EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Jaroslaw Wisniewski

Respondents: Express VPN at Kape Technologies PLC (First Respondent)
Kape Technologies (Second Respondent)
Kape Technologies PLC (Third Respondent)

Heard at: In chambers at London Central **On:** 4 December 2023

Before: Employment Judge Lumby

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 decision being varied or revoked.

REASONS

1. The claimant has applied for a reconsideration of the reserved judgment dated 24 October 2023 which was sent to the parties on 26 October 2023 ("the Judgment"). The grounds are set out in his email dated 9 November 2023, sent at 22.41. That email was received at the tribunal office on 9 November 2023.

2. This reconsideration has been on the papers alone as I did not consider that a hearing is necessary. The order made is described at the end of these reasons.
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. Applying Rule 4 of the Rules, the application was received within the relevant time limit.
4. Under Rule 5 the Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in the Rules or in any decision, whether or not (in the case of an extension) it has expired.
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.
6. The grounds relied upon by the claimant are set out in a long list of often repeated points in his email. They are a reiteration of the claims and arguments put forward by the claimant up to and during the hearing, sprinkled with a repetition of allegations against the respondent's representatives, which were addressed in the judgment. In addition, the claimant seeks to add new assertions as to his connection to London. He argues that these connections and the connections of the Kape Technologies PLC group of companies mean that the Tribunal does have jurisdiction to hear his case.
7. The matters raised by the claimant were considered in the light of all of the evidence presented to the tribunal before it reached its decision. As the claimant has largely repeated himself, these points have already been taken into consideration.
8. Rule 70 of the Rules provides a single ground for reconsideration, being the interests of justice. This replaced the previous test, which gave five grounds for reconsideration; one of these was that new evidence had become available since the conclusion of the tribunal hearing to which the decision related, the existence of which could not have been reasonably known of or foreseen at that time. However, it is clear that, following Outasight VB Ltd v Brown [2015] ICR D11 EAT that the interests of justice test can be viewed through that lens. The EAT confirmed in that case that the test set out by the Court of Appeal in Ladd v Marshall 1954 3 All ER 745, CA
9. In that case, the Court of Appeal established that, in order to justify the reception of new evidence, it is necessary to show three separate matters – that the evidence could not have been obtained with reasonable diligence for use at the original hearing, that the evidence is relevant and would probably have had an important influence on the hearing and, finally, that the evidence is apparently credible.
10. Applying the Ladd v Marshall test, I find that all the new evidence put forward by the claimant would have failed the first test. The claimant had

full information as to his connection to London prior to the hearing and, if relevant, should have been put forward before.

11. Accordingly, I do not find that the determination in this case should be reconsidered by virtue of the purported new evidence as this does not pass the tests in Ladd v Marshall. I do not consider that it is in the interests of justice to allow the claimant a second bite of the cherry because he did not bring to the tribunal's attention evidence that was available in support of her case at the original hearing. Furthermore, I do not consider that this evidence would have changed the outcome in any event. Finally, considerations of interests of justice should also have regard to the need for finality in litigation.
12. The earlier case law suggests 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 has been ventilated and argued then any error of law falls to be corrected on appeal and not by review. In addition, in Fforde v Black EAT 68/80 (where the applicant 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 does 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".
13. More recent case law suggests 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). This requires the tribunal to give effect to the overriding objective to deal with cases fairly and justly. As confirmed in Williams v Ferrosan Ltd [2004] IRLR 607 EAT, it is no longer the case that the "interests of justice" ground was only appropriate in exceptional circumstances. However, in Newcastle Upon Tyne City Council v Marsden [2010] IRLR 743, the EAT confirmed that it is 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 include that there should be finality in litigation, which is in the interest of both parties.
14. In this case, all of the evidence was carefully analysed at and following the hearing by the Tribunal. The claimant may not agree with the conclusions reached but all issues were addressed in the Tribunal's view both fairly and justly. Reiterating his prior arguments does not assist finality in litigation. The Tribunal does not consider that anything has gone wrong in its analysis of the facts or application of the law. It is not in the interests of justice for these points to be re-opened. If the claimant does not agree, then that is a matter for an appeal.

15. Accordingly I refuse the application for reconsideration pursuant to Rule 72(1) because there is no reasonable prospect of the judgment dated 24 October 2023 being varied or revoked.

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Employment Judge H Lumby
Dated 4 December 2023

Judgment sent to Parties on

13/12/2023