EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001571/2025

Final Hearing regarding reconsideration held remotely in Aberdeen on 17 September 2025

Employment Judge A Kemp

Mr R Joseph	**Claimant** **In person**
Pizza Express Ltd	**Respondent** **Represented by:** **Ms E Burns** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's application for reconsideration is refused.

REASONS

Introduction

1. A Judgment in this case was issued to the parties on 21 July 2025 ("the Judgment").

2. The claimant applied for reconsideration of the Judgment by email also dated 21 July 2025. He provided supplementary arguments by email. Both parties provided Bundles of documents for use at the hearing into the reconsideration application held remotely at the claimant's request on 17 September 2025. The delay was caused my being involved in another case and then on annual leave.

3. The claimant argued that there was new evidence that tipped the balance in his favour, in very brief summary of his submission. It was focused on WhatsApp messages he stated he had exchanged with a former colleague named Jason, in which it is suggested that Jason had not made an allegation against the claimant, again in very brief summary. The claimant explained that he had considered that he had sufficient evidence to succeed in the original interim relief application and had not thought to contact his former colleague about the case until the decision was issued. He further tendered an audio recording of a conversation with another colleague named Lauren who he had met on Union Street in Aberdeen when out with his wife. I listened to that recording. The claimant asked her about whether a complaint had been made, and she said that she had been instructed by the respondent not to speak to him, and made it clear that she did not wish to speak to him, in brief summary. He considered that that supported his arguments.

4. The respondent had provided in their Bundle a letter to Mr Tortolano which set out a final written warning, and the claimant argued eloquently that that showed that the way the claimant had been treated was different to the treatment of Mr Tortolano: that included that allegations he had made were not pursued, but allegations Mr Tortolano had made were, that his own mitigation was ignored in part, and that the comments Mr Tortolano made were far worse than those alleged of him. He argued that there was a clear disparity in treatment between him and Mr Tortolano, and that the reason for that was his protected disclosures.

5. Further aspects of the claimant's submission are set out below and included commentary about the contract terms and the email sent to his email account which he denied was by him but which he argued was a protected disclosure. All that he said was considered, but not all recorded in this Judgment.

6. The respondent had provided a written submission which was spoken to and supplemented orally.

The Law

7. The Employment Tribunal Procedure Rules 2024 have provisions in relation to reconsideration of judgments at Rules 68 – 70, formerly Rules 70 – 73 in Schedule 1 to the 2013 Regulations, and although there are some differences in wording they are not material for the present application such that earlier case law remains relevant.

8. The Rules I consider relevant for the present application are as follows:

> "**Principles**
> 68**.**—(1) The 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.
(2) A judgment under reconsideration may be confirmed, varied or revoked.
(3) If the judgment under reconsideration is revoked the Tribunal may take the decision again. In doing so, the Tribunal is not required to come to the same conclusion.

Application for reconsideration
69. Except where it is made in the course of a hearing, an application for reconsideration must be made in writing setting out why reconsideration is necessary and must be sent to the Tribunal within 14 days of the later of—

(a) the date on which the written record of the judgment sought to be reconsidered was sent to the parties, or
(b) the date that the written reasons were sent, if these were sent separately.

Process for reconsideration
70.—(1) The Tribunal must consider any application made under rule 69 (application for reconsideration).
(2) If the Tribunal considers that there is no reasonable prospect of the judgment being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application must be refused and the Tribunal must inform the parties of the refusal.
(3) If the application has not been refused under paragraph (2), the Tribunal must send a notice to the parties specifying the period by which any written representations in respect of the application must be received by the Tribunal, and seeking the views of the parties on whether the application can be determined without a hearing. The notice may also set out the Tribunal's provisional views on the application.
(4) If the application has not been refused under paragraph (2), the judgment must be reconsidered at a hearing unless the Tribunal considers, having regard to any written representations provided under paragraph (3), that a hearing is not necessary in the interests of justice.
(5) 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."

9. The terms of these Rules are subject to the overriding objective in Rule 3. It states as follows:

"**Overiding objective**
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.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules, or

(b) interprets any rule or practice direction.

(4) The parties and their representatives must—

(a) assist the Tribunal to further the overriding objective, and

(b) co-operate generally with each other and with the Tribunal."

10. In ***Serco Ltd v Wells [2016] ICR 768***, the EAT observed that the Rules of Procedure must be taken to have been drafted in accordance with the principles of finality, certainty and the integrity of judicial orders and decisions.

11. In ***Liddington v 2Gether NHS Trust EAT/0002/16*** the extent to which reconsideration was appropriate was addressed by the EAT 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 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."

12. In ***Trimble v Supertravel Ltd [1982] ICR 440*** the EAT held that the reconsideration procedure is there so that where there has been an oversight or 'some procedural occurrence' such that a party can be said not to have had a fair opportunity to present their argument on a point of substance, they can bring the matter back before the tribunal for adjudication.

13. In ***Shaw v Intellectual Property Office UKEAT/0186/20*** the EAT described the first stage in what is now Rule 70 as a 'sift' stage of the

reconsideration application, akin to the sift process which is applied to appeals to the EAT. The test is in Rule 70 itself and is whether the Judge considers that there is no reasonable prospect of the original decision being varied or revoked. If so the application may be refused if that is in accordance with the overriding objective.

14. I have not found authority on where in a reconsideration application for an interim relief judgment a party seeks to found on new evidence. There is however authority in the circumstances of a Final Hearing. The position in England is based on the decision in ***Ladd v Marshall [1954] 3 All ER 745***, determining the admissibility of fresh evidence in civil proceedings and decided in the Court of Appeal, which has been followed in Employment Tribunal cases for example in ***Wileman v Minilec Engineering Ltd [1988] IRLR 144***. Following the implementation of the 2013 Rules, the EAT held that the ***Ladd v Marshall*** test (in conjunction with the overriding objective) continued to apply where it is sought to persuade a tribunal, in the interests of justice, to reconsider its judgment on the basis of new evidence in the case of ***Outasight VB Ltd v Brown UKEAT/0253/14***).

15. The ***Ladd v Marshall*** test has three parts. It must be shown:

    (a) that the evidence could not have been obtained with reasonable diligence for use at the original hearing;
    (b) that it is relevant and would probably have had an important influence on the hearing; and
    (c) that it is apparently credible.

16. The principle that applies in Scotland in the civil courts is not identical, although some aspects are similar. The principle is *res noviter veniens ad notitiam*, usually referred to as the *res noviter* rule. MacPhail on ***Sheriff Court Practice*** states the following:

> "The court may also receive a minute of *res noviter* and allow additional evidence to be heard in very exceptional circumstances: see ***Coul v Ayr CC, 1909 S.C. 422***; ***Mitchell v Sellar, 1915 S.C. 360*** at 361"

17. In the latter of those two cases the Lord President said this:

> "This is one of a class of cases in which the Court has certainly a very wide discretion—at the same time, a discretion which is only exercised under very exceptional circumstances."

18. The *res noviter* principle was referred to in ***Ramsden v Santon Highlands Ltd [2015] CSOH 65***, in the Outer House of the Court of Session as follows:

> "*Res noviter* must refer to some fact which was not known and which could not, with reasonable care and diligence, have been known before. The pursuer requires to aver circumstances showing

> that he was excusably ignorant of how matters stood. He must give particulars of its discovery and of the circumstances which bear upon the possibility of his having acquired earlier knowledge of it."

19. The issue of new evidence was also addressed by the Inner House in ***Choudhury v General Medical Council [2023] CSIH 13,*** in which the following summary was given:

> "(a) It was for the party seeking to introduce the fresh evidence to satisfy the court that there is an acceptable explanation for the evidence not having been available at the time of the original proceedings;
> (b) that party must satisfy the court that the fresh evidence would have been relevant and admissible before the original Tribunal; and
> (c) the court must be satisfied that there is a reasonable prospect that the fresh evidence would have made a material difference to the Tribunal's decision.
> Even where relevant evidence was not available at the proof and its non-availability was not due to a failure to investigate the case properly, the court will not necessarily allow additional proof: the overall consideration is the interests of justice, in respect of which finality is an important element. Particular difficulties may arise where it is sought to lead additional evidence in order to persuade the court to alter findings in fact which were based upon the Lord Ordinary's assessment of credibility or reliability. The court will normally be slow to reopen the evidence….."

20. The President of the Employment Appeal Tribunal applied the ***Ladd v Marshall*** test in an appeal from a decision in Scotland in ***Gourlay v West Dunbartonshire Council [2025] EAT 29*** such that it appears to me that I am bound by that and therefore apply that test. The test in the *res noviter* principle is similar but in my view is slightly higher. If the claimant does not meet the ***Ladd v Marshall*** test any point as to *res noviter* becomes academic.

21. It appears to me that a similar principle operates in the context of an interim relief judgment – the same principles of finality of litigation arise, with that principle applying to all judicial decisions as noted above, not only those after Final Hearings and a form of exceptional circumstance is required to allow a matter to be raised that could with reasonable diligence have been obtained prior to the original hearing.

22. If the new evidence is to be considered it requires to have a material impact on the decision, and then if that hurdle is surmounted the assessment of whether or not to grant interim relief, the law as to which was set out in the Judgment, requires to be applied.

23. The law applicable to the interim relief Judgment was set out in the Judgment.

Discussion

24. It is relevant to stress that at the interim relief hearing no evidence was heard and no findings in fact were made. The process was a summary assessment on the basis of documentation provided and submissions made.

25. The present application requires consideration firstly in the context of the new evidence the claimant seeks to put forward. That raises the issue of whether it is in accordance with the overriding objective to allow it to be raised at this stage, having regard to the authorities referred to above. In my view it is not. That is because with reasonable diligence the claimant could have raised the matter with his former colleague prior to the interim relief hearing and tendered an answer then. Whilst the respondent gave an instruction not to speak to colleagues, which they were entitled to do as the employer, that ceased to be effective at the point of dismissal. At that point onwards the claimant was able to send a WhatsApp message to his colleague. He did not do so prior to the interim relief hearing. Although he is a party litigant, it appears to me such an obvious step to take that whether someone is represented or not one would expect it. It is the kind of step that reasonable diligence requires, and the view the claimant took of his prospects of success is in my view not a sufficient answer to that point.

26. The other aspects of his argument are largely repeating the same points made at the interim relief hearing, or doing so with additional points that he could with reasonable diligence have been in a position to make at that stage (for example in relation to the contract). Much of the argument is the kind of rearguing of points in a different way that ***Liddington*** states is not permissible.

27. Against that background I do not consider that the reconsideration application succeeds. I did however secondly consider matters in the alternative, in the event that it was appropriate to take it into consideration the new material provided by the claimant. There are then further issues that arise. The first is the dispute the respondent raises over its provenance. It has the transcript of a call with the employee Jason which suggests that the claimant has not been in contact with him since termination. The claimant argues that the message was to the account of that employee, and refers to a comment made by Jason about not wishing to be involved because of his need for the job. But that dispute over the provenance of the documentation, and whether or not a complaint was made by Jason or not, is not one that I am able to determine on the material before me, and without evidence. There are arguments both

ways, and it requires evidence (which I assume is to be given by Jason as a witness either for the respondent or if not called by them should the claimant wish to seek a witness order).

28. The second issue is the conversation with his other former colleague Lauren which the claimant recorded. In my view it adds nothing to his case. The colleague does not comment on the material allegation, being that he had used lewd language which she did not wish, stating that she has been instructed not to speak to the claimant. That is not evidence of suppression of the claim or evidence related to it in my view. Whilst the claimant argued that the language, if used, was not unwanted, that is not agreed by the respondent. It argues that there was a difference between what Lauren may have said, and what the claimant is alleged to have said, and that if what the claimant is alleged to have said is established in evidence that can be unwanted conduct under section 26. This again is a dispute of fact, and I am not in a position to form a view on that from documents or the recording.

29. The third issue is that related to Mr Tortolano. There is now evidence submitted by the respondent which it could have provided at the interim relief hearing but did not. The lack of disciplinary procedure against Mr Tortolano was a material factor in the comments in the Judgment as to the claimant coming close to meeting the test.

30. It appears to me that if the claimant's new evidence is to be considered, this evidence submitted by the respondent also requires consideration. The respondent required to address the interim relief hearing at short notice, and states that it is now aware of further matters from a fuller investigation. It seems to me that if the claimant's new evidence can be said to meet the test for admitting it, that for the respondent is at the very least no less worthy of consideration given the circumstances.

31. It is not entirely straightforward as an issue however. Whilst there was a final written warning issued, not no disciplinary matters as the position had appeared at the interim relief hearing, many of the observations of the claimant about how his case had been handled as against that of Mr Tortolano have, at least on the face of them, merit. There is the possibility that he will establish a disparity of treatment between them, although whether that is sufficient to reverse the onus of proof, or lead to a conclusion that the sole or principal reason for dismissal was one or more protected disclosures is a different question that at this stage I do not consider can easily be answered. The context is that disciplinary action was taken against Mr Tortolano at the level of a final written warning, his far longer service than the claimant having been taken into account, and he did not have the two other issues alleged against him of inappropriate comments, and of allegedly sending a confidential email.

32. As to that confidential email, the claimant firstly denies that he did send it to his email account, but accepts that it was received at his own email account. That is not as a matter that is easily understandable. Why someone else would send that email to his private account, who did so, and how, will require evidence. Secondly he argues that it was then the subject of a protected disclosure he made, and thus from the terms of the contract of employment is not a breach of contract. It is a somewhat circular argument, and assumes that sending an email to his email account outside the respondent is a protected disclosure, but in my view that is not likely to be right. The email to the claimant's account is not I consider likely to be held to be a protected disclosure, it is the email he later sent on 2 July 2025 that might be. The claimant can argue that the sending of the email to his own email account is part of that process, but there are I consider difficulties with that argument, whether it is established that someone else did so, or that he did so. It seems to me that this point also is one that requires evidence to establish whether or not the claimant did send it, he denying that. It appears to me that this and some of the other issues identified above are more complex than the claimant argued for, and perhaps appreciates.

33. Looking at all the material before me in the light of the new circumstances that are before me in the event that the new material is to be considered, the matrix is somewhat different to that at the interim relief hearing. I remain of the view that the claimant does not meet the threshold for the award of interim relief. His case is, similarly to that at the interim relief hearing itself but for somewhat different reasons given the changed circumstances, quite close to doing so, but there are a number of factual matters in dispute which I do not consider means that I am able to conclude that the test for granting interim relief is met.

34. In all the circumstances in my view it is not in accordance with the overriding objective to grant the reconsideration application for these reasons, and it is refused.

Date sent to parties **23 September 2025**