EMPLOYMENT TRIBUNALS

Claimants: **(1) Mr G Sheehy (2) Mr P Polderman**

Respondent: **Morrisons Utility Services Limited**

Before: **Employment Judge John Crosfill**

RECONSIDERATION JUDGMENT

1. The Claimants application made by e-mail sent on 5 March 2019 for a reconsideration of the reasons signed by me on 26 February 2019 has no reasonable prospects of success and is dismissed.

REASONS

1. Following the full merits hearing that took place on 2 & 3 August 2018 I dismissed the Claimants claims of unfair dismissal. I had delivered an oral judgment with reasons on that day. The Claimants sought full written reasons and they were signed by me on 26 February 2019. Mr Sheehy apparently acting on behalf of both Claimants now seeks a reconsideration of my judgment.

2. In his e-mail Mr Sheehy sets out the basis for his application as follows:

> *I would like to request that our case is reconsidered . There are 2 points that I feel have been missed*
>
> *The first is that in the summing up it is claimed we went from normal working hours to a 247/365 roster . This was never the case . I've worked in this industry since 2004 and it's always been 24/7 365 .since joining [the Respondent] on the national grid / cadent contract in 2011 it had been from day 1 a 247/365 roster . That is when the respondent had first won the contract for supply of labour We even provided published rosters going back a few years before the contract talks took place that backed this up.*

The second point being that the contract did not comply with the working time directive . I fully understand that the company had made a promise that if the roster hours exceeded 38.75 then it would find an alternative mechanism to change the holidays . The truth of the matter is the day I signed my roster i would have been the same roster as it had been previously. In the bundle a roster that the current engineers was working on was obtained provided and it was exactly the same roster as when My employment was terminated So hence forth that would have been a reality. In court it was admitted by the respondent that engineers where rostered above 38.75 and still wasn't getting the right entitlement . The conversion into hours would also have left myself short on full the correct holiday entitlement even if the roster had been 38.75 . The contract had been in place for over a year by the time mr Polderman and myself attended court and still nothing had been done to alter this and that was admitted by the respondent in court . I believe this alone was good enough ground to justify myself not to sign a contract that didn't comply with the working time directive . Having spoken to some of my colleagues recently regarding this the respondent have still have not sorted that issue out . They very recently have worked out the difference in hours that should have been allocated to holiday entitlement and just simply paid them the difference in money thus denying them there full holiday time for nearly two years . I am strongly considering taking this to the higher appeals court .

The rules

3. The Employment Tribunal Rules of Procedure 2013 as amended set out the rules governing reconsiderations. The pertinent rules are as follows:

"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.

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.

Process

72.—(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 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) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

Discussion and Conclusions

4. In accordance with the Employment Tribunal Rules of Procedure, if I consider that there is no reasonable prospect of the original decision being varied or revoked, I must refuse the application for reconsideration without a hearing. That is my conclusion here.

5. The Claimants application for a reconsideration takes two distinct points. In the first Mr Sheehy alleges a factual error. He says that I was not entitled to find that at some point in time services were ordinarily provided during normal working hours.

6. I do not consider that Mr Sheehy's criticism of my judgment is justified. I was alive to the evidence that he alludes to and accepted his account that nothing had changed since he worked for the Respondent. At paragraph 4 I stated (with emphasis added):

   Historically, by which I mean at a time prior to the employment of anybody who gave evidence before me, the FCOs provided their services only during what would be regarded as normal working hours.

7. The Respondent's evidence was that that historically there had been a greater emphasis on working during normal hours. I note that the Respondent offers its services over a much greater area than the Claimants worked in. The Respondent's evidence did provide an explanation as to why there was a mismatch between the obligations owed to the FCOs and the contract with the end users.

8. At the end of the day whether I was or was not wrong to accept the Respondent's evidence in part is immaterial. The Respondents demonstrated a sound business reason for wanting to adjust the pay rates to reflect the 24/7 working pattern where they had no control over the time that the work would be

done. I make those findings at paragraphs 7 & 8 and revisit that in my conclusions. Even if Mr Sheehy is correct and the contractual obligations had always created the commercial difficulties relied upon by the Respondent that would not undermine my conclusion that there was a sound commercial reason for making changes.

9. The second point made by Mr Sheehy is that he says that the proposed new contract terms '*did not comply with the working time directive'*. I have discussed that point extensively in my reasons as it became the key point argued before me.

10. It is wrong to say that the contract did not comply with the Working Time Regulations 1998. It is true to say that if employees were rostered to work on average over 38.75 hours per week that might be the case (depending on whan holidays were taken) but on its face the contract did not guarantee any such additional work.

11. As I have set out in my reasons the Respondent had good reason to believe that Cadent would move to a 38.75 hour per week roster. It was common ground that that proved not to be the case. Prior to the dismissals taking effect the Respondent recognised that if the hours exceeded the 38.75 average then some adjustment would be made. Reassurances were given that the proper entitlement would be given.

12. I am now told that adjustments have been made in some cases by making payment rather than permitting additional holiday. What has happened after a dismissal can have little bearing upon whether a dismissal was fair or unfair. The fairness of a dismissal is judged on what was known or believed at the time.

13. I recognise that the introduction of holiday based on assumed hours might reasonably have been perceived by employees as giving rise to difficulties. I have also found that the Respondent was not resistant to working through those difficulties. Ultimately the issue I had to deal with was whether it was reasonable for the Respondent to impose those terms on the small proportion of employees who had refused to agree them.

14. The terms were not unlawful on their face. The contract could be operated lawfully. I have set out why I considered the decision of the Respondent to plough on with the new terms to be reasonable. The fact that after the event some employees might have been paid cash rather than being given additional holiday makes no difference to my conclusions.

15. In the main this application is an attempt to re-argue points fully canvassed at the hearing before me. It is not the function of a reconsideration to permit one or other of the parties a second bite of the cherry. The points made were considered by me and for the reasons given I have rejected them.

16. For the reasons set out above I find that the Claimants' application for a reconsideration has no reasonable prospects of success and I dismiss it without a hearing.

Employment Judge John Crosfill

Dated 25 March 2019