EMPLOYMENT TRIBUNALS

Claimant: **Mr D Ings**

Respondent: **Priory Healthcare Limited**

Heard at: **in Chambers** **On: 13 June 2019**

Before: Employment Judge Maxwell

JUDGMENT

1. The judgment of the Tribunal is that the Claimant's application for reconsideration is refused.

REASONS

Application

2. By a letter of 16 May 2019 attached to an email of the same date, the Claimant applied for a reconsideration of the 4 May 2019 judgment dismissing his claims. The grounds relied upon by the Claimant were set out over 17 pages and summarised by him on the first page in the following terms:

    2.1. fraud;

    2.2. Respondent not involved with claim;

    2.3. Employment Tribunal breached statutory law and Employment Tribunal's Rules of Procedure 2013;

    2.4. breach of Equality Act 2010;

2.5. breach of Human Rights Act 1998;

2.6. breach of Data Protection Act 1998;

2.7. breach of Public Interest Disclosure Act 1998;

2.8. Tribunal breached statutory law and ET Rules of Procedure 2013 twice addressing employer identity issue;

2.9. no party disputed Priory Central Services Limited being Claimant's employer and correct Respondent;

2.10. no party asserted Priory Healthcare Limited being Claimant's employer;

2.11. no Claimant dismissal meeting or dismissal in 2015;

2.12. unlisted party Priory Group No.1 Limited misled Tribunal and obstructed and perverted the course of justice.

3. By a separate letter of 16 May 2019 attached to the same email, the Claimant applied for his reconsideration application to be determined at a preliminary hearing.

Law

4. With respect to reconsideration applications, schedule to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** provides:

> **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. If it is revoked it may be taken again.**
>
> **Application**
>
> **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 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.

5. Rule 70 allows for the reconsideration of a judgment where it is in the interests of justice to do so. There is, however, no automatic right for a party to re-argue a claim which has failed. Almost every disappointed litigant would say they believed their case ought to be reconsidered, but it does not follow that such a course of action will be in the interests of justice.

6. The extent of the discretion in this regard was considered by the EAT in **Newcastle upon Tyne City Council v Marsden [2010] ICR 743**, per Underhill P:

16 Williams v Ferrosan Ltd and Sodexho Ltd v Gibbons clearly show that the extensive case law in relation to rule 34(3)(e) and its predecessors should not be regarded as requiring tribunals when considering applications under that head to apply particular, and restrictive, formulae—such as the "exceptionality" and "procedural mishap" tests which were understood to be prescribed by DG Moncrieff (Farmers) Ltd and Trimble. I would not in any way question that approach or the general message of both decisions. There is in this field as in others a tendency—often denounced but seemingly ineradicable—for broad statutory discretions to become gradually so encrusted with case law that

decisions are made by resort to phrases or labels drawn from the authorities rather than on a careful assessment of what justice requires in the particular case. Thus a periodic scraping of the keel is desirable. (The exercise would indeed have been justifiable even apart from the introduction of the overriding objective. It is not as if the principles of the overriding objective were unknown prior to their explicit incorporation in the Rules in 2001: rule 34(3)(e) itself is based squarely on the interests of justice. But I can see why its introduction has commended itself to judges of this tribunal as a useful hook on which to hang an apparent departure from a long stream of previous authority.)

17 But it is important not to throw the baby out with the bath-water. As Rimer LJ observed in Jurkowska v Hlmad Ltd [2008] ICR 841, para 19 it is "basic"

> **"that dealing with cases justly requires that they be dealt with in accordance with recognised principles. Those principles may have to be adapted on a case by case basis to meet what are perceived to be the special or exceptional circumstances of a particular case. But they at least provide the structure on the basis of which a just decision can be made."**

The principles that underlie such decisions as Flint and Lindsay remain valid, and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles. In particular, the weight attached in many of the previous cases to the importance of finality in litigation—or, as Phillips J put it in Flint (at a time when the phrase was fresher than it is now), the view that it is unjust to give the losing party a second bite of the cherry—seems to me entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final (subject, of course, to appeal). Likewise, I respectfully endorse, for the reasons which he gives, the strong note of caution expressed by Mummery J in Lindsay about entertaining a review on the basis of alleged errors on the part of a representative. Lindsay was referred to in both Williams v Ferrosan Ltd and Sodexho Ltd v Gibbons , but Mummery J's observations on this aspect were not disapproved: at para 17 of his judgment in Williams (set out at para 14 above) Hooper J said only that the dangers to which Mummery J referred were of less concern on the facts of that particular case.

7. The approach in **Marsden** was approved by the Court of Appeal when considering the application of rule 70 in the 2013 rules; see **Ministry of Justice v Burton [2017] 4 All ER 603 CA**, per Elias LJ:

[21] An employment tribunal has a power to review a decision 'where it is necessary in the interests of justice': see r 70 of the Employment Tribunals Rules of Procedure (as set out in Sch 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237). This was one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, as Underhill J,

> **as he was, pointed out in Marsden v Council of the City of Newcastle Upon Tyne (2010) UKEAT/0393/09/CEA, [2010] ICR 743 (at [17]) the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] IRLR 277, [1975] ICR 395) which militates against the discretion being exercised too readily; and in Ironsides Ray & Vials v Lindsay [1994] IRLR 318, [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review. In my judgment, these principles are particularly relevant here.**

8. Where the Tribunal's decision is said to involve an error of law, the proper course will be an appeal to the EAT rather than a reconsideration application; see **Trimble v Supertravel [1982] IRLR 451 EAT**, per Browne-Wilkinson J:

> **7. As it seems to us the fundamental question is whether or not the Industrial Tribunal's decision that Miss Trimble had failed to mitigate her loss was reached after Miss Trimble had had a fair and proper opportunity to present her case on the point, being aware that it was a point which was in issue. We do not think that it is appropriate for an Industrial Tribunal to review its decision simply because it is said there was an error of law on its face. If the matter has been ventilated and properly argued, then errors of law of that kind fall to be corrected by this Appeal Tribunal. If, on the other hand, due to an oversight or to some procedural occurrence one or other party can with substance say that he has not had a fair opportunity to present his argument on a point of substance, then that is a procedural shortcoming in the proceedings before the Tribunal which, in our view, can be correctly dealt with by a review under Rule 10 however important the point of law of fact may be. In essence, the review procedure enables errors occurring in the course of the proceedings to be corrected but would not normally be appropriate when the proceedings had given both parties a fair opportunity to present their case and the decision had been reached in the light of all relevant argument.**

Analysis

9. Following the preliminary hearing on 3 May 2019, the Tribunal made decisions with respect to the preliminary issues listed at paragraphs 5.1, 5.2 and 5.3 of the reasons given for the judgment of 4 May 2019. In essence, the Tribunal decided by whom the Claimant had been employed and whether his claims were presented in time. Given the resulting lack of jurisdiction, the issue at 5.4 did not arise.

10. On the Claimant's reconsideration application, The Tribunal must first consider, pursuant to rule 72(1), the likelihood of the original decision being varied or revoked. For the reasons set out below, I consider there is no reasonable prospect of the original decision being varied or revoked and refuse the Claimant's application.

11. In paragraphs A1 to A24 of the Claimant's reconsideration application he makes submissions with respect to factual matters, relating to his employment, the period thereafter and the procedural history of this claim. There is no reasonable prospect of the interests of justice test being satisfied and this allowing for the variation or revocation of the original order:

    11.1. the Tribunal was only required to make findings of fact relevant to the issues which fell to be determined on that occasion - essentially, the identity of the Claimant's employer and time;

    11.2. the findings of fact were made after a careful consideration of the witness evidence, the documents and the parties' submissions;

    11.3. the submissions on the facts made in the reconsideration application overlap very substantially with the points made by the Claimant at the hearing;

    11.4. the Claimant's attack on the bona fides of the Respondent's solicitor and / or her authority to act in the proceedings is not relevant in this regard;

    11.5. the Claimant's repeated observation (at the hearing and in this reconsideration application) that there was no dispute as to the identity of his employer or the correct respondent was, plainly, incorrect;

    11.6. the Claimant's recitation of the procedural history is not complete, nor an accurate summary of the position as can be ascertained from the various case management orders and Tribunal letters and, in any event is not relevant in this regard.

12. In paragraphs B1 to B21 of the Claimant's reconsideration application he makes submissions with respect to factual matters, relating to the procedural history of this claim. There is no reasonable prospect of the interests of justice test being satisfied and this allowing for the variation or revocation of the original order:

    12.1. the Tribunal was only required to make findings of fact relevant to the issues which fell to be determined on that occasion - essentially, the identity of the Claimant's employer and time;

    12.2. the findings of fact were made after a careful consideration of the witness evidence, the documents and the parties' submissions;

    12.3. the submissions on the facts made in the reconsideration application overlap substantially with the points made by the Claimant at the hearing;

    12.4. because the Tribunal has no jurisdiction to determine the Claimant's claim and this has now been dismissed, his "outstanding applications" (save for this reconsideration application) do not fall to be considered;

12.5. there was no "cover-up" with respect to the identity of the Claimant's employer and correct respondent in the proceedings, on the contrary it was the first issue dealt with at the preliminary hearing;

12.6. the Claimant's attack on the bona fides of the Respondent's solicitor and / or her authority to act in the proceedings is not relevant in this regard;

12.7. the Claimant's recitation of the procedural history is not complete, nor an accurate summary of the position as can be ascertained from the various case management orders and Tribunal letters and, in any event is not relevant in this regard;

12.8. where the Claimant alleges the Tribunal has erred in law, then the matter can only properly be pursued by way of an appeal to the Employment Appeal Tribunal;

12.9. adjustments were made for the Claimant at the hearing on 3 May 2019 to cater for his visual and hearing impairments:

12.9.1. asked about reading documents, the Claimant said that his bifocals would allow him to do this;

12.9.2. asked about his hearing impairment, the Claimant said this was tinnitus and he was told to say if he had any difficulty understanding the proceedings;

12.9.3. after being sworn-in, the Claimant said he had not read his witness statement and the hearing was adjourned to allow him to do so;

12.9.4. when the Claimant returned after the adjournment and stated he still had not read his statement, this was read to him by the Tribunal - slowly, clearly and with frequent pauses for him to confirm the truth of its contents, which he did;

12.9.5. the material parts of documents were read to the Claimant during the hearing when he said and / or it appeared he was having difficulty with them;

12.9.6. questions were repeated to the Claimant during the hearing when he said and / or it appeared he may not have heard them;

12.10. the Claimant's repeated observation (at the hearing and in this reconsideration application) that there was no dispute as to the identity of his employer or the correct respondent was, plainly, incorrect;

12.11. whether the Respondent could prove a failure of probation was irrelevant, the evidence of dismissal and the Claimant's understanding he had been dismissed emerged clearly from the contemporaneous

documents (including in his own hand) and his answers in cross-examination and to the Tribunal's questions.

13. Paragraphs C1 to C12 repeat the grounds of appeal (essentially headings) from the first page of the reconsideration application and these points are then developed in paragraphs D1 to D12. There is no reasonable prospect of the interests of justice test being satisfied and this allowing for the variation or revocation of the original order:

13.1. D1 - fraud:

13.1.1. the Claimant complains he was misled by the Tribunal about which issues would be dealt with - this complaint is without foundation as the orders and Tribunal letters are entirely clear and matters were dealt with in accordance with the same;

13.1.2. the suggestion of prejudgment is misconceived;

13.1.3. the issues dealt with at the preliminary hearing were those directed by EJ Livesey, save for that at 5.4 of the reasons which did not arise because the claim was dismissed;

13.2. D2 - respondent not involved with claim:

13.2.1. the Tribunal made findings of fact as to the Claimant's employer and correct respondent;

13.3. D3 - Employment Tribunal breached statutory law and Employment Tribunal's Rules of Procedure 2013:

13.3.1. where the Claimant alleges the Tribunal has erred in law, then the matter can only properly be pursued by way of an appeal to the Employment Appeal Tribunal;

13.4. D4 - breach of Equality Act 2010:

13.4.1. where the Claimant alleges the Tribunal has erred in law, then the matter can only properly be pursued by way of an appeal to the Employment Appeal Tribunal;

13.5. D5 - breach of Human Rights Act 1998:

13.5.1. where the Claimant alleges the Tribunal has erred in law, then the matter can only properly be pursued by way of an appeal to the Employment Appeal Tribunal;

13.6. D6 - breach of Data Protection Act 1998:

13.6.1. where the Claimant alleges the Tribunal has erred in law, then the matter can only properly be pursued by way of an appeal to the Employment Appeal Tribunal;

13.7. D7 - breach of Public Interest Disclosure Act 1998:

13.7.1. where the Claimant alleges the Tribunal has erred in law, then the matter can only properly be pursued by way of an appeal to the Employment Appeal Tribunal;

13.8. D8 - Tribunal breached of statutory law and ET Rules of Procedure 2013 twice addressing employer identity issue:

13.8.1. where the Claimant alleges the Tribunal has erred in law, then the matter can only properly be pursued by way of an appeal to the Employment Appeal Tribunal;

13.9. D9 - no party disputed Priory Central Services Ltd being Claimant's employer and correct Respondent:

13.9.1. this is factually incorrect, against the Claimant's case it was argued and the Tribunal found he was employed by Priory Healthcare Limited;

13.10. D10 - no party asserted Priory Healthcare Ltd being Claimant's employer:

13.10.1. this is factually incorrect, against the Claimant's case it was argued and the Tribunal found he was employed by Priory Healthcare Limited;

13.11. D11 - no Claimant dismissal meeting or dismissal in 2015:

13.11.1. the Tribunal decided the Claimant was dismissed with effect from 29 May 2015 and set out the reasons for this finding;

13.11.2. the Claimant's points on the facts in the reconsideration application were either were made at the preliminary hearing, or could have been made;

13.11.3. the evidence of dismissal and the Claimant's understanding he had been dismissed emerged clearly from the

contemporaneous documents (including in his own hand) and his answers in cross-examination and to the Tribunal's questions;

13.12. D12 - unlisted party Priory Group No.1 Limited misled Tribunal and obstructed and perverted the course of justice:

13.12.1. the Tribunal made findings of fact as to the Claimant's employer and correct respondent;

13.12.2. the Claimant's attack on the bona fides of the Respondent's solicitor and / or her authority to act in the proceedings is not relevant in this regard.

Conclusion

14. The Claimant's claim and his various contentions were ventilated at length during the preliminary hearing on 3 May 2019. His reconsideration application, in very large measure, seeks to re-argue the points on which he lost. Nothing in the reconsideration application tends to cast doubt on the conclusion reached by the Tribunal originally. There is no reasonable prospect of the interests of justice test being satisfied, such as would allow the variation or revocation of the judgment.

15. In addition, it is in the public interest that there should be finality in litigation, and the interests of justice apply to both sides.

16. Accordingly, I refuse the application for reconsideration pursuant to rule 72(1) because there is no reasonable prospect of the judgment being varied or revoked.

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Employment Judge Maxwell

Date: 13 June 2019