EMPLOYMENT TRIBUNALS

At: **Bristol**

Claimant: **Mr L Farrow**

Respondents: **(1) Coastline Housing Ltd**
(2) Mr G Frost
(3) Mr P Davis

Before: **Employment Judge Cuthbert (in chambers)**

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The judgment of the tribunal is that the claimant's application for reconsideration is **refused** because there is **no reasonable prospect of the original decision of 14 July 2023 being varied or revoked.**

REASONS

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1. The claimant applied for a reconsideration of the reserved judgment dated 14 July 2023, 31-page written reasons for which were sent to the parties on 31 July 2023 ("the Judgment"). The Judgment dismissed the claimant's claims on the basis that:

    a. the claimant had not established that he was disabled at the relevant times; and

b. the claimant's claims for detriment and automatically unfair dismissal (protected disclosure) were presented outside the normal time limit and the claimant had failed to establish that it was not reasonably practicable for him to have presented his claims within that time limit.

2. The claimant's reconsideration grounds were set out in an email to the Tribunal dated 31 July 2023.

3. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). Under Rule 71 an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The application was therefore received within the relevant time limit.

4. Rule 72(1) states as follows (emphasis added):

> *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…*

5. The grounds for reconsideration are only those set out in Rule 70, namely that it is **necessary** in the **interests of justice** to do so.

The relevant law - reconsideration

6. Early case law suggested that the *"interests of justice"* ground should be construed restrictively. The Employment Appeal Tribunal ("the EAT") in *Trimble v Supertravel Ltd* [1982] ICR 440 decided that if a matter had been ventilated and argued then any error of law fell to be corrected on appeal and not by review.

7. In addition, in *Fforde v Black* EAT 68/80 (where the claimant was seeking a review in the interests of justice under the former Rules, which is analogous to a reconsideration under the current Rules) the EAT decided that the interests of justice ground of review did **not** mean *"that in every case where a litigant is unsuccessful he is automatically entitled to have the tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in the even more exceptional case where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order".*

8. More recent case law suggested that the *"interests of justice"* ground should not be construed as restrictively as it was prior to the introduction of the "overriding objective" (which is now set out in Rule 2). Rule 2

requires the Tribunal to give effect to the overriding objective to deal with cases fairly and justly.

9. In *Williams v Ferrosan Ltd* [2004] IRLR 607 EAT, the EAT said it was no longer the case that the *"interests of justice"* ground was only appropriate in exceptional circumstances. In *Newcastle Upon Tyne City Council v Marsden* [2010] IRLR 743, the EAT said, however, that it was **incorrect** to assert that the interests of justice ground need not necessarily be construed so restrictively, since the overriding objective to deal with cases justly required the application of recognised principles. These included that there should be **finality in litigation**, which is in the interest of both parties.

10. In *Outasight VB Ltd v Brown* [2015] ICR D11, EAT, Her Honour Judge Eady QC accepted that the wording *"necessary in the interests of justice"* in rule 70 allows the tribunal a **broad discretion** to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially, *'which means having regard not only to the interests of the party seeking the review or 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'*.

11. More recently, in *Ebury Partners Ltd v Acton Davis* [2023] EAT 40, the EAT said:

> *'A central aspect of the interests of justice is finality in litigation. It is unusual for a litigant to be given a "second bite at the cherry" and the jurisdiction to reconsider should be exercised by employment tribunals with caution. While it may be appropriate to reconsider a decision where there has been a procedural mishap meaning that a party has been denied a fair and proper opportunity to put their case, reconsideration should not be used to correct a supposed error made by the tribunal after the parties have had a fair and proper opportunity to put their case.'*

The specific grounds relied upon by the claimant – 31 July 2023

12. The grounds relied upon by the claimant are as follows. The claimant said in his email of 31 July 2023 that:

    a. *'ADHD is a recognized and permanent disability under the Equality Act 2010. It significantly impacts various aspects of my daily life, including organizational challenges and difficulties with handling procedures and processes. These challenges have adversely affected my ability to present my claims within the specified time frame'.*

    b. *Supporting Medical Documentation: Enclosed with this letter, please find updated medical documentation and expert opinions that provide a comprehensive understanding of my ADHD condition*

and its effects on my day-to-day activities. These documents affirm that I meet the criteria for disability under the Equality Act 2010.

c. *Evidence Not Previously Considered: This evidence demonstrates the impact of my disability on my work environment and supports my claims of detriment and unfair dismissal. Based on the new information presented, I kindly request that the tribunal reconsider their decision regarding the dismissal of my disability discrimination claim. I firmly believe that the additional evidence presented in this letter and the enclosed documents provide a more comprehensive and accurate representation of my situation.*

13. The claimant did not attach copies of the further medical evidence which he mentioned in his email of 31 July.

The respondents' response to the claimant's application – 12 September 2023

14. The claimant's emailed application for reconsideration was not copied to the respondents (in breach of Rule 71). The respondents were served with a copy by the Tribunal on 1 September and submitted a reply on 12 September. The reply was copied to the claimant.

15. The respondents said in their response:

a. They had not seen the further medical documents to which the claimant referred in his application, nor did it appear that they were attached to the claimant's email of 31 July 2023 to the Tribunal.
b. The claimant needed to show that it is "necessary in the interests of justice" for the Judgment to be reconsidered in accordance with Rule 70. It referred to the EAT's comments in the *Ebury Partners* case, set out above.
c. The claimant said in his application that he was unable to present his claim in time due to his ADHD condition, specifically, *"organisational challenges and difficulties with handling procedures and processes"*.
    i. The claimant provided no medical evidence to support this. Prior to the Hearing, the claimant had submitted a detailed witness statement explaining why he was unable to present his claim in time. The claimant also gave evidence on this point at the Hearing. At no point did the claimant assert that he was unable to present his claim in time as a result of his ADHD condition.
    ii. On the contrary, the claimant explained in his witness statement (and again during oral evidence at the Hearing) that he was unable to present his claim in time because he was not aware of the possibility of such a claim until the preliminary telephone case management hearing on 14 March 2023. The claimant was therefore given ample opportunity to put forward his argument that he was unable to present his claim in time due to his ADHD condition but has failed to do so until his reconsideration application.

iii. Notwithstanding the fact that the claimant had failed to provide medical evidence to support this position, the respondents said that the claimant, having failed on his initial argument – i.e. that he was unaware that he could bring these claims until the preliminary telephone case management hearing – was now seeking to change his argument and to have a 'second bite of the cherry'.

d. On the new medical evidence point, the respondents had not seen this new evidence. In any event, to succeed on this ground, the claimant needed to be able to show that the new evidence (*Ladd v Marshall* [1954] 1 WLR 1489):
   i. could not have been obtained with reasonable diligence for use at the original tribunal hearing. The claimant had not explained why he was unable to obtain this evidence for the Hearing; and
   ii. was relevant and would probably have had an important influence on the hearing. The respondents had not seen the evidence and are unable to comment on the content. However, the claimant had ample opportunity to provide this evidence prior to the Hearing; and
   iii. was apparently credible. The respondents had not seen the evidence was unable to comment on the content. However, the claimant had ample opportunity to provide this evidence prior to the Hearing.
e. In *Adegbuji v Meteor Parking Ltd* UKEAT/1570/09, the EAT applied the "governing principles" established in *Ladd v Marshall* and concluded that the claimant could "with reasonable diligence" have obtained the new evidence in time for the Tribunal proceedings and so dismissed the appeal. The claimant had not explained why he was unable to provide this new medical evidence in advance of the Hearing. It followed that he could "with reasonable diligence" have obtained the evidence.
f. At the earlier telephone hearing, EJ Bax had explained to the claimant what he needed to provide by way of evidence to discharge his burden of proof on the issue of whether he had a disability within the meaning of the Equality Act 2010. This was confirmed to the claimant in writing in the Case Management Order dated 14 March 2023.
g. Further, the respondents' solicitor emailed the claimant on 9 May 2023 to explain that the evidence he had disclosed so far was insufficient and inviting him to obtain and disclose additional evidence as set out in the Case Management Order.
h. In summary, the claimant was given ample opportunity to disclose medical evidence and was informed on several occasions what he needed to provide. The claimant did not at any point assert (and indeed, still has not asserted) that he was having difficulty in obtaining the necessary medical evidence; rather, that he did not wish to disclose the evidence.
i. The claimant was then expressly reminded by the Tribunal of his ongoing duty to disclose relevant documents and that the issue of disability would be determined at the Hearing.

j. It was not "necessary in the interests of justice" to reconsider the Judgment. There was no reasonable prospect of the Judgment being varied or revoked, and the claimant's application to reconsider the Judgment should be refused.

16. No further correspondence was subsequently received from either party.

Consideration of the claimant's grounds

17. In line with Rule 72(1) and the case law above, I considered whether any of the grounds set out by the claimant had **any reasonable prospect** of leading to me deciding to vary or remove my original decision because it would be necessary in the interests of justice to do so.

18. The main argument raised by the claimant is in respect of medical evidence on disability. As the respondents rightly observed, the claimant failed to provide copies of any further evidence in support of his application. The respondent pointed this out in its response dated 12 September 2023. The claimant has not subsequently provided this further evidence to the Tribunal.

19. In any event, in line with *Ladd v Marshall* and *Outasight,* the claimant would need to have shown that any additional medical evidence could not have been obtained with reasonable diligence before the original hearing. I note in particular (with reference to paras 13 to 18 of the Judgement) that:

    a. The claimant was told at the initial case management hearing by EJ Bax about the medical evidence he would need to adduce on disability (as recorded in the CMO).
    b. He was told in very clear terms in writing, in the CMO, about the need to provide medical evidence, including copies of GP records[1].
    c. When he subsequently disclosed only a very limited amount of medical evidence, the respondent properly wrote to him and not only explained why they did not concede the issue of disability but also invited the claimant to provide further medical evidence.
    d. The claimant subsequently did so, but only to a very limited degree.
    e. I asked the claimant at the hearing why he had not provided copies of any GP records from the relevant period – he replied that he thought he had provided copies of the relevant medical documents that he needed to. He did not refer to other medical documents in existence, save in closing submissions when he mentioned some missing GP medical certificates (i.e. fit notes).

20. So, the claimant has (i) failed to supply copies of any further medical evidence in his application and (ii) in any event has failed to show that he could not have provided such evidence, with reasonable diligence, for the Hearing. He chose the produce the witness evidence and medical evidence which he did at the Hearing – he had a fair and proper opportunity to put forwards his case on disability. No procedural mishap has been identified. The evidence he put forwards was found to be

[1] This is in accordance with the Equal Treatment Bench Book, 2023 update, page 415, reasonable adjustments for parties with ADHD.

insufficient in various respects, in terms of the burden upon him to establish disability (see paras 93 – 102, 105, and 107 – 108 of the Judgment in particular). It is not therefore necessary in the interests of justice, in the circumstances, to permit him to have 'a second bite of the cherry' on the same issue.

21. The only other argument raised by the claimant in his application for a reconsideration is a seemingly new point, to the effect that he now says that it was his ADHD condition which meant that he failed to originally bring claims for whistleblowing detriment and dismissal when he presented his ET1. This was not an argument which he raised at the Hearing – rather he said that he was ignorant of his rights to bring such claims until he learned of them at the hearing before EJ Bax. He has not provided any medical evidence in support of this new argument that it was due to ADHD, rather than ignorance. Had he wished to run this argument, he should have raised it at the original hearing and adduced any supporting medical evidence at that hearing.

22. It is not therefore necessary in the interests of justice, in the circumstances, to permit the claimant to raise a new argument after the issue of limitation has been determined at the Hearing – he had a fair and proper opportunity to put his case at the Hearing and did so on the basis of ignorance of his rights. Again, no procedural mishap has been identified. He was told in advance, in the CMO, in clear terms what the issues on time limits would be and those issues were then determined on the basis of the case he put forwards, namely ignorance of his rights (see paras 12, 19 – 21, 32 – 33, 89(h) and 111 - 115 of the Judgment). To permit the claimant to re-run this time limit point on the basis of a different argument, in effect that he missed the time limit due to ADHD, and to have a 'second bite of the cherry' on this basis, would be contrary to the principle of finality in litigation.

Conclusion

23. The points raised on behalf of the claimant in his reconsideration application, both of which amount to an attempt to have a "second bite of the cherry" and are contrary to the principle of finality in litigation, do not disclose any basis upon which I consider that it would be **necessary** to reconsider the Judgment in the interests of justice. There has been no procedural mishap and the claimant had a fair and proper opportunity to put his case at the original hearing. There is **no reasonable prospect** of the Judgment being varied or revoked.

24. Accordingly, I **refuse** the application for reconsideration pursuant to Rule 72(1).

Employment Judge Cuthbert
Dated: 12 October 2023

Judgment sent to the Parties:
01 November 2023
FOR THE TRIBUNAL OFFICE