EMPLOYMENT TRIBUNALS

Claimant:		**Respondents:**
Mr J Robinson	**v**	R1 - LHR Airports Limited
		R2 - MJM Industrial Limited

DECISION ON APPLICATION FOR RECONSIDERATION
Rules 70-73 of Schedule 1 to the Employment Tribunals (Constitution and Rules of procedure) Regulations 2013

1. The Claimant's application for reconsideration of the Reserved Preliminary Hearing Judgment sent to the parties on 6 September 2017 is refused.

2. Reasons for this decision are attached.

REASONS

Background

1. On 13 September 2017 and 22 September 2017 the Claimant requested that the Reasons for a Reserved Preliminary Hearing Judgment sent to the parties on 6 September 2017 be clarified in view of two authorities:

   McTigue v University Hospital Bristol NHS Trust [2016] ICR 1155 (EAT) and
   Day v Lewisham and Greenwich NHS Trust [2017] ICR 917 (CA).

2. These authorities were not cited at the preliminary hearing on 9 August 2017 in respect of which the reserved judgment was made.

3. At a preliminary hearing held on 11 July 2018 Employment Judge Chudleigh listed the case for a full merits hearing on 7 and 8 May 2019 and gave standard directions and orders in respect of that hearing. However, she concluded, rightly in my view, that she should not consider the Claimant's request in the September 2017 letters and that those were matters for me to consider. The relevant part of the case management order reads as follows:

   1. Reconsideration application

      1.1 Employment Judge Vowles is to consider:-

1.1.1 The Claimant's solicitor's letter of 13 September 2017 (pages 9-35 of the bundle prepared for the preliminary hearing on 11 July 2018);

1.1.2 The Claimant's solicitor's letter of 22 September 2017 (pages 36-37 of the bundle);

1.1.3 The Claimant's submissions for the hearing on 11 July 2018;

1.1.4 The First Respondent's submissions for the hearing on 11 July 2018; and

1.1.5 The First Respondent's submissions dated 26 September 2018 (pages 37A-37E of the preliminary bundle).

1.2 And is to determine whether:-

1.2.1 On its proper construction, the letter of 13 September 2017 was an application for a reconsideration within the meaning of rule 71 of the Employment Tribunals of Procedure; and if so

1.2.2 Whether there is no reasonable prospect of the original decision being varied or revoked.

1.2.3 Further, whether if there is no such reasonable prospect of the decision being varied or revoked, whether the First respondent should be removed as a party to the proceedings.

1.3 Both the Claimant and the First Respondent consented to all of the above issues being determined by Employment Judge Vowles on the papers. The Claimant contends that the First Respondent was his "employer" for the purposes of section 43K of the ERA in addition to the Second Respondent. The First Respondent's case is that Employment Judge Vowles determined this issue against the Claimant at the hearing on 1 August 2017.

1.4 If the Claimant's application for a reconsideration is not finally determined on the papers, the issues set out above shall be considered at the final hearing on 7 and 8 May 2019.

4. Although the Claimant's letters dated 13 and 22 September 2017 request "clarification" rather than "reconsideration", I have treated the contents as an application for reconsideration under rules 70-73 of the Employment Tribunals Rules of Procedure.

Relevant Law

5. Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:

Rule 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.

Rule 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.

Rule 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 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. …

6. McTigue v University Hospital Bristol NHS Trust [2016] ICR 1155 (EAT)

The relevant paragraph of this judgment is as follows:

"38 In conclusion, in the hope that it will assist tribunals dealing with these issues, it seems to me that, in determining whether an individual is a worker within section 43K(1)(a), the following questions should be addressed.

(a) For whom does or did the individual work?

(b) Is the individual a worker as defined by section 230(3) in relation to a person or persons for whom the individual worked? If so, there is no need to rely on section 43K in relation to that person. However, the fact that the individual is a section 230(3)

worker in relation to one person does not prevent the individual from relying on section 43K in relation to another person, the respondent, for whom the individual also works.

(c) If the individual is not a section 230(3) worker in relation to the respondent for whom the individual works or worked, was the individual introduced/supplied to do the work by a third person, and if so, by whom?

(d) If so, were the terms on which the individual was engaged to do the work determined by the individual? If the answer is yes, the individual is not a worker within section 43K(1)(a).

(e) If not, were the terms substantially determined (i) by the person for whom the individual works or (ii) by a third person or (iii) by both of them? If any of these is satisfied, the individual does fall within the subsection.

(f) In answering question (e) the starting point is the contract (or contracts) whose terms are being considered.

(g) There may be a contract between the individual and the agency, the individual and the end user and/or the agency and the end user will have to be considered.

(h) In relation to all relevant contracts, terms may be in writing, oral and may be implied. It may be necessary to consider whether written terms reflect the reality of the relationship in practice.

(i) If the respondent alone (or with another person) substantially determined the terms on which the individual worked in practice (whether alone or with another person who is not the individual), then the respondent is the employer within section 43K(2)(a) for the purposes of the protected disclosure provisions. There may be two employers for these purposes under section 43K(2)(a).”

7. Day v Lewisham and Greenwich NHS Trust [2017] ICR 917 (CA)

The relevant paragraphs of this judgment are as follows:

“24 The second ground of appeal asserts that the employment tribunal erred in concluding that HEE did not substantially determine the terms on which the worker was engaged. There are two elements to this submission. First, Mr Laddie submits that passages in the employment tribunal judgment demonstrate that the tribunal was applying the wrong test; it was asking itself which party, as between HEE and the trust, played the greater role in determining the terms on which Dr Day was engaged. It did not envisage the possibility that both could substantially determine the terms of engagement. Second, he submits that if the correct test had been

adopted, the inevitable conclusion would have been that the employment tribunal must have found in his favour.

25. I agree with the first submission. In my view on a fair reading of the employment tribunal decision, it did commit the error alleged. For example, both in paras 42 and 46 the tribunal appears to have seen its task as being to identify "the body" which substantially determined the terms of engagement, as though it were necessary to identify the single body which was primarily responsible. The employment judge evaluated the relationship of Dr Day with both HEE and the trust and concluded that the latter had substantially determined the terms. There is no express recognition that both could have done so, which in my view is the proper reading of the provision.

…

28. However, I do not accept Mr Laddie's further submission that the employment tribunal would have been bound to find in favour of Dr Day had it properly directed itself."

Decision

8. I have reminded myself of the contents of the judgment and reasons sent to the parties on 6 September 2017.

9. In my findings of fact I found:

"11. … the contractual hierarchy was as follows:

Claimant > Ducas > MJM > Carillion/Mitie > Respondent.

…

16. The Claimant had no written contract with MJM or Carillion/Mitie or the Respondent. It was clear however that he was introduced and supplied by MJM to work for the Respondent.

17. Mr Stinton said "Heathrow did not have any requirement for MJM personnel to work to any particular hours or working pattern, that was up to them – our only requirement and contract was for a certain quantity of man-hours or delivery of the phase of works by a particular time."

18. Mr Mearns said "We did not have any requirement that it be Mr Robinson personally who was to perform the work. We simply had a need for skilled labour on site to carry out the work/tasks require, provided the person had the appropriate skill and experience to do the work to the required standards, it didn't matter to us who did it. The ultimate decision as to who worked on our contract as opposed to other sites was with MJM."

> *19. Mr Smith confirmed that "Initially, Mr Robinson was under the control of Carillion on site at Heathrow, who supervised and directed his work. Mark Collins (MJM Supervisor) then took on direction and control of Mr Robinson and other contractors on site. … Mr Robinson was under the direction and control of MJM at all times."*
>
> *20. The Tribunal accepted that evidence. The contractual hierarchy described by the Respondent and set out above was correct."*

10. Those findings of fact informed my decision at paragraphs 40, 41 and 42 as follows:

> *"40. It was clear from the evidence that the Claimant was introduced and supplied to work for the Respondent by MJM and that the terms on which he was engaged to do the work were in practice substantially determined not by him, or the Respondent, but by MJM. The requirements of the work were laid down by MJM and the Claimant was obliged to report to MJM managers. That was the practicality of the situation.*
>
> *41. The Claimant was a worker within the meaning of section 43K(1)(a). No contract was required.*
>
> *42. The employer under section 43K(2) was therefore MJM Industrial Limited as the person who substantially determined the terms on which the Claimant was engaged."*

11. I was aware, having set out the provisions of sections 43K(1) and (2), that there may be two employers for the purposes of section 43K(2)(a). However, on my findings of fact referred to above, I found that the terms on which the Claimant is or was engaged to do the work were not in any way in practice substantially determined by the 1st Respondent. It is clear that I considered the position of the 1st Respondent from the wording of paragraph 40 of the reasons.

12. It follows that even if the cases of McTigue and Day had been cited at the preliminary hearing on 9 August 2017 my decision would have been the same.

13. It follows that there is no reasonable prospect of the judgment being varied or revoked and the application for reconsideration is refused.

14. Separately, I have considered the 1st Respondent's application to be removed from the proceedings. In view of my reserved judgment, which I have confirmed above, it is clear that there are no longer any issues between the 1st Respondent and the Claimant and the 2nd Respondent falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings. The 1st Respondent has

therefore been removed from the proceedings under rule 34 of the Employment Tribunals Rules of Procedure

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Employment Judge Vowles
7 August
Date: …… 2018

Sent to the parties on:

3 September 2018
…….....

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For the Tribunal Office