EMPLOYMENT TRIBUNALS

Claimant: Mr O Chipenzi

Respondent: IQuest Logistics t/a Interlink Express

HELD AT: Manchester **ON:** 17 August 2017

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: Not in attendance
Respondent: Not in attendance

JUDGMENT ON RECONSIDERATION

The judgment of the Tribunal is that the claimant's application for a reconsideration of the judgment signed on 28 July 2017 and sent to the parties on 31 July 2017 fails and is dismissed.

REASONS

1. The claimant applied for a reconsideration of the judgment in his case promulgated on 28 June 2017. He made his application on 9 August 2017 relying on the following

   (1) New evidence had become available since the hearing which was not available and could not have been foreseen at the time of the hearing; and

   (2) The interests of justice required a review.

2. The new evidence was one email of 24 June 2016 which was already contained in the bundle but redacted which was dated Friday 24 June 2016 which said “OB is still sick and now claiming an accident at work which none of us know anything about. I wouldn’t expect him to be in, we haven’t planned for him” and on Monday 27 June 2016 an email which was not in the bundle from Louise Saddik to Tony Austin, “You still have OB on route map, he is sick”.

3. The claimant also relied on his interpretation and presumably note of evidence given by Tony Austin which he said was that Tony Austin implied that he had received two fit notes, and further that Adam Seed implied that he might have received those fit notes. He also prayed in aid the fact that Adam Seed and Duncan Harris had conducted a telephone call with him which they had secretly recorded (by this I assume the claimant means one of them had taken notes of it while the other conducted the telephone conversation, although they gave slightly different evidence about this); and in relation to discrimination he asked us to consider that the remark made by Duncan Harris which we found was not racist was racist in respect of saying when was the claimant going to back to his country. The claimant gave further evidence regarding this which he had not given before, stating that Mr Harris had been talking to him about President Mugabe driving out white commercial farmers and it was the claimant's perception that when the claimant did not condemn Mr Mugabe's actions he then said when was he going back to his own country. The claimant said it was offensive, and Mr Harris's only defence was that he would not have made the comment because he was a liberal.

The Law

4. Reconsideration of judgments is contained in rule 70 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. It says that:

> "(70) A Tribunal may, either on its own initiative or on the replication of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration the decision may be confirmed, varied or revoked. If it is revoked it may be taken again.
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> (71) Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing 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 when the written reasons were sent out (if later) and shall set out why reconsideration of the original decision is necessary.
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> Process
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> (72) An Employment Judge shall consider any application made under rule 71:
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> (i) If the Judge considers there is no reasonable prospect of the original decision being varied or revoked the application shall be refused and the Tribunal shall inform the parties of that 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.
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> (ii) If the application has not been refused under paragraph (i) the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to

the notice provided under paragraph (i), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further representations.

(iii) Where practicable the consideration under paragraph (i) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full Tribunal which made it, and any reconsideration under paragraph (ii) shall be made by the Judge or, as the case may be, the full Tribunal which made the original which made the decision. Where that is not practicable the President, Vice President or Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full Tribunal, either shall direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part."

Conclusions

5. I make this decision under regulation 72(1) of the above Regulations. Accordingly I have considered it in chambers on my own.

6. I refuse the claimant's application for a reconsideration on the following grounds:

(1) The new evidence referred to was partly available at the Tribunal hearing and the Tribunal were aware of it when making their decision. As to the second piece of evidence – there is no reason given why this was not originally available, although we do not hold this against the claimant as it would have been up to the respondent to disclose it. In any event, neither piece of evidence leads us to make a different decision from the original one. The respondent was anxious to know whether or not, at the expiry of the claimant's current sick note, he was going to come in or whether he was going to present another fit note, and if so for how long. In order to ascertain this they rang the claimant on 28 June when clearly he had not attended work or, as far as the respondent was concerned, submitted a sick note. The claimant said he would see the doctor on the following Friday and would then contact them that day to tell them what was going on (i.e. 30 June). Therefore on the dates when the two emails the claimant now relies on were produced the respondent was aware that his sick note was on the cusp of running out or had just run out, and that the claimant had been spoken to and was not intending to come in that day. Therefore at that stage the respondent had the knowledge that he would not be working, however it was knowledge they had had to ascertain themselves: he had not kept them informed and neither did he submit a sick note on time, therefore the issue as we decided it is unaffected by these two emails.

(2) The oral evidence of Duncan Harris and Adam Seed regarding the receipt of two sick notes: My note of the evidence is that no witness of the respondent agreed that two sick notes had been received, and that

when Adam Seed was answering the claimant he was answering in the context of what process he followed in respect of sick notes as he was responsible for paying sick pay.

(3) Regarding the recorded conversation and collusion between Adam Seed and Tony Austin, even if this was true nothing turns on it. The respondent was being careful to ensure that it had a note of what occurred.

(4) Regarding discrimination, we did find the burden of proof shifted to the respondent on the basis of drawing inference from other matters and a different decision regarding the "Zimbabwe remark" would make no difference to this as the burden had shifted. The claimant was not bringing a harassment claim so this would not refer to a stand alone claim; it was a matter on which he relied in order to argue the burden of proof shifted. Further, we were satisfied that Mr Seed made the decision to dismiss uninfluenced by Mr Harris, and therefore even if we found that Mr Harris had made a discriminatory remark and that it was possible that the decision making process would be tainted by that, we were satisfied that Mr Harris took no part in the decision to dismiss the claimant. There were no allegations that Mr Seed's actions were directly tainted by discrimination.

7. Accordingly the claimant's application for a reconsideration of our decision fails and is dismissed.

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Employment Judge Feeney

Date 21st August 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
25 August 2017

FOR THE TRIBUNAL OFFICE