EMPLOYMENT TRIBUNALS

Claimant: Mr J Steel

Respondent: Lauri Swindell

Judgment ("the original judgment") was sent to the parties on 21 September 2022. Following a hearing on 6 June 2023, the original judgment was varied in a further judgment ("the reconsideration judgment") which was sent to the parties on 9 June 2023.
By letter dated 17 June 2023, the claimant has applied for further reconsideration of the reconsideration judgment.

JUDGMENT

The claimant's application is refused.

REASONS

Procedural history

1. For the full procedural history of this case, the parties should refer to the written reasons ("Reasons") for the reconsideration judgment.

Grounds for reconsideration

2. The claimant has essentially advanced two grounds for reconsidering the reconsideration judgment. These are:

    2.1. The reconsideration hearing should never have happened in the first place; and

    2.2. The respondent lied during the reconsideration hearing when explaining why she had delayed presenting her response and applying for reconsideration.

Relevant law

3. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides the tribunal with a general power to reconsider any judgment "where it is necessary in the interests of justice to do so".

4. The making of reconsideration applications is governed by rule 71. One of the procedural requirements of rule 71 is that the application must be made within 14 days of the date when the original judgment was sent to the parties.

5. A time limit imposed by the rules (including rule 71) can be extended under rule 5.
6. Rule 72(1) states that an employment judge must 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, the application must be refused.
7. Rule 71 continues:

> "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."

8. If the application is not refused under rule 72(1), it must be dealt with in accordance with rule 72(2), which provides:

> "(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."

9. The overriding objective of the 2013 Rules is to enable the tribunal to deal with cases fairly and justly. By rule 2, dealing with cases fairly and justly includes putting the parties on an equal footing, avoiding delay, saving expense, and dealing with cases in ways that are proportionate to the complexity and importance of the issues.
10. The old Employment Tribunal Rules of Procedure 2004 required that judgments could be "reviewed", but only on one of a prescribed list of grounds. One of those grounds was that "new evidence [had become] available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time." This proviso reflected the well-known principle applicable to civil appeals derived from *Ladd v. Marshall* [1954] 3 All ER 745, CA.
11. The current 2013 Employment Tribunal Rules of Procedure replaced the old list of grounds with a single test: a judgment will be reconsidered where it is "necessary in the interests of justice to do so". There is no specific provision for fresh evidence. Nor is there any express prohibition a party relying on evidence about which he knew or ought to have known before the judgment was given. Nevertheless, the "interests of justice" test must, in my view, incorporate a strong public interest in the finality of litigation, even if it is not as inflexible as the proviso in the 2004 Rules. Where a party could reasonably have been expected to rely on the evidence first time around, it would take a particularly good reason to give that party a fresh opportunity to rely on it. Such reasons might include where a party has genuinely been ambushed, or where the party asked for an adjournment to obtain the further evidence and that request was refused by the tribunal: see *Outasight VB Ltd v. Brown* UKEAT 0253/14.

Conclusions

<u>Preliminary consideration</u>

12. In the light of these legal principles I must now give preliminary consideration to the claimant's reconsideration application.

Ground 1 – alleged error in listing reconsideration hearing

13. I hold to the view that I was right to list the case for a reconsideration hearing.

14. I extended the time limit for the respondent's reconsideration application. The Reasons explain why I made that decision.

15. The conditions in rule 72(1) for refusing the respondent's reconsideration application were not satisfied. This is because there was, in my view, a reasonable prospect of the original judgment being varied or revoked.

16. Having looked again at rule 72(1), I acknowledge that the rule required me to take a step prior to listing the case for a reconsideration hearing. I should have set a time limit for the claimant to provide a written response to the application. By implication, rule 72(2) then required me to wait for that time limit to expire before deciding whether a hearing was necessary or not.

17. Despite this irregularity, I have concluded that there is no reasonable prospect of the claimant persuading me either that I was wrong to list the case for a reconsideration hearing, or that the reconsideration judgment should consequently be varied or revoked.

18. The claimant's e-mail of 28 April 2023 effectively set out the claimant's response to the application and made substantially the same points that he would have made if he had been given a time limit for making a written response. Having taken that e-mail into account, I was still satisfied that a hearing was necessary. I remain of that view. There was a dispute about whether the claimant had been given notice of termination. Written representations would have been unlikely to have resolved that dispute.

19. Even if the matter could have been resolved by written representations alone, that would not have helped the claimant. The respondent's written representations would almost certainly have included screenshots of the WhatsApp messages, including the one that gave the claimant his two weeks' notice of termination. The original judgment would still have been varied.

Ground 2 – alleged lies during the hearing

20. The claimant has provided an account of a lie that he claims that the respondent told to her church at the time the claimant became a Godfather to one of the respondent's children. I do not recollect this evidence being given at the reconsideration hearing. If I am right that it was not, I would not now allow the claimant to rely on it. First, the claimant could reasonably have relied on it at the reconsideration hearing. He could have taken the opportunity to ask questions of the respondent to test the reliability of what she was telling me. He could have asked to give evidence about the incident himself. More fundamentally, however, I would not have allowed it into evidence in any event. It is not sufficiently relevant. Even if the respondent did tell that lie, it does not mean that the respondent would tell a lie to an employment tribunal about something completely different.

21. I found the respondent's account capable of belief. It was consistent with her e-mails to the tribunal. The claimant had the opportunity to test the reliability of the respondent's account and chose not to take it. There is no reasonable prospect of

my varying or revoking the reconsideration judgment on the ground that the respondent was allegedly not telling the truth.

Disposal

22. For the above reasons the claimant's reconsideration application is refused.

Employment Judge Horne
10 August 2023

SENT TO THE PARTIES ON
22 August 2023

FOR THE TRIBUNAL OFFICE