EMPLOYMENT TRIBUNALS

Claimant: **Mr J. Chapman**

Respondent: **Stephensons of Essex Limited**

JUDGMENT ON CLAIMANT'S APPLICATION FOR RECONSIDERATION

The judgment of the Tribunal is that: -

1. the Claimant's application for reconsideration of the judgment on liability, sent to the parties on 10 July 2023, is refused.

REASONS

1. An oral judgement, with reasons, rejecting the Claimant's claim of unfair dismissal, was delivered at a hearing on 19 June 2023. The Claimant asked for written reasons.

2. The Claimant wrote to the Tribunal on 28 June 2023, before the judgment and reasons were sent to the parties, stating: 'I wish to exercise my right of appeal to the judgment for the following reasons'. He then set out his reasons. The following day he chased for a reply.

3. I directed that the Claimant be written to as follows on 6 July 2023:

> 'The Claimant's emails of 28 and 29 June 2023 are acknowledged.
>
> The judgment was given orally at a hearing on 19 June 2023. The Claimant requested written reasons. The Judge explained that there was likely to be a delay of several weeks in providing them, owing to the competing demands of other cases.
>
> The Judge anticipates that the judgment and written reasons will be sent to the parties by 14 July 2023. It is at that point that the Claimant may submit either an application for reconsideration (to the Employment Tribunal) or an appeal against the judgment (to the Employment Appeal Tribunal). Neither application can be considered before the judgment and reasons are sent out.

> The judgment will be accompanied by guidance notes, which the Claimant should read carefully before submitting any application.'

4. The judgment and written reasons were sent to the parties on 10 July 2023.

5. By email of 17 July 2023, the Claimant applied for reconsideration of the judgment, referring back to the reasons in his email of 28 June 2023.

The law

6. Rules 70 to 73 of the Employment Tribunal's Rules of Procedure 2013, make provision for the reconsideration of Tribunal Judgments 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.**
>
> **(2) If the application has not been refused under paragraph (1), the original decision shall be considered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that 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.**

7. The Tribunal thus has discretion to reconsider a judgment if it considers it in the interests of justice to do so.

8. 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. It is a mandatory requirement for a judge to determine whether there are reasonable prospects of a judgment being varied or revoked before seeking the other party's response and the views of the parties as to whether the matter can be determined without a hearing, potentially giving any provisional view, and deciding how the reconsideration application will be determined for the purposes of rule 72(2): *T.W. White & Sons Ltd v White*, UKEAT/0022/21.

9. If I consider there are reasonable prospects, 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.

10. In *Outasight VB Ltd v Brown* UKEAT/0253/14 the EAT held (at [46-48]) that the Rule 70 ground for reconsidering Judgments (the interests of justice) did not represent a broadening of discretion from the provisions of Rule 34 contained in the replaced 2004 rules. HHJ Eady QC explained that the previous specified categories under the old rules were only examples of where it would be in the interests of justice to reconsider. The 2014 rules remove the unnecessary specified grounds, leaving only what was in truth always the fundamental consideration: the interests of justice. This means that decisions under the old rules remain pertinent under the new rules.

11. The key point is that it must be in the interests of justice to reconsider a judgment. That means that there must be something about the case that makes it necessary to go back and reconsider, for example a new piece of evidence that could not have been produced at the original hearing or a mistake as to the law. It is not the purpose of the reconsideration provisions to give an unsuccessful party an opportunity to reargue his or her case. If there has been a hearing at which both parties have been in attendance, where all material evidence had been available for consideration, where both parties have had their opportunity to present their evidence and their arguments before a decision was reached and at which no error of law was made, then the interests of justice are that there should be finality in litigation. An unsuccessful litigant in such circumstances, without something more, is not permitted to simply reargue his or her case, to have 'a second bite at the cherry' (per Phillips J in *Flint v Eastern Electricity Board* [1975] IRLR 277).

12. The expression 'necessary in the interests of justice' does not give rise to an unfettered discretion to reopen matters. The importance of finality was confirmed by the Court of Appeal in *Ministry of Justice v Burton and anor [2016] EWCA Civ 714* in July 2016 where Elias LJ said that:

> **'the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (*Flint v Eastern Electricity Board* [1975] ICR 395) which militates against the discretion being exercised too readily; and in *Lindsay v Ironsides Ray and Vials* [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review.'**

13. In *Liddington v 2Gether NHS Foundation Trust* EAT/0002/16 the EAT, *per* Simler P, held at paragraph 34 that:

> **'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 by 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.'**

The application

14. I will deal with each of the Claimant's points in turn under the subheadings below.

'Breach of data is against the law and the ICO confirmed this, the judge didn't have a problem with Stephensons breaking the law and said it wasn't a breach of confidentiality between Stephensons and myself. I believe he is wrong and Stevensons saying sorry isn't good enough.'

15. My findings on this issue are at para 13 onwards of the liability judgment; my conclusions at para 62 onwards. I did not find that it was not a breach of confidentiality. I concluded that it was plainly a wrong, which might contribute to a cumulative breach of the implied term, but that it was not serious enough in its own right seriously to amount to a breach of the implied term. The fact that the Claimant disagrees with my assessment of the seriousness of the incident is not good grounds for reconsidering my conclusion.

16. As for the fact that the only remedy offered by the Respondent was an apology, I explained why the Claimant did not receive financial compensation at paras 63-64.

'The furlough was a complete mess, even if I had declared my partner's illness at the beginning I still wouldn't have been furloughed. I didn't want to declare the information at the time as they are a company that gossip and the office release private information to other drivers which is wrong. They were happy to put my partner at risk on a daily basis.'

17. My findings on the furlough issue are at para 16 onwards; my conclusions at para 65. I concluded that the Respondent had reasonable and proper cause for not offering the Claimant furlough in April 2020 and, for that reason, it could not form an element of any breach of the implied term of trust and confidence. There is nothing in the application to disturb that conclusion.

18. I note that the Claimant confirms in his application that he did not declare his partner's illness initially. He may have had his own reasons for not doing so, but nonetheless the Respondent did not know about it when deciding who to furlough. That is consistent with my findings of fact at para 18.

'Simon Crump, how can the judge say that Simon Crump visited my property on his own initiative and didn't hold Stephensons responsible. He worked for them, he visited during work time and he wasn't a compliance officer he dealt with accidents.'

19. My findings of fact on this issue are at para 28 onwards; my conclusions at para 70 onwards. I made my findings, and reached my conclusions, on the balance of probabilities. The fact that the Claimant disagrees with them is not good grounds for reconsideration.

20. There was no evidence before me that Mr Crump visited during work time. The fact that he worked for the Respondent is not determinative of the Respondent's liability. I note that the Claimant restates the fact that Mr Crump was not a

compliance officer. That is consistent with my finding that visiting the Claimant in the way that he did was not part of his job which, in turn, fed into my conclusion that the Respondent was not liable for his actions on that occasion.

'During the 7hr 20 min hearing evidence showed that Bill Hiron and Dean Robbie lied under oath. I might add, for example Dean Robbie denied my partner sent him an email when he clearly was sent one, and both of them stumbled when it was proved I never said I would rather work that was Dean Robbie's quote.'

21. I did not conclude that Mr Hiron or Mr Robbie lied under oath. As for the email which the Claimant's partner sent to the Respondent about her cancer diagnosis, the Claimant believed she had sent an email in March/April 2020, i.e. at the time of the first lockdown. When the email was located, it was from January 2021, and so was not relevant to the Respondent's conduct during the first lockdown (para 21 of the judgment).

22. Mr Robbie stated in his own witness statement (para 23) that the Claimant emailed him on 20 April 2020, saying that his partner was high risk and was a cancer patient. I found as a fact that, by that date, the Respondent had already made its decisions about who should be furloughed.

23. The Claimant is correct that the Respondent's witnesses believed that he had sent an email saying that he would prefer to work than to be furloughed. That was a simple misreading of an email which was not from the Claimant; When this was pointed out, they immediately acknowledged it. I could see why the misunderstanding had arisen; it did not affect my view of their credibility.

'They left documents out of the bundle and couldn't find them and generally did not care what I had gone through.'

24. The case had not been well-prepared by either party. Nonetheless, I was satisfied that it could properly be heard on the material before me with a degree of flexibility on my part. I record that the Claimant had very few questions for either of the Respondent's witnesses. I considered it appropriate to ask a number of questions on his behalf, to ensure that his case was fairly explored.

'Then I had to wait a very long 26 days for the result and on the day the meeting was due at 2 p.m. and didn't start till nearly 2:40 p.m. The Judge spent 12 minutes reading his findings and that was it, whilst the Peninsula representative was just smirking.'

25. I had hoped to give oral judgment on the day of the hearing, but I was unable to complete my deliberations within the time available. I listed an additional day, on the earliest date available, to give oral judgment and consider how to deal with remedy, if appropriate. The Claimant is correct that the hearing started about half an hour late, for which I apologise; a hearing in a different case was listed before me in the morning. According to my note, it took 24 minutes to give oral judgment, not 12 minutes. I did not notice any inappropriate expression on the Respondent's representatives face.

'Regarding her she asked many inappropriate questions during the hearing which she had no right to and was corrected by the judge on several occasions.'

26. There was nothing in the Respondent's representatives conduct which was improper or which rendered the hearing unfair. When I considered a question irrelevant or inappropriate, I asked her to move on, as is my usual practice.

'I was a loyal employee for eight years and five months as my reference from Matthew Crooke shows, it's worth mentioning at this point Dean Robbie made no effort to send me a reference. The job had now cost me two relationships and I feel I deserve to come out of this with some kind of compensation due to the fact that all of this still affects my mental health daily.'

27. As I said in my judgment, I have considerable sympathy for the Claimant's situation. However, none of the matters he raises in this paragraph are grounds for my reconsidering the judgment.

Other matters contained in the email of 17 July 2023

28. In his email of 17 July 2023, the Claimant set out further details of his personal circumstances, including in relation to his relationship, housing and mental health. These are not matters to which I can have regard in deciding whether to reconsider the judgment.

Conclusion

29. For all these reasons, I conclude that the Claimant's application for reconsideration has no reasonable prospects of success. Essentially, he is seeking to reargue/restate the case he advanced at the hearing. There is nothing in the application which would lead me to consider varying or revoking the judgment and it is not in the interests of justice to do so. Accordingly, the application is refused. Because I have reached this conclusion, I have not invited the Respondent to comment.

30. I remind the Claimant that, if he wishes to appeal against the judgment, he must lodge an appeal with the Employment Appeal Tribunal (not the Employment Tribunal), within the relevant time limits and in accordance with the guidance which accompanied the written judgment.

Employment Judge Massarella
Date: 24 July 2023