objective.

3. In **Liddington v 2Gether NHS Foundation Trust UKEAT/0002/16** Simler P

held at paragraph 34:

"..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 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. Tribunals have a wide discretion whether or not to order reconsideration, and the opportunity for appellate intervention in relation to a refusal to order reconsideration is accordingly limited.

4. **Newcastle Upon Tyne City Council v Marsden UKEAT/393/09** was a case where claimant had been advised not to attend a pre-hearing review to determine whether he was a disabled person. The judge dismissed the claim on the basis the claimant had failed to provide evidence. On a later application for reconsideration, the decision was revoked on basis that counsel for the claimant had misled the tribunal. This decision was upheld by Underhill, J who discussed the importance of finality of litigation at paragraphs 17:

"*The principles that underlie such decisions as Flint and Lindsay remain valid, and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles. In particular, the weight attached in many of the previous cases to the importance of finality in litigation or, as Phillips J put it in Flint (at a time when the phrase was fresher than it is now), the view that it is unjust to give the losing party a second bite of the cherry seems to me entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunals decision on a substantive issue as final (subject, of course, to appeal)"*

5. In **Ladd v Marshall 1954 3 All ER 745, CA t**he Court of Appeal established that, in order to justify the reception of fresh evidence, it is necessary to show:

- that the evidence could not have been obtained with reasonable diligence for use at the trial:

- the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive:

- the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

6. **Outasight VB Limited v Brown UKEAT/0253/14** is a case about reconsiderations where a party wishes to adduce fresh evidence. In this case

the EAT held that the approach in **Ladd v Marshall** would in most cases encapsulate what is meant by "the interests of justice". There might be cases where the interest of justice would permit fresh evidence to be adduced notwithstanding that the principles laid down in **Ladd v Marshall** were not strictly met.

The Application

7. The claimant has applied for a reconsideration of the judgment which was sent to the parties on 29th March 2023 ("the Judgment"). The grounds are set out in her email dated 10th April 2023.

8. The grounds relied upon by the claimant are these:

   5.1 The Tribunal misinterpreted the evidence in finding that commission should be calculated as 10 per cent of the profit margin instead of on the total gross sales.

   5.2 The Tribunal wrongly attached weight to Mr Tweedie's evidence that the commission would be based on 10 per cent of profit at 20 to 30 per cent margin and did not attach weight to page 54 which indicated the structure that was offered was on total products sold.

   5.3 The Claimant was intimidated into reaching an agreement by the Respondent's representative and if they had not reached an agreement, would have elected to proceed to a remedies hearing.

   5.4 The Tribunal miscalculated the Claimant's effective date of termination and the start and end of her holiday year.

9. The Claimant's application is rejected under Rule 72(1) as it is considered that there is no reasonable prospect of the original decision being varied or revoked.

10. The Claimant seeks to adduce evidence now by way of text messages which were not litigated in front of the Tribunal. The Tribunal was provided with documentary evidence at the hearing in a bundle of documents. There is no reason that why that evidence could not have been obtained with reasonable diligence for use at the trial.

11. The Tribunal did have regard to the document at page 54 at paragraph 23 of the judgment and arrived at their conclusions regarding the structure of the scheme had it come into existence at paragraph 24 (page 54 was not evidence of any agreement as to the structure of the scheme). The Tribunal found in the circumstances on the evidence that was before it at the time that the finer details of the structure were never agreed by the parties but that had the agreement been put forward it would have been on 10 per cent of the profit margin (20 to 30 per cent). The Tribunal accepted the evidence of Mr Tweedie, which was considered to be plausible and commercially probable. Accordingly it was open to the Tribunal to reach the conclusion that it did on the evidence that it heard

and that was before it at the time. The application is in effect an attempt to have another bite of the cherry and finality requires that the determination be left as it is.

12. The Tribunal is not permitted to hear about the discussions that took place between the parties to settle the commission claim as these were 'without prejudice.' The Tribunal made specific findings which it hoped would enable the parties to reach an agreement on the commission payments. It adjourned to allow the parties time to see if they could reach an agreement, which they did. It was open to the Claimant to elect to decline any offers put forward by the Respondent.

13. The Claimant's effective date of termination was arrived at on the evidence (see paragraph 27) on the basis of mutual agreement as to date. What is in a P45 or P60 is not necessarily determinative. This was the date that on the evidence we heard, the parties had decided would be the end date of the Claimant's employment.

14. The Tribunal's findings as to the commencement and end of the leave year are at paragraph 28. We found that the Claimant's leave year aligned with that of the Respondent.

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Employment Judge A Frazer
17th May 2023

DECISION ON RECONSIDERATION
SENT TO THE PARTIES ON
31 May 2023 By Mr J McCormick

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS