EMPLOYMENT TRIBUNALS

London South Employment Tribunal

Claimant: Anastassia Maari

Respondent: J & A Pellings Limited

Application for reconsideration

DECISION

For the reasons which follow, the application for reconsideration is refused as I find there is no reasonable prospect that it would be varied or revoked.

Background

1. This matter concerned claims of unfair dismissal brought by two former employees of J&A Pellings Limited – Mr Nicolas Maari and Mrs Anastasia Maari. The First Claimant, Mr Nicolas Maari, was engaged by J&A Pellings Ltd as an Architect. Over his tenure, he rose to become Head of the Architecture Department. The Second Claimant – and the subject of this application – Mrs Anastasia Maari, was employed by J&A Pellings as more junior member of the team in the Architecture Department, under Mr Maari's indirect supervision.

2. Concerns were raised within J&A Pellings about potential inflation of costs quoted to clients for subcontracted services. This culminated in an anonymous whistleblowing email which sparked internal investigations into allegations of overcharging clients. Separate but joined investigations were initiated against both Mr and Mrs Maari.

3. Following the investigations, Mr and Mrs Maari were invited to disciplinary hearings chaired by Mr Nigel Board. Mr Board decided to dismiss them both for gross misconduct. They appealed but the dismissals were upheld by Mr Gary Young. This led them to lodge claims for unfair dismissal with the Employment Tribunal.

4. The claims were against J&A Pellings Limited, as well as RSK Group Limited which had acquired J&A Pellings. Both Claimants argued they were jointly employed by J&A Pellings and RSK. The claims were heard together over three days in February 2024. I issued a substantive judgment making findings on the issues on 3 March 2024.

5. On 20 March 2024, the Respondent employer applied for reconsideration of part of my judgment relating to the claim of Mrs Anastasia Maari whom I found was unfairly dismissed. I must now determine whether to reconsider that judgment in the interests of justice based on the application made.

Application for reconsideration

6. On 20 March 2024, 5 days after the Tribunal issued my substantive judgment, the Respondent J&A Pellings Ltd applied for reconsideration of part of my decision relating to the claim of Mrs Anastasia Maari.

7. The application was made in writing by the Respondent's solicitor, Mr Adam Bramhall. It

was presented within 14 days of the judgment being sent to the parties, meeting the time limit in Rule 71.

8. The application focuses on the issue of contributory fault. It argues that there was a procedural error or omission in my judgment by not making express findings on contributory fault and the appropriate percentage deduction for any compensation awarded to Mrs Maari.

9. The Respondent maintains Mrs Maari's conduct warrants a 100% reduction in compensation based on the evidence presented at the full merits hearing. It argues addressing contributory fault now will assist preparation for the remedies hearing and any settlement negotiations between the parties.

10. No additional evidence has been submitted with the application. The Respondent relies on the existing evidence and submissions made during the final hearing regarding Mrs Maari's alleged culpable conduct leading to her dismissal.

11. The Claimant's representative has been notified of the application as required.

The law on contributory fault

12. The concept of contributory fault relates to potentially reducing compensation where the employee's own blameworthy conduct caused or contributed to their dismissal. The relevant legislative provisions are sections 122(2) and 123(6) of the Employment Rights Act 1996.

13. Section 122(2) states the tribunal shall reduce the basic award if it finds the dismissal was to any extent caused or contributed to by the employee. Section 123(6) similarly provides that compensation may be reduced if the tribunal considers the dismissal was to any extent caused or contributed to by the employee's conduct.

14. The seminal case which provides authoritative guidance is *Nelson v BBC (No 2) [1980] ICR 110*. Here, the Court of Appeal held the statutory wording means a reduction is only appropriate where the employee's conduct was culpable or blameworthy.

15. The Court clarified that blameworthy conduct could include actions that were unreasonable, perverse, foolish or "bloody minded" in the circumstances. However, not all unreasonable behaviour necessarily qualifies. There must be an assessment based on the degree of unreasonableness and whether the conduct crossed the threshold of culpability.

16. Therefore, when considering contributory fault, the Tribunal must analyse whether the employee's actions were culpable or blameworthy based on the facts. A reduction will only be fair and equitable where the evidence demonstrates conduct meeting the threshold of culpability, unreasonableness or foolishness warranting apportioning some responsibility to the employee.

The law on reconsideration

17. The rules governing applications for reconsideration of Employment Tribunal judgments are contained in the Employment Tribunals Rules of Procedure 2013 (as amended). Rule 70 provides the statutory basis for reconsideration, stating that a Tribunal may reconsider any judgment where necessary in the interests of justice. The original decision may be confirmed, varied or revoked following reconsideration.

18. Applications for reconsideration must meet strict procedural requirements under Rule 71. Except where made during a hearing, the application must be in writing within 14 days of the written record or reasons being sent to the parties. Critically, the application must set out why reconsideration of the original decision is necessary in the interests of justice.

19. Rule 72 obliges the Tribunal to consider any reconsideration application properly made. Under paragraph (1), the Tribunal will refuse the application if there is no reasonable prospect of the original decision being overturned. If not dismissed at this initial stage,

paragraph (2) states the Tribunal must hold a hearing to reconsider the decision, unless a hearing is deemed unnecessary in the interests of justice. Further written representations may also be permitted.

20. These legislative provisions establish reconsideration as an exceptional remedy, with a high threshold to be met. The application must demonstrate strong grounds and a reasonable prospect of the original decision being varied or revoked. Procedural requirements regarding timing and content must also be strictly fulfilled.

21. Authoritative guidance on the proper approach to reconsideration applications was given by HHJ Shanks in *Ebury Partners UK Ltd v Acton Davis*. Emphasising reconsideration is unusual, HHJ Shanks held it may be warranted where there was some procedural irregularity denying a party a fair hearing. However, alleged legal errors are better addressed through appeal.

22. Critically, HHJ Shanks found the Employment Judge in that case erred by embarking on an inappropriate complete re-decision of the case. Reconsideration must focus tightly on the specific issues and decisions the applicant seeks to revisit, not reopen the whole case. These principles regarding the high threshold for reconsideration have been carefully borne in mind.

Findings on the application

23. I find that the Respondent has applied for reconsideration of my previous judgment on the basis that I failed to make explicit findings on the issue of contributory fault regarding the Claimant Mrs Anastassia Maari.

24. Having carefully reviewed the application, I find that the issue of contributory fault was encompassed in the list of issues before me at the final hearing. I accept the Respondent's submission that oral evidence going to this issue was heard from the witnesses.

25. However, I find that contributory fault is not a freestanding head of claim but goes to the question of remedy. As I have not yet received submissions from the parties on remedy, including the question of contributory fault, I consider it premature to make determinative findings on this issue.

26. Applying the legal principles from *Nelson v BBC*, I must assess based on the evidence whether the Claimant's conduct was culpable or blameworthy so as to cross the threshold of unreasonableness warranting apportioning contributory fault. This detailed analysis has not yet been undertaken as it falls to be determined at the remedies stage.

27. I therefore find that in the absence of written submissions from the parties, it would be inappropriate for me to give any indication in my liability judgment as to whether and to what extent I may consider there to be contributory fault. This must await full argument at the remedies hearing.

Findings on the law on reconsideration

28. Turning to the law on reconsideration, I find that the relevant rules establish a high threshold for reconsideration to be permitted. It is an exceptional remedy requiring demonstration of strong grounds and a reasonable prospect of my decision being overturned.

29. Applying the guidance from *Ebury Partners*, I find reconsideration is not appropriate just to correct supposed legal errors, which are better addressed through appeal, or where – as here – there is a further process before me which will address the point. The application must show reconsideration is strictly necessary in the interests of justice.

30. Here, I find the Respondent has not identified any procedural irregularity or defect in the original hearing that compromised fairness. The application effectively seeks clarification or an advance ruling on contributory fault prior to the remedies evidence and submissions.

31. I do not consider this meets the high threshold for reconsideration. It does not establish any prospect of my liability decision being varied or overturned. As such, reconsideration is not warranted in the interests of justice. I therefore refuse the application as it is misconceived and does not meet the legal tests for reconsideration.

Judge M Aspinall
Sunday, 31st March 2024

Sent to the parties:
Monday 29th April 2024

For the Tribunal Office

Public access to Employment Tribunal decisions and judgments
Judgments and reasons for judgments (except those given under Rule 52) of the Employment Tribunal are published in full. These can be found online at **www.gov.uk/employment-tribunal-decisions** shortly after a copy has been sent to the parties in a case.