EMPLOYMENT TRIBUNALS

Claimant: **Mr P Baker**

Respondent: **24 British Maintenance Ltd**

Heard at: **Sheffield** **On: 2 May 2019**

Before: **Employment Judge Brain**

JUDGMENT ON RECONSIDERATION

The Judgment of the Employment Tribunal is that there is no reasonable prospect of the Judgment dated 18 February 2019 being varied or revoked. The respondent's reconsideration application is therefore refused.

REASONS

1. The hearing of this case took place on 18 February 2019. The claimant was represented by Mr Smith, a solicitor. There was no attendance or representation by or on behalf of the respondent. After hearing evidence from the claimant and helpful submissions from Mr Smith I gave Judgment in the claimant's favour. The written Judgment that was prepared following the hearing was sent to the parties on 7 March 2019.
2. On 18 March 2019 Donald Smith, the owner of the respondent, emailed the Employment Tribunal. Donald Smith said:

"I'd like to say we have never received court orders or any letter until today 11.30am when a neighbour from one of our previous addresses forwarded on some letters to us. Previously a company called Avensure had taken over the case from them but we fire them because they are bad company. We

asked them to forward all court correspondence to us and they never did. We didn't know what court was dealing with the case and the last thing we heard was that Paul Baker had failed to file his defence (or something along that line) and case got struck off. Now we are totally shocked the case went ahead in our absence and without our knowledge. Paul Baker is not owed anymore by us and in fact he owes us thousands of pounds of damages and we would certainly like to ask the court to re-open the case so we can attend and not only defend our case but also make claim against Paul Baker. We would like to hear back to you at nearest time possible please and re-open this case hopefully".

3. I treat the respondent's email of 18 March 2019 as an application for reconsideration of the Judgment of 18 February 2019. By Rule 70 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, a Tribunal may on the application of a party reconsider any Judgment where it is necessary in the interests of justice to do so. On reconsideration, the original decision may be confirmed, varied or revoked. If it is revoked it may be taken again.

4. Rule 72 sets out the procedure that an Employment Tribunal will follow upon receipt of an application for reconsideration. The Employment Judge shall consider the reconsideration application. If he or she considers that there is no reasonable prospect of success of the original decision being varied or revoked then the application shall be refused. 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.

5. Under Rule 70, a Judgment will only be reconsidered where it is necessary in the interests of justice to do so. An Employment Tribunal dealing with an application for reconsideration should be guided by common law principles of natural justice and fairness and the need to give effect to the overriding objective (in Rule 2 of schedule 1 to the 2013 Rules of Procedure) to deal with cases fairly and justly. Tribunals have a broad discretion in determining whether reconsideration of a Judgment is appropriate in the circumstances. That discretion must be exercised judicially, which means having regard not only to the interests of the party seeking the reconsideration but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation.

6. Ordinarily, it will not be in the interests of justice to reconsider a Judgment because of an error by a party's representative. Otherwise, there would be a risk that disappointed litigants would be encouraged to re-argue their cases by blaming their representatives. Complaints about the conduct and competence of representatives should not be dealt with by way of Tribunal proceedings. A litigant has to accept any deficiency in his or her representation. A party is not entitled to litigate the case again by blaming the representative for not putting the case properly or conducting it expeditiously.

7. It may be in the interests of justice to reconsider a Judgment made in the absence of a party. However, an absent party must have a good reason for his or her absence from the hearing.

8. I now turn to make some findings of fact. I will then apply the principles elucidated above to those facts.

9. The claimant presented his claim form on 27 June 2018. At the time, he was acting in person. The particulars of his claim were very brief. He said that *"[I] just want my wages and expenses that are owed to me".* Regional Employment Judge Robertson ordered the claimant to provide further particulars of his claim. He did so on 25 July 2018.

10. The respondent presented its response to the claimant's claim on 31 July 2018. The respondent presented a defence to the claimant's claim and also raised a counter claim against the claimant. (As the claimant was pursuing a complaint of breach of contract in addition to a claim for unlawful deduction from wages an employer's counter claim was permissible).

11. On 22 August 2018 Employment Judge Jones directed that the claimant was not required to file a response to the employer's contract claim pending receipt from the respondent of further particulars of it. He directed that the respondent shall file with the Employment Tribunal and serve upon the claimant the following particulars: the specific term of the contract which it is said the claimant breached; the specific sum due for each breach; and what sum was accepted as outstanding in wages and expenses.

12. The same day, 22 August 2018, the Employment Tribunal received an email from Shepa Syeda, a legal clerk with Avensure Limited. The email said that Avensure Limited had been instructed to represent the respondent and requested the Employment Tribunal to direct correspondence to Paul Cunningham, who, it seems, is or was based at Avensure's offices in Manchester. The email from Shepa Syeda was also copied in to Donald Smith (via his email address which is ceo@24britishmaintenance.co.uk).

13. Shepa Syeda's email was acknowledged by the Employment Tribunal on 23 August 2018. The Employment Tribunal's letter of 23 August 2018 was addressed to Paul Cunningham at his Avensure email address. The letter confirmed that the Employment Tribunal records had been updated to show Avensure as acting for the respondent and that all future correspondence would be issued to them. The Employment Tribunal's letter of 22 August 2018 containing Employment Judge Jones' direction for further particulars of the counter claim was also attached.

14. The respondent failed to comply with Employment Judge Jones' order of 22 August 2018 to give further particulars of the counter claim. On 2 October 2018 he directed that the respondent should show cause why the counter claim should not be struck out upon the basis that it was not being actively pursued and the respondent had failed to comply with his order of 22 August 2018. The respondent was given until 16 October 2018 within which to reply. The strike out warning dated 2 October 2018 was sent to Mr Cunningham at his email address.

15. On 27 November 2018 Employment Judge Wade issued a Judgment that the respondent's counter claim was struck out. This was upon the basis that the respondent had failed to show cause why it should not be struck out. The Judgment was sent to the claimant and to Mr Cunningham by email dated 27 November 2018.

16. On 11 January 2019 a notice was sent to the parties that the claimant's claim was to be heard in the Sheffield Employment Tribunal on 18 February 2019. The notice of hearing was sent to the claimant and to Mr Cunningham.

17. On 5 February 2019 Mr Smith emailed the Employment Tribunal to confirm that he was now representing the claimant. He therefore asked that his firm go on the Employment Tribunal's record as acting for him. As I have already said, the hearing went ahead on 18 February 2019. Judgment was given in the claimant's favour. The Judgment was sent to the parties on 7 March 2019.

18. In his letter (sent by email) of 10 April 2019 Mr Smith, at my request, addressed the issues raised in Donald Smith's email of 18 March 2019 cited above. Amongst other things, Mr Smith said that he received an email from Avensure dated 19 February 2019 (the day after the hearing). This was in response to an email sent that day by Mr Smith to Avensure. Paul Cunningham said, "*we acknowledge receipt of your email of today in the above matter".* Mr Cunningham described himself in the email to Mr Smith as *"employment law consultant (legal team)".*

19. Avensure have not written to the Employment Tribunal to ask that they be removed from the record as acting for the respondent. Mr Cunningham holds himself out as an employment law consultant. I am quite satisfied that all of the Tribunal's correspondence and orders was sent to the respondent's nominated representative.

20. I have received no explanation from the respondent as to why there was a failure to actively pursue the respondent's counter claim. The respondent was given two opportunities to furnish particulars of the counter claim. The respondent failed to do so. It has had its chance. The failure to comply with Employment Judge Jones' order of 22 August 2018 led ultimately to Employment Judge Wade's Judgment that the counter claim be struck out. The respondent did not apply for reconsideration of her Judgment nor appeal against it.

21. An application for reconsideration of a Judgment must be made within 14 days of the date upon which the written record of a Judgment was sent to the parties. Way in excess of 14 days elapsed between 27 November 2018 until 18 March 2019. Furthermore, the respondent is effectively seeking reconsideration of the Judgment of 18 February 2019 in order to reactivate the counter claim which stood struck out long before that date. In the circumstances I agree with Mr Smith's submission in his email of 10 April 2019 that the respondent is seeking to relitigate a complaint which has already been dismissed which is an abuse of process. The counter claim has been dismissed. There has been no appeal or reconsideration application in respect of it. It cannot now be reactivated. Therefore, it cannot be in the interests of justice to allow a reconsideration of the Judgment of 18 February 2019 in order to allow those issues to be aired.

22. If the failure to comply with Employment Judge Jones' order of 22 August 2018, to respond to the show cause letter of 2 October 2018 and to prosecute the defence of the claimant's claim is down to failures upon the part of Avensure in general and Mr Cunningham in particular then, as Mr Smith says, that is a matter between the respondent and Avensure. The respondent's nominated representative received notice of the hearing. There is no credible evidence to suggest the respondent itself was not aware of the date of the hearing. Even if the respondent was not aware of it then its representative certainly was. Avensure's letter of 19 February 2019 addressed to Mr Smith does not convey the message that Mr Cunningham was unaware of the hearing of the previous day.

23. The reality, in my judgment, is that the respondent is seeking to blame Avensure and Mr Cunningham for the outcome of the case. The respondent is seeking to re-argue its case by blaming Avensure. To allow a reconsideration in those circumstances is not in the interests of justice. The interests of justice have to be seen from both sides. It will be grossly unjust and unfair upon the claimant to visit upon him failures that have occurred upon the respondent's side. The respondent was aware of the hearing. It chose not to participate. No satisfactory explanation has been given for the failure to attend the hearing of 18 February 2019. It must therefore take the consequences.

24. In considering the interests of justice I must take into account the overriding objective in Rule 2 to schedule 1 of the 2013 Rules. This requires the Tribunal to deal with cases in ways which are proportionate to the complexity and importance of the issue, to avoid delay and to save expense. It is not proportionate to re-open this case. To do so would involve the claimant in the incurring of significant additional expenditure through no fault of his own. I must also take into account the public interest in the finality of litigation and the interests of other users of the Employment Tribunal. In the circumstances it cannot be in the interest of justice to allow the respondent to have a further bite of the cherry where: no good reason has been shown for its failure to engage in the litigation or to attend the hearing, where the respondent is estopped from pursuing its counter claim against the claimant, where the amount involved is modest and it will be disproportionate for there to be a further hearing about it which would involve the claimant in significant additional expense, and which would be prejudicial to the good administration of justice by devoting additional Tribunal resources to this matter to the detriment of other Employment Tribunal users.

25. In all the circumstances therefore, the respondent's reconsideration application is refused as there is simply no reasonable prospect of the Judgment of 18 February 2019 being varied or revoked.

Employment Judge Brain

22nd May 2019