EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms M Kumar	v	**Member Benefits Limited**

JUDGMENT ON RECONSIDERATION APPLICATION

The respondent's application dated 27 November 2023 for a reconsideration of the judgment dated 17 October 2023 is refused because there is no reasonable prospect of the original decision being varied or revoked.

REASONS

1. In a judgment dated 17 October 2023, the Employment Tribunal determined that the name of the respondent be amended, that the claimant was a worker and that she was entitled to payment of £1214.50.

2. In a letter to the Tribunal dated 27 November 2023, the respondent seeks a reconsideration of the judgment. Any application for the reconsideration of a judgment must be determined in accordance rules 70 to 74 of the Employment Tribunal Rules of Procedure 2013.

Rules

3. The relevant employment tribunal rules for this application read as follows:

RECONSIDERATION OF JUDGMENTS

Principles

70. 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.

Application

71. 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.

> Process
> 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. 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.

4. In accordance with rule 70, a tribunal may reconsider any judgment "*where it is necessary in the interests of justice to do so*". On reconsideration, the decision may be confirmed, varied or revoked. If it is revoked it may be taken again.

5. The case authorities remind Tribunals that there is no automatic entitlement to reconsideration for any unsuccessful party. On the contrary, there is an underlying public policy principle in all proceedings of a judicial nature that there should be finality in litigation. Reconsideration of a judgment should be regarded as the exception to the general rule that Tribunal decisions should not be reopened and relitigated. In reference to the antecedent review provisions, in **Stevenson v. Golden Wonder Ltd** [1977] IRLR 474 EAT, Lord McDonald said that the (exceptional) process was '*not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before*'.

6. When dealing with the question of reconsideration a Tribunal must seek to give effect to the overriding objective to deal with cases 'fairly and justly'. The Tribunal should also be guided by the common law principles of natural justice and fairness. Her Honour Judge Eady QC (as she then was) gave guidance as to the approach to be taken in **Outasight VB Ltd v. Brown** [2015] ICR D11 EAT. Although a tribunal's discretion can be broad, it 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*".

7. The requirement to consider the interests of justice to both sides is neither new nor novel. By way of illustration, in **Redding v. EMI Leisure Ltd** UKEAT/262/81, the claimant argued that it was in the interests of justice to undertake a [reconsideration] because she had not understood the case against her and had failed to do herself justice when presenting her claim. When rejecting the claimant's appeal, the EAT observed that: '*When you boil down what is said on [the claimant's] behalf, it really comes down to this: that she did not do herself justice at the hearing, so justice requires that there should be a second hearing so that she may. Now, justice means justice to both parties. It is not said, and, as we see it, cannot be said that any conduct of the case by the employers here caused [the claimant] not to do herself justice. It was, we are afraid, her own inexperience in the situation.*'

8. Earlier guidance as to the approach of Tribunals to the matter of reconsideration remains equally pertinent. In **Trimble v. Supertravel Ltd** [1982] ICR 440, the EAT made the following observations:

a. it is irrelevant whether a tribunal's alleged error is major or minor;

b. what is relevant is whether or not a decision has been reached after a procedural mishap;

c. since, in that case, the tribunal had reached its decision on the point in issue without hearing representations, it would have been appropriate for it to hear argument and to grant the review if satisfied that it had gone wrong;

d. if a matter has been ventilated and properly argued, then any error of law falls to be corrected on appeal and not by review.

9. The Tribunal considered the contents of the email chain attached to the application for reconsideration but other than repeat that there had been communication issues before the hearing which prejudiced the respondent, no reason is provided as to why the determination of the Tribunal is incorrect.

10. Notwithstanding the lack of any basis for reconsideration put forward by the respondent, the Tribunal reviewed its judgment. The issue of the correct contact details for the respondent seems to have started with the ET1 which was received on 21 September 2021 but served on the wrong address provided by the claimant. The ET3 provided the correct address for the respondent and there is subsequent correspondence about contact with the respondent's representative. The ET3 narrates:

> "..The respondent has a counter claim of 1090 for customers where the Claimant did not follow up and owes commission of £98.75 leading to a balance owed by the Claimant of £191.25…"

11. Some form of financial reconciliation had to have been carried out by the respondent to substantiate the figures in the ET3, indeed the respondent must have been able to calculate the amount due to the claimant and other workers under the operation of the contracts at around the time payment was due to them.

12. The hearing was listed on 19 January 2023. Case management orders were made. The employer's contract claim was disallowed and the Tribunal wrote to the respondent on 24 February 2023 in relation to reconsideration of that decision:

> "…If no such application is received the matter will proceed as a claim only and remains listed for hearing on 19 July 2023 and the orders made dated 19 January 2023 remain in force…"

13. The orders were not complied with. On 7 June 2023, the Tribunal legal officer wrote to the parties with a pre-hearing checklist. It noted that a final hearing had been listed for 19 July 2023 and was postponed. The intimation of a postponement said that the case would be "relisted in the near future." The respondent should have made some preparation for the forthcoming hearing. The hearing was listed for 14 September 2023.

14. For the purpose of the original judgment, the Tribunal reviewed the evidence provided during the course of the hearing. It is correct that Mr Morrison of the respondent complained he had not had proper notice of the hearing. The claimant wanted the hearing to proceed. The Tribunal decided to proceed with the hearing because of the passage of time since the claim was made and as the matter should have been relatively straightforward. There was more than ample time in the intervening period for a proper reconciliation of payments due to or by the claimant to be made if there was some inadequacy in the original figures and there was time provided during the hearing for any such documents to be provided by the respondent. The Tribunal found itself in a very unsatisfactory position but proceeded to hear from the parties and made a judgment on the material before it.

15. The Tribunal still does not understand why a financial reconciliation was not prepared for the final hearing if one was not available before then. If there was a difference between the current position when compared with the calculation by the respondent in the ET3, such a calculation could have been made available to the Tribunal. If there was no difference, an explanation of the figures in the ET3 could have been provided but was not.

16. The respondent is dissatisfied with the outcome but the facts and the relevant issues were explored and the legal tests applied. There is nothing in what is now said which indicates that it is in the interests of justice to re-open matters. The Tribunal considers that there are no grounds for revisiting the judgment within the scope of its powers of reconsideration under Rule 70 of the Employment Tribunal Rules of Procedure 2013.

17. The respondent's application for reconsideration of the judgment dated 17 October 2023 is refused because there is no reasonable prospect of the original decision of the Tribunal being varied or revoked.

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Employment Judge Truscott KC

Date 11 December 2023