EMPLOYMENT TRIBUNALS

Claimant: Ms F MacDonald

Respondent: Alpha Property Management and Services Ltd

JUDGMENT

The Respondent's application dated **21 July 2023** for reconsideration of the judgment, sent to the parties on **14 June 2023** (with written reasons sent 7 July 2023) is refused as it has no reasonable prospects of success.

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.

   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.

   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 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.

8. Previous appellate decisions, even under the pre-2013 rules, can provide helpful guidance to a judge, but they are not intended as a checklist. The individual circumstances of the particular application have to be considered on their own merits.

9. In Phipps v Priory Education Services Neutral Citation Number: [2023] EWCA Civ 652, the Court of Appeal disagreed with the EAT, which had decided that the employment tribunal's decision to refuse reconsideration would stand. The Court of Appeal decided that there had been "only one answer to the

request for reconsideration. The application should have been granted on the grounds that it was necessary in the interests of justice."

10. In the course of reaching that conclusion, at paragraph 31, Bean LJ said:

    I derive from these three judgments and the authorities cited in them, the following principles to be applied on applications for reconsideration in the interests of justice.

    (1) The interests of justice test is broad-textured and should not be so encrusted with case law that decisions are made by resort to phrases or labels drawn from the authorities rather than on a careful assessment of what justice requires. The ET has a wide discretion in such cases. But dealing with cases justly requires that they be dealt with in accordance with recognised principles.
    (2) Failings of a party's representative, professional or otherwise will not generally constitute a ground for review where the disappointed party has had an opportunity to argue the case and wishes to reargue it. This is because considerable weight must be given to the public interest in the finality of judicial decisions, both to protect the opposing party and to avoid over-burdening the employment tribunal system. A typical example of this is a case where a full hearing has been conducted but an argument was not put, or a witness was not called. In most such cases reconsideration will be refused on the grounds that the claimant has had a fair opportunity to put her case.
    (3) However, the general rule that a party to tribunal proceedings cannot rely on the default of her representative as the basis for an application for reconsideration is not a blanket rule. In the exceptional circumstance where a party has not had a fair opportunity to present her case, that is a significant procedural shortcoming which may be appropriately dealt with by reconsideration.

11. The court also commented on the argument, sometimes raised by opposing parties, that the party seeking reconsideration should have the application refused and seek a remedy against their own adviser/representative instead.

12. In Newcastle-upon-Tyne City Council v Marsden [2010] ICR 743, a claimant did not attend a preliminary hearing personally, though counsel did. The hearing proceeded and a judgment on the preliminary issue was made. The Claimant then sought reconsideration, asserting that they had been told by counsel that they did not need to attend the hearing. This was significant, in the tribunal's opinion, because (i) counsel had said something different at the hearing and (ii) the claimant's attendance was potentially important and (iii) based on the witness statements presented at the reconsideration stage, had the claimant attended the hearing, given that evidence, and been believed, they would probably have been successful on the preliminary issue. The Tribunal granted reconsideration and the EAT upheld that decision.

History

13. The decisions I made on 8 June 2023 included a decision to proceed with the hearing in the Respondent's absence, and a decision about the Respondent's application to extend time for response, and a decision about the Respondent's name. These were case management decisions. I will discuss

them below in the context of deciding whether the judgment itself should be changed.

14. The judgment on the preliminary issue was that the Claimant had a contract of employment with the Respondent.

15. At the hearing, no-one for the Respondent attended. Shortly after 10am, I spoke to the Claimant briefly to let her know that the clerks had attempted to contact the Respondent that day and the previous day without success, and that she should come back at 10.15am, to see if anyone for the Respondent had either arrived, or contacted the Tribunal to explain their absence. I monitored the video lobby and no-one from the Respondent attempted to join, and nor did they return the messages from the clerks.

16. I had read the file in preparation for the hearing.

    16.1. Notice of Hearing and case management orders had been sent to parties on 8 April 2023. It included orders for witness statements to be sent to each other by 2 May 2023 and the Tribunal by 1 June. I could see from the file that the Respondent had not complied with the latter and that the Claimant had emailed the Tribunal, copying the Respondent, to assert that it had not complied with the former. There had been no response from the Respondent.

    16.2. The previous notice of hearing and case management orders had been sent on 13 March 2023. It was clear that the Respondent had received them because the Claimant applied for postponement of the hearing listed for 3 May 2023, and the Respondent had objected. The Respondent's email, which made comments about the ET3, ACAS conciliation, and the Respondent's identity, was considered by EJ Welch before granting the postponement to 8 June 2023.

    16.3. As the 13 March notice made clear, the hearing was to (i) deal with the Respondent's application to extend the time for submission of response and (ii) decide the preliminary issue.

    16.4. Notice of Claim had been sent on 19 July 2021, giving the Respondent until 16 August 2021. On 8 November 2022 (that is a year later), a letter had been sent to parties stating that no response had been received and judgment might be issued in accordance with Rule 21.

    16.5. An email from Dilawar Khan, Director of Alpha Property Consultants, dated 21 November 2022 was sent to the Tribunal but not the Claimant. It denied the Respondent had seen the claim form.

    16.6. On 20 December 2022, a letter was sent on the instructions of a judge stating that the Respondent would have to make an application for an extension of time. There had also been prior correspondence between the Respondent and Tribunal staff, including an email attaching ET3 response dated 10 December 2022, which commented on ACAS conciliation, the Respondent's identity, denied the Claimant was an employee, and gave details of the correspondence with the Tribunal.

16.7. On 20 December, the Respondent made a formal application for extension of time in a letter headed “Dilawar Khan, Alpha Property Management and Services Ltd” and signed “Dilawar Khan”. On 21 December 2022, the Claimant objected to the extension of time.

16.8. The file was reviewed by a judge who gave the orders reflected in the 13 March 2023 notice of hearing.

17. At around 10.15am, I unlocked the video hearing room to let the Claimant back in. The hearing room remained unlocked and the Respondent still had the opportunity to join. The Claimant’s preference was to continue with the hearing, and expressed the opinion that the Respondent was not likely to attend the hearing even if I postponed and re-listed. I agreed with that assessment and the hearing got underway.

18. On checking with the Claimant, the intended respondent, and her alleged employer, was Alpha Property Management and Services Ltd. This matched the name in the ACAS certificate (except for word “Ltd”). It was also named in Box 2.1 of the claim form, albeit there it was preceded by “Dilawar Khan” followed by a comma.

19. I was satisfied that there had been no (sufficient) reason to reject the claim.

20. I did not immediately reject the application for extension of time for the response, but first discussed with the Claimant the documents which she had submitted to check I had received everything. Following that, I heard evidence on oath from the Claimant. This commenced around 10.30am, and lasted around 15 minutes, followed by a brief opportunity for the Claimant to make submissions. No-one on the Respondent side attended. The hearing room remained unlocked during this phase of the hearing.

21. Shortly after 10.50am, I informed the Claimant that I was going to deliberate until 11.15am and to come back to the video room then. I was able to monitor the lobby during this period and no-one from the Respondent joined. Around 11.15am, the hearing resumed and I gave my decision and reasons.

22. I refused the Respondent’s application for extension of time for the response. The proposed response had not been rejected under Rules 17 or 18. My decision was made under Rule 20, and I took into account the very familiar principles, including those in Kwik Save v Swain. The non-attendance by the Respondent and the failure to comply with orders for the hearing were relevant considerations, but not the only factors.

23. Although the response was rejected, I still took into account all of the documents and information sent by the Respondent to the Tribunal, including the response form, when I made my decision on the preliminary issue.

24. Based on Claimant’s evidence on oath, the documents that she had submitted and the documents that the Respondent had submitted, I was satisfied that I could reach a judgment on the preliminary issue, and I did so.

The Respondent's application and my decision on it

25. The Respondent submitted an email at 12:44 on 21 July 2023, attaching a 4 page letter, seeking reconsideration.

26. One assertion made is that my decision "amended" the name of the Respondent. I do not agree. I interpreted the claim form, and my interpretation was that the intended respondent was Alpha Property Management and Services Ltd, which was the entity named in the ACAS certificate and which was the alleged employer. The fact that two extra words, and a comma, were written in Box 2.1 immediately preceding the company name were not an indication that "Dilawar Khan" had been the intended respondent. Furthermore, it was not my opinion that the Claimant had attempted to bring a claim against a company that she thought was named "Dilawar Khan, Alpha Property Management and Services Ltd" but rather that she had intended to bring the claim against Alpha Property Management and Services Ltd, and had included Mr Khan's name in Box 2.1 because she believed that should be part of the address used on correspondence sent by the Tribunal.

27. This was a case management decision and I do not change it. To the extent that the argument is that this decision was "made without notice to the Respondent", I do not agree. The issue about how the Respondent was named in the claim form was flagged up in the documents submitted by the Respondent. The Respondent knew the hearing was going to address the application for extension of time. It also knew that a preliminary issue was to decide whether the Claimant had a contract of employment or not. For there to be a decision about whether she did have a contract of employment, there would have to be a decision about who the other party to the alleged contract was. The Respondent had received the Claimant's witness statement (amongst other documents). The Respondent knew all about the hearing and, as mentioned below, is not arguing otherwise.

28. The reconsideration application argues that Mr Khan chose not to attend the hearing, or to arrange any representation for the Respondent, based on legal advice. It repeats the arguments which I already considered that the Respondent did not deliberately fail to submit the ET3 on time. It is silent about alleged reasons for non-compliance with the case management orders, or about the exact date of the alleged legal advice. No copy of any written advice is supplied, only an email dated 19 June 2023 from a company with the word "Law" in its trading name, with the subject line "fees". This is seemingly written in response to some suggestion from the Respondent that it might have received negligent advice; the email is consistent with what the reconsideration application states. For the purposes of deciding whether or not there are "no reasonable prospects", I have assumed that what the application says about the advice is true. Were the application to get through the "no reasonable prospects" stage, I would require much fuller evidence before I made a decision about what the actual legal advice had been.

29. Previous appellate decisions are a guide to what "the interests of justice" require, rather than suggestions that if a similar fact pattern is repeated in future then the decision should always be reconsideration granted, or

reconsideration refused, to match the outcome of the earlier case. That being said, the fact pattern here is vastly different to either Phipps (where the Court of Appeal made its own decision to grant reconsideration) or Marsden (where the EAT upheld a decision to grant reconsideration made by the employment judge). In each of those cases, the relevant party (the claimant in each of those cases) had appointed a representative; in the first case to conduct the litigation as a whole, in the second case to conduct a particular hearing. In the first case, the representative had not warned the party that the case might be struck out unless certain steps were taken; in the second case, the representative positively misled the tribunal about the reason for the party's non-attendance (and had also told the party that they, the representative, would be at the hearing and this would be sufficient; the party had not been led to believe that the legal advice was to allow the hearing to proceed completely without attendance from their side, just that their own personal attendance – to give evidence, or at all – was not needed in order to obtain the desired result).

30. In this case, the party (the Respondent) placed no representative on record. It simply decided that it was "safe" to allow the hearing to proceed without any attendance at all on its behalf (not merely having no witness evidence, but no-one to make any oral submissions either) on the basis that, at worst, a judgment would be issued against "Dilawar Khan, Alpha Property Management and Services Ltd" and the Respondent would treat that as unenforceable against it, as not being a judgment against it.

31. Having not attended the hearing, and not got any of the outcomes they might have hoped for (either a decision that the Claimant was neither worker nor employee, or, at worst, judgment naming "Dilawar Khan, Alpha Property Management and Services Ltd" as respondent) it now seeks reconsideration on the basis that the advice was negligent and that it is not in the interests of justice that it suffer the consequences of that negligent advice.

32. I am entirely satisfied that this is an attempt to have a second bite at the cherry. There were attempts to contact the Respondent by tribunal staff. By implication, the application is suggesting that the Respondent deliberately ignored those attempts for tactical reasons. Mr Khan, the director of the Respondent, knew what the hearing was listed for, and had corresponded with the Tribunal when it suited him (for example, to object to the Claimant's postponement application) but when it did not suit him, he ignored the Tribunal's communications (including the attempts made on my instructions on the day of the hearing).

33. The interests of justice do not require that the Respondent have a second bite at the cherry in relation to my case management decision under Rule 20.

34. In terms of my judgment on the preliminary issue, the application makes no comments at all on why the decision is said to be "wrong" in its interpretation of the facts or the law, or about what additional evidence the Respondent might have sought to produce on the preliminary issue had it attended (or had it complied with the case management orders for pre-hearing preparation).

35. I heard from the Claimant. It is hypothetical whether I would have allowed the Respondent to cross-examine her had it attended. It would have had that opportunity as of right had it attended and I granted the extension of time for response; it might have been allowed to do so, at my discretion, had it attended and I had refused the application. The fact is that, of its own volition, it did not attend to cross-examine the Claimant knowing full well that I might issue a judgment that she was an employee (or a worker) but thinking that it could, by later arguments, avoid such a judgment having adverse consequences for it. That is not a good enough reason for me to decide that the interests of justice require that the judgment on the preliminary issue be revoked and that there should be a fresh determination.

36. The application also goes on to comment about events after the preliminary hearing and asserts that what the Claimant has said in her witness statement provides a reason that it should be allowed to defend the case. These may or may not be points that it can potentially ask to have considered if and when a judge is making a decision under Rule 21(3), but they are not reasons for me to change my judgment on the preliminary issue.

37. The Respondent also says that the Claimant is potentially seeking to add another respondent (namely Mr Khan, as an individual). If and when such an application is granted, Mr Khan might be ordered to file a response or the requirement for him to do so might be waived. Either way, my Rule 20 decision in relation to the current respondent is not relevant to whether any additional respondent will be able to defend any claims.

38. For the reasons stated above, having considered the Respondent's application, I am satisfied that there is no reasonable prospect of the original decision being varied or revoked, and the application is refused.

Employment Judge Quill

Date: 3 August 2023

JUDGMENT SENT TO THE PARTIES ON
4 August 2023
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FOR THE TRIBUNAL OFFICE