EMPLOYMENT TRIBUNALS

Claimant: Ms V Govenden

Respondent: ISS Facility Services Ltd

JUDGMENT

The claimant's application dated **2 July 2021** for reconsideration of the judgment, sent to the parties on **14 April 2021** is refused.

REASONS

1. Rules 70-72 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.

2. The Tribunal has discretion to reconsider a judgment if it considers it in the interests of justice to do so. Rule 72(1) requires the judge to dismiss the application if the judge decides that there is no reasonable prospect of the original decision being varied or revoked. Otherwise, the application is dealt

with under the remainder of Rule 72.

3. In deciding whether or not to reconsider the judgment, the tribunal has a broad discretion, which must be exercised judicially, having regard not only to the interests of the party seeking the 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.

4. Under the current version of the rules, there is a single ground for reconsideration — namely, *"*where it is necessary in the interests of justice*".* This contrasts with the position under the 2004 rules, where there specified grounds upon which a tribunal could review a judgment.

5. When deciding what is "necessary in the interests of justice", it is important to have regard to the overriding objective to deal with cases fairly and justly, which includes: ensuring that the parties are on an equal footing; dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense.

6. In Outasight VB Ltd v Brown 2015 ICR D11, the EAT explained that the revision to the rules had not been intended to make it more easy or more difficult to succeed in a reconsideration application. In the new version of the rules, it had not been necessary to repeat the other specific grounds for an application because an application relying on any of those other arguments can still be made in reliance on the "interests of justice" grounds.

7. The situation remains, as it had been prior to the 2013 rules, that it is not necessary for the applicant to go as far as demonstrating that there were *exceptional* circumstances justifying reconsideration. There does, however, have to be a good enough justification to overcome the fact that, when issued, judgments are intended to be final (subject to appeal) and that there is therefore a significant difference between asking for a particular matter to be taken into account before judgment (even very late in the day) and after judgment. As was stated in Ebury Partners Uk Limited v Mr M Acton Davis Neutral Citation Number: [2023] EAT 40

> The employment tribunal can therefore only reconsider a decision if it is necessary to do so "in the interests of justice." A central aspect of the interests of justice is that there should be finality in litigation. It is therefore unusual for a litigant to be allowed a "second bite of the cherry" and the jurisdiction to reconsider should be exercised with caution.

The Claimant's application

8. The Claimant submitted an email dated 2 July 2021 at 18:29 seeking reconsideration. . It was outside the relevant time limit, but by letter dated 30 August 2021, the parties were informed of my decision to extend time. I did not dismiss on the basis of no reasonable prospects. I set out my preliminary views, and invited submissions from the parties.

9. Having considered what was received, I gave instructions for a letter giving the parties 14 days to respond. Aa letter was sent to parties on 4 December

2021 to say that I proposed dealing with the matter without a hearing, and set a deadline of 20 December 2021 for further submissions.

10. As far as I am aware, no response from either side was received by that date. The Tribunal appears to have chased, rather than referred the file back to me, on 18 January 2022. The Respondent, but not the Claimant, appear to have responded to that chaser.

11. The Tribunal file shows no substantive correspondence from the Claimant (or any from the Respondent) until the Claimant's email of 27 April 2023 at 12:31 (which she re-sent on 15 May). I do note that she sent emails on 16 November 2022, re-sending previous items without additional comment, and that there is a record she telephoned on 14 March 2023, seeking an update.

12. I apologise to the parties for the fact that there was a delay in this file being referred back to me, and for my own failure to have set a reminder to request sight of the file shortly after the 14 day deadline.

13. I do not revoke the April 2021 decision. The strike out judgment remains in place. My reasons are as follows.

14. On 21 July 2020, an email was sent to the parties about a name change for the Respondent. The Claimant responded to that email on 24 July.

15. On 29 July 2020, parties were informed that a one day hearing was to take place on 15 April 2021, and case management orders for preparation were contained in the same document. There were dates for compliance in September, October and November 2020. By 4 November 2020, statements were supposed to have been exchanged.

16. On 24 March 2021, the Respondent applied for strike out, using the same email address which had been used for the Claimant in July 2020. The Respondent sent a chaser on 6 April 2021, which was also copied to the Claimant. On 8 April, the Claimant sent an email to the Tribunal and the Respondent which objected to strike out, but said nothing about the alleged breaches of case management orders.

17. On 12 April 2021, a letter was sent on my instructions giving the Claimant until 14 April 2021 to respond to my proposal to strike out for the reasons stated in the Respondent's 24 March 2021 letter. This was sent by email at 10:04am. The letter said that if the Claimant did reply by the deadline, the decision on whether to strike out or not would be made at the hearing on 15 April 2021.

18. There was no reply, and, at 14:32 on 14 April 2021, the strike out judgment (which is the subject of the reconsideration application) was sent. As with other emails, it was sent to the same email address which the Claimant had used on 24 July 2020 and 8 April 2021 to write to the Tribunal.

19. I remain satisfied that the Claimant did not respond by 10am on 14 April.

20. The Claimant sent an email at 12:03pm on 15 April. The hearing had been

due to start at 10am that day but for the strike out. Her 15 April 2021 email was not copied to the Respondent and did not mention the strike out judgment. I am satisfied that she had seen the judgment by this time. It was sent to the correct email address, and, according to her own 15 April comments, she had been checking for links to the CVP hearing which she had been told the Tribunal would send.

21. For the same reason, I am also satisfied that she saw the 12 April email promptly, and by no later than 13 April (the latest date for the links to be sent to her, according to her understanding of what she had been told).

22. Her 15 April 2021 email says (amongst other things) "please find attached my claimant's response to strike out and other medical evidences". On the balance of probabilities, this was because she had seen the 12 April letter and 14 April judgment, and was seeking to respond, belatedly. Her email did not give a reason for the lateness of the response to the 12 April letter, but sought to imply that the Claimant had received neither that or the judgment.

23. On 2 July 2021, the Claimant sent the email that is the reconsideration application. In it she stated that she had not received the judgment, and had only found out about it by phoning the Tribunal. She said that she had sent an email on "14 April 2020". Although the year is wrong, that does not matter. I realise that she meant 2021, and it is just a typo. Of far more significance is that she assert she sent an email on 14 April [2021]. If true, that could hypothetically have been prior to 10am (or, at least, prior to 14:32). In other words, it could have been a document which had been sent to the Tribunal, but not seen by me before I struck out the claim.

24. It was the possibility of such a 14 April 2021 document existing that caused me to decide that the application for reconsideration was not one which had "no reasonable prospects of success", and should proceed.

25. I am now satisfied that there was no email on 14 April 2021, or any other response to the 12 April letter. As mentioned above, the Claimant sent an email with attachments at 12:03pm on 15 April. It did not refer to the 12 April letter. It requested postponement of the 15 April hearing, and gave reasons, which included alleged failure by the Respondent to send the hearing bundle, and absence of legal advice, and medical reasons. The letter said she would be seeking costs "pursuant to Rule 76(1)" against the Respondent because its application was vexatious and otherwise unreasonable. Under the heading "Legal framework/case law" she included 4 pages of legal argument objecting to strike out. Some of the paragraphs might have been copied/pasted from other sources, but she had adapted them to deal with her own situation in a manner that shows she understood the general principles which were contained.

26. Had the Claimant made an application for postponement prior to the hearing, it may or may not have been granted. I do not know. The medical evidence does not directly address why she could not have complied with the case management orders. It does not directly say that she was not fit to participate in a one day video hearing. A lot of the evidence appears to have been prepared for another purpose, relating to her partner's situation.

Furthermore, the evidence bore dates well in advance of April 2021 meaning both (i) the application for postponement based on those items could and should have been made much earlier (if it was to be made at all) and (ii) an argument that the Claimant was intending to say she was medically unfit for the hearing based on this medical evidence is inconsistent with the fact that, more recently than these letters, she had been contacting (on her account) both the Tribunal and the Respondent seeking to progress the preparations for the hearing.

27. Had the claim not been struck out on 14 April, and had the hearing started on 15 April, and had the Claimant made an application for postponement then, it may or may not have been granted. I do not know.

28. However, in fact, it seems that the Claimant had not prepared for the hearing, or complied with the case management orders. She was given the opportunity to respond to the 12 April letter by 10am on 14 April. She did not respond to it at all that day, or even by 10am on 15 April. I am satisfied that there were no medical reasons preventing her replying to the 12 April letter, and I am also satisfied that she received it.

29. Nothing that the Claimant wrote on 15 April is information that she was unable to present by 10am on 14 April, or, indeed, much earlier. She could have sent the email of 12:03pm on 15 April (or a shorted version of it) in response to the Respondent's 24 March application. However, she did not respond to that at all, and only sent a cursory response to their 6 April chaser.

30. Strike out is a draconian sanction. However, the Claimant had the opportunity to comment before the decision was made, and failed to do so. It is not in the interests of justice for me to reverse the strike out decision.

Employment Judge Quill

Date: 4 July 2023

JUDGMENT SENT TO THE PARTIES ON

4 July 2023

GDJ
FOR THE TRIBUNAL OFFICE