EMPLOYMENT TRIBUNALS

Claimants: **Chloe Naylor**
Megan Anderson

Respondents: **Hugh Sims-Hilditch**
Hildare Stud Farm Limited

Heard at: **Bristol Employment Tribunal (in person)**
On: **18 December 2023 at 12.00**

Before: **Employment Judge Hogarth**

Representation:
Claimants: Mr Adrian Naylor
Respondent: Mr Alan Roberts, counsel

JUDGMENT UPON RECONSIDERATION

The judgment of the tribunal is that the judgments given on 7 December 2022 are confirmed.

REASONS

Introduction

1. The claimants have applied for a reconsideration of the judgments, given orally at a preliminary hearing on 7 December 2022, striking out all their claims against both respondents under Rule 37 of the Employment Tribunal Rules of Procedure 2013 ("ET Procedure Rules"). Formal written judgments (dated 8 December) were sent to the parties on 15 December 2023. Written reasons were sent to the parties on 28 February 2023.
2. The claims were for unfair dismissal and associated pay matters arising from the claimants' dismissal by the second respondent on 8 July 2021 from their employment as grooms at a stud farm.
3. Mr Naylor, the first claimant's father, has acted for both claimants since their dismissal and has been their sole point of contact with the Tribunal. He is not legally qualified or experienced in employment proceedings.

Factual and procedural background to the reconsideration application

4. The background prior to the 7 December hearing is set out in paragraphs 2 to 18 of the written reasons for my decision to strike out the claims.
5. Claim forms presented in September 2021 named the first respondent (Mr Sims-Hilditch) and his wife as respondents. The claim against Mrs Sims-Hilditch was rejected by the Tribunal. It is not clear why the claim against Mr Sims-Hilditch was not rejected at that stage too as there was no Early Conciliation ("EC") certificate naming either of them as a prospective respondent. The claimants had each obtained an EC certificate naming their employer Hildare Stud Farm Limited ("Hildare"), but that company was not one of the original respondents. At a preliminary hearing on 30 August 2022 Hildare was added as second respondent by Employment Judge Cadney, on a provisional basis.
6. The claims were struck out because I considered they had no reasonable prospect of success at the final hearing. The claims were bound to fail against Mr Sims-Hilditch because (a) it was clear (and Mr Naylor had accepted) that he was never the claimants' employer, and (b) the claimants had failed to obtain an EC certificate naming him as a prospective respondent, which made the proceedings against him a nullity from the start.
7. The claims against Hildare were well out of time when it was added as a party on 30 August 2022. In my judgment the claimants had no reasonable prospect of meeting the first part of the test for extending time in section 111(2)(b) of the Employment Rights Act 1996 ("ERA 1996"), which would have required the claimants to show that it was "not reasonably practicable" for them to bring the claims against Hildare in time, that is within the period of 3 months plus the extension for early conciliation ("the initial time period"). I considered the case for meeting that requirement to be extremely weak because there was no adequate explanation as to why, having correctly obtained EC certificates naming Hildare, the claimants failed to claim against it within the initial time period but instead presented claims against others.
8. That decision meant that the second issue under section 111(2)(b) of ERA 1996 did not arise. That issue was (assuming it was not reasonably practicable to bring the claims in time) whether the claimants had a reasonable prospect of showing that the claims were brought against Hildare within a reasonable period after the end of the initial time period. The parties made submissions at the 7 December hearing on that issue. Mr Naylor maintained that much of the delay in Hildare being added as a party was due to significant delays by Tribunal staff in processing the claim forms. The respondents relied on the fact that (a) he was informed by the first respondent on 30 March 2022 that he was not the right respondent and the employer was Hildare, after which (b) he continued to pursue the claims against Mr Sims-Hilditch as the employer and took no action in relation to Hildare. I mention this because if Mr Naylor had succeeded on the first issue, the second issue would then have had to be decided, and the claims would still have been

struck out if I had concluded there was no reasonable prospect of his showing that the claims were brought within a reasonable period.

9. Mr Naylor applied in December 2022 for reconsideration of my judgments (which was premature) but he confirmed in writing shortly after he was sent the written reasons that he wished the application to proceed. The application was, therefore, received in time under Rule 71 of the ET Procedure Rules. In accordance with Rule 72 I considered whether the application should be refused because there was "no reasonable prospect of the original decision being varied or revoked". I decided not to refuse it at that stage and the parties were notified of that decision on 14 March 2023.
10. On 27 March 2023 Mr Naylor wrote to the Tribunal to ask for reconsideration to be carried out by another judge owing to what he described as bias on my part during the 7 December hearing. I read this as an application for me to be recused from the case on the grounds of actual or apparent bias. I was directed by Regional Employment Judge Pirani to deal with the matter, in accordance with established practice in the South West Region.
11. Mr Naylor also appealed to the EAT against the decision for me to deal with the reconsideration. However, that did not directly impact on the need for me to deal with the recusal application. So I carefully considered the grounds for recusal raised by Mr Naylor and on 20 July 2023 the parties were sent orders I made (a) refusing the recusal application, with written reasons and (b) giving further directions in relation to the reconsideration proceedings. Among other things, I directed that there should be a hearing to reconsider the judgment.
12. A video reconsideration hearing was listed for 12 October 2023, but on 25 September the respondents sought a postponement, granted by Employment Judge Bax on 11 October 2023. It proved difficult to re-list the case. On 20 November 2023 the case was relisted for a video hearing on 1 December, but Mr Naylor applied for it to become an in-person hearing. I directed the case to be heard in person in Southampton, but the parties then asked for it to be moved to Bristol. That was ordered, but Mr Naylor was by then unable to arrange to get to Bristol in time for a hearing on 1 December. That date was vacated and eventually the case was relisted for 18 December 2023.

Documentation

13. I was provided with a 276-page bundle consisting of (a) the respondents' bundle for the 7 December hearing, (b) the claimants' supplementary bundle for that hearing, (c) some payslips and related documents sent by Mr Roberts to the Tribunal and Mr Naylor during the 7 December hearing and (d) later correspondence involving the Tribunal. The later correspondence includes what I refer to below as the pleadings in relation to the reconsideration application, namely Mr Naylor's original application for reconsideration (28 December 2022), the respondents' response (5 May 2023) and Mr Naylor's reply to the response. Those documents set out the parties' positions.
14. I was also provided at my request with the letters dismissing the claimants from their employment with the second respondent and some related messages. I was concerned that the letters were not in the bundles for the 7 December hearing, despite being of possible relevance to Mr Naylor's case

for extending time. The respondents had removed documents relevant to the identity of the claimants' employer, because that had been established at the 30 August hearing. Mr Naylor submitted his own short bundle shortly before the hearing, but this did not include the dismissal letters. As it turned out, they did not assist his case. During his submissions, Mr Roberts appeared to think that Mr Naylor was relying on the dismissal letters and other messages, but Mr Naylor later clarified that he was not relying on them and he had produced them simply because he was asked to do so.

The applicable law

15. The legal ground for reconsideration is set out in Rule 70, namely that it is necessary in the interests of justice to reconsider the judgment That governs both the initial decision under Rule 72(1) (whether to reject the application) and the decision to be made after a reconsideration hearing under Rule 70 (whether to confirm, vary or revoke the judgment). The Tribunal must, in dealing with a reconsideration, seek to give effect to the overriding objective to deal with cases fairly and justly: see Rule 2 of the ET Procedure Rules. This includes ensuring that the parties are 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
16. Consideration of whether reconsideration is "necessary in the interests of justice" allows the Tribunal a broad discretion which must be exercised judicially which means 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 in there being finality in litigation.
17. 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 that earlier case law (decided when the legal test for what was then called a "review" was expressed slightly differently) cannot be ignored. The courts have repeatedly emphasised the importance of finality (*Flint v Eastern Electricity Board [1975] ICR 395*) which militates against the discretion being exercised too readily; and in *Lindsay v Iron sides Ray and Vials [1994] ICR 384* Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review.
18. Reconsideration is not an option that is there simply to enable the losing party to ask the judge to make a second decision. In *Liddington v 2Gether NHS Foundation Trust* UKEAT/0002/16 Simler P said:

> "..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. 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."

19. 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 68/60 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".

20. In *Redding **v** EMI Leisure Ltd EAT 262/81* the claimant appealed against the refusal by an employment tribunal to accept her application for a review, saying that it was in the interests of justice to do so because she had not understood the respondent's case and had failed to do herself justice in presenting her case. The EAT commented that:

> 'When you boil down what is said on [her] 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 [her] not to do herself justice. It was, we are afraid, her own inexperience in the situation.' The appeal failed.

21. Many of the reported cases in this area relate to the initial stage under Rule 72(1) but the principles articulated in them are also applicable to the determination of a reconsideration application at a hearing. The case law indicates that the grounds on which the judge can properly vary or revoke an earlier judgment are in practice relatively limited. That is because, while the interests of justice test is a broad one, the result always involves considering the competing interests of both parties as well as the public interest

22. I should also mention a case relied on in his submissions by Mr Roberts, namely *Ladd v Marshall* [1954] 3 All ER 745, a decision of the Court of Appeal about the admission of new evidence on an appeal. In that case Denning LJ laid down the following rule.

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

That statement of principle is relevant to the consideration of new evidence on a reconsideration of an employment tribunal's judgment.

The issue for determination at the reconsideration hearing

23. It follows that the issue for me following the reconsideration hearing is whether it is in the interests of justice to exercise the power under Rule 70 to vary or revoke the judgments striking out the claims in this case, taking account of the limits placed on the use of the power under the case law. I must determine that issue in the light of (a) the grounds put forward by Mr Naylor in his written application and at the hearing and his oral submissions on them and (b) Mr Roberts' written response and oral submissions. I have considered the documents in the bundle so far as relevant to those matters.
24. Mr Naylor general position was that he had made a genuine mistake in bringing the claims against the "wrong" respondents and he invited me to exercise my discretion to allow the claims to be determined at a hearing. However, as explained above, the issue at a reconsideration hearing is not one about an exercise of discretion by the judge as to whether the claims should proceed, but the much narrower issue set out in paragraph 23.
25. Mr Roberts' position was that Mr Naylor had not raised any change in circumstances following the 7 December hearing. Nor had he produced any new evidence that was relevant or admissible. Nothing raised came into any of the categories of matter that could as a matter of law justify revoking or varying a judgment and there was no basis for exercising my powers under Rule 70. Mr Roberts' referred to the interests of justice test as interpreted by the case law: the hearing should not be used as a rehearing of matters already heard. He said that the usual sorts of reason for altering or revoking a decision were mentioned in para 9 of his Response to the application i.e. a material change of circumstances following the judgment or new evidence coming to light which could not have been known or reasonably foreseen at the time. While that is broadly correct as far as it goes, in my view the interests of justice test is perhaps a little broader. For example some procedural failures might potentially be capable of being put right through reconsidering a judgment (see paragraphs 19 and 20 above).
26. Mr Naylor urged me to treat the matters he raised as sufficient to lead me to vary or revoke my decision to strike out the claims. I consider below whether any of the grounds he has raised are sufficient to lead me to do that.

The reconsideration hearing

27. After an opening statement Mr Naylor presented his case, to which Mr Roberts responded. Mr Naylor then briefly replied. Mr Roberts then came back on two factual matters Mr Naylor had mentioned in his reply.

The decision to strike out the claims against the first respondent

28. Mr Naylor has not called into question the correctness of my decision to strike out the claims against the first respondent on the basis described in paragraph 6 above and set out more fully in my original written reasons.

29. As no grounds have been put forward for varying or revoking that decision, I confirm my judgments striking out the claims against the first respondent.

The decision to strike out the claims against the second respondent

30. What follows relates to the decision to strike out the claims against the second respondent on the basis that the claimants had no reasonable prospect of showing that it was not reasonably practicable for the claims against it to have been brought in time.

Mr Naylor's opening statement

31. Mr Naylor made an opening statement explaining how he was seeking justice for two young ladies who had been unfairly summarily dismissed for gross misconduct, with no prior warnings and previously good reports for their work. He referred to the reasons why the claimants regarded the dismissals as unfair and why the actions of Mr Sims-Hilditch (including giving only 2 weeks' notice to quit their accommodation) were vexatious and vindictive. They had been seeking justice as a matter of principle rather for compensation. In this regard I note that the respondents' have always disputed the claims and the claimants' main factual assertions, maintaining that the dismissals were fair.
32. Mr Roberts did not address this statement in any detail because it related to the merits of the claims rather than the issue at the hearing. Mr Naylor was saying the original claims had merit and the claimants should be allowed to have them determined properly. At the 7 December hearing I was of course acutely aware that striking out the claims against Hildare was a serious step that would deprive the claimants of the chance to have the clams determined on their merits. However, as I explained at the time, I was required to determine in accordance with the law the specific issues that arose on the respondents' application to strike out the claims. The merits or otherwise of the claimants' claims were not directly relevant at the 7 December hearing. Nor were they directly relevant at the reconsideration hearing and for that reason nothing in Mr Naylor's statement disclosed any valid ground for varying or revoking the decision to strike out the claims.

Grounds for reconsideration raised orally at the hearing

33. Mr Naylor mentioned two grounds at the hearing to which Mr Roberts objected in his submissions as being new matters that were neither included in Mr Naylor's pleadings nor the subject of an application to amend. He maintained that the only proper grounds for consideration were those in the application document. There was force in those submissions, but I consider that as a layman Mr Naylor was unlikely to have been aware of the need to seek leave to amend his grounds and. if he had done so. I consider it likely that he would have been permitted to amend. Also, it appears to me that his second ground (ground B below) was to some extent founded on matters set out in his written application (ground E below). I have concluded that it is right for me to address in these reasons the matters he put forward orally, despite

Mr Roberts' objections, in addition to the specific matters mentioned in Mr Naylor's written pleadings.

A: Mr Naylor's explanation for making a genuine mistake in claiming against the wrong respondents

(i) The parties' main submissions

34. Mr Naylor stated that he made a genuine mistake in proceeding against Mr and Mrs Sims-Hilditch rather than Hildare. He had worked out that the claimants could not bring unfair dismissal claims without 2 years' service but was very confused by the fact that for about two thirds of their employment, the employer was not Hildare. He had not found any precedent for how to deal with a case like that. He had asked for details of the company structure on 4 occasions without success and was left with the impression the employers were Mr and Mrs Sims-Hilditch, who were the face of the company and the one "constant" throughout their employment. He said nothing changed in the claimants' employment when their employer changed to Hildare in September 2020. Mr Naylor then referred to the fact that he submitted the ET1 forms in September 2021. But no response from the Tribunal was received until March 2022, when the claims against Mrs Sims-Hilditch were rejected and those against Mr Sims-Hilditch accepted. He never understood why the first claim was rejected but had reasonably thought he was properly left with Mr Sims-Hilditch as sole respondent. Mr Naylor said that he put Hildare on the ACAS form because it had dismissed the claimants.
35. Mr Roberts submitted that this ground did not meet the criteria for changing my decision and, in any event, there was nothing in it. The explanation of Mr Naylor's mistake in claiming against the wrong respondents by virtue of this confusion about Hildare only being the employer for a third of the employment was completely new, but could and should have been made at the 7 December hearing. I was not entitled to consider a new explanation, certainly in the absence of new evidence that meets the *Ladd v Marshall* test for admitting new evidence. Nor was it supported by any evidence, such as a witness statement or documents in the bundle. I made findings on 7 December in relation to Mr Naylor's decision to pursue the two individuals in his ET1 forms. It was not open to him simply to ask me to re-open those facts. Mr Naylor was seeking to rely on a new explanation and have a second bite at the cherry to see if that was more successful than the explanation offered on 7 December. If it was the true explanation there was no reason why it could not have been made, or the need for it foreseen, on 7 December 2022.
36. Further, Mr Roberts said that the new explanation did not really go to the actual issue at the 7 December hearing (the test for extending time). To meet the *Ladd v Marshall* test for considering new evidence, the evidence needs to be likely to make a difference to the outcome: and this was not the case here because the explanation was logically flawed. Mr Naylor knew Hildare was the employer at the time it dismissed the claimants and the ACAS procedure was against Hildare (as employer), yet the claims were presented against Mr and Mrs Sims-Hilditch and not Hildare. Nor was any action ever taken by Mr

Naylor against Hildare even after the initial wrong respondent clearly pointed out the error to Mr Naylor in his Response to the ET1 form. The claimants themselves clearly did know Hildare was their employer in July 2021 prior to presenting their claims and it was not material whether Mr Naylor was confused about the identity of the previous employer or whether there might be a problem if the claimants did not have two years' qualifying service with Hildare. They went through EC on the basis of continuity of service for more than 2 years since starting their jobs. Also, I had decided that Mr Naylor had elected for his own reasons to pursue the claim against Mr and Mrs Sims-Hilditch and then Mr Sims-Hilditch and to link the case with another case against him. Mr Roberts also said that if, contrary to his submissions, it was open to Mr Naylor to seek to re-open the question of why he chose to pursue Mr and Mrs Sims-Hilditch and not Hildare, the issue on 7 December was not simply whether he made a reasonable mistake, but rather whether it was reasonably practicable to bring the claims against Hildare in time. Given that the claimants and Mr Naylor knew who the employer was at the date of dismissal and were able to and did pursue EC with ACAS, it was clearly reasonably practicable for them to do that.

(ii) the parties' further submissions

37. In his reply to Mr Roberts, Mr Naylor repeated that the identification of the previous employer at the 7 December hearing was new information and that he had previously been confused by the fact that the claimants did not have two years' service with Hildare and had been employed by someone else for two thirds of their employment. He had thought it was Urathon Europe Ltd. He had not been sitting on his hands but had been trying to find out who the employer was. Also, he was influenced by the Tribunal's acceptance of the claim against Mr Sims-Hilditch which he thought meant he was the right respondent. He would not have questioned that unless the Tribunal had come back to him to clarify the facts. He did not accept Mr Roberts' suggestion that the initial claims against Mr and Mrs Sims-Hilditch was linked in his (Mr Naylor's) mind with other claims by another employee. He was aware of that other case and thought he should mention it in answer to a question in the ET1 form. He had been worrying about the need for two years' service and so had been trying to find out the corporate structure (and had pursued that with the ICO) but the company would not respond to his queries.
38. Mr Roberts came back on two factual matters. First, in relation to Mr Naylor's assertion that he had tried to find out who the employer was, he referred to paragraph 71 of my original written reasons for striking out the claims: that dealt with a message in the claimants' bundle from Rob Taylor (document 2) which, on 17 September 2021, clarified that it was not Urathon but Hildare that was the employer from 8 September 2020. Also, his assertion that the fact Mrs Sims-Hilditch was the previous employer was new to him on 7 December 2022 was not consistent with the fact he named her on the claim form. But who did the claimants think had dismissed them? Not Mrs Sims-Hilditch, it appears and it would have been more consistent with what Mr

Naylor said on 7 December was his (or the claimants') misconception as to their employer before Hildare for him to have claimed against Urathon; but he did not do that. And when the remaining respondent (Mr Sims-Hilditch) informed Mr Naylor in the Response to the claim form who was the correct respondent, his response was to disagree and maintain his position that Mr Sims-Hilditch was the employer. Secondly. in relation to Mr Naylor's assertion that he had been misled by the Tribunal's "acceptance" of the claims against Mr Sims-Hilditch, that anomaly (in not rejecting it at that stage for want of an EC certificate) did not explain why he persisted with those claims. The Tribunal staff had seen no evidence and no Response, and had no way of knowing who the employer was. The Response made the position clear to Mr Naylor and there was nothing he had from the Tribunal that could have led him to think Mr Sims-Hilditch was the correct respondent.

39. Mr Naylor's final comment was that nobody ever told him who the original employer was prior to 7 December 2022, and that his entering the names of Mr and Mrs Sims-Hilditch was based on his interpretation of the ET1 form

(iii) conclusions

40. I have concluded that there is nothing in this ground that could lead me to vary or revoke my striking out decision. Although Mr Naylor asserted in his application that I had wrongly decided the claims against Hildare were out of time, there was no doubt about that fact. The issue on 7 December 2022 related to whether the claimants had a reasonable prospect of success in showing that the test for extending time in their favour was met.
41. The explanation now put forward for the mistake in September 2021 is new, and as a new factual assertion (and leaving aside questions of evidence for it) it fails, in my view, to meet the first element of the test in *Ladd v Marshall* for considering new evidence: there is no reason why, if it was as compelling a reason for the mistake as he suggested, Mr Naylor could not have relied on it at the 7 December hearing or referred to it in his claim form or in any other correspondence prior to that hearing. Mr Naylor did not show at the reconsideration hearing that the point could not have been put forward at the 7 December hearing. His new explanation put forward at the reconsideration hearing was clearly based on material within his knowledge on 7 December 2022. Moreover, on that day Mr Naylor was free to put forward whatever arguments he wished to resist the application to strike out the claims and having done so it is not open to him to have another go by putting an alternative explanation forward at a reconsideration hearing (at least where that is not related to new evidence that meets the *Ladd v. Marshall* test). Accordingly, for the reasons set out in this paragraph I do not consider it appropriate to view the ground as a potential basis for changing my decision. However, if I am wrong on that there are further reasons which would lead me to conclude that this ground is, in any event, an insufficient basis for changing the decision.
42. First, the new explanation does not in my view lead very far in terms of its impact on the decision on 7 December 2022. This is because Mr Naylor was

aware who had dismissed the claimants (Hildare) and that for the last third of their employment they were employed by Hildare. He correctly initiated EC against Hildare. His asserted confusion as to who to claim against does not in my view explain why he failed to add Hildare as a respondent at the outset, within the initial time period allowed for making the claims.

43. Secondly, at the 7 December hearing the explanation given for the mistake was rather different, and was based in part on confusion said to have been caused by the role of Urathon prior to Hildare taking over as the claimants' employer. Mr Naylor had asserted that Urathon Europe Ltd was the employer prior to Hildare, even though he did not claim against it. He had also maintained ever since presenting the claims that the claimants always regarded Mr and Mrs Sims-Hilditch as their employers and that Mr Sims-Hilditch's actions while they were employed made him, in effect, their employer. All of those matters were before me when I made my decision to strike out the claims. In my view the new way Mr Naylor put things at the reconsideration hearing was not really consistent with his previous reliance on the position of Urathon Europe and its actions (and on the actions of Mr and Mrs Sims-Hilditch) as the source of the mistake. I was left at the reconsideration hearing with the impression that Mr Naylor had attempted to re-package the facts into a new explanation so as to give him a different argument as to why he failed to claim against Hildare in time, his others having failed previously.
44. Thirdly, that impression led me to question whether the new explanation is in fact sufficiently credible as the main reason for the mistake in not claiming against Hildare in September 2021. I do not regard it as being sufficiently credible to qualify as a potential basis for changing my decision. I note in that regard that the new explanation not only does not feature as a ground for reconsideration in Mr Naylor's pleadings, but it also did not feature in Mr Naylor's submissions on 7 December 2022 or in any documentation in the bundle from before that time.
45. Finally, I agree with Mr Roberts that, in any event, the suggestion that the confusion was due to the claimants only spending a third of their employment with Hildare and two thirds with a previous employer) is not supported by any evidence, whether in a witness statement or documentation in the bundle.
46. Mr Naylor had a further point under this ground which was that he had been misled by the Tribunal's "acceptance" of his claim against Mr Sims-Hilditch. This point was mentioned at the 7 December hearing but did not appear to be relied on as adding that much to his case for extending time. Its relevance was, if anything, to the second part of the test for extending time in section 11(2)(b) (whether the claims were made within a reasonable period of time after the end of the initial time period). The response from the Tribunal was well after the end of the initial period allowed for the claims and so cannot be relevant to the first part of that test (whether it was reasonably practicable for the claims to have been made in time, in the first place). Furthermore, at the 7 December hearing Mr Naylor appeared to be relying more on what he said he had been told by ACAS staff during the EC process as the reason for

claiming against Mr Sims-Hilditch. In any event, the further point Mr Naylor was making at the reconsideration hearing does not relate to new evidence, as the letter telling the claimants that the claim against Mr Sims-Hilditch was accepted by the Tribunal was in the original bundle and a matter of record. It may be that, with hindsight, Mr Naylor would like to have put this point more forcefully at the 7 December hearing. But he had his chance to do that, and it is not now open to him to make more of the point at the reconsideration hearing in the hope of persuading me to make the decision again.

47. I agree with Mr Roberts that there was no plausible basis on which Mr Naylor could have read into the formal acceptance of the claim by the Tribunal anything about the substance of the case against Mr Sims-Hilditch or anyone else. There was no evidence and no response from the respondent at that time. But this matter is not in my view relevant to the correctness of my striking out decision, which was based on the first part of the test for extending time. That is because the acceptance of the claim took place after the end of the initial time period allowed for making the claims against Hildare, and so does not help explain why the claims were not made within that initial time period.

B: Wrong application of employment law

(i) the parties' submissions

48. Mr Naylor explained at the hearing that he had relied on a book about using employment tribunals without a lawyer. He understood from the book that it was possible to change the identity of the respondent so long as the ET1 form (naming the wrong respondent) was initially presented in time (i.e. within 3 months of dismissal plus the EC extension). I asked Mr Naylor if he had made this point at the 7 December hearing and he said he may not have articulated it properly, which was why he wanted an in-person reconsideration hearing.

49. Mr Roberts submitted that this was a new ground, complaining about an incorrect application by me of employment law. On that point, he may have misread the book or it may have simply been wrong. In any event, there is nothing in the point. Any assertion that the law allows a claimant to apply to amend a claim by naming a new respondent at any time, without time issues being relevant, is simply incorrect. The point being made by Mr Naylor appeared to be referring to the old "reference back" principle that is no longer good law. It is now clear law that time limits are always relevant and should be considered, because the substitution or addition of a party takes effect when it is ordered and not as from the date of the ET1 form. Mr Roberts also submitted that if I had got the law wrong at the 7 December hearing, reconsideration under Rule 70 was not the correct route to a remedy because an error of law by the judge was a matter for appeal, and not for reconsideration by the original tribunal.

50. In reply Mr Naylor reiterated that the passage in the book did suggest that the 3-month time limit did not apply when correcting the respondent.

(ii) conclusions

51. I agree with Mr Roberts that this ground is a compliant about an alleged legal error on my part in making my strike out decision and as such is a matter that falls to be raised on an appeal, and not at a reconsideration hearing. In any event, even if it were a proper matter for my consideration in deciding whether to change my decision, the view of the law put forward by Mr Naylor on the basis of the book he consulted is not an accurate statement of the law, whether in general (time limits are always relevant to adding or substituting a respondent out of time) or in the particular circumstances of this case (where the initial proceedings against both original respondents were a nullity owing to the absence of EC certificates naming them as prospective respondents).
52. I should add that I did not understand Mr Naylor to be putting forward his understanding of the law for any purpose other than to suggest I got the law wrong in making my striking out decision. But even if he was saying that his understanding contributed to his failure to take action against Hildare before 30 August 2022, that argument is not relevant to whether it was reasonably practicable to bring the claims against Hildare in time in the first place.

Other grounds referred to in Mr Naylor's application

53. In his written application, presented as both an application for reconsideration and a notice of appeal, Mr Naylor mentioned a number of other matters, some of which were relied on in the recusal application described above. I will address the specific grounds raised (using Mr Naylor's descriptions) below, even though they were mostly not picked up in his oral submissions.

C: procedural irregularities:

54. Mr Naylor complained that the Tribunal staff failed to supply me with his supplementary bundle prior to the 7 December hearing, that I had "the respondent's" bundle" in advance of the hearing, that Mr Roberts sent me Mr Naylor's bundle without any consultation with Mr Naylor which was unverified or potentially adulterated, and I failed to question the bundle's accuracy. He also said I only paused for 5 minutes to read the new documents and that I had run the hearing so as to complete it within the 3-hour allowance, which was unfair to him towards the end of the hearing as he did not have a full opportunity to clarify or object to what Mr Roberts (a professional barrister) was saying.
55. Mr Roberts' written Response was, among other things, that nothing in the complaints suggested that the matters complained of actually vitiated my decision to strike out the claims. The suggestion that he might have adulterated the claimants' documents was improper, and hypothetical without an allegation of actual wrongdoing. No concerns were raised at the time and there is no foundation for the complaints, which amounted to "mudslinging". The Response also states that I took advantage of a 6-minute break due to connection issues to look at the short supplementary bundle before giving Mr Naylor a chance to address the tribunal on them later (which he did). Mr Naylor referred to the documents as he wished and they were considered.

56. In my view Mr Roberts' position on these complaints is substantially correct, for reasons I set out in the written reasons accompanying my refusal of the recusal application. It was regrettable that I was not forwarded the claimants' bundle prior to the hearing, but I was able to identify what the documents were during a short pause in the hearing and Mr Naylor had the chance to refer to me to specific documents in his bundle and make submissions as to what, in his view, they established. He did just that, and I took account of the documents and Mr Naylor's submissions and arguments in reaching my decision. Furthermore, I do not consider that Mr Naylor's criticism of my approach in seeking to complete the preliminary hearing on 7 December within the 3-hour time allocation to be well-founded. Employment judges are expected to manage proceedings in that way. In any event Mr Naylor did not complain about this at the time or suggest that he had further submissions that had been closed off by my handling of the hearing.
57. There is in my view nothing in this ground that vitiates my decision to strike out the claims. Any error of law by me in the handling of the preliminary hearing on 7 December 2022 would be a matter for appeal rather than reconsideration.

D: Real possibility of bias

58. Mr Naylor listed numerous matters relating to the 7 December hearing that he said indicated bias on my part. Mr Naylor relied on the same matters (supplemented in further written representations) as the grounds for his recusal application. Those matters were addressed in Mr Roberts' response document at some length. As Mr Naylor accepted during the reconsideration hearing that I dealt with his complaints under this heading in my decision on recusal, I will not set out the details of the complaints and the response. Those matters were fully explored by me in considering the application for recusal from the reconsideration hearing.
59. The written reasons for my decision to refuse that application explain fully why I did not consider the various complaints to be well-founded as disclosing any bias, actual or apparent. For the same reasons I do not consider that there is anything in matters complained of that could vitiate my decision to strike out the claims against Hildare.

E: Incorrect application of employment law.

60. Mr Naylor's written grounds said that until August 2020 the claimants were paid by Urathon Europe Ltd whose staff dealt with the administration of their employment. Then they became employed by a new company Hildare, but nothing else changed for them. The employment was therefore split between two employers with the only constant being Mr and Mrs Sims-Hilditch. The ACAS process was submitted under Hildare as their last employer. Due to the split employment and a failure by the respondents to clarify the structure of the company the respondents listed on the ET1 form were Mr and Mrs Sims-Hilditch, who the ACAS case worker had referred to as their employers. He did not know why one respondent was rejected and the other accepted, given

the submission criteria were the same. I had wrongly accepted Mr Roberts' argument that the claim was out of time. After listing the timeline of events after submitting the claims in September, well in time, Mr Naylor goes onto say that there was over six months delay before the claims were responded to by Tribunal staff and a complaint was responded to on 4 April 2022. He did not get an ET3 from the then respondent until 18 July 2022, 10 months after the claims were presented. It was another 4 months or so until the hearing on 7 December. Mr Naylor rejected the arguments from Mr Roberts that he had done nothing to advance the case. Indeed it was his complaint to Bristol ET in March that had resulted in the claims being finally processed. His conclusion was that I had wrongly failed to take account of delays outside his control in deciding that the claims were out of time, when I prepared for the hearing and prepared my judgment. The facts he relied on were presented to me at the 7 December hearing but dismissed.

61. Mr Robert's written response was that this ground is an attempt to re-argue a case that failed at the 7 December hearing. The claims were well out of time when Hildare was added as a respondent and it was simply immaterial to the practicability of claiming against it that Mr Naylor claimed against the wrong respondents in time. The reasons for delays after the claims were presented were not relevant to that issue.
62. Some of the matters raised under this heading were picked up in Mr Naylor's oral submissions as to his explanation for his mistake in claiming against the wrong respondent, although with a slightly different emphasis.
63. I agree with Mr Roberts that the matters put forward under this ground do not identify a misapplication of the law. Nor do they suggest that in making my strike out decision I failed to take account of anything Mr Naylor said at the 7 December hearing. Rather they appear to amount to an attempt to persuade me to have a second go at deciding the matters in dispute at the 7 December hearing. For that reason they are not an appropriate basis for varying or revoking my decision. Any error of law on my part in making my decision to strike out the claims is a matter for appeal and not for a reconsideration.

F: Introduction of new evidence:

64. Mr Naylor's written grounds state that M Roberts introduced new evidence at the hearing on 7 December which had not been previously disclosed in the ET3 form or the Particulars of Response, namely that the claimants' employer before August 2020 was Mrs Sims-Hilditch. This was pivotal to his argument about the identity of the claimants' employer and had been withheld prior to the Preliminary Hearing proceedings. I did not challenge this, I accepted the new disclosure and did not question why the documentary evidence stated otherwise.
65. Mr Roberts' written response was that it was not clear what evidence Mr Naylor refers to. There were some payslips from November 2022 supplied by Mr Roberts during the 7 December hearing, which were not in the bundle because at the previous hearing Mr Naylor had accepted that the relevant employer at the time of dismissal was Hildare.

66. I do not consider there is anything in this point so far as the issue at the reconsideration hearing is concerned. Mr Naylor's confusion as to the identity of the original employer was a matter relied on by him at the 7 December hearing and was considered in making my decision. In particular I did consider the documents indicating facts consistent with Urathon Europe Ltd being the employer as well as those consistent with Mrs Sims Hilditch being the employer. The respondent's assertion that it was Mrs Sims-Hilditch who was the original employer was in the context of his assertion that it was Urathon Europe who was that employer. Whether that was correct was not directly relevant to the practicability of proceeding against Hildare in time. If I made any legal error in relation to the parties' respective assertions then that is a matter for an appeal and not a reconsideration.

G: Data protection:

67. Mr Naylor complains that Mr Roberts referred at the 7 December hearing to his previous occupation as a police officer, insinuating that he would have been well versed in unfair dismissal claims and could not claim to have a "layman's knowledge" of employment law. This information must have come from the respondents' solicitor, and was an unauthorised personal disclosure that should not have gone unchallenged by me. Mr Roberts written response was that this was relevant information and that no data protection rules were breached, in particular by a disclosure made in litigation. He said this was not in any event a matter that was a ground for reconsideration. And I made clear in the written reasons for the judgments in this case that the disclosure had not significantly affected my view of Mr Naylor's capabilities.
68. In my view it is unnecessary to decide whether or not there was any data protection breach as that cannot be relevant to the reconsideration issue.
69. The point being made relates to a matter that arose at the 7 December hearing and was considered at the time. There is nothing new raised by this ground that could be a potential justification for varying or revoking my decision to strike out the claims. If I made any legal mistake in my approach to the matter that would be a potential ground of appeal, and not a ground for a reconsideration
70. In any event, I did not consider the fact disclosed as being of much relevance to the issues at the 7 December hearing. Mr Roberts' reference to Mr Naylor's previous occupation (to which Mr Naylor objected at the time) gave no details, such as rank, length of service or duties and/or experience, and was not supported by any evidence. For that reason, its probative value was limited. It certainly did not indicate any knowledge or experience of employment law or proceedings. While evidence of a person's occupation or education may be relevant to arguments relying on their lack of knowledge or understanding of employment law and/or their ability to find out about it, the particular disclosure did not reveal anything of much assistance in assessing Mr Naylor's capabilities.

Reconsideration application: Mr Naylor's further representations

71. In his document responding to Mr Roberts' written response to his applications, Mr Naylor made some further representations. He repeated the facts he relied on to assert that "the confusion and ambiguity created by the respondent's failure to notify the claimants' correct employer prior to September 2020 led directly to the only constant, i.e. R1 and R2 being notified as respondents on the ET1". He referred to the overriding objective in Rule 2, He repeated his point that I only adjourned for 5 minutes to read his documents. He objected to Mr Roberts' statement that the time estimate (of 3 hours) was ordinary for the type of hearing and the hearing was conducted in the usual way, that the parties are expected to keep to the estimate and it was ordinary practice for the judge to adopt a pace commensurate with the listed time. Mr Naylor considered that those things are only pertinent if the participants have experience of employment law proceedings or are employed in the legal profession.
72. I considered the content of this document carefully in the course of reaching my conclusions on the grounds set out in the application for reconsideration. I did not identify any new grounds being made as the content was, so far as I could see, reiterating and supporting points already made in the reconsideration application.

Decision

73. It follows from my conclusions on the grounds Mr Naylor put forward that I do not consider that the interests of justice require me to vary or revoke my judgments striking out the claims against Hildare. The relevant information was before me on 7 December 2022 and I made my decisions on the relevant law and issues in the light of the submissions Mr Naylor and Mr Roberts chose to make. If I made any errors of law during the hearing or in my decision-making then that is a matter for appeal rather than reconsideration.
74. Accordingly, I confirm my judgments striking out the claims against the second respondent.

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Employment Judge Hogarth
Dated: 5 March 2024

Judgment sent to the Parties on 19 April 2024

For the Tribunal Office