# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | **Respondent** |
|---|---|
| Mr Ogunbayo | Amazon UK Services Ltd |

**AND**

**APPLICATION FOR A RECONSIDERATION**

In exercise of the powers conferred upon me by Rule 72(1) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules), I refuse the application for a reconsideration by the claimant because I consider that there is no reasonable prospect of the judgment being varied or revoked under Rule 70.

## REASONS

1. A judgment was promulgated on 16 May 2023. By email dated 30 May 2023 the claimant seeks a reconsideration of the judgment.

2 Rules 70 - 73 of the Rules provide (in so far as is relevant) as follows:

> 70 A Tribunal may ……. 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… may be confirmed, varied or revoked. If it is revoked it may be taken again.
>
> 71 Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all other parties) within 14 days of the date on which the written record, or other 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(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.

3 A judgment is defined in Rule 1(3) as being;

A decision, made at any stage of the proceedings…. which finally determines;

(i) A claim, or part of a claim, as regards liability, remedy or costs.

4 **Outasight VB Ltd v Brown UKEAT/0253/14** is authority for the proposition that the change in the wording of the 2013 Rules (and in particular the removal of the specific categories which were contained at Rule 34(3)(a) – (e) of the 2004 Rules) does not signify a change in approach. The same basic principles apply as under the 2004 Rules and cases decided under the old rules are still relevant to cases under the new.

5 As was explained in **Ebury Partners UK Ltd v Acton Davis [2023] IRLR 486** an Employment Tribunal can only reconsider a judgment if it is necessary in the interests of justice to do so. A central aspect of the interests of justice is that there should be finality in litigation. The interests of justice include not only the interests of the person seeking a review, but also the interests of the person resisting a review on the grounds that once the hearing which has been fairly conducted is complete, that should be the end of the matter. There are also the interests of the general public in finality of proceedings of this kind. Considerable weight must be given to the public interest in the finality of judicial decisions, both to protect the opposing party and to avoid overburdening the employment tribunal system, **Phipps v Priory Education Services Ltd [2023] EWCA Civ 652.**

6 For these reasons it is unusual for a party to be "given a second bit of the cherry", and the jurisdiction to reconsider should be exercised with caution, paragraph 24, **Ebury**.

7 In relation to the submission of new evidence; tribunals, under the 2004 Rules, were expressly required to consider whether the new evidence submitted had become available since the conclusion of the hearing and whether its existence could not reasonably have been known of or foreseen at the time, Rule 34(3)(d). This reflected the guidance in **Ladd v Marshall 1954 1 WLR 1489** in which the Court of Appeal explained that to justify the reception of fresh evidence or a new trial three conditions must be fulfilled. Firstly it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, secondly the evidence must be such that, if given, it will probably have an

important influence on the result of the case, though it need not be decisive, and thirdly the evidence must be such that it is presumably to be believed - i.e. it must be apparently credible although not incontrovertible.

8 I take from **Outasight** that these are still relevant considerations when dealing with an application for a reconsideration which involves the submission of new evidence under the 2013 Rules. As per **Flint v Eastern Electricity Board [1975] ICR 395** new evidence could also be allowed under the interests of justice where the requirements of Rule 34(3)(d) of the 2004 Rules were not strictly met but where there might be some special additional circumstance or mitigating factor. As to what additional circumstance or mitigating factor would allow new evidence to be adduced despite the fact the strict requirements of **Ladd** were not met, this was explored in **General Council of British Shipping v Deria [1985] ICR 198**. The EAT held that the other circumstance or mitigating factor had to be related to the failure to bring the matter within paragraph (d), as it was then.

9 Dealing with the principal points raised by the claimant in his application;

(i) There was evidence before the tribunal relating to the claimant's visits to hospital and treatment with Apixaban, all of which was considered and findings of fact about this were made. It is not appropriate in a reconsideration application, to seek to change/re-open findings already made on the basis of information that was before the tribunal, and which has already been considered by it.

(ii) The claimant has attached to his application a link to an NHS website which sets out some of the side effects of Apixaban. This was not put before the tribunal for the preliminary hearing. There is nothing to suggest that this information was not readily available to the claimant prior to the preliminary hearing. Accordingly, the conditions for permitting new evidence are not met.

(iii) The claimant has attached to his application a letter to him from the respondent dated 2 April 2022, which appears to relate to an alleged unauthorised absence from work on 2 February 2022. This letter was not put before the tribunal for the preliminary hearing. It self evidently was available to the claimant at the time because it pre-dates the preliminary hearing and was written to him. In any event, it appears to be irrelevant to the issue of whether the claimant was a disabled person, as defined under the Equality Act, at the relevant time. Accordingly, the conditions for permitting new evidence are not met.

(iv) The tribunal does not deal with claims of stalking under the Protection from Harassment Act. Accordingly, this is irrelevant to the reconsideration application.

(v) The claimant complains that he only received a copy of the respondent's written skeleton argument on the morning of the hearing. This cannot properly be

said to be a procedural mishap in circumstances where; (1) this was not an issue raised by the claimant with the judge at the time, (2) the claimant does not identify any specific disadvantage to him that this caused (he simply asserts it prevented him from understanding the defence) and (3) the claimant had 40 minutes at the start of this hearing to read this document should he have wished to do so whilst the judge was carrying out the pre-reading.

10 I therefore conclude after preliminary consideration that I shall refuse the claimant's application for a reconsideration of the judgment. For the reasons set out above there is no reasonable prospect of the decision being varied or revoked and it is not in the interests of justice for a reconsideration to be conducted.

Note: the claimant made reference to an application to amend within his reconsideration application. The claimant is reminded that in accordance with Judge Dimbylow's order any amendment application was to have been made by him by 28 April 2023, which it was not. In any event, if the claimant wishes to make an application to amend he would need to write to the respondent and the tribunal setting out clearly and precisely what claims he wants to add to his existing claims (not just listing section numbers of the Equality Act). The claimant is also reminded that the judge has found that the claimant was not a disabled person, as defined.

Case No: 1302015.22
Signed by: Judge Harding
On: 10 August 2023