EMPLOYMENT TRIBUNALS

Claimant: Mr T Duncan

Respondent: Fujitsu Services Limited

JUDGMENT

The claimant's application dated **13 July 2023** for reconsideration of the judgment, sent to the parties on **29 June 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.
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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 8 page email, within the relevant time limit, seeking reconsideration.

9. The Claimant asserts that the "panel is absent from the decision". I infer that he means that there are not separate sets of reasons from each panel

member, in the same way that different members of the Supreme Court, or Court of Appeal, might issue separate judgments. However, the reasons, as provided, are the unanimous decisions and reasons of the whole panel (not just EJ Quill) except where expressly stated otherwise. Where there was a majority decision (that is, there was a 2:1 split) the majority is named, as is the minority, and the majority's reasons are given, as well as the minority's.

10. The Claimant requests the panel's notes, under the heading "Freedom of Information Act / GDPR". Neither piece of legislation grants him the right to those notes. Each panel member's notes are confidential and privileged. I (EJ Quill) have consulted the other panel members and our unanimous decision is that we are not proposing to disclose our notes to the parties.

11. The Claimant requests further written reasons. If reconsideration were to be granted, and a previous judgment decision were to be revoked, then there would be reasons for that (which would be written reasons were applicable) and if there was a new judgment on that issue, then there would be reasons for that too (which would be written reasons were applicable). Other than that, a reconsideration application is not a mechanism to request additional written reasons for the existing judgment on any complaint.

12. It is true that the reasons did not refer to Mr Lockwood's image appearing on the monitor in the physical hearing room. It is true that that happened. There was no need for the (already very lengthy) written reasons to mention that. We made no finding that it was deliberate (in the sense of being a conscious attempt to make his face visible to the Claimant) and it was not relevant to the issues which we had to decide.

13. It is true that the reasons make "no mention of the decision that excluded [the Claimant's] father" on 12 December 2022. The Claimant's father was not excluded (by the Tribunal) from any part of the hearing.

14. The Claimant says that no (or insufficient) reference was made to medical evidence. However, he does not specify which items of evidence should have been mentioned in these liability reasons, or why.

15. Numbered paragraph 1 of the application, apart from points already mentioned above, asserts that there is insufficient narration about which questions were asked by the panel to witnesses, and/or that some particular answers from witnesses (such as about the preparation of minutes) are insufficiently recorded in the reasons. The written reasons document seeks to set out our detailed findings of fact as relevant to the issues that we needed to decide. It was not intended as a verbatim record of everything that happened in the hearing. Indeed, the panel made that very point early in the hearing when the Claimant's father asked when we would supply the Claimant with our findings of fact.

16. Numbered paragraph 2 of the application, refers to what we said (in our paragraph 5) about EJ Lewis's orders. Since we did not decide that the dismissal was unfair or discriminatory, we did not need to make a decision about Polkey/Chagger reductions.

17. Numbered paragraph 3 of the application refers to a decision that the Claimant asserts was made prior to the final hearing, and the paragraph is not relevant to the reconsideration application.

18. Numbered paragraph 4 of the application is a request for further written reasons. By implication, it is also an assertion that the Tribunal has given insufficient reasons so far, but does not identify a particular factual issue.

19. Numbered paragraph 5 of the application, points out that the Claimant corresponded with the Respondent's solicitors rather than directly with the Respondent itself. The panel understood that. The wording of paragraph 11 of the reasons is neither a typing mistake nor an error in the findings of fact; it is simply a choice of terminology. The Claimant's assertion that the Respondent was obliged to tell him the names of its witnesses sooner than it did is one that he made several times in the early stages of the final hearing (and previously). As he was told at the time, it was up to him to call the witnesses that he wanted to call, and the Respondent was not obliged to call Ms Shelton, or any other particular person, if it did not wish to do so.

20. Numbered paragraph 6 of the application asserts that the Respondent or the Tribunal refused to accept evidence of the Claimant's disability, but does not specify which evidence, or when.

21. Numbered paragraph 7 of the application, refers to paragraph 18.1 of the reasons. As a whole, paragraph 18 is making clear that we were not asked to strike out instead of hearing the evidence. Instead, we were asked to hear the evidence and then make our decisions. Neither party formally abandoned the arguments about the other side's (alleged) actions referred to in paragraph 18. The paragraph is accurate.

22. Numbered paragraph 8 of the application refers to the witness order which the Tribunal granted at the Claimant's application. The Respondent did not assert that they had never held any address for Mr Welek. They asserted that he was no longer their employee and they did not necessarily have his current address. To the extent that the Claimant is asserting that the Respondent should have obtained witness statements for the Tribunal hearing from Mr Welek and Ms Shelton, they had no such obligation.

23. Numbered paragraph 9 and 10 of the application seeks further written reasons about the timing of closing submissions. The existing reasons, and case management orders rearranging the date for submissions, already contain sufficient detail, as did the oral reasons given to the parties at the time.

24. Numbered paragraph 11 of the application refers to the delay in promulgation. I apologise again for the delay. We had the deliberation dates in chambers as mentioned in the heading of the reasons, and it then took time to write up the reasons, which ran to 159 pages.

25. Numbered paragraph 12 of the application does not expressly say that the

Claimant is suggesting that Claim 1 was alleged to be a protected act in relation to the victimisation complaints in Claim 2, or that Claim 3 includes any complaints of victimisation. However, if that is the implicit argument, then there is no reasonable prospect of the panel changing the decision in paragraph 61 of the written reasons.

26. Numbered paragraph 13 of the application has to be dealt with in two parts. For those complaints which failed, the defence self-evidently did not have "no reasonable prospects of success". There were some complaints which succeeded because, having heard the evidence, we decided them in the Claimant's favour. Given that the eventual outcome of those complaints was in the Claimant's favour, it would not be an appropriate use of reconsideration to revoke the judgment, and issue a new judgment, also in the Claimant's favour, but striking out the parts of the response which addressed those complaints. In any event, there is no reasonable prospect that the panel would do so.

27. Numbered paragraph 14 of the application refers to our decisions on the material which the Respondent said was without prejudice and which the Claimant said was admissible. His paragraph is simply a briefer repeat of the arguments that he made already, and which were addressed and rejected in our decision. The Claimant is wrong to say that a discussion cannot be without prejudice unless parties concede weaknesses in their own case. When "without prejudice privilege" applies, it allows them to make such concessions, but the protection does not cease to apply to settlement discussions (which otherwise satisfy the requirements for "without prejudice privilege") just because no concessions are made. Furthermore, and in any event, one of the Claimant's own arguments is that the fact that a sum of money is offered to an opponent can potentially be interpreted as an implied acknowledgment of a weakness in a party's case.

28. Numbered paragraph 15 of the application is an assertion that it is true that the Respondent (or someone acting on its behalf) and/or one of the witnesses hacked the Claimant's accounts. There is no reasonable prospect that the panel would reach such a finding of fact based on the evidence we received on the topic.

29. Numbered paragraph 16 of the application asserts that the Tribunal was not told that the police had said they would investigate if and only if the Tribunal ordered them to do so. I consider paragraph 75 of the reasons to be accurate. However, and in any event, if the Claimant is right, and the police were simply awaiting our judgment and reasons, before deciding whether to investigate, then that would not be a reason for reconsideration of the judgment.

30. Numbered paragraph 17 of the application starts with a quote from paragraph 76 of the reasons, including the observation that the Respondent's comments were caveated. The panel understood the caveats that were made. In addition, the panel also understood that the Respondent's position was that, since the Claimant had not named any specific person (but had said that he believed the alleged hacking was done to help the Respondent with the final hearing) there was (a) no more enquiries it could be expected to make and

(b) confirmation that the legal team and witnesses had no reason to believe there had been hacking was, in any event, a sufficient response to the allegation that had been made that the Respondent was seeking improper advantage in the litigation. In any event, there no reasonable prospect that the panel would reach a finding of fact that the Claimant had been hacked by the Respondent, anyone acting on its behalf, or any of the witnesses, based on the evidence we received on the topic.

31. Numbered paragraphs 18 and 19 of the application assert that the written reasons included insufficient detail about the Claimant's disabilities and their effects. There is no reasonable prospect that the panel would decide to revoke or vary its judgment on any of the complaints for this reason. The written reasons set out, in relation to each of the disability discrimination complaints, what our reasons for each decision were.

32. Numbered paragraph 20 of the application refers to quotations (in paragraphs 104 and 105 of the reasons) from a document. The quotations are accurate.

33. Numbered paragraph 21 of the application seems to allege that the direct disability discrimination complaint should have been upheld in relation to Row 2 of the Scott Schedule. Paragraphs 545 and 546 explain that, since the corresponding harassment complaint was upheld, the direct discrimination complaint was dismissed.

34. Numbered paragraph 22 of the application refers to the findings of fact made in paragraph 109 of the reasons. He does not say the finding is inaccurate. Nor does he refer to which of the judgments on his complaints (and/or which of the paragraphs of our analysis and conclusions) are in error because (by implication) we overlooked that finding of fact when reaching our decision.

35. Numbered paragraph 23 of the application alleges that our findings of fact were insufficient in relation to Ms Godfrey's purported reasons for not having the OH report. We made clear that our finding was that the earliest she requested the report was January 2019 and that she ought to have had it sooner and that she had not previously asked Mr Tolgyesi for a copy of the OH report.

36. Numbered paragraph 24 of the application refers to paragraph 117 of our reasons, where we described Ms Godfrey's opinion. The Claimant expresses the view that Ms Godfrey's opinion was incorrect and/or unreasonable, but that is not a reason for us to change our finding of fact about it.

37. Numbered paragraphs 25 and 26 of the application seek further written reasons, but does not identify which of the judgments on his complaints (and/or which of the paragraphs of our analysis and conclusions) are said to be in error (or why).

38. Numbered paragraph 27 of the application refers to paragraph 132 of the reasons. The Respondent did not actually dispute the date of the conversation. As addressed in the reasons, the meeting was not documented contemporaneously, but both sides accept it took place. The

exact date of the meeting made no difference to our substantive findings about what occurred during the meeting. (See paragraphs 161 and 884 of the reasons, for example).

39. Numbered paragraph 28 of the application simply repeats arguments that the panel already understood at the time it made its decisions. There is no reasonable prospect of the panel changing the findings of fact that we made in paragraphs 422 and 423 of our reasons.

40. Numbered paragraphs 29 to 33 of the application are generalised and vague, and contain no arguments that have any reasonable prospects of persuading the panel to change the judgment on any of the complaints.

41. For the reasons stated above, having considered the Claimant'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: 7 August 2023

JUDGMENT SENT TO THE PARTIES ON

31 August 2023

FOR THE TRIBUNAL OFFICE