EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
	AND
Mr P Shinh	National Grid PLC (1) Pontoon (Europe) Limited (2) Olsten (UK) Holdings Limited (3)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Employment Judge: Coaster **Date:** 15th February 2018

JUDGMENT ON THE SECOND RESPONDENT'S APPLICATION FOR RECONSIDERATION OF THE JUDGMENT OF 6th DECEMBER 2017

The judgment of the Tribunal is that there are no grounds for the decision of 6th December 2017 to be reconsidered under rule 72 and there is no reasonable prospect of the decision being varied or revoked. The second respondent's application for reconsideration made on 21st December 2017 is refused.

REASONS

1. The history of the case and the reasons for the decisions made following a preliminary hearing on 16th November 2017 to determine time points and the amendment of pleadings, are set out in some detail in the judgment of 6th December 2017. There is furthermore a decision dated 22nd January 2018 refusing to reconsider the judgment of 6th December 2017 on the application of the first respondent.

2. By email dated 21st December 2017 the second respondent seeks a reconsideration of the judgment of 6th December. It is noted that the second respondent stated at the preliminary hearing that it also represented the third respondent.

3. Due to a malfunction in the tribunal administration, the 21st December 2017 application for reconsideration by the second respondent was not brought to my attention until 1st February 2018 when, on receipt of further submissions from the second respondent referring to an '*original reconsideration application'*, a search of the tribunal file was made. The original reconsideration application was then located.

4. Rules 70, 71 and 72 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 schedule 1 provide (so far as relevant):

> 70 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. It if 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 (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 of 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.
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> 72(1) An Employment Judge shall consider any application made under rule 71. If the judge considerations 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 provision views on the application.

5. I have read the second respondent's application dated 21st December 2017 and additional submissions of 30th and 31st January 2018 They are prolix and discursive and include opinion and commentary which has made the understanding and analysis of the second respondent's submissions unnecessarily difficult. I have also read the additional emailed submissions made by the claimant in response to the application of 21st December 2017.

6. ***First amendment***: The second respondent objects to the decision to allow a claim against the second respondent of terminating the claimant's

contract with the second respondent because the claimant had made protective disclosures on 31st October 2016. In the second respondent's application for reconsideration it is submitted that there is no evidential basis to find that the First Amendment was in time. I accept that the reasons given were not full. I now clarify the decision to allow the First Amendment.

7. Termination of the claimant's engagement at the first respondent's premises was made by the second respondent initially on 1st November 2017, the day following the protective disclosure made by the claimant. The dismissal of his services could only have been undertaken by the 2nd respondent as it was the contracting party with the claimant's personal service company, GSI. The first respondent contracted with the second respondent for the provision of the claimant's services (through his personal service company) and was not a contracting party with the claimant/GSI. The first respondent therefore was not in a position to terminate his services; it could only instruct the second respondent to do so.

8. The complaint of termination of claimant's services in response to raising a whistleblowing complaint was expressly referred to in the ET1. The ET1 was filed in time complaining of dismissal, albeit filed against the wrong respondent.

9. The second respondent was added to the proceedings on 16th November 2017 at the preliminary hearing. No objection has been made in relation to the addition of the second respondent. It begs the question what was the second respondent added to the proceedings for in relation to the original ET1, if not for the termination of the claimant's services? Time limits do not apply where the complaint, which is not a new head of claim, relates back to the original in time claim form. In any event short submissions on the First Amendment were heard, with the bulk of submissions relating to the Second Amendment.

10. Furthermore, and in the alternative, allowing the claim of 'dismissal' against the second respondent is effectively correctly substituting the second respondent for the first respondent in respect of the dismissal of the claimant's services. Again, the claim is therefore not a new head of claim, it relates back to the original claim form which was submitted in time. The first respondent still remains answerable to the allegation of detriment in that they instructed the second respondent to terminate the claimant's services which constitutes a detriment.

11. In the further alternative, if the First Amendment application is out of time, as both First and Second Amendments are detriments and are inextricably linked, I would unhesitatingly allow the First Amendment based on the

reasons applying to the Second Amendment set out in paragraphs 39 – 42 and 44 namely that the balance of injustice and hardship between the claimant and second respondent clearly falls in favour of the claimant.

12. ***Second amendment****:* In respect of the second respondent's submissions relating to the Second Amendment, reference to specific paragraphs by the second respondent correspond to the paragraphs in the Judgment of 6th December 2017.

13. *Paragraph 20:* The second respondent is mistaken in claiming there is a contradiction between paragraph 20 and paragraph 26. Paragraph 20 is a summary of the second respondent's submissions made at the preliminary hearing and not part of the tribunal's findings or reasons.

14. Just as a summary of the second respondent's submissions are found in paragraph 20, likewise paragraphs 21 – 24 are a summary of the claimant's submissions.

15. *Paragraph 26:* The 'hard evidence' of the claimant's complaint that he had been blacklisted was referred to in the second respondent's submissions of 21st December 2017 – an email of 1st November. The second respondent states that when discovered by the claimant In the SAR exercise, he "set great store" by the email and goes on to criticise the claimant's interpretation of the email and to offer a different interpretation. That was not a submission made at the preliminary hearing and in any event, the interpretation of the second respondent's email (instructing its staff not to engage the claimant for any reason) is a matter for the substantive hearing and not a preliminary hearing. The email is prima facie evidence supporting the claimant's claim of having been 'blacklisted' by the second respondent.

16. *Paragraph 29 – claimant's date of knowledge on scope of Addecco Group:* this paragraph should not be read in isolation, but as part of the reasoning commencing at paragraph 29 concluding at paragraph 36 of the 6th December 2018 judgment. Paragraph 29 refers to the date when the claimant claimed that he knew that Spring Technology belonged to the Adecco Group. The second respondent submitted initially that it was unreasonable of the Tribunal to conclude that the claimant only knew in early May 2017 that Spring Technology was part of the Adecco group. However subsequently in its further submissions of 31st January 2018 the second respondent conceded that they cannot definitely rebut the claimant's assertion (made at the preliminary hearing) that he did not know that Spring Technology was part of Adecco until early May 2017. There is therefore no need to consider this submission further and the submission provides no basis to reconsider this finding by the Tribunal.

17. *Paragraphs 29,33 and 37*: The comments in respect of paragraphs 29, 33, and 37 are nothing more than the second respondent disagreeing with the findings made and provides no basis to justify reconsideration.

18. *Paragraph 43: the length of the hearing*. This has now been overtaken as on the application of the three respondents and in view of the matter having been referred to the EAT, the substantive hearing listed for March 2018 has been vacated.

19. *Balance of prejudice*: detailed analysis of the balance of prejudice calculated in financial terms was not necessary at the preliminary hearing. The claimant's submissions on the effect of the second respondent's conduct are set out at paragraph 24. The claimant's has made it clear in amended pleadings and his submissions, referred to paragraph 24, that he has suffered financial loss and hardship as a result of the second respondent's conduct. He has been unable to find suitable work despite multiple applications to the second respondent for work for which he was qualified. The prejudice to the claimant of disallowing the claim is self evidently the loss of his chance to seek redress for his financial loss in respect of the termination of his contract and his failure to find work with what he described as one of the largest recruitment companies in the West Midlands. The Tribunal was entitled to find that this prejudice to the claimant outweighed by far the cost and inconvenience of defending the complaints for a substantial organisation such as the Adecco Group.

20. *Alleged misdirection on **Selkent***: The second respondent recites at length its criticism of the Tribunal's application of **Selkent**. It is noted that in the further submissions of 31st January 2018, the second respondent concedes:

> ***"Pontoon and Olsten recognise that even if the learned judge were to vary her finding in connection with 'not reasonably practicable' the amendment could yet be allowed under the Tribunal's discretion, to be exercise with the appellant authority such as Selkent and TGWU, primarily by reference to the balance of prejudice."***

In the circumstances, as the second respondent acknowledges the Second Amendment (and for that matter the First Amendment) could be allowed under the Tribunal's discretion on the balance of hardship and injustice, following **Selkent** and **TGWU**, further analysis of the second respondent's grounds for justifying reconsideration is not required.

21. *Paragraph 51*: I repeat paragraph 4.6 of the decision of 22nd January 2018 relating to the rejection of the first respondent's reconsideration application, namely that neither of the two comments in paragraph 51 of the 6th December judgment is central to the decision of the Tribunal to

allow the amendments. The removal of paragraph 51 would make no difference to the outcome of the preliminary hearing.

22. For the reasons given above in paragraphs 6 – 21 I consider there are no grounds for the application to be reconsidered under Rule 72. There is also no reasonable prospect of the decision being varied or revoked. On this ground too, the application is therefore refused.

Employment Judge Coaster
15 February 2018