EMPLOYMENT TRIBUNALS

Claimant: **Ms A Hayward**

Respondents: **(1) MVRSS Group Ltd (dissolved) ("R1")**
(2) MVRSS Training Ltd (in creditor's voluntary liquidation)
(3) Wales England Care Ltd ("R3)

JUDGMENT

The respondent's application dated 29 December 2023 repeated on 22 January 2024 for reconsideration of the judgment sent to the parties on 14 September 2023 is refused.

There is no reasonable prospect of the original decision being varied or revoked.

REASONS

Background and introduction

1. Claim 1600874/2022 was treated as presented on 5 September 2022 against R1 and R2. Claim 1600909/2022 was presented on 5 August 2022 against R3. Both claims were served on all three Respondents on 20 September 2022. The Claimant brings claims of automatic unfair dismissal (pregnancy), unfair dismissal and pregnancy discrimination. No response was received by 18 October 2022. The claims were re-served on R1 and R2 on 14 November 2022 to the registered office (R1) and the insolvency practitioner.

2. On 24 November 2022 Peninsula wrote to the Tribunal advising they had been appointed to represent R3 and filed a response. They erroneously referred to the wrong claimant name in the covering email but the claim number quoted 1600909/22. The response asserted that the Claimant did not work for R3 but worked for "MVRRS Ltd". On 12 December 2022 Peninsula applied to amend the response to assert the Claimant was

employed by "MVRRS Training" which they asserted was no longer trading (R2). This response was accepted (for R3 only) on 27 January 2023 and the claims were listed for a preliminary hearing on 4 May 2023 by CVP.

3. Peninsula, on record for R3 provided a bundle for the preliminary hearing which was attended by a Ms Oseghlae. Mr Churcher, director of all Respondents also attended and was recorded as representing R1.

4. This preliminary hearing took place before Judge Harfield on 4 May 2023. Mr Churcher, who is a director of R3 and of R1 and R2 was present at that hearing. Directions were made by Judge Harfield for a preliminary hearing to determine who was the claimant's employer. Mr Churcher was told by Judge Harfield that he was unable to give evidence from Malta and if he wished to give evidence at the next preliminary hearing he would need to do so from the United Kingsom.

5. On 9 May 2023 Mr Churcher was sent the ET1 claims forms and particulars of claim for both claims as he had told Judge Harfield he had not received service on both occasions.

6. On 9 June 2023 Peninsula filed a response on **behalf of all three Respondents** advising they were instructed and an application for an extension of time to file response for R1 and R2. The covering email again erroneous misquoted a different claimant but the claim numbers and respondents were matched to these claims.

7. At a public preliminary hearing on 14 September 2023 R3 was found to be the Claimant's employer at all material times and R1 and R2 were dismissed from the proceedings. A judgment was given orally on the day and a written record of the judgment dated 14 September 2023 was sent on 19 September 2023. The Respondents did not request written reasons.

8. On 20 September 2023 Peninsula wrote on behalf of all three Respondents seeking a postponement of the final hearing on 5, 6 and 7 February 2024 on the basis Mr and Mrs Churcher were away. The hearing was subsequently re listed for 15, 16 and 17 April 2024.

9. On 6 December 2023 a different consultant from Peninsula applied for a postponement of the hearing citing the same reasons. The subject header only cited R3.

10. On 29 December 2023 the first application for reconsideration was made. This was refused on the basis it was more than 14 days after the decision was sent to the parties and there was no explanation for the delay.

11. On 22 January 2024 the Respondent repeated its application. The reasons provided for the delay in the reconsideration application were as follows.

a) The Respondent's representative (Peninsula Business Services Ltd ("Peninsula"), came off record when R1 and R2 went into liquidation and in error also came off record for R3.

b) Written reasons were not requested as Peninsula believed in error that they

had come off record for England Wales Care Ltd and not R1 or R2, which was formerly known as Wales England Care Training Ltd;

c) The consultant present at the preliminary hearing was not responsible for the day to day management of this matter and handed it back to a colleague who informed the colleague that England Wales Care Ltd and not Wales England Care Training Ltd had gone into liquidation;

d) As a result the previous consultant wrongly believed Peninsula was off the record for England Wales Care Ltd and the system was "incorrectly amended" and (for reasons that are not explained), "this was picked up and handed over [to the current consultant] on 6 December 2023. At this point this consultant had received the notice of hearing for April 2024;

e) The Respondents are resident in Malta and instructions were difficult to obtain;

f) When the consultant was made aware that R1 and R2 were "formally known as Wales England Care **Training** Ltd but for commercial reasons still marketed under the same name", Companies House was checked the information corroborated and the reconsideration application made;

g) This error could not have been picked up sooner with reasonable diligence due to the similarities of name, lack of contact with the Respondent and the system showing Peninsula had come off record and therefore documents no longer showing of their system (sic).

12. I also set out the reasons why the Respondent say the Judgment should be reconsidered as provided in their application dated 29 January 2023. These were:

a) Judge Moore had made a finding of fact in error from the evidence in the bundle that Wales England Care Limited (sic)[1].

b) The grounds are:

c) The contract handbook had MVRRS Training Limited and Wales England Care Limited on the header. The Contract handbook clearly has the logos for MVRSS Training Limited (R2 and Wales England Care Training (this now being asserted as the former name of R1 and R2). [2]

d) Emails and signatures were all Wales England Care Limited and the Claimant's lanyard. It is asserted the email signature of the Claimant, her line manager and Mr Elliot all had the signature "Wales England Care Training" which again is not part of R3.

e) The application goes on to rehearse the evidence heard at the last hearing regarding the contract handbook header and logo (citing R2 and stating the logo was Wales England Care Training not Wales England Care). It is

[1] The error is not then set out the sentence ends there.

[2] The application quoted company numbers for these companies but these are not on the contract handbook header or logos in the evidence bundle.

submitted that Mr Elliot, who was the witness for the Respondent "omitted to put logos on the contract statement which should have shown R1 and Wales England Care Training." This error is asserted to have come to light after Mr Churcher's attendance at the hearing on 14 September 2023.

f) It repeated assertions made at the hearing on 14 September 2023 that neither R2 nor R3 employed the claimant. It then went on to explain why the Claimant and her colleagues had email signatures citing R3 as well as the Claimant's lanyard.

g) Evidence had not provided to the Tribunal namely an offer letter and Companies House documentation. The reason provided for the omission of these documents in the bundle for the hearing on 14 September 2023 was that they were not obtained until after Mr Elliot had been dismissed. There was no explanation as to why the copies of the Companies House documentation provided did not contain former names nor nature of the business. The Respondent asserted had the correct copies been supplied this would have "clearly shown the former names" and also the differing nature of R3 to R1 and R2.

The Law

13. The Tribunal's power to reconsider judgments are contained within Rules 70 to 73 of the Employment Tribunal Rules of Procedure 2013. Rule 70 provides it may confirm, vary or revoke the judgment where it is necessary in the interest of justice. The process is contained with Rule 72. Rule 73 deals with the tribunal's ability to reconsider a decision of their own initiative. Where the tribunal proposes to do so, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72 (2) as if an application had been made and not refused.

14. The Tribunal must follow Rule 72 in the order provided for within that rule (TW White & Sons Ltd v White UKEAT 0022/21). In exercising the power the Tribunal must do so in accordance with the overriding objective.

15. In Ministry of Justice v Burton and another [2016] ICR 1128, Elias LJ approved the comments of Underhill J in Newcastle upon Tyne City Council v Marsden [2010] ICR 743, 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. Further, that 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.

16. In Liddington v 2Gether NHS Foundation Trust UKEAT/0002/16 Simler P held:

"..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 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. Tribunals have a wide discretion whether or not to order reconsideration, and the opportunity for appellate intervention in relation to a refusal to order reconsideration is accordingly limited.

[35] Where, as here, a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application. It seems to me that the Judge was entitled to conclude that reconsideration would not result in a variation or revocation of the decision in this case and that the Judge did not make any error of law in refusing."

17. Newcastle Upon Tyne City Council v Marsden UKEAT/393/09 was a case where claimant had been advised not to attend a pre hearing review to determine whether he was a disabled person. The judge dismissed the claim on the basis the claimant had failed to provide evidence. On a later application for reconsideration, the decision was revoked on basis that counsel for the claimant had misled the tribunal. This decision was upheld by Underhill, J who discussed the importance of finality of litigation at paragraphs 17:

"The principles that underlie such decisions as Flint and Lindsay remain valid, and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles. In particular, the weight attached in many of the previous cases to the importance of finality in litigation or, as Phillips J put it in Flint (at a time when the phrase was fresher than it is now), the view that it is unjust to give the losing party a second bite of the cherry seems to me entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunals decision on a substantive issue as final (subject, of course, to appeal)"

18. In Ladd v Marshall 1954 3 All ER 745, CA the Court of Appeal established that, in order to justify the reception of fresh evidence, it is necessary to show:

- that the evidence could not have been obtained with reasonable diligence for use at the trial:

- the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive:

- the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

19. Outasight VB Limited v Brown UKEAT/0253/14 is a case about reconsiderations where a party wishes to adduce fresh evidence. In this case the EAT held that the approach in Ladd v Marshall would in most cases encapsulate what is meant by "the interests of justice". There might be cases where the interest of justice would permit fresh evidence to be adduced notwithstanding that the principles laid down in Ladd v Marshall were not strictly met.

Conclusions

20. On receipt of the application for reconsideration I decided, under Rule 72 (1) that there was no reasonable prospect of the original decision being revoked or varied and the application should be refused. I determined that the application did not set out any comprehensible reason why the application had been made three months after the written judgment was sent.

21. The application was repeated on 22 January 2024. I refuse the application for the same reason. Given the repeated application it is in the interests of justice to provide this judgment and reasons.

22. I firstly observe that the Respondent has asked to reconsider a judgment where there has been no request for written reasons. The Respondent was warned in the case management order dated 14 September 2023 that I was considering making a costs order against them on the basis that their position that they had not employed the Claimant had no reasonable prospect of success and was unreasonable.

Reasons for delay in making the application

23. I have found the reasons put forward to be either factually inaccurate, misleading or incomprehensible. I deal with each one in turn below.

The Respondent's representative (Peninsula Business Services Ltd ("Peninsula"), came off record when R1 and R2 went into liquidation and in error also came off record for R3.

24. Firstly, Peninsula say they came off record when R1 and R2 went into liquidation. R1 did not go into liquidation. It was dissolved on 18 July 2023. R2 went into Creditors Voluntary liquidation with the practitioner being appointed on 7 September 2022.

25. At no time has Peninsula come off record for any of the Respondents. Peninsula have continued to be on record for all three Respodents and have made a number of applications after the above events including, applications to postpone the final hearing in September and December 2023 (see above). This position is therefore not accurate.

Written reasons were not requested as Peninsula believed in error that they had come off record for England Wales Care Ltd and not R1 or R2, which was formerly known as Wales England Care Training Ltd;

26. I do not know who "England Wales Care Ltd". They are not a party to these proceedings. I assumed this is a typo and should read "Wales England Care Ltd. Even so, I am unable to understand this paragraph as it does not make any sense. In the above paragraph Peninsula say they came off record when R1 went into liquidation etc. They now appear to be saying in the next paragraphs they believed in error they had come off record for R3 and not R1 or R2. This does not provide any comprehensible explanation as to why written reasons were not requested as at all material times Peninsula remained on record for all three Claimants and continued to represent them.

    The consultant present at the preliminary hearing was not responsible for the day to day management of this matter and handed it back to a colleague who informed the colleague that England Wales Care Ltd and not Wales England Care Training Ltd had gone into liquidation; and

    As a result the previous consultant wrongly believed Peninsula was off the record for England Wales Care Ltd and the system was "incorrectly amended";

27. I will repeat that I do not know who "England Wales Care Ltd" are. They are not a party to these proceedings and are not a company registered on Companies house. Even if I assume this is another typo, I am unable to understand this submission.

    This error could not have been picked up sooner with reasonable diligence due to the similarities of name, lack of contact with the Respondent and the system showing Peninsula had come off record and therefore documents no longer showing of their system (sic).

28. At best, the grounds for the delay in making the application for reconsideration appear to be that Peninsula made a series of errors in their internal administration of these claims which meant that only as of 6 December 2023 was it realised that they remain on record.

29. I am unable to follow this rationale at all. I do not say this lightly, but the explanations put forward are frankly nonsensical and inaccurate. There are grounds to conclude the application seeks to mislead the Tribunal. Peninsula remained on record throughout and corresponded with the Tribunal and the Claimant and continued to correspond with the Tribunal throughout. Further, if the Respondent's legal representatives were confused by the similarity of names of the varying companies and former company names then this only reiterates why there was a need for a preliminary hearing to consider the correct employer. It does not explain or provide any evidence that Peninsula told the Respondent they had come off record, had they done so, the Respondent could have asked for written reasons themselves.

Reasons for asking for the judgment to be reconsidered

I now deal with the grounds advanced as to why the judgment should be reconsidered.

30. *The contract handbook had MVRRS Training Limited and Wales England Care Limited on the header. [3]The Contract handbook clearly has the logos for MVRSS Training Limited (R") and Wales England Care* ***Training*** *[4](this being asserted as the former name of R1 and R2)..*

31. *Emails and signatures were all Wales England Care Limited and the Claimant's lanyard. It is asserted the email signature of the Claimant, her line manager and Mr Elliot all had the signature "Wales England Care Training" which again is not part of R3.*

32. The application goes on to rehearse the evidence heard at the last hearing regarding the contract handbook header and logo (citing R2 and Wales England Care Training). It is submitted that Mr Elliot, who was the witness for the Respondent "omitted to put logos" on the contract statement which should have shown R1 and Wales England Care Training. This error is asserted to have come to light after Mr Churcher's attendance at the hearing on 14 September 2023.

33. It repeated assertions made at the hearing on 14 September 2023 that neither R2 nor R3 employed the claimant. It then went on to explain why the claimant and her colleagues had email signatures citing R3 as well as the Claimant's lanyard.

34. The evidence in the bundle included multiple documents between the Claimant, Respondent and other individuals and companies with a range of different company names, logos, email signatures and addresses. In particular, the claimant's contract of employment was titled "MVRSS Ltd Wales England Care Ltd". Documents that were used in conjunction with stakeholders by the Claimant were labeled as R3 documents. The job description produced was titled "Wales England Care". All of these matters were considered at the preliminary hearing and findings of fact made on the basis of the evidence. It was plain that the Respondent has taken no care to establish clear demarcations between the legal entities which led to the need to have a hearing to establish the correct employer in the first instance.

35. None of the above matters are new. The Respondent is cherry picking parts of the evidence by the Tribunal that mention "Wales England Care Training" and asserting that there has been an error of law (although the error has not been explained it appears to be that the judgment is flawed as the Tribunal did not take account of the word "Training").

36. It cannot be grounds to reconsider a judgment where a party has produced a contract of employment as evidence and then assert they should have added logos to that contract. The contract was presented as the Claimant's contract.

37. I also have very serious concerns as to the explanation given for why the error came to light which was that it only came to light "after Mr Churcher's attendance at the hearing on 14 September 2023". **Mr Churcher did not**

[3] This must be a reference to one of the findings of fact at the preliminary hearing but as there are not written reasons it is unclear on what basis this is advanced.

[4] My emphasis

attend the hearing on 14 September 2023. This is another example of the Respondent and / or Peninsula misleading the Tribunal in this application.

38. The issue as to the correct employer of the Claimant was considered at a preliminary hearing. The Respondents were represented by Peninsula at that hearing. There were directions for disclosure, bundles and witness statements, which was the time to present all of the relevant evidence. At all material times the Respondent had the opportunity to explain and present evidence about a former name of R1 and R2 (Wales England Training Ltd) but they did not. The Tribunal heard the evidence and read the documents and made findings of fact and decided that R3 was the employer. The position was considered to be so obvious that I have advised of my own volition I am considering a costs order against R3 for unreasonably asserting they were not the employer.

39. In my judgment, the Respondent seeks to re litigate the issues that were decided at the last preliminary hearing. There can be no prospect of a party repeating previous assertions that they were not the employer and expect this can be grounds for revoking or varying a judgment.

40. In respect of the purported new evidence that has come to light. This has not been produced. It is asserted that there is an offer letter to the Claimant that Mr Elliott should have produced but he did not which "would have clarified the matter of the Claimant's employer". It is asserted this could not have been previously obtained with reasonable diligence but there is no explanation as to why this is the case. Furthermore, it would have only been one of many documents and other physical evidence (staff badge, lanyard etc) that had to be considered.

41. Firstly, the bundle did contain an email from Mr Elliot attaching a standard contract of employment and offer letter. It was described on the index as a "Template welcome letter and offer email". It was not addressed to the Claimant but to another individual. This did not assist the Respondent at all as all of the company information (save Mr Elliot's sign off signature which stated "Wales England Care Training") on the covering email was R3 with no mention of the company names of R1 and R2.

42. Secondly, the Respondent had been directed to undertake disclosure by Judge Harfield. The Respondent prepared the bundle. There is no explanation as to why the Claimant's offer letter was not disclosed and is now relied upon as new evidence. In accordance with the principles in **Ladd v Marshall 1954 3 All ER 745, CA** there are no grounds to support the contention it could not have been obtained with reasonable diligence. I would also now have grave concerns as to the authenticity of any such document given the Respondent's assertions that the Claimant's contract should have been altered by adding logos before going into the trial bundle.

43. In regard to the Companies House documentation purported new evidence. This was not copied with the application but it appears to be a reference to R1 and or R2 formerly being called "Wales England Care Training Ltd". Companies House documentation is easily obtainable from Companies House and one must assume that the Respondents were in possession of

their own company documentation that could have been produced at the hearing. Furthermore, the bundle did contain evidence from Companies House in the way of four pages of screen shots detailing the overview page and peoples page for each of the three companies. Evidently further information could have and was not adduced.

44. Lastly, I observe that the Respondents did not even produce a witness statement for the preliminary hearing. It was decided in the interest of justice to allow Mr Elliott to adopt the position statements as his evidence and he gave detailed evidence about the relationship between the different entities. All of this was considered at the hearing. The Respondent's case was poorly prepared and they now seek to relitigate the evidence and have in effect a second chance to put the case in order, having heard all of the Claimant's evidence. This would not be in accordance with the principles of finality of litigation nor would it be in the interests of justice.

45. In the circumstances, the application is refused.

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Employment Judge S Moore

Date: 24 January 2024
JUDGMENT SENT TO THE PARTIES ON 5 February 2024

FOR THE TRIBUNAL OFFICE Mr N Roche