EMPLOYMENT TRIBUNAL PROCEDURE – THE POWER TO RECALL A JUDGMENT

In the recent appeal in *Dr N Malik v Cenkos Securities PLC* UKEAT/0100/17 and UKEAT 0101/17 the Employment Appeal Tribunal (the Honourable Mr Justice Choudhury, sitting alone) heard Dr Malik's appeal against an Employment Tribunal's decision to dismiss his complaints that he had been constructively dismissed and subjected to detriments on the grounds that he had made protected disclosures and that he had been victimised on the grounds of race and/or religion. The grounds of appeal were detailed and wide-ranging. However, a point of interest for practitioners arises in the EAT's judgment on a subsidiary appeal, this being an appeal against the Decision of the Employment Tribunal to refuse an application to introduce new evidence by way of a reconsideration application. The interest arises because the judgment is a reminder about the power of an employment tribunal to recall its judgment before it is promulgated and the way in which this should be exercised.

Employment law practitioners will be familiar with the procedure for reconsideration of an employment tribunal judgment under Rule 71 of the Employment Tribunal Rules of Procedure 2013 and the process of appealing a judgment to the EAT. However, less familiar may be the tribunal's power to recall a judgment. The power of recall applies after the hearing of the evidence and submissions has been completed in a case but before the tribunal has promulgated its judgment, that is, recorded the judgment in writing and sent it out to the parties. In some circumstances the tribunal may alter its judgment before promulgation, either of its own motion or following an application by one of the parties. This may happen where the judgment has been given orally at the conclusion of the hearing, but the written judgment has not yet been drafted and sent out, or, where judgment has been reserved, may happen between the conclusion of the hearing and the final written judgment.

The relevant factual circumstances which gave rise to the subsidiary appeal in *Malik* were as follows. Following the hearing before the Tribunal the Tribunal had spent 4 days in Chambers deliberating between 25 and 28 October 2016. On 08 December 2016 the Claimant's solicitors wrote to the Tribunal providing it with transcripts of two recordings of meetings between the Claimant and managers of the Respondent made by the Claimant during his employment. The Claimant said these recordings had just been discovered by him on an old laptop. The covering letter from the Claimant's solicitors invited the Tribunal to consider the transcripts on the basis that they, *"may be relevant to the Tribunal's deliberations."* However there was no formal application made in the covering correspondence. The Respondent's solicitors objected to the attempt to introduce the transcripts into the evidence in the case, citing the principles established in *Ladd v Marshall* [1954] 1 WLR 1489. The Tribunal did not respond to the correspondence.

Following promulgation of the judgment on 21 December 2016 the Claimant made an application for reconsideration, on the basis of the new evidence. In its response to the application the Tribunal stated that when the transcripts were sent to the Tribunal it had already made its decision and that it had decided that it was not appropriate to consider further material at that stage. When dealing with the reconsideration application it applied *Ladd v Marshall* and held that the new evidence could have been obtained and deployed at trial with reasonable diligence and would not have had an important impact on the outcome of the proceedings in any event. The reconsideration application was dismissed.

The basis of the subsidiary appeal was that:

a) The Tribunal had failed to respond to the Claimant's letter of 08 December 2016 enclosing the transcripts prior to promulgating the judgment;
b) It failed to exercise its discretion to recall the judgment under *In re L & B (Children)* [2013] UKSC 8 and *Hanks v Ace High Productions Ltd* [1978] ICR 1155;
c) IT applied *Ladd v Marshall* when in fact it should have applied the cases referred to in (b);
d) Even if *Ladd v Marshall* was the correct test it had been wrongly applied.

There is no reference to a power to recall judgments in the Employment Tribunal Rules of Procedure 2013 or indeed in any of the predeceding versions of the procedural rules. The power derives from the decision of the EAT in *Hanks v Ace High Productions Ltd.* In this case the EAT noted that the practice in the High Court and County Court was that until a judgment or order had been entered or drawn up there was an inherent power to alter it. Although there was no express provision for this in the rules of procedure governing employment tribunals it was appropriate to apply the practice in employment tribunal proceedings. The EAT stated in relation to the power to recall a judgment:

“Putting the matter negatively, it would obviously be wrong to make use of the power, in effect to re-hear the case, or merely to hear further argument on matters of fact with the possibility of changing the mind of the tribunal on the facts, when already a clear decision has been reached upon them. It is intended for the plain omission or the simple error which can be put right, and matters of that sort. In other words, in summary, the power exists. It should be used carefully, sparingly and not as a matter of course.”

The exercise of the power to recall a judgment has been considered by the EAT on various occasions since the judgment in *Hanks*. In *Blockleys Plc v Miller* [1992] UKEAT 644/88 the EAT declared that it was limited to simple cases of minor errors or omissions **“very much as one would use the slip rule.”** Arguably this is a narrower application of the power than that set out in *Hanks*, in which the power was exercised as a result of the chairman reviewing an authority which had been cited to the Tribunal in that case and inviting further submissions on it. In *CK Heating Ltd v Doro* UKEATS/0043/09 the EAT held that the ultimate question when deciding whether to exercise the power of recall was whether it was in the interests of justice to do so and that a tribunal should also have regard to the overriding objective. It approved the statement in *Hanks* that the power should be exercised sparingly and with caution, but added that this was a general principle and not an absolute rule. A decision on whether it will be correct to recall a judgment will depend on the circumstances of each individual case.

In *In re L & B (Children)* [2013] UKSC 8 the Supreme Court considered the circumstances in which a judge was entitled to recall a judgment after it had been announced but before it had been perfected. The case concerned care proceedings but the Supreme Court’s decision on the general point applies to all types of civil proceedings. The Supreme Court reviewed the authorities and concluded that the power was not solely to be exercised in exceptional circumstances. Examples of when it may be exercised include a plain mistake by the court, the parties’ failure to draw to the court’s attention a plainly relevant fact or point of law and the discovery of new facts after judgment was given. However the Supreme Court stated than even a carefully considered change of mind on the part of a judge can be sufficient. How the discretion should be exercised will depend on all the circumstances of the case, the overriding principle being to deal with the case justly. However the discretion should be dealt with judicially and not capriciously.

In *Malik* the EAT noted, firstly, that the letter of 08 December 2016 did not make any express reference to the power to recall or the authorities relevant to this. As such there was no error of law in the Tribunal not considering whether it should exercise its power to recall.

The EAT then noted the wider approach to the power of recall set out by the Supreme Court in *L & B* and that the power still had to be exercised judicially and not capriciously. It held that the Tribunal had exercised its discretion lawfully by

declining to reopen its decision and consider new evidence when the basis for considering that evidence had not been set out and established. As stated above it then considered the Tribunal's decision in relation to the reconsideration application, found it to be correct, and dismissed the subsidiary appeal.

It is an unfortunate but inevitable fact of litigation that on occasions a party may produce a piece of evidence which they consider relevant after the conclusion of the hearing, or become aware of an authority or submission which was not drawn to the tribunal's attention in the hearing. If this happens before the judgment has been handed down, or even after an oral judgment has been given but before it has been recorded and sent out, then the correct course of action for a party who wishes the tribunal to consider the new material before the judgment is promulgated is for it to make a formal application for recall, citing the relevant authorities and setting out fully the grounds of the application, for recall. As is clear from *Malik* simply sending the material to the tribunal office with a request that it be considered will be insufficient. When making the application it will be important to draw the tribunal's attention to the decision of the Supreme Court in *L & B*, since the test it sets out is wider than that in *Hanks*. Ultimately, of course, whether this makes a difference to the outcome of a particular case will depend on the nature of the error which the application seeks to remedy, or the quality of the new evidence which it seeks to introduce or the new submission which it seeks to raise. A court or tribunal is only likely to change its mind if it is given a good reason for doing so.

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