THE EMPLOYMENT TRIBUNALS

Claimant: **Mr James Rafferty**

Respondent: **API Engineering (O&G) Limited**

Before: **Employment Judge M Warren**

JUDGMENT ON AN APPLICATION FOR RECONSIDERATION

The Respondent's application for a reconsideration is refused on the grounds that there is no reasonable prospect of the original Judgment being varied or revoked.

REASONS

Background

1. This case was heard on 27 and 28 September 2021 before me and two members, Ms D Clarke and Ms S Williams. Oral Judgment was given to the parties on 28 September; Mr Rafferty's discrimination complaint and his claims for notice pay and holiday failed. His claim for unlawful deduction from his wages succeeded in the sum of £376.94.

2. The Judgment, signed by me on 28 September 2021, was, according to the Judgment as saved by the Administration, sent to the parties on 14 October 2021. However, I have seen a copy of an email from the Administration to the Respondent which suggests that it may not in fact have been sent until 18 October 2021. I assume that to be the case.

3. By an email dated 1 November 2021, the Respondent submitted an application for reconsideration. That application was referred to me on 12 June 2024, but without the substantive application purportedly attached to the original email. On my instructions, the Administration have asked for and have been provided with, a copy of the substantive application by the Respondent. That was referred to me on 21 August 2024.

4. The tribunal file has long since been destroyed. Fortunately, I have some written notes to which I spoke when giving Judgment. I do not have the bundle. I can see that the Tribunal made a finding of fact that Mr Rafferty had made a payment in cash to reimburse the Respondent for personal payments he had made on his Company AMEX card. The Respondent disputed that he had made a cash reimbursement, to his estranged wife, who was a director and shareholder of the Respondent company. The Respondent deducted that sum of money from his wages. We found that his contract did not authorise such a deduction and that there was no prior authorisation in writing, as required by section 13(1) of the Employment Rights Act 1996.

Law

5. Rules 70 to 73 of the Employment Tribunal's Rules of Procedure 2013, make provision for the reconsideration of Tribunal Judgments as follows:

> *"**Principles***
> ***70***
> *A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.*
>
> ***Application***
> ***71***
> *Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.*
>
> ***Process***
> ***72***
> *(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.*

6. In Outasight VB Ltd v Brown UKEAT/0253/14 the EAT held the Rule 70

ground for reconsidering Judgments, (the interests of justice) did not represent a broadening of discretion from the provisions of Rule 34 contained in the replaced 2004 rules, (at paragraphs 46 to 48). HHJ Eady QC explained that the previous specified categories under the old rules were but examples of where it would be in the interests of justice to reconsider. The 2014 rules remove the unnecessary specified grounds leaving only what was in truth always the fundamental consideration, the interests of justice. This means that decisions under the old rules remain pertinent under the new rules.

7. Rule 34 of the previous 2004 Rules of Procedure limited the grounds of review to the following:

   7.1. The decision had been wrongly made as a result of administrative error:

   7.2. A party did not receive notice of the hearing:

   7.3. The decision was made in the absence of a party:

   7.4. New evidence has become available the existence of which could not reasonably have been known of or foreseen at the time, or

   7.5. The interests of justice require such a review.

8. The key point relating to reconsideration is that it must be in the interests of justice to reconsider a Judgment. That means that there must be something about the case that makes it necessary to go back and reconsider, for example a new piece of evidence that could not have been produced at the original hearing, a mistake as to the law, a decision made in a parties absence. It is not the purpose of the reconsideration provisions to give an unsuccessful party an opportunity to reargue his or her case. If there has been a hearing at which both parties have been in attendance, where all material evidence had been available for consideration, where both parties have had their opportunity to present their evidence and their arguments before a decision was reached and at which no error of law was made, then the interests of justice are that there should be finality in litigation. An unsuccessful litigant in such circumstances, without something more, is not permitted to simply reargue his or her case, to have, "a second bite at the cherry", (per Phillips J in Flint v Eastern Electricity board [1975] IRLR 277).

9. At paragraph 33 of Outasight, HHJ Eady QC said:

   "The interests of justice have thus long allowed for a broad discretion, albeit one that must be exercised judicially, which means having regard not only to the interest of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation."

Discussion and Conclusions

10. On the basis that our Judgment was sent to the parties on 18 October 2021, the application is in time.

11. On the application, the Respondent is seeking to reargue its case. The Tribunal made its findings of fact on the evidence, oral and written, before it. It is not open to the Respondent to, "have another go". It is in the interests of justice that there should be finality in litigation.

12. Further and regardless of the forgoing, nothing the Respondent has said in its application deals with the fact that Mr Rafferty's contract of employment did not authorise in writing the deduction made from his wages, nor had he authorised the deduction in advance in writing. As a matter of law, it was not entitled to make the deduction, even if it had not received the cash reimbursement.

13. For these reasons, there are no reasonable prospects of the Tribunal's Judgment being varied or revoked and the application for reconsideration is refused.

Dated: 27 August 2024

Employment Judge M Warren

JUDGMENT SENT TO THE PARTIES ON
4 September 2024

FOR THE TRIBUNAL OFFICE