Appeal No. UKEATS/0016/16/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 19th April 2017

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

TCO IN-WELL TECHNOLOGIES UK LTD — APPELLANT

MR ANTHONY STUART — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Ms Margaret Gibson Burness Paull LLP 5th & 6th Floor Union Plaza 1 Union Wynd Aberdeen AB10 1SL
For the Respondent	Mr Neil MacDougall (Advocate) Instructed by: Parabis Scotland Ltd 38 Queen Street Glasgow G1 3DX

SUMMARY

PRACTICE AND ROCEDURE :

REVIEW/ RECONSIDERATION OF JUDGMENTS

Following a judgment in his favour the claimant, through his representatives, sought reconsideration on the basis that the compensatory element of the award made to him should have been " grossed up" to take account of the incidence of tax. The reconsideration application was out of time and was opposed by the respondent, both in relation to lateness and in substance. Subsequent to receipt of the respondent's opposition the Tribunal decided to effect reconsideration " of its own initiative" and purported to gross up the award. The respondent appealed.

Rules 70 – 73 of the Employment Tribunal Rules provide alternative routes to reconsideration. Where an application has been made by a party for such reconsideration, that must be dealt with by the Tribunal. There is no scope for a hybrid process where an application is commenced by a party but is then taken on by the Tribunal of its own initiative, at least where there is a single subject matter for potential reconsideration. The course adopted by the Tribunal was procedurally and substantively unfair. It should have addressed the issue of lateness, and whether to extend time, as a first consideration and thereafter deal with the substance of the reconsideration application only if time was extended. In any event, the purported reconsideration judgement had ignored the respondent's opposition, was accordingly not balanced and could not withstand scrutiny.

Appeal allowed and case remitted to a fresh Tribunal to consider the out of time reconsideration application.

THE HONOURABLE LADY WISE

Introduction

1. This appeal raises an apparently novel point, namely whether, when faced with an out of time application for a reconsideration under Rule 71 of the Employment Tribunals Rules of Procedure 2003 (as amended) "the ET Rules", a Tribunal can, instead of determining that application proceed to reconsider the Judgment "of its own initiative".

2. The appellant is the respondent's employer and was represented before the Tribunal by Mr Howson, Consultant and before me by Ms Gibson, Solicitor. The claimant who opposes the appeal was represented both before the Tribunal and before me by Mr MacDougall, Advocate. I will refer to the parties as claimant and respondent as they were in the Tribunal below.

3. The claimant was employed from 24th March 2014 by the respondent, a company providing certain "plugs" or devices to companies in the UK sector of the North Sea oil fields and elsewhere. He was initially a Sales Engineer but from 8th September 2014 held the promoted position of UK Sales Manager. He was dismissed on 8th May 2015 in circumstances fully narrated in the Tribunal's Judgment of 22nd April 2016. The unanimous decision of the Tribunal recorded in that Judgment was that the claimant was unfairly dismissed for making protected disclosures. He was found entitled to a monetary award totalling £106,520.98. The respondent has not sought to appeal that decision. This appeal concerns a subsequent Judgment of the Tribunal dated 22nd July 2016 ("the July Judgment") in which the Tribunal states that "on its own initiative" it reconsiders the Judgment dated 21st April and copied to parties on

22nd April 2016. The effect of the reconsideration was to "gross up" the compensatory award element of the total award although, curiously, the reconsideration Judgment while it contains a calculation does not make any Order substituting the previously awarded figure.

4. The background to the Tribunal reconsidering the decision in relation to the compensatory award is not in dispute. I will set it out chronologically and relatively fully as the context in which the Tribunal made the decision to reconsider is important to the issue under appeal.

5. On 9th May 2016 the claimant's representative contacted the Tribunal by email pointing out that the compensatory award to the extent that it exceeded £30,000 is subject to tax. In those circumstances it was said that it was standard for the Tribunal to gross up the award so that once HMRC has been paid he is left with the figure the Tribunal intended to award. It is accepted that the email of 9th May was not copied to the respondent and did not constitute a reconsideration application.

6. On 17th May 2016 the claimant's representative again emailed the Tribunal. This correspondence was more formal and specifically asked the Tribunal to "treat this as a request for reconsideration of the claimant's award …". The basis for the application was that mentioned in the email of 9th May, namely that the compensatory award should other than the first £30,000 be "grossed up" to take account of the tax liability. The email goes on:-

> "We appreciate that the request for reconsideration is outwith the period of 14 days within which the written Judgment was issued to parties however would ask that consideration is given to the fact that the principal solicitor handling the matter was out

of the office at the time when the Judgment was received. The request for reconsideration is made within 14 days of the solicitor's return to the office. The request is also made within 14 days of the tax query being raised with the Employment Tribunal on 9th May 2016".

The request for reconsideration was duly copied to the respondent's representatives.

7. On 31st May 2016 the respondent's representatives wrote to the Tribunal in response to the claimant's application for reconsideration. Two main issues were raised: first, it was submitted that the application was out of time the 14 day limit for such an application, being 14 days from the date of Judgment in terms of Rule 71 and that period having expired on 6th May 2016. It was made clear that the respondent opposed the application on that basis. Secondly, the respondent accepted that the principle that awards should be grossed up was accepted but that further evidence would be required of the claimant's circumstances before an accurate calculation could be carried out. That would involve additional time and expense and should not be allowed as the matter could and should have been addressed at the original hearing.

8. On 3rd June 2016 the claimant's representative wrote to the Tribunal addressing the two objections of the respondent to the reconsideration application. The point about the principal solicitor having been on leave when the Judgment was received was reiterated, reference was also made to the point having been raised informally by email of 9th May 2016. The point was then made that the claimant's representative could find no authority to support the proposition that grossing up should only be allowed if submissions to that effect had been made at the hearing. Reliance was placed on the case of **Hardie Grant London Limited v Aspden 2012 ICR D6** which it was said supported the contrary position.

9. On 14th June 2016 the office of the Employment Tribunal wrote (by email) to both representatives in response to the correspondence. The message confirms that having considered that correspondence the Employment Judge:-

> **"… is of the opinion that the Tribunal appears to have been in error in grossing up. Accordingly in terms of Rule 73 the Judge considers that the reconsideration should be at the Tribunal's own initiative. He suggests that to save expense the reconsideration could be dealt with by written submissions. Indeed the proper calculations should be capable of agreement."**

What followed was the Judgment appealed against, namely that of 22nd July 2016.

The Employment Tribunal's Reasons

10. Insofar as relevant to the issue for determination in this appeal the Judgment of 22nd July 2016 gives the following reasons for substituting a "grossed up" award for the one contained in the April Judgment:-

> **"1. … the Tribunal received an email from the solicitors acting for the claimant on 17th May indicating that they were concerned that the monetary award had been calculated on the basis of net wages and seeking a reconsideration. They indicated that for the first £30,000 of the compensatory award would be tax free and thereafter that the claimant would be taxed. They asked the Tribunal why it had not "grossed up" the claimant's wages as sought.**
>
> **2. The application was considered by the Tribunal. It indicated on the 9th of June that it appeared as if an error had been made and proposed dealing with the reconsideration on its own initiative and on written submissions. No written submissions were received from the respondents' agent.**
>
> **3. Further submissions were received by the Tribunal on 3rd June from the claimant's solicitors in relation to the issue of grossing up and they were copied to the respondent's agent.**
>
> **4. The Tribunal having read the correspondence came to the view that there had clearly been an error made by the Tribunal in the calculation. They considered that the terms of Rule 70 were apt and that the Tribunal can on its own initiative reconsider any Judgment where it is necessary in the interests of justice to do so. In the Judgment of the Tribunal it is necessary to reconsider the Judgment otherwise a considerable injustice will be done to the claimant."**

The Respondent's Argument on Appeal

11. Ms Gibson, for the respondent, argued that the Tribunal had not been entitled to proceed under Rule 73 when there was a pending, albeit late, application under Rule 71. The Rules required the Tribunal to deal with the Rule 71 application including determining the issue of its being out of time. In **Practice Surgeries Limited Surrey Primary Care Trust v Srivatsa UKEAT/0212/15** the EAT made clear that an Employment Judge must give reasons for any decision to extend time. As in the absence of an extension on a late application there was no jurisdiction to hear it. What the Tribunal appeared to have done in this case was attempt to use the power in Rule 73 to excuse the claimant for a failure to make a timeous application. The issue of lateness required to be considered first. The issue of whether the claimant should be excused the consequences of a failure to make a timeous application ought then to have been considered. It could not be said that the Tribunal in this case had decided to reconsider the Judgment "on its own initiative". Reconsideration arose only because of the claimant's email of 17th May as is evident from the reasons in the Judgment appealed against. On any view, therefore, the email of 17th May raised the issue as opposed to the Tribunal doing that itself. Ms Gibson contended that Rule 73 does not operate independently from Rule 71. There is a distinction between the two separate ways of reconsidering a Judgment. The issue of loss was not one for the Tribunal acting on its own initiative.

12. Separately, the Tribunal had no proper basis under Rule 73 to make an award in the interests of justice in the absence of evidence and where required submissions. To conclude otherwise would mean that a Tribunal could reconsider any issue about which no material had been put before it.

13. Insofar as it might be argued by the claimant that the test for interfering with an exercise of discretion and for perversity were relevant it was submitted that these were not the issue in this appeal which was whether the course taken by the Tribunal was competent.

14. As a fallback position Ms Gibson argued that even if the Tribunal was entitled in the circumstances to reconsider the Judgment on its own initiative it erred in law in so doing. No submissions had been made at the hearing in relation to grossing up and agreed figures on the proposed award had been before the Tribunal. In those circumstances it was wrong for the Tribunal to look at this as its own error. It was not something focused before the Tribunal that the Tribunal failed to deal with. It was an error on the part of the claimant, not the Tribunal. Reference was made to **Trimble v Super Travel Limited 1982 ICR 440** where a Tribunal had reduced a compensatory award otherwise payable to a claimant on the basis of contribution. On an appeal against the refusal of a review of that decision the EAT made clear that the review procedure enabled errors occurring in the course of the proceedings to be corrected but would not normally be appropriate when the proceedings had given both parties a fair opportunity to present their case and the decision had been reached in light of all relevant argument.

15. In this case it could not be said that the claimant did not have an opportunity at the hearing to make submissions on grossing up. Reference was made also to the cases of **Lindsay v Ironsides Ray and Vials 1994 ICR 384** and **Newcastle Upon Tyne City Council v Marsden UKEAT/393/09** and **Ministry of Justice v Burton and others 2016 ICR 1128** on the issue of the restriction of the scope of review/reconsideration particularly where any error was arguably that of parties' representatives.

16. Ms Gibson contended that if the grossing up point was obvious then it would surely have been raised at the full hearing. Reconsideration was not apt to excuse one's own failings. For a Tribunal to properly review and allow grossing up the Trimble test would have had to have been satisfied and it hadn't been in this case.

The Claimant's Response to the Appeal

17. Mr MacDougall spoke to his written argument and responded to the arguments in relation to competence and *separatim* perversity. On the alleged procedural incompetency the procedure began with the claimant's request for reconsideration of 17th May 2016. After opposition had been marked by the respondent the Tribunal's decision to reconsider of its own initiative was intimated to parties a period of 3 working days to respond to the suggestion of it being dealt with on written submissions had been afforded. The terms of Rule 73 had been complied with insofar as the Tribunal had informed parties why the decision was being reconsidered and, separately, the reconsideration had been carried out in accordance with Rule 72(2). That Rule makes clear that reconsideration can proceed without a hearing but parties must be given a reasonable opportunity to make further representation.

18. The email of 14th June explains that the Judge is going to reconsider his own initiative because the failure to gross up appears to be the Tribunal's own error. Accordingly, the requirement to inform parties of the reason for it was satisfied as was the opportunity to make further written submissions. In the July Judgment the Tribunal records that no written submissions were received from the respondent's agents. The procedure carried out by the Tribunal was competent. The respondent's argument that it was incompetent because of the pending (late) application under Rule 71 was not supported by any authority. What the

Tribunal was doing was "taking ownership of its own error". In **Newcastle City Council v Marsden UKEAT/393/09,** at paragraph 14 the EAT referred to the relevant authorities and approved those confirming that exceptional circumstances are not required for a review/reconsideration where the interests of justice demanded one. The overriding objective enables the Employment Tribunal to deal with matters expeditiously, justly and in a manner that saves expense. Nothing in Rule 70 or 73 stops the Employment Tribunal reconsidering on its own initiative where there is a pending application under Rule 71. Such a prohibition cannot be implied into the Rules. Standing the overriding objective the Employment Tribunal was entitled to proceed as it did. The case of **Practice Surgeries Limited Surrey Primary Care Trust v Srivatsa** UKEAT/0212/15 was not in point other than as a reference to extension of time under Rule 5 a provision which, the respondent had acknowledged, can be used to assist achieving the interests of justice.

19. The respondents' second argument ignored the fact that there was more than one possible outcome to the Rule 71 application. The Employment Tribunal acted properly on its own initiative. No-one else had told it what to do. The Tribunal became aware of an error through the email from the claimant but it did not effect reconsideration because it was told to do so by the claimant who did not have that power. The expression "on its own initiative" should not be interpreted too strictly particularly as a request from the EAT can result in a reconsideration of the Tribunal's own initiative (Rule 70). There was no basis for saying that the Tribunal had not acted on its own initiative.

20. The Tribunal has admitted that the failure to gross up was its own responsibility and so it cannot be categorised as a claimant error. The July Judgment at paragraph 4 refers to the Tribunal's view that "there had clearly been an error made by the Tribunal in the calculation."

It was important that the respondents had been invited to make submissions in the Rule 73 process and chose not to do so. They could have engaged with it but did not and in those circumstances could not complain about the procedure that followed.

21. So far as the second ground or fallback position of the respondent was concerned Mr MacDougall emphasised that the reconsideration Judgment involves an exercise of discretion. Therefore the EAT can interfere with the decision to gross up the award in the interests of justice only if it was perverse - see **Bastick v James Lane (Turf Accountants) Limited 1979 ICR 778** at 782 –784 One must look not just at the reasoning but also at the outcome. It is not seriously disputed that it is just and equitable to gross up awards to take account of tax. The respondents cannot meet the very high test for perversity. The issue of whether the Tribunal can is a matter of law. Gross up is not the test. In **Newcastle City Council v Marsden** reference was made to the case of **Dhedi v United Lincolnshire Hospitals Trust [2003] UKEAT 1303/01,** which also dealt with an error on grossing up. Both representatives in that case had erred in the approach put before the Tribunal and the Tribunal had followed their error as the error was made by both parties and by the Tribunal Chair. The interests of justice had demanded reconsideration. The dangerous path argument of Mr Justice Mummery relied on by the respondent related to the mischief of giving litigants a second bite of the cherry. That does not arise in this case. The case of **M Shortall t/a Auction Centres UK v Covey** was said to be in point as grossing up was not addressed before the Tribunal. In the present case it wasn't a live issue and so there was no obligation on anyone's part to make submissions about it.

22. In Mr MacDougall's submission the cases cited highlight that grossing up is something that should happen as a matter of course. There cannot be any substantive argument that grossing up should not have taken place so the claimants are not seeking a second bite of the

cherry just the granting of something that it cannot be disputed should happen. That was sufficient to distinguish any cases relied on by the respondent, including **Ministry of Justice v Burton and others 2016 ICR 1128**. In that case Elias LJ had recognised that where it was being argued that the review would be a second bite of the cherry it would be highly material if a central argument had not been not addressed before the hearing. The Tribunal in this case, on the other hand, realised that an error had occurred in grossing up. It thought to rectify that error in the most efficient and cost effective manner available. That could hardly be said to be perverse particularly where the outcome was that the just and equitable practice of grossing up had been achieved.

Discussion

23. Reconsideration of Judgments is a procedure peculiar to Tribunal decision making It is a departure from the rule in ordinary litigation that a Judge's rule is *functus* once he or she has issued a determination, including dealing with any matter of expenses. Accordingly, where a process is the creation of a rule or statutory provision, as opposed to developed at common law, that process can only be undertaken in compliance with those rules. Several of the rules in question in this appeal are in mandatory terms. The relevant provisions on reconsideration of Judgments, contained in a standalone section of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 are in the following terms:-

"**70 Principles**

A 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. On reconsideration, the decision (" the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

71 Application

Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) 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 that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

72 Process

(1) An Employment Judge shall consider any application made under rule 71. If the judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the tribunal shall inform the parties of the 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.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice period provided under paragraph (1), 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 written representations.

(3) ….

73 Reconsideration by the Tribunal on its own initiative

Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused). "

24. In my view three main points of construction of those Rules arise for consideration and determination in this case. The first point is that Rule 70 makes clear that a party's application for reconsideration and separately the Tribunal reconsidering on its own initiative are alternative processes. The rules do not provide for both types of reconsideration taking place at the same time, far less some kind of hybrid process where an application starts as an application by a party but is then taken on by the Tribunal under Rule 73. Secondly, Rule 71(1) requires an Employment Judge to consider any application made by a party under that Rule and on the undisputed facts in this case there was a Rule 71 application before the Tribunal, namely that of 17th May 2016. It was an opposed application contested firstly on the basis that it was said to be out of time and secondly on the ground that the claimant's representative had failed to make submissions on the point of the hearing and should not be allowed to involve parties in the Tribunal in the additional expense of rectifying that. Thirdly, where the Tribunal proposes to reconsider a decision on its own initiative under Rule 73 the procedure that is followed is that in accordance with Rule 72(2) " as if an application had been made and not refused". This provision is consistent with the Tribunal's ability to reconsider on its own initiative being limited to situations where no party had in fact made such an application.

25. The procedure adopted in this case was that the Tribunal, faced with an application that was opposed, attempted to remedy the matter by instigating its own reconsideration. The process then undertaken was, in my opinion, both incompetent and procedurally and

substantively unfair. The Tribunal failed to determine the opposed Rule 71 application that was already before it. It was not entitled to instigate the alternative route of reconsideration on its own initiative where that application was pending. Further, the Tribunal's reasons failed to record that a Rule 71 application had been made and that it was opposed inter alia on the ground that it was out of time. The reference to reconsideration appears only in relation to the Tribunal's decision to reconsider. In other words the reasons failed to acknowledge that there was a live issue before the Tribunal on the matter of whether reconsideration was available on the issue of grossing up at all. Finally, the Tribunal's reasons lack balance. The anticipated injustice to the claimant is relied on as a basis for reconsideration but the points made by the respondent in opposition are completely ignored. Accordingly, even had I regarded the procedural mechanism adopted in the July Judgment as competent the process was procedurally and substantively unfair as the contentions of the respondent were simply ignored. This was tantamount to a breach of natural justice as a decision that does not make clear that the arguments of both sides were heard and considered is not one that can withstand scrutiny.

26. I accept the submission of the respondent that a proper application of the rules in this case required the Tribunal to deal with the Rule 71 application on its merits. That would include consideration of whether in terms of Rule 5 of the ET Rules an extension of time for lodging the application should be granted. Some arguments for and against such an extension were already before the Tribunal and required to be addressed and the reasons for granting or refusing an extension would have to be given - **Practice Surgeries Limited Surrey Primary Care Trust v Srivatsa UKEAT/0212/15**

27 . Rule 5 of the Employment Tribunal Rules provides:-

> "The Tribunal may on its own initiative or on the application of a party extend or shorten any time limit specified in these Rules or in any decision whether or not (in the case of an extension) it has expired".

Although the claimant's representative's email of 17th May 2016 made no formal application for extension of time it is implicit in that email that such an extension was sought. There is an acknowledgement that the application is out of time and a plea that consideration be given to the circumstances in which it came to be made. As already emphasised the respondent's representative had articulated opposition to it being dealt with out of time. In my view there was simply no other option open to the Tribunal in such circumstances than to determine as a first consideration whether the application should proceed, albeit out of time. If an extension was justified the issue of whether the matter properly fell to be reconsidered in light of the applicable authorities would then require to be addressed.

28. I reject the contention for the claimant that the Tribunal in this case followed the rules on reconsideration of its own initiative. The inclusion in Rule 70 including within the term, "on its own initiative", action taken following a request from the Employment Appeal Tribunal is a necessary clarification as otherwise it could easily be argued that reconsideration following such a request could never fall within the usual meaning of reconsidering on one's own initiative. Far from supporting the construction put on it by the claimant I consider that the inclusion of this particular route to reconsideration on the Tribunal's own initiative tends to support a conclusion that a request from any other party, especially one that takes the form of a formal application for reconsideration excludes the route of reconsideration at the Tribunal's own initiative.

29. The conclusion I have reached is based on the agreed facts of this case which are that the issue that was the subject of the claimant's application for reconsideration was the very same issue that the Tribunal then sought to reconsider of its own initiative rather than determine the application before it. I do not rule out that a situation could arise where in dealing with a Rule 71 application on one issue the Tribunal notices an entirely separate issue that may merit reconsideration. Nothing I have said in this case should be taken as an indication that in those circumstances reconsideration of the second, new issue, on the Tribunal's own initiative would be incompetent or inappropriate simply because there had already been a Rule 71 application in the same proceedings.

30. The decision I have reached on the primary ground of appeal namely that the Employment Tribunal in this case was not entitled to reconsider on its own initiative an issue already before it within a pending Rule 71 application as an alternative to complying with the mandatory provision requiring a decision on that pending application to be made is sufficient to dispose of this appeal. I have recorded the submissions made on the respondent's fallback position and the response to it. Some of the points go to the issue of whether this is a case where the discretion to act in the interests of justice should be exercised or whether reconsideration is not justified due to the issue arising from the alleged failure of party's representative to draw attention to a matter at the hearing. There are a number of authorities on that point, including that of the Court of Appeal in **The Ministry of Justice v Burton 2016 ICR 1128**. However, as that comprises the second of the two issues raised by the respondent in opposition to the Rule 71 application and as the Tribunal has not yet engaged with that opposition I express no view as to whether or not this is a case in which the discretion should ultimately be exercised.

Disposal

31. The respondent's agent conceded at the hearing that, following the guidance in **Jafri v Linton College 2014 3 WLR 933,** it could not be said that if her appeal succeeded on the primary ground there was only one inevitable outcome of the opposed reconsideration application. She suggested that standing the particular circumstances of the case and the background to the July Judgment a remit to a freshly constituted Tribunal would be appropriate.

32. Mr MacDougall submitted that were the appeal allowed to any extent the matter should be remitted back to the same Tribunal, the body familiar with the facts of the case and the relevant issue.

33. I have decided that in the particular circumstances of this case it would not be appropriate for the matter of determination of the outstanding Rule 71 application to be remitted back to the same Tribunal. The points I have made about lack of balance in the Tribunal's approach to the reconsideration render such a remit inappropriate and not practicable. Accordingly, I will allow the appeal and remit the matter to a freshly constituted Tribunal for consideration of the claimant's opposed application for reconsideration. The procedure to be adopted is for that Tribunal, as the issues of lateness together with arguments for and against extension of time will require to be addressed as a first consideration with the matter of whether the substantive argument for reconsideration also then being addressed in the event that the time limit issue is decided in favour of the claimant. I wish to add only my gratitude to those appearing on both sides today for the helpful and constructive way in which submissions were presented.