Case No: 2401600/2016

EMPLOYMENT TRIBUNALS

Claimant: Mr J Allan

Respondent: The Federation of Self Employed and Small Businesses Limited

JUDGMENT

The respondent's application dated 8 August 2017 for reconsideration of the judgment sent to the parties on 28 June 2017 is refused.

REASONS

1. I have considered the respondent's application for reconsideration of the judgment in which I refused to make a costs order ("the costs judgment"). That application is contained in a letter of 8 August 2017 to which is attached a copy of a report prepared on behalf of the claimant in July 2017 ("the July report"). I have also considered the claimant's response to this application contained in a letter from Mr Horan of 10 August 2017.

Rules of Procedure 2013

2. Rule 70 sets out the circumstances in which a judgment may be reconsidered. The test is whether it is necessary in the interests of justice to reconsider the judgment. This provision replaced rule 34(3) of the 2004 Rules of Procedure which set out five circumstances in which a decision could be reconsidered (or, as it was then termed, reviewed). They included where:

> **"new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time…"**

3. The Employment Appeal Tribunal (Her Honour Judge Eady QC sitting alone) considered the relationship between the 2004 Rules and the current provision in **Outasight VB Limited v Brown [2015] ICR D11**. The change in wording was not intended to effect any substantive change to the circumstances in which judgment could be reconsidered or reviewed. Consequently it may be in the interests of justice to reconsider a decision if there is new evidence which might have made a difference which could not reasonably have been put before the Tribunal at the hearing of the case.

4. Rule 71 requires the application to be made within 14 days of the date the judgment with reasons was sent to the parties. I have power to extend that time limit under Rule 5.

5. Rule 72(1) of the 2013 Rules of Procedure empowers me to refuse the application without a hearing if I consider that there is no reasonable prospect of the original decision being varied or revoked.

6. Finally, in common with all powers under the 2013 Rules, preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay. Achieving finality in litigation is part of a fair and just adjudication.

Time Limit

7. I consider it just to extend time so as to enable this application to be considered on its merits. The information on which it is based came to the attention of the respondent on 8 July 2017. The application was made one month later after taking legal advice. It was appropriate for the respondent's Board to consider carefully how to proceed before making its application, which is full and clear. There is no suggestion by the claimant that this delay has caused him any prejudice which would make it unjust to grant the extension of time. He has still been able to respond to the substantive points being made.

Preliminary Consideration

8. The new evidence on which this application is based could not have been relied upon at the costs hearing on 16 June 2017 because the July report was issued by Mr Horan after it. The question is whether it might have made a difference to my finding that the claim was not pursued vexatiously or for a collateral purpose (see paragraphs 27 – 29 of the costs judgment).

9. I accept that in principle a document prepared after the conclusion of litigation may shed some new light on the state of mind of a party during that litigation. However, I do not consider that the contents of the July report would have made any difference to my conclusions had the report been available at the cost hearing.

10. The key point is that in my judgment there were reasonable grounds for the claimant to argue that he was an employee and that if so his employment rights had been infringed (see costs judgment paragraphs 29 and 32) and therefore the claim was not vexatious within the terms of the authorities quoted in paragraphs 14 and 15 of the costs judgment. It was neither "hopeless" (see **ET Marler Ltd v Robertson [1974] ICR 72**) nor a claim with "little or no basis in law (or at least no discernible basis)" (see **Attorney-General v Barker [2000] 1 FLR 759**). The fact that the employment tribunal litigation was only part of a broader dispute between the parties, and that the claimant and his representative in the July report say that they will pursue other litigation options ("there are many other ways to skin a cat") does not affect that conclusion.

11. Nor does the July report's confirmation that it was hoped that this litigation would clear the claimant's name render it vexatious or pursued for a collateral purpose. A hope that success in establishing unfair dismissal will have that effect is a common misconception amongst litigants in person. In any event the respondent did plead that if the claimant had been an employee unfairly dismissed, compensation should be reduced by reason of contributory fault (Grounds of resistance paragraph 74). Potentially, therefore, the Tribunal could have been required to decide whether he had been guilty of culpable and blameworthy conduct.

12. Ultimately the July report simply amounts to more evidence of matters already before the Tribunal which I took into account in making my decision on costs. Paragraph 21 of the reconsideration application of 8 August 2017 appears to acknowledge that. The claim was part of a broader picture, and the claimant (and his representative) clearly have strong feelings of bitterness and resentment against the respondent which they are ventilating at every opportunity, but the proceedings themselves were not vexatious. I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The application for reconsideration is refused.

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Employment Judge Franey

15 August 2017

JUDGMENT SENT TO THE PARTIES ON

31 August 2017

FOR THE TRIBUNAL OFFICE