EMPLOYMENT TRIBUNALS

Claimant: **Mr Amandeep Singh**

Respondent: **Mr Yaser Iqbal t/a Smokin' Rooster**

Heard on the papers on: 8 June 2018

Before: Employment Judge O'Rourke

RECONSIDERATION APPLICATION DECISION

The Respondent's application for reconsideration of the Reserved Judgment of 16 April 2018 is rejected and the Judgment is confirmed.

REASONS

Background and Issues

1. Following a hearing on 13 April 2018 ('the Hearing'), attended by both parties, a reserved judgment ('the Judgment') was issued on 30 April 2018, finding that the Respondent had made unlawful deductions from the Claimant's wages (in the sum of £451.20) and had failed, contrary to s.1 of the Employment Rights Act 1996 ('ERA'), to provide him with terms and conditions of employment and ordered appropriate remedy.

2. By letter of 5 May 2018, the Respondent applied for reconsideration of that Judgment, the details of such application being considered below. The Claimant was invited to make written submissions in response, which he did, by letter of 6 June 2018 (copy attached).

3. The Tribunal considered those submissions and further considered that in light of the Overriding Objective (Rule 2 of the Employment Tribunal's Rules of Procedure), in particular that cases be dealt with in ways which are proportionate to the complexity and importance of the issues and avoiding delay and expense, that it was in the interests of justice that the application be dealt with without a hearing.

The Law

4. Rule 72 of the Rules of Procedure sets out the procedure for reconsideration, on the grounds that the interests of justice are such that reconsideration is appropriate.

5. The case of **Fforde v Black UKEAT 68/80** indicates that the interests of justice ground only applies when something has gone radically wrong with the procedure, involving a denial of natural justice, or something of that order.

6. The case of **Redding v EMI Leisure Ltd UKEAT 262/81** sets out that 'the interests of justice' relate to the interests of justice to both sides. The EAT commented in that case, of a litigant stating that she had not properly presented her claim at hearing that '*when you boil down what is said on her behalf, it really comes down to this: that she did not do herself justice at the hearing, so justice requires that there should be a second hearing so that she may. Now, 'justice' means justice to both parties. It is not said, and as we see it, cannot be said that any conduct of the case by the employer here caused her not to do herself justice. It was, we are afraid, her own inexperience in the situation.'*

7. Under the previous Rules, old rule 34(3)(d) provided a ground for review if new evidence had 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. This is a matter that is now encompassed within the single 'interests of justice' ground, but it is not generally within the interests of justice that parties in litigation should be given a second bite of the cherry simply because they have failed as a result of oversight or a miscall in their litigation preparation to adduce all the evidence available in support of their case at hearing.

Details of Application

8. A summary of the application is as follows:

    a. The finding in respect of the failure to provide terms and conditions of employment was in error, as the Claimant had not been employed by the Respondent for two months, at the point of termination of his second period of employment.

    b. The Respondent reiterated his assertions from the Hearing that he had misunderstood the purpose of the Hearing and was therefore unprepared for it.

    c. He challenged the authenticity of the documentary evidence provided by the Claimant at the Hearing, or the lack of evidence as to hours worked.

    d. The Respondent sought to adduce further witness and documentary evidence, to include pay slips and P45, which, he contended, showed that the Claimant was not subject to unlawful deductions from salary

and in fact owes the Respondent money.

e. It is the Claimant who is a '*liar'*, not the Respondent.

f. That other findings of fact were incorrect.

Findings

9. Terms and Conditions of Employment. Reference is made to paragraph 16 of the Judgment, in which it was found that the Respondent had failed to provide s.1-compliant terms and conditions of employment to the Claimant, in either of his two periods of employment, firstly a period from January to May 2017 and secondly, in a latter period of employment, from 13 July to 29 August 2017. It is self-evident that the latter period of employment is for less than two months and that therefore the Respondent's duty to provide terms and conditions for that employment was not, subject to s.1(2) ERA, engaged. There was (and isn't now) any dispute that the first period of employment was for more than two months and that the Respondent did not provide terms and conditions of employment in respect of it. Section 38(3) of the Employment Act 2002 ('EA') states:

   (3) If in the case of proceedings to which this section applies (and which does include unlawful deductions from wages)*:*
   (a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and
   (b) when the proceedings were begun the employer was in breach of his duty to the employee under s.1(1) of the Employment Rights Act 1996 …
   the tribunal must, subject to subsection (5) increase the award by the minimum amount and may if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

10. In this case, the Tribunal made an award to the Claimant in respect of unlawful deduction from wages. At the point that the proceedings were begun (in January 2018), the Respondent continued to be in breach of s.1(1) and (2) ERA , in that he had failed to provide terms and conditions of employment to the Claimant for the first period of employment. There is no requirement in s.38 EA that the breach of s.1(1) ERA relate to the period of employment for which the claim is successful. Accordingly, the judgment in this respect stands.

11. New Evidence. The Respondent seeks to adduce pay slips, a p45 and witness statements from his brother, Naser Iqbal and a Mr Khan and an email from a Mr Wheller. In broad terms, Mr Iqbal denies the validity of WhatsApp messages relied upon by the Claimant and casts aspersions on his honesty and character. Messrs Khan and Wheller state that the takeaway restaurant where the Claimant worked was not open during the hours he asserted that he had worked (and therefore, by implication, he could not have worked the hours he claimed). The Respondent asserts that the reason this evidence was not called at the Hearing was because

he had misunderstood that Hearing's purpose, thinking it a preliminary hearing and that therefore all his evidence would not be required. However, he raised exactly this contention in the Hearing and the Tribunal rejected it (paragraph 8), for the following reasons:

a. The Notice of Hearing, by letter of 25 January 2018, was quite clear as to the nature of the Hearing. It said that the claim would be heard at Southampton on 13 April 2018 and that one hour had been allocated (in fact at least two hours were taken) '*to hear the evidence and decide the claim… If you wish to rely on written representations at the hearing they must be sent to the Tribunal and to all other parties not less than seven days before the hearing. You will have the chance to put forward oral arguments in any case. It is your responsibility to ensure that any relevant witnesses attend the hearing and that you bring copies of any relevant documents.'* The Notice also referred the Parties to the online link for the Tribunal booklet 'The Hearing'. The Respondent did not deny receiving the Notice and had obviously done so, as he was in attendance at the Hearing.

b. As pointed out in the Reasons (paragraph 11.3), the Respondent had previous experience of this Tribunal, in a very similar claim to this one, so could be expected to be familiar with the procedure.

12. In short, therefore, the excuses he offered at the Hearing and also now, for his failure to adduce the evidence he now provides, are, particularly in view of the Tribunal's finding as his credibility (paragraph 11), not believed. Accordingly, therefore it is found that he was aware of the Hearing's purpose, but in view of the Judgment against him, now seeks a 'second bite of the cherry' (**Redding**), by attempting to adduce evidence that was available to him at the Hearing, but which, through his own fault, he did not call and which it is not, it is concluded, in the interests of justice (particularly to the Claimant) now to permit to be considered.

13. Lack of Prior Sight of the Claimant's Documents. Again, this issue was raised and considered at the Hearing (8.) and it was pointed out that the Notice of Hearing (as quoted above) only required the Parties to bring their documentation with them to the Hearing. There was therefore no requirement that it be provided in advance of the Hearing. In any event, the Tribunal granted a short adjournment, telling the Respondent to take as long as he wished to peruse the documents and he confirmed, on recommencement of the Hearing that he was ready to proceed.

14. Alleged 'Mistake' in paragraph 11.3. The Respondent states in his application that the Tribunal made '*another huge mistake – Ms Astute was an Italian national, not Indian'.* This is in the context that, in that sub-paragraph, in considering the Respondent's credibility, the Tribunal referred to the fact that he had previously been found by another Tribunal, in a similar case, involving a Ms Astute, a foreign national employee, to be untruthful. The Judgment states that the previous judgment '*had involved a claim by another ex-employee, also a foreign student (the Claimant is an Indian national).'* There is no mistake in this statement, but a misreading

by the Respondent: the 'Claimant' referred to is clearly Mr Singh, not Ms Astute and in any event, even if a mistake had been made, it is of little relevance to the overall finding that the Respondent was not a witness of truth.

15. Other Matters Raised. The other matters raised by the Respondent in his detailed three-page application are not considered further, as either they are irrelevant, repetitive or were considered in the original Judgment.

16. Conclusion. For these reasons, the Respondent's application for reconsideration is rejected and the Judgment is confirmed.

_____
Employment Judge C H O'Rourke

Date 8 June 2018

JUDGMENT SENT TO THE PARTIES ON
.....

.....

FOR THE TRIBUNAL OFFICE