EMPLOYMENT TRIBUNALS

Claimants:	Mr M Mehmet	[3301208/2021	"Claim 1"]
	Mrs Y Mehmet	[3302603/2021	"Claim 2"]
	Mr A Cakmaktas	[3302371/2021	"Claim 3"]
	Mrs Y Alican	[3306458/2021	"Claim 4"]

Respondent: Medsun Food Ltd

JUDGMENT

The claimant's application dated **13 September 2023** for reconsideration of the judgment, sent to the parties on **16 August 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.

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.

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.

(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.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

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 Claimants' representative, Mr Gorlov, submitted an email dated **13 September 2023** seeking reconsideration. By order sent to the parties on 18 August 2023, I had agreed to extend the date for such application to 13 September 2023, and thus it was in time. The application is supplemented by email dated 13 October 2023, attaching affidavit of Mr Gorlov dated 12 October 2023.

9. The application is in the format of sending the reserved judgment and reasons document to the tribunal, with Mr Gorlov's running commentary on particular paragraphs/sections inserted. I have read all his remarks, but it would be disproportionate to give a specific response to every one of Mr Gorlov's comments.

10. There are some typographical errors in the judgment for which I take full responsibility and apologise unreservedly.
    10.1. C4 - Mrs Alican is incorrectly referred to as "Mrs Y Yelican" in paragraphs 5.4, 6 (including subparagraphs) and 7.4. I apologise for not picking up on that error before the judgment and reasons was sent out. I do not agree that it demonstrates that I did not pay attention to the evidence. C4 - Mrs Alican is named correctly many times throughout the document.
    10.2. Likewise, I apologise for the spelling "Y Mehemet" in paragraph 3.2. However, C2 - Mrs Mehmet was named correctly many times throughout the document.

11. Mr Gorlov seems to take issue with the fact that the reconsideration process means that reconsideration is to be by me, and not someone else.
    11.1. The question, in relation to an allegation of apparent bias, is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased.
    11.2. As noted in particular Locabail (UK) Ltd v Bayfield Properties Ltd [2000] IRLR 96, "… *The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or a witness, or found the evidence of a party or witness to be unreliable, would not by itself found a sustainable objection*."
    11.3. I do not consider that my judgment and reasons was biased, or that it appears to be biased, and I do not recuse myself from further involvement in the matter based on the allegation that the decisions or reasons demonstrate any appearance of bias.
    11.4. To the extent that that there is a suggestion that bias is demonstrated by the admission into evidence of the Respondent's (extremely) late disclosure of documents, in the liability reasons, I discussed in detail what was submitted and when, and what Mr Gorlov's stance was at the time. I do not recuse myself from further involvement in the matter based on the allegation that my decisions on admissibility demonstrate any appearance of bias.

11.5. To the extent that that there is a suggestion that bias is demonstrated by which questions I allowed to be put to C2 - Mrs Mehmet and/or an alleged failure to intervene with improper questioning, the cross-examination was perfectly normal and appropriate and professional. When I did think a question should be prevented (for example, follow-up questions about why the claimant had not stated, in her interview under caution, certain things that she mentioned in her tribunal statement, after she had already stated that she followed legal advice during her police interview), I did prevent it. However, the Respondent was entitled to, and did challenge the Claimant on matters in her evidence that the Respondent disagreed with. As is commonplace, the method of challenge included asking her questions about the contents of other documents, including items which were allegedly prepared by her, or on her behalf. The argument that C2 (or any other claimant) denies knowing what was included in the form ET1 or the attachments which were presented to the Tribunal by her then representative is not a good reason that she could not be cross-examined about those documents (or that I could not take them into account when making my decisions).

12. Any complaints or cross-complaints that either side's representatives has made to the other side's representatives' regulator are irrelevant to my decisions. The allegations that there was something unfair or improper about the connection between Davenport Solicitors and Davenport HR was made at the hearing and is not a new argument.

13. In terms of any inheritance dispute, I set out my findings on that dispute, insofar as it was relevant to the claims and complaints before me. The application raises no new relevant matter in relation to that, and does not cause me to think that I overlooked anything relevant.

14. The attacks on the credibility of Ms Alic and Mr Mehmet, comments about Ms Bal's and Ms Winsor's documentation (and the omissions from it), and arguments about lack of accurate payroll or attendance records are simply a an attempt to reargue the findings of fact.

15. The parties' failure to agree a joint bundle is not a reason for me to revoke my decision. The judgment and reasons sets out in some detail which documents were presented as evidence, and when they were submitted.

16. The allegation that C4 - Mrs Alican was dismissed in April 2020 is not the argument that was presented to me at the hearing. The argument described in the application (assuming that it is intended as a serious point) lacks any merit given the stance that C4 and Mr Gorlov took in the contemporaneous documents and at the tribunal hearing. If C4 - Mrs Alican actually was dismissed in April 2020 (contrary to the decision about the effective date of termination contained in the judgment and reasons), there would be time limit issues to consider. It would also mean that both the unfair dismissal decision and the notice pay decision would need to be revoked, as they were based on a finding that there was a dismissal in February 2021.

17. The suggestions that C4 - Mrs Alican (in particular) or any other claimant did nothing wrong were considered and my reasons for rejecting those

suggestions are set out in the judgment and reasons.

18. I discussed the Claimants' arguments for the lack of reliability of the evidence presented to Ms Bal and Ms Winsor in the judgment and reasons. The application repeats arguments that were already considered.

19. The claim that C1, C3 and C4 were not asked to swear to their statements is (I infer) a suggestion that they would have been willing to swear to those statements provided it was on the basis that they would not be cross-examined. I agree that I did not offer that option of my own initiative; I would have been likely to refuse such an application had it been made. I did explain the consequences of not giving evidence in the presence of all the claimants and Mr Gorlov, and gave them a chance to reconsider their decision not to do so. They stuck to their decision.

20. In relation to whether the "old payslips" or "new payslips" are regarded as valid or correct by HMRC, I need make no findings and it does not make a difference to the unauthorised deduction from wages claim.
    20.1. The Claimants had to prove that they had some particular contractual entitlement to wages (either an exact sum, or an ascertainable sum) on a particular date, and that they were paid less than that.
    20.2. They failed to prove that there was any occasion on which the sum actually paid by the Respondent was less than they were entitled to receive.
    20.3. I asked a number of times for the Claimants' case on entitlement to be explained clearly (as did Mr Wilson) and the only argument presented was that the "new" payslips gave rise to an entitlement to back pay.
    20.4. However, during employment, they received payments in cash, and if the amount paid by the Respondent had been less than they had been entitled to receive then they would have raised that with the Respondent during Senior's time.
    20.5. They did not do so, because they did not have, and did not believe that they had, an entitlement to a higher amount.
    20.6. Their payments were not reduced after Senior died.
    20.7. My finding was that the Respondent represented to HMRC that it was paying lower (net) sums than it was actually paying. I see no reason to consider varying that finding of fact.
    20.8. However, even if it is wrong, it does not change the fact that the net sums which the claimants actually received were the sums which accurately reflected their (unwritten) agreement with the Respondent. See paragraph 288 of liability reasons.

21. To the extent that it is argued that a failure to give accurate information to HMRC could potentially be seen as dishonest, and could potentially reflect badly on a witness's credibility, I do not disagree. However, I set out the respective roles of the relevant individuals in the findings of fact, and took all those matters into consideration when making my decision. The Claimants had the opportunity to question Ms Alic, and they did so. The application argues (and this was my finding in any event) that Mr Halim had nothing to do with running the Respondent's business prior to Senior's death. It also argues that, in addition to C3 - Mr Cakmaktas (who I found could properly be described as general manager), C2 - Mrs Mehmet and C4 - Mrs Alican also

had more senior positions and more regular day to day involvement with operating the business than was found by me in the findings of fact. The argument that the Respondent's historic failure to supply accurate information to HMRC should somehow be seen to adversely affect Mr Halim's credibility but not that of the claimants is not a logical one. In any event, the argument has no prospect of causing me to amend any of the findings of fact or decisions.

22. To the extent that C4 - Mrs Alican (or any other claimant with a relevant interest) believes that anyone has stolen from the company, then they can pursue that through appropriate channels if they see fit, but it is not a matter for the Tribunal to deal with. There is no sensible argument that the claimants were unaware of what cash they were receiving. Even it if were true that they did not know because they never counted it (which is an argument I firmly reject) there would be no sensible way that they could establish what sum they actually received and, therefore, no sensible argument that they were paid less than the Respondent had agreed to pay them.

23. The argument that there is no evidence that Ms Bal exists is not well-founded. She corresponded with Ms Crosby and with C2 - Mrs Mehmet. She invited the claimants to hearings which they did not attend. The insinuation, it appears, is that the Respondent and/or Davenports decided to invent a fake email address and were (presumably) going to have someone attend the disciplinary hearing using the fake name "Ms Bal". This is an unreasonable allegation, which is unsupported by any evidence. Even an employer which had all of the disreputable motives which are alleged by the claimants would have no reason to do this. Ms Crosby and Ms Winsor each attended the hearing and the suggestion that Ms Bal might not exist seems to be based on nothing other than the fact that she did not attend the tribunal hearing. The application says that in Mr Gorlov's opinion "Winsor/Crosby would blindly follow their instructions"; if that were true (and my finding was that it was not) the Respondent would not need to create a fictional Ms Bal to purport to dismiss C1, C2 and C3. Mr Gorlov is making very serious allegations on behalf of the claimants and I am currently not satisfied that there is any proper foundation for them.

24. In terms of ACAS advice, if I limit it to the two possibilities:
    24.1. Did ACAS give advice that an employee should not attend a disciplinary hearing if they do not agree with the allegations (and/or do not agree with something about the process) and
    24.2. Did Mr Gorlov misunderstand ACAS advice

    The second is much more likely than the first. (These are not the only two possible explanations for why the claimants claim that they did not attend the hearings because of ACAS advice). However, the Claimants were dismissed for the reasons set out in the liability decision. They were not dismissed for failing to attend the hearing. No matter how "good" or "bad" their reasons for failing to attend the hearing, this argument has no reasonable prospects of causing me to change my decisions about the fairness of the dismissals as set out in the liability reasons.

25. In relation to C4 - Mrs Alican, in particular, as set out in paragraph 181 of the liability reasons, Mr Gorlov responded to the dismissal letters for C1, C3, C3

in the manner quoted in that paragraph. C4's disciplinary hearing was more than a month after that (and followed further correspondence between Ms Winsor and Mr Gorlov). There was ample time for C4 to consider her position about whether to attend the hearing or not. (And, via her daughter, one of the suggested reasons was that she could not attend the video hearing because she was shielding. See paragraph 184 of liability reasons). Nothing in the application has any reasonable prospects of causing me to change my mind about the decisions in relation to sections 122(2) and 123(6) of the Employment Rights Act 1996.

26. To the extent that it is argued that there cannot be a contractual agreement between employer and employee unless it is in writing, that does not represent an accurate statement of the law. It is also inconsistent with the assertions that (a) the claimants had an entitlement to wages that was higher than the sums which were paid and (b) that C2 and C4 had a contractual entitlement to £50 per week benefits in kind.

27. 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: 26 October 2023

JUDGMENT SENT TO THE PARTIES ON
8 November 2023

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FOR THE TRIBUNAL OFFICE