EMPLOYMENT TRIBUNALS

Claimant: Miss G M Edwards

Respondent: Jam'n'vegan

JUDGMENT ON RECONSIDERATION

1. The respondent's application dated **18 December 2023** for reconsideration of the judgment sent to the parties on **12 December 2023 (and corrected on 23 January 2024),** and/or the respondent's application for an extension of time to present his response dated **20 January 2024** is refused. The original decision is confirmed.

2. On the Tribunal's own initiative, the Tribunal considers that it is necessary in the interests of justice to reconsider the elements of the Tribunal's Judgment (as corrected on 23 January 2024) which relate to remedy (i.e. compensation). A hearing will be listed for that purpose.

REASONS

The Law

Reconsideration

1. Rules 70 to 73 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provide that:

   Rule 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.

Rule 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.

Rule 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 personal 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.

(2) 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 by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

Rule 73

Where the Tribunal proposes to reconsider a decision on its own initiative, 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).

2. In considering whether to grant the reconsideration, the Tribunal should have regard to the interests of both parties, along with the public interest in finality of litigation (**Outasight VB Ltd v Brown 2015 ICR D11 EAT**).

Extension of Time for Submitting Response

Rule 20

(1) An application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall set out the reason why the extension is sought and shall, except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation of why that is not possible and if the respondent wishes to request a hearing this shall be requested in the application.

(2) The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.

(3) An Employment Judge may determine the application without a hearing.

(4) If the decision is to refuse an extension, any prior rejection of the response shall stand. If the decision is to allow an extension, any judgment issued under rule 21 shall be set aside.

3. The key case is **Kwik Save Stores Ltd v Swain and others [1997] ICR 49**. Whilst all relevant factors should be considered, there are three essential principles to address:

    a. The explanation for the delay;
    b. The balance of prejudice; and
    c. The merits of the defence.

The respondent's application for reconsideration / application for an extension of time to present his response

4. I address these matters together given that they are interlinked.

5. The respondent initially applied for reconsideration on 18 December 2023, following receipt of the Tribunal's judgment. Mr Parchment on behalf of the respondent explained that the reason for this was that he had not received the claimant's claim (or correspondence relating to that) because of being locked out of his business premises, and so he had been unable to defend the claim. The claimant objected to that request by email dated 19 December 2023.

6. Following correspondence from the Tribunal on 8 January 2024 seeking further information about the matter and informing the respondent that if he wished to request an extension of time in which to submit a response to the claim, he needed to make that application with a draft response form, the

respondent did so by email dated 20 January 2024. The claimant again objected to the respondent's request by email dated 22 January 2024.

7. I considered that it could not be said that there were no reasonable prospects of the original decision being varied or revoked and therefore I did not refuse the application at that stage. I wrote to the parties again with further questions for the respondent on 6 February 2024 (noting that both parties had already provided comments and a response to the application), and asked the parties to comment on whether the application could be determined without a hearing, as required by Rule 72(1) of the Employment Tribunal Rules. Both parties provided further information during the course of February 2024, and both submitted that the matter could be dealt with without a hearing.

8. Under Rule 72(2) of the Employment Tribunal Rules, where the application has not been refused under Rule 72(1) on the basis of having no reasonable prospect of the decision being varied or revoked, the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice to the parties regarding the application, 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. At this stage, given the detailed information provided to me by both parties and the parties' stated desire not to have a hearing, I decided that a hearing was not necessary in the interests of justice.

9. By this time, I had however identified a further ground for reconsideration on my own initiative (which I address below). Therefore, the Tribunal wrote to the parties again on 8 March 2024, explaining that:

    a. I had decided that a hearing was not necessary in the interests of justice;

    b. In accordance with Rule 72(2), the parties were given a further opportunity to make written representations despite their previous detailed submissions;

    c. I advised the parties that I was proposing separately, and on my own initiative, to reconsider the Judgment on remedy on the basis of the information now provided to me by the parties during the course of considering the respondent's reconsideration application. I explained that I proposed to hold a hearing to reconsider that matter, and asked the parties whether this changed their view on whether the respondent's application should be dealt with at a hearing or not. Both parties provided some further comment and both confirmed their view remained that the respondent's application could be dealt with without a hearing.

10. I have therefore considered the respondent's application without a hearing, and have considered whether to grant the respondent's application for an extension of time to submit his response to 20 January 2024 (the date on

which the draft response was presented). On reconsideration a decision may be confirmed, varied or revoked.

11. Addressing first the application for an extension of time in which to submit the respondent's response, and turning first to the explanation for the delay. The respondent's position is that, by the time that the claimant submitted her claim form, he was locked out of his business premises due to debts and that he believed the claim form had been sent to those premises after he was locked out and so he did not see the claim form. He says that he did not arrange for mail to be forwarded because he "didn't know what was happening in his life after losing everything and having our first child". He referred to being in a depressive state, although later clarified that he had not been diagnosed with depression as he had tried to tackle the matter himself and had no medical evidence. Mr Parchment said that he did not change the respondent's registered address at that stage as he had nowhere to change it to, however he later made a decision to try to get the business back up and running in 2024 and so changed it on companies house in November 2023 (which then led to Mr Parchment being in receipt of the Tribunal Judgment following the hearing in December 2023).

12. The claimant pointed out in her comments that she had in fact emailed Mr Parchment about her claim during the course of proceedings (and received no response). Mr Parchment's explanation for this was that he had restricted any conversation with the claimant by email because of his mental health and feeling that she was attempting to disrupt the business. He said that he therefore would not have received the emails she sent.

13. Whilst I can understand that it would have been a difficult time for the claimant during the course of 2023 given his financial situation and being locked out of this business, I consider that there was no good reason why he did not arrange for the forwarding of his post. By not doing that, he inevitably ran the risk of not seeing something important. This is further compounded by his decision to block emails from the claimant. This was not a situation which arose over a short period of time but for a number of months: the claim form was sent to the respondent on 25 May 2023 and a letter explaining that no response had been received was sent to the respondent on 27 October 2023. The hearing was on 11 December 2023.

14. Turning to the prejudice to the parties, if I do not vary/revoke the Judgment and do not allow the respondent's response to be submitted late, this will mean that he cannot defend the claim and the Judgment will stand (subject to the further reconsideration issue below). However, if I do vary/revoke the Judgment and/or allow the respondent's response out of time, this would mean that the proceedings would need to go back to the beginning. A new hearing would have to be listed, with all the preparation for hearing that this would entail. The claimant attending a hearing in December 2023 where her claim has already been determined. To reopen that matter now and start the process again from almost the beginning would be of significant prejudice to the claimant. These points apply equally to the consideration of the interests of both parties for the purposes of the reconsideration application.

15. In relation to the merits of the case, it is relevant to note initially that the respondent accepts liability for a redundancy payment. The respondent says that it did make the claimant redundant and appears to accept that it did not make a redundancy payment to the claimant. The respondent has not addressed its position on holiday pay specifically. However, the respondent does dispute the other elements of the claim and seeks to provide evidence to show that a consultation process was carried out with the claimant. However, it is not clear what the respondent's position is in relation to the claimant's assertion that a colleague was given a role that she should have been considered for.

16. Taking everything into account, and having regard to the Overriding Objective to deal with cases fairly and justly, I conclude that the application for an extension of time should be refused, and that the original judgment of the Tribunal is confirmed. The respondent has not satisfied me that it should be granted permission to submit a late response to the claimant, and the respondent's request to do so is refused. Therefore, the respondent would still not be permitted to participate in any hearing except to the extent permitted by the Judge. There is public interest in the finality of litigation: the final hearing has already taken place and evidence heard from the claimant at that hearing. A determination of the claim was properly reached and there would be significant prejudice to the claimant if she were now required to re-litigate her claim in its entirety. Although there is clear prejudice to the respondent given that this will mean that they cannot defend the claim, when having regard to the interests of both parties and the circumstances surrounding the respondent's applications, I do not consider that it would be appropriate to vary or revoke the original decision (as corrected on 23 January 2024).

Reconsideration on Remedy

17. In accordance with Rule 70 of the Employment Tribunal Rules, a tribunal may reconsider any judgment on its own initiative where it is necessary in the interests of justice to do so. That decision may be confirmed, varied or revoked.

18. During the course of considering the respondent's application for reconsideration of the Judgment as a whole (i.e. including liability), it has come to my attention that there is additional evidence which was not available to the Tribunal at the hearing on 11 December 2023, which indicates that the decision on remedy may have been incorrect.

19. Although at the hearing on 11 December 2023, from the information available it appeared that the claimant's employment ended on 1 February 2023, there is new evidence which suggests that the claimant may have received statutory sick pay beyond that date. This could mean that the date on which her employment ended (and from which compensation was calculated) is incorrect.

20. The respondent has also provided new information to indicate that the last member of staff left the respondent's employment in April 2023, and that after that date the respondent had no employees (although I accept that the claimant submits that the business is now operational again). If that is

correct, then this would be relevant for the purposes of remedy as it may be the case that, if the claimant had not been unfairly dismissed, she would have been dismissed in any event in April 2023 when the respondent ceased to operate.

21. Whilst the respondent's request to be permitted to submit a late response to the claim / application for reconsideration has been rejected, it is necessary in the interests of justice to reconsider the decision on remedy in circumstances where otherwise the claimant may be receiving more compensation that she should be entitled to. Although there is a public interest in the finality in litigation so as far possible, as held in **Outasight VB Ltd v Brown 2015 ICR D11,** EAT, the Tribunal does have a broad discretion to determine whether reconsideration is appropriate. In making that assessment, regard should be had not only to the interests of both parties. Whilst I recognise that this could result in the claimant's compensation award being revisited, the purpose of compensation in these circumstances is to compensate, and not to punish the respondent, and therefore it is important that it properly reflects the claimant's true losses.

22. No decision on reconsideration has as yet been taken, however in accordance with Rule 73 of the Employment Tribunal Rules a hearing shall now be listed to determine this matter. If the original Judgment on remedy is varied or revoked, there will be a re-hearing on remedy immediately afterwards to determine what the appropriate award of compensation should be, at which I consider that the respondent should be permitted to participate. In order to prepare for that hearing:

    a. The parties shall work together to agree a file of documents containing all the documents they wish to rely on. This should include the claimant's claim form and any Tribunal correspondence, and should be indexed. The respondent shall be responsible for sending the file to the Tribunal at least one week prior to the hearing.
    b. If the parties wish to present oral evidence about remedy, they should prepare written witness statements setting out everything they want to say. These should be exchanged with each other at least two weeks prior to the hearing and should be sent to the Tribunal at the same time as the file referenced above.

Employment Judge Edmonds

Date: 26 March 2024