EMPLOYMENT TRIBUNALS

Claimant: Mr A Amini

Respondent: Ustun Catering Limited

JUDGMENT

The claimant's application dated **22 August 2024** for reconsideration of the Judgment sent to the parties on **6 August 2024** is refused.

REASONS

1. By an email dated 22 August 2024, Mr Hussain applied on behalf of the claimant for reconsideration of my judgment sent to the parties on 6 August 2024 ("the Judgment"). In the Judgment I dismissed the claimant's claim that the respondent had made an unauthorised deduction from his wages. I dismissed the claim because it had not been presented within the relevant time limit when it was reasonably practicable to have done so.

Relevant law and procedure

2. From 6 January 2025, the Employment Tribunal Procedure Rules 2024 ("the 2024 Rules") apply to all ongoing tribunal cases. They replace the Employment Tribunal Rules of Procedure 2013. The power to reconsider a judgment and the process for doing so are now set out in rules 68-71 of the 2024 Rules. They replace the equivalent rules at rules 70-73 of the 2013 Rules. Although there are differences in the wording of the equivalent rules, there is no suggestion that the legal tests which applied under the 2013 Rules have changed. The decisions and guidance in cases decided under those 2013 Rules still apply to my decision.

3. The rules say that the Tribunal has a power to reconsider a judgment "where it is necessary in the interests of justice to do so". On reconsideration the decision may be confirmed, varied or revoked and, if revoked, may be taken again (Rules 68(1) to (3) of the 2024 Rules).

4. An application for reconsideration must be made within 14 days of the date on which the judgment was sent to the parties or within 14 days of the date that written reasons were sent (if later) (rule 69 of the 2024 Rules).

5. Rule 5(7) of the 2024 Rules gives the Tribunal power to extend any time limit in the 2024 Rules on its own initiative or on the application of a party. An extension can be granted even where the time limit has expired.

6. In deciding whether to exercise its discretion to extend time, the Tribunal will have regard to all the relevant circumstances. That includes any explanation for the delay in making the application. It also includes the prejudice to the claimant if the extension of time is refused and to the respondent if it is granted.

7. In exercising its discretion to extend time the Tribunal must seek to give effect to the overriding objective. That is set out in rule 3 of the 2024 Rules:

> **"3.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.**
>
> **(2) Dealing with a case fairly and justly includes, so far as practicable—**
>
> **(a) ensuring that the parties are on an equal footing,**
>
> **(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues,**
>
> **(c) avoiding unnecessary formality and seeking flexibility in the proceedings,**
>
> **(d) avoiding delay, so far as compatible with proper consideration of the issues, and**
>
> **(e) saving expense."**

8. Applications for reconsideration are subject to a preliminary consideration by the Tribunal. Paragraph 16.1 of the Presidential Guidance on Panel Composition (October 2024) says that preliminary consideration will always be by an employment judge alone. If that judge considers there is no reasonable prospect of the original decision being varied or revoked the reconsideration application must be refused (rule 70(2) of the 2024 Rules).

9. If the application is not refused at that preliminary stage, the parties must be sent notice specifying the period within which any written representations must be received. The parties' views must be sought on whether the application can be determined without a hearing (rule 70(3) of the 2024 Rules).

10. If not refused at the preliminary stage, the application must be considered at a hearing unless the Tribunal considers that a hearing is not necessary in the interests of justice (rule 70(4) of the 2024 Rules).

11. If the Tribunal determines the application without a hearing the parties must be given a reasonable opportunity to make further written representations in respect of the application (rule 70(5) of the 2024 Rules).

12. In deciding whether to reconsider a judgment, the "interests of justice" allows for a broad discretion. That discretion must be exercised judicially. That 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 requirement that there should, so far as possible, be finality of litigation (**Outasight VB Ltd v Brown [2015] ICR D11, EAT para 33**).

13. Achieving finality in litigation is part of a fair and just adjudication. The importance of finality was confirmed by the Court of Appeal in **Ministry of Justice v Burton and anor [2016] EWCA Civ 714**. It has also been the subject of comment from the then President of the Employment Appeal Tribunal in **Liddington v 2Gether NHS Foundation Trust EAT/0002/16** (paragraph 34) in the following terms:

> "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 by 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."

14. Where the application for reconsideration is based on new evidence the approach laid down by the Court of Appeal in **Ladd v Marshall 1954 3 All ER 745, CA** will, in most cases, encapsulate what is meant by the "interests of justice". That means that in most cases, 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 original hearing
- that the evidence is relevant and would probably have had an important influence on the hearing; and
- that the evidence is apparently credible.

15. The interests of justice might on occasion permit evidence to be adduced where the requirements of **Ladd v Marshall** are not met. (**Outasight** at paras 49-50).

The Reconsideration Application

16. The claimant's reconsideration application was sent to the Tribunal by Mr Hussain by email on 22 August 2024. In a one-page email he set out points he disagreed with in the Judgment. He said that I was wrong to find that he had a tendency to exaggerate (para 29 of the Judgment). Specifically, he said that despite what it said on the paperwork before me at the hearing, the CAB was closed for 2 days a week rather than 1 day a week. He said that was shown by a google search but did not provide a copy of that. He also said I was wrong to say that the Employment Tribunal online portal was only down for 3-4 days at the relevant period and that it was in fact down and unavailable for 2 weeks or more.

17. He expanded on the evidence he gave at the hearing about the troubles and problems he was facing in August/September 2023. That included very poor housing conditions which he was trying to sort out with the local authority and which were causing him to be anxious and depressed. He also cited his dyslexia and dyspraxia as reasons why he was confused and forgetful and only able to give limited assistance to the claimant.

18. The claimant had not copied the reconsideration application to the respondent. On 24 September 2024 I directed that it be copied to the respondent. I also wrote to the parties to explain that the first step was for me to consider whether the application for reconsideration had any reasonable prospect of success. I noted that the application appeared to include further evidence from Mr Hussain about why it had not been reasonably practicable for the claimant to have presented his Tribunal claim in time. I explained that in deciding whether to allow the application I would need to understand why it had not been possible to put forward that evidence at the tribunal hearing. I ordered that by 8 October 2024 the claimant (or Mr Hussain on his behalf) write to the Tribunal (copying to the respondent) to explain why it was not possible for the evidence in his email to be given at the original hearing of the case. I confirmed no response was required from the respondent at that point.

19. On 1 October 2024 Mr Hussain sent an email in response to my order. He said that he didn't say much at the tribunal hearing because he felt embarrassed to explain the difficulties he was having with his housing conditions and their effect on him. He said he did not realise how much detail about the issues he was facing he would need to include in his evidence at the hearing. He added that presenting the claim took longer than expected because he was sleeping during the afternoons which meant he missed chances to call the CAB and ACAS. He also said he had to rearrange appointments with the CAB to a later date because the original appointments they gave him clashed with his own appointments.

20. I apologise to the parties that my absence from the Tribunal due to ill-health has led to a delay in finalising my judgment.

Decision

<u>The Time Limit Issue</u>

21. The reserved judgment was sent to the parties on the 6 August 2024. The time limit of 14 days for applying for reconsideration expired on 20 August 2024. The application was made on 22 August 2024. It is out of time.

22. There is no application to extend time for making the application to reconsider. There is no explanation for the delay in making the application to reconsider.

23. I have considered whether I should extend the time for the application of my own initiative. The application is late by 2 days. That is not a long delay. However, there is no explanation for the delay. The email of 22 August 2024 refers to Mr Hussain's dyspraxia and dyslexia but does not suggest that there is a link between that and the delay in applying for reconsideration. There was no

medical or other evidence to support the assertion by Mr Hussain that he has those impairments or of their effect on him.

24. I also take into account that the reconsideration application relates to a Judgment not to allow the claimant's claim to proceed because it was out of time. It seems to me that in those circumstances the claimant and Mr Hussain could be expected to be particularly conscious of the importance of Tribunal time limits.

25. When it comes to the prejudice to the claimant if I decide not to extend time, I accept that it means he is denied the opportunity to argue the decision should be reconsidered. As I explain below, I found that the application had no reasonable prospect of success. That seems to me to reduce the prejudice of not allowing the application out of time because I am not denying a reconsideration application on time limits which in my view could go on to succeed. The claimant has a live appeal against the Judgment. Refusing the reconsideration on time limit grounds will not close off his only avenue to challenge my decision.

26. The prejudice to the respondent of extending time is arguably reduced because I have found that even if it was in time the application would have no reasonable prospect of success. However, I do find that there is prejudice to the respondent if I did extend time. There would be one less hurdle for the claimant to overcome in overturning the Judgment in favour of the respondent. I find that the need for finality referred to in **Outasight** is also a relevant consideration which weighs against allowing the application for reconsideration to proceed out of time.

27. On a balance I have decided I should not exercise my discretion to extend time of my own initiative. Any prejudice to the claimant is outweighed by that to the respondent and by the need for finality.

28. The application to reconsider is refused because it was made outside the relevant time limit.

Consideration of reasonable prospects of success

29. In case I am wrong on the time limit point I have gone on to consider whether the application for reconsideration has any reasonable prospect of success. I find that it does not.

30. It seems to me that the application consists of 2 elements. The first is a challenge to my finding that Mr Hussain tended to exaggerate his evidence. Specifically, it is said I was wrong to find that the CAB was only closed on 1 day a week and that the tribunal online submission portal was only unavailable for 3-4 days.

31. When it comes to the CAB opening hours, Mr Hussain did not provide any documentation to support his assertion that the CAB was closed 2 days a week. He referred to a google search but did not produce it. When it comes to the unavailability of the online tribunal portal, on the day of the hearing the information available to me from the tribunal administration was that the portal was unavailable in September 2023 for 3-4 days. In fairness to the claimant, I have in dealing with the application for reconsideration double checked the information available. Updates from the President of the Tribunals in September

2023 indicate the portal was unavailable from the afternoon of 6 September until some point on 15 September 2023. That is more than the 3-4 days I noted in my Judgment but less that the "2 weeks or more" suggested by Mr Hussain. I note that by the time of the unavailability the deadline of 4 September 2023 by when the claimant should have contacted ACAS or presented his claim had already passed.

32. I have considered whether that information about the online portal affects my finding that Mr Hussain tended to exaggerate his evidence. I find that it does not. That finding reflected my overall assessment of his evidence at the hearing. The number of days for which the portal was unavailable was an example only. I do not find that the fact that the portal was unavailable for 9 days rather than the 3-4 I was originally informed changes that overall assessment of Mr Hussain's evidence to the extent that it is necessary in the interests of justice to vary or revoke my judgment.

33. The second element of the application is the additional evidence Mr Hussain provides in his emails of 22 August and 1 October 2024 about the difficulties he was experiencing which he says limited the help he could provide to the claimant. When it comes to that, I am not satisfied that there is any reason why Mr Hussain could not have given that evidence at the tribunal hearing. I do not find that Mr Hussain's explanation of feeling "embarrassed" to do so is sufficient to satisfy the test in **Ladd v Marshall**. I also do not accept that his explanation that he did not realise that he needed to mention everything that was going on in his life meets that test. As he acknowledges, he gave evidence about problems in his life at the hearing and it was apparent that the issue I was deciding was why the claim was presented late. Any evidence about why that was the case should have been given at the hearing and does not make it necessary in the interests of justice to vary or revoke the Judgment. To allow the application for reconsideration to succeed on the basis of that evidence would be to allow the claimant to have exactly the kind of "second bite at the cherry" which the Employment Appeal Tribunal warned against in **Liddington**.

34. In any event, even had I accepted it, I do not find that the further evidence (or the information about the number of days for which the portal was unavailable) would have necessitated me to vary or revoke my Judgment. There is no challenge to my finding (in paragraph 30 of the Judgment) that the claimant was aware from around 9 August 2023 that the deadline for starting proceedings and contacting ACAS was 4 September 2023. The CAB had stressed how important it was to meet that deadline and how to start ACAS Early Conciliation. Mr Hussain in his additional evidence explains the challenges he faced during August-September in assisting the claimant. I am not diminishing the challenges he may have faced in terms of housing conditions and other issues but they do not, it seems to me, go so far as to amount to grounds for a finding it was not reasonably practicable for the claim to have been presented in time.

35. In those circumstances, I have decided that there is no reasonable prospect of the reconsideration application succeeding and it is refused.

Employment Judge McDonald

Date: 22 January 2025

JUDGMENT SENT TO THE PARTIES ON

30 January 2025

FOR THE TRIBUNAL OFFICE