EMPLOYMENT TRIBUNALS

Claimant: **Mr D. Carabott**

Respondent: **London Borough of Newham**

JUDGMENT ON THE CLAIMANT'S APPLICATION FOR RECONSIDERATION

The Claimant's application for reconsideration of the judgment dismissing his claim for lack of jurisdiction, sent to the parties on 2 October 2023, is refused pursuant to rule 72(1) of the ET rules because there is no reasonable prospect of the original decision being varied or revoked.

REASONS

1. By email dated 16 October 2023, the Claimant made an application for reconsideration of the Tribunal's judgment dismissing his claim for lack of jurisdiction, sent to the parties on 2 October 2023. It consisted of a two-paragraph application, supported by several documents. Later the same day he submitted a three-paragraph addendum to his application, along with a copy of the witness statement produced by his daughter for a preliminary hearing in 2021.

The law on reconsideration

2. 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.**
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> **(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.**

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

4. 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.

5. 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.

6. 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 (as she then was) 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.

7. 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).

8. 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.'**

9. In *Liddington v 2Gether NHS Foundation Trust* EAT/0002/16 the EAT, *per* Simler P (as she then was), held at [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.'**

Assessment of the application under Rule 72(1)

10. Rule 72(1) requires me to make an initial assessment of the application to determine whether there are reasonable prospects of the original judgment being varied or revoked. I will take each point in the Claimant's application and addendum in turn.

11. The Claimant seeks a reconsideration on the basis of 'two new pieces of information I now have', the first of which may have relevance to the issue of the effective date of termination, the second to the issue of extension of time.

12. The first document is what appears to be a printout of a hardcopy version of the letter of dismissal, dated 10 July 2020. In a one-paragraph statement in support of the Claimant's reconsideration application, Mr Owolade wrote as follows:

> 'During the Employment Tribunal Hearing Judge Massarella instructed me to look in my phone to see if I had pictures of decision letter that Dennis Carabott received on 13 July 2020, then photographed and sent to me. I did not have copies on my phone, however I had downloaded the pictures onto my computer. I found them and they are attached.'

13. The context is as follows. In the statement the Claimant prepared on the second day of the hearing to deal with the time limits point, he wrote at paragraph 8:

> 'The first time Mr Owolade learned of my termination was on 13 July 2020 when I told him what the decision was and sent him a copy of the letter.'

14. Counsel for the Respondent asked the Claimant in cross-examination how he sent a copy of the letter to Mr Owolade. The Claimant replied that he took a photo of the letter and sent it through WhatsApp to Mr Owolade. Counsel then asked him whether he was sure that he did not forward the email which was sent on 10 July 2020. The Claimant said no. The Tribunal gave Mr Owolade and the Claimant's wife the opportunity to look at the Claimant's and Mr Owolade's email and WhatsApp accounts to see if they supported the Claimant's account. Neither of them could locate an email or WhatsApp message being sent from the Claimant to Mr Owolade on 13 July 2020. Various explanations were provided as to why this was, none of which the Tribunal found particularly plausible.

15. The Claimant now seeks to admit this document and Mr Owolade's statement as new evidence.

16. Firstly, Mr Carabott was professionally represented at the hearing. Ms Driver had the opportunity to enquire of Mr Carabott and Mr Owolade on the afternoon of the second day of the hearing whether they had any evidence to support a suggestion that the first Mr Owolade knew of the dismissal was on 13 July 2020, as the Claimant said in his statement. They could have searched for, and provided, any records then or at any point during the rest of the hearing; it appears they did not do so. Moreover, Mr Owolade could have provided a statement in support of the Claimant's recollection of the sequence of events at the hearing; he did not do so. The Tribunal gave them a further opportunity to make good the Claimant's account on the third day of the hearing. In my judgment, this is evidence that could have been provided at the original hearing and it is not in the interests of justice to reconsider the decision on the basis of it.

17. Secondly, the evidence in the form it is presented now is of limited probative value. It is a printout of a photograph of the dismissal letter. There is no evidence as to when the photograph was taken or, if it was attached to a WhatsApp message, when that message was sent.

18. Thirdly, the only possible relevance of this evidence is if it is said to support a case that, if it can be proved that the first Mr Owolade knew about the dismissal was on 13 July 2020, then it follows that the first the Claimant knew about it was on that date. However, the Claimant did not say that in his statement, which was drafted with the assistance of Ms Driver. His evidence (paragraph 6) was that he 'did not receive the letter Mr Humphries *posted* to me until Monday, 13 July 2020' [*emphasis added*]. He did not state that he did not receive the email version of the letter Mr Humphries sent to him on 10 July 2020, only that he could not recall when he read it. The Tribunal found that the Claimant did receive the email on 10 July 2020 (paragraph 18 of the judgment). We went on to find on the balance of probabilities (paragraph 22 onwards) that he and his wife read the dismissal letter attached to the email on Saturday 11 July 2022 at the very latest.

19. Finally, and crucially, the Tribunal also found (paragraph 30 onwards) that, even if the Claimant did not read the email version of the letter on 11 July 2020, he had a reasonable opportunity to do so on that date. There is nothing in this new evidence to disturb that conclusion.

20. The second 'new evidence' the Claimant seeks to introduce relates to a purported attempt by him to contact ACAS on Friday 9 October 2020. This is a matter which the Claimant raised in the statement which he prepared on the time limits issue in 2021: see paragraph 11 onwards of the judgment. His daughter also prepared a statement at that time and the Claimant appended a copy of her statement to his addendum to the reconsideration application.

21. As we recorded in our judgment, it was the Tribunal which discovered the existence of these earlier statements and, when we did, drew them to the attention of the parties' advocates, who were unaware of them. We gave them time (about an hour, according to my note) to take instructions from their respective clients, so they could decide whether either party wished to rely on these statements. When they returned, both advocates confirmed that their clients did not wish to rely on the statements. According to my note I asked them a second time whether either party wished to rely on them, and they confirmed again that they did not. Accordingly, we put them to one side. I note that, in his addendum to his reconsideration application, the Claimant expressly states: 'I did not want to refer the Employment Tribunal judges to the evidence that was submitted in my previous hearing on timeliness in 2021'.

22. This is not new evidence; it is evidence which was available to the Claimant and his representative at the hearing in September 2023 (indeed long before then). The Claimant chose not to rely on it. I reminded myself of the guidance in *Liddington* (above) that 'a request for reconsideration is not an opportunity for a party to seek […] to reargue matters in a different way or by adopting points previously omitted'.

23. The Claimant has not explained why he did not wish to rely on it. Although it is not strictly necessary for me to do so, I observe that it may be because the accounts given in 2021 and 2023 about his experience of contacting ACAS are so very different.

24. The explanation given in the statement drafted in 2023 at paragraph 8 is as follows:

> 'I believe I had three months, that is until 13 October 2020, to file my employment claims. I filed my claims on 12 October 2020 just to make sure that they were filed on time. I filed my claim without anyone's assistance. A worker at ACAS named Liz Edejer, who helped me, filled out the forms the minute I told her that I was dyslexic.'

25. There is no reference to the Claimant encountering any difficulties with ACAS.

26. By contrast, in his reconsideration application he now alleges that he phoned ACAS on 9 October 2020, 'hoping I could find someone who would assist me in filing a claim' but that he 'could not get an ACAS representative to take my information over the phone'. In the statement the Claimant's daughter provided in 2021, she wrote that he called her on 9 October 2020:

> '[stating] he was having difficulties submitting his application form to ACAS. He told me that he was advised by ACAS to ask a family member to help him to complete and submit online his application form, as they were unable to help. My mother was away at the time and the earliest I could get home to help my father was on Monday, 12 October 2020. On Monday, 12 October 2020 I helped him successfully submit his claim form to ACAS online.'

Conclusion

27. For all these reasons, I am satisfied that there is no reasonable prospect of the Tribunal varying or revoking its judgment. The application for reconsideration is refused pursuant to rule 72(1) because it is not necessary in the interests of justice to reconsider the judgment.

28. Because I have dismissed application at the first stage, I have not invited the Respondent to comment on it.

Employment Judge Massarella
Date: 27 October 2023