EMPLOYMENT TRIBUNALS

Claimant: **Mr S Kilroy**

Respondent: **The Phoenix Academy Trust**

Heard at: **Nottingham** **On:** **Friday 21 June 2019**

Before: **Employment Judge Blackwell (sitting alone)**

RECONSIDERATION JUDGMENT

1. This is a decision pursuant to an application under Rule 70 of Schedule 1 of the Employment Tribunals Constitution and Rules of Procedure Regulations 2013.

JUDGMENT

1. The Respondent's application for a reconsideration of 10 May 2019 is refused and the original decision sent to the parties on 27 April 2019 is confirmed.

REASONS

The Relevant Law

1. Rules 70, 71 and 72 of Schedule 1 of the Employment Tribunals Constitution and Rules of Procedure Regulations 2013:-

> "Principles
>
> 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."

History

2. The original decision namely that Mr Kilroy's single claim of constructive unfair dismissal succeeded and was sent to the parties on 27 April 2019.

3. On 10 May Mr Hoyle on behalf of the Respondent made an application for reconsideration. I invited the Claimant's solicitor to comment and he did so by e-mail on 29 May.

4. The following directions were issued to the parties on 31 May:-

> "1. That the Respondent's application for a reconsideration of the decision of 10 May be determined without a hearing pursuant to Rule 72(2) of Schedule 1 of the Employment Tribunals Constitution and Rules of Procedure Regulations 2013 taking into account the application itself and the Claimant's solicitor's comments of 29 May. The parties have until 7 June 2019 to object.
>
> 2. The determination of remedy is stayed pending the determination of the reconsideration and an application by the Claimant which should be made no later than 28 days from the date the decision on the reconsideration is sent to the parties."

5. Neither party objected. Therefore a notice was sent to the parties that the matter would be considered on the papers on 21 June which occurred.

Error

6. There is unfortunately an error in paragraph 46 of the original decision that should have read:-

> "Finally there is no doubt that Mr Kilroy resigned **partly** because of the delays in the disciplinary process and primarily the impression that was objectively justified that one way or another the Trust wished to be rid of him."

The Application

7. Mr Hoyle's application of 10 May is on the basis of two grounds, firstly that the original decision was perverse and paragraphs 1-34 deal with that point. Secondly that the original decision was wrong in law and paragraphs 35-55 deal with that point.

8. Firstly it should be noted that on 26 February 2019 there was a Preliminary Hearing case management discussion held by telephone before me, with Mr Hamilton representing the Claimant and Mr Haynes representing the Respondent, though Mr Hoyle was present with Mr Haynes. That led to the case management summary being set out in paragraph 2 of the original decision. Contrary to Mr Hoyle's submissions all of those matters were agreed in the case management discussion.

9. Further Mr Hoyle did not demur when those matters were repeated at the beginning of the hearing on 24 April. Nor did he demur in the closing submissions which he provided for the benefit of the Tribunal.

10. In any event having reconsidered the matter in my view they remain the correct analysis.

11. As I understand it, although Mr Hoyle does not define it, perversity means that the original decision was one which no reasonable Employment Tribunal properly directing itself as to the relevant legal principles could have reached.

The assertion of perversity appears to rest primarily on paragraph 6 of the application in which Mr Hoyle states:-

> "At paragraph 1.4 it is not common ground that the Claimant resigned by a letter of 22 October. Whilst it states this in the case management summary of Tuesday 26 February this is in conflict with the evidence at page 243."

12. At page 243 is a letter from the Claimant's solicitors to the Respondent of 15 November 0218. I accept that that letter is to some extent contradictory but I remain of the view that it brought the contract of employment to an end.

13. Paragraphs 12 to 19 of the application criticised the findings of fact in the original decision between paragraphs 9 and 19. Those findings of fact were made on the unchallenged evidence of Mr Kilroy and his partner. Neither Mr Armond nor Mrs White were called by Mr Hoyle notwithstanding that Mrs White was present throughout the hearing.

14. As to paragraph 23 Mr Hoyle is correct but this has no bearing on the reasoning behind the original decision, see paragraph 41.

15. As to paragraphs 28-34 I regret that I do not understand the reasoning. And remain of the view that the analysis set out in the case management discussion and confirmed at the beginning of the hearing is correct.

16. Turning to the second part of Mr Hoyle's application namely that the original decision was wrong in law. Again much of this seems to be based on the premise that the analysis set out in the case management discussion and repeated at the beginning of the hearing was wrong.

17. Mr Hoyle cites the case of **Kaur v Leeds Teaching Hospital NHS Trust** [2018] EWCA Civ 978. Firstly Mr Hoyle did not cite that case in his closing submissions. Indeed he cited no case law. Had he done so the response to the 5 questions would have been as follows:-

> "17.1 The delay in communicating the result of the disciplinary hearing.
>
> 17.2 See paragraphs 43-45 of the original decision.
>
> 17.3 Probably not.
>
> 17.4 Yes the conversations with Mr Armond and Mrs White.
>
> 17.5 Yes."

18. As to paragraph 51 Mr Hoyle is correct but Mr Kilroy also repeatedly confirmed that he had decided not to return as from 23 July.

19. As to paragraphs 52 and 53 having re-read them I cannot see their relevance.

20. On balance I am of the view that the original decision was correct and should be confirmed. Therefore Mr Hoyle's application is refused.

Employment Judge Blackwell

Date 25 June 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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