EMPLOYMENT TRIBUNALS

Claimants: **1) Mr S Smith**
2) Mr J Scott
3) Mr G Risely

Respondent: **Ecofix Complete Building Solutions Ltd**
(In Creditors Voluntary Liquidation)

DECISION ON APPLICATION FOR RECONSIDERATION

Rules 70-73 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

1. Mr J Scott's application for reconsideration of the remedy judgment dated 5 July 2019 and sent to the parties on 10 July 2019 is refused.

2. Reasons for this decision are set out below.

REASONS

Background

1. By claim form presented on 20 March 2019 and assigned case number 2600867/2019, Mr Scott brought a claim for 'arrears of pay'.

2. In the claim form Mr Scott wrote, in response to question 9.2 ('What compensation or remedy are you seeking?'):

   "I just want the monies owed for work completed (approximately £700) plus the payments in lieu of holiday (as stated by Rebecca Fixter), together with being paid any notice period as per the terms of my contract."

3. The claim was served on the respondent. No response was presented on behalf of the respondent, and on 3 June 2019 the respondent was placed into creditors voluntary liquidation.

4. On 30 May 2019 a letter was sent by the Tribunal to Mr Scott and Mr Smith ordering that their claims be heard together, at a hearing on 5 July 2019. In the letter the claimants were informed that "*It is your responsibility to ensure that any relevant witnesses attend the hearing and that you bring sufficient copies of any relevant documents*".

5. The letter also contained a Case Management Order directing Mr Scott to set out in writing to the respondent what remedy the Tribunal is being asked to award, and to include any evidence and documentation supporting what is claimed and how it is calculated. The Orders also said that "*The Claimant shall bring a copy of such evidence and documentation to the Hearing.*"

6. A further letter, in similar terms, was sent to Mr Scott, Mr Smith and Mr Risley on 18 June 2019.

7. On 7 June Mr Scott sent an email setting out the remedy that he was asking the Tribunal to award by way of a Schedule of Loss. The sums contained in that email were: -

    a. A 'compensatory award' made up of one month's pay for 17 December 2018 to 16 January 2019 (£1,338.44) and 1.5 weeks' pay for the time the claimant was out of work (£463.31);

    b. One month's pay in lieu of notice: £1,338.44;

    c. A guarantee payment of £140.00; and

    d. Loss of statutory rights of £500

8. A remedy hearing took place on 5 July 2017. Mr Scott attended the hearing and represented himself, as did the other claimants. Mr Scott did not produce any documentary evidence at the hearing, nor did he refer to his email to the Tribunal dated 7 June 2019 or the sums contained in that email. Mr Scott gave oral evidence during the hearing.

9. I asked Mr Scott at the outset of the hearing what sums he was claiming. He told me that he was claiming £1,338.44 arrears of pay, but had been paid £553 of the arrears, leaving a net amount owing of £785.44. He also said that he had made a claim for notice pay to the 'Insolvency Services' online. He did not give any indication during the hearing that he wanted to pursue a claim for notice pay before the Tribunal.

10. Having heard Mr Scott's evidence and listened to what he had to say I ordered the respondent to pay the sum of £785.44 to Mr Scott in respect of unpaid wages. I delivered judgment orally on 5th July, and written judgment, with reasons, was sent to the parties on 10 July 2019.

11. On 14 July Mr Scott applied for a reconsideration of the remedy judgment. The reasons for his application, in summary, are that: -

a. I was not in receipt of all or the most up to date documentation in the case at the time I made my decision;

b. Mr Scott had made specific reference to notice pay in the claim form (box 9.2);

c. Mr Scott's Schedule of Loss dated 7 June 2019 was 'not in my hands' when I made my decision;

d. Mr Scott is only 22 years old and had never been in Tribunal before; and

e. Although he "*had copies of all the information with me on the day, I admit to feeling somewhat overwhelmed by the occasion and therefore failed to draw your attention to what was actually an error on behalf of the Employment Tribunal team…I found the whole Court experience daunting and when Mr Smith said he had no further evidence to produce unfortunately I did not have the confidence to then produce my pack…"*

The relevant law

12. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provide that: -

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

…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…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…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…

13. In dealing with applications for reconsideration, it is incumbent upon the Tribunal to seek to give effect to the overriding objective of dealing with cases fairly and justly, and to take account of common law principles of natural justice and fairness.

14. The only ground upon which a party can now apply for reconsideration of a judgment is 'the interests of justice'. When considering whether it is in the interests of justice to reconsider the judgment, the Tribunal must keep in mind that the interests of justice apply to both parties – not just the unsuccessful one. There is also a public policy interest in the finality of litigation.

15. The reconsideration process is not designed to give a party that is unhappy with the outcome of a hearing a 'second bite at the cherry' and re-argue points that were considered at the remedy hearing.

16. Lord McDonald said in Stevenson v Golden Wonder Ltd [1977] IRLR 474 that the (then) review provisions were "*not intended to provide parties with the opportunity of a re-hearing at which the same evidence can be rehearsed with different emphasis…"* In Trimble v Supertravel Ltd [1982] ICR 440 the Employment Appeal Tribunal held that on an application for what was at the time a review (and is now reconsideration), if a matter has been ventilated and properly argued during the course of Tribunal proceedings, then any error of law falls to be corrected on appeal and not by way of review.

17. It is well established that the interests of justice may require a reconsideration of a judgment if new evidence becomes available after the date of the original hearing if: -

    a. The evidence could not reasonably have been obtained for use at the original hearing;

    b. The evidence is relevant and would probably have had an important influence on the hearing; and

    c. The evidence appears to be credible.

    (Ladd v Marshall [1954] 3 All ER 745, CA)

18. The position is different however where the evidence that a party seeks to rely upon in support of their application for reconsideration was available at the time of the hearing, but not used. Where that is the case, it will not normally be in the interests of justice to reconsider a decision, unless there are exceptional circumstances. (See Flint v Eastern Electricity Board [1975] ICR 395, QBD and also General Council of British Shipping v Deria & ors [1985] ICR 198, EAT).

Decision

19. I have considered carefully the issues raised in the respondent's application for reconsideration.

20. It seems to me that Mr Scott's grounds for seeking a reconsideration of the remedy judgment fall into two categories. In the first category are the arguments (summarised at paragraphs 11(a), (b) and (c) above) that the Tribunal did not take account of all relevant evidence when reaching its decision, and that there was evidence available at the time which ought to have been taken into account. The second category (summarised at paragraphs 11 (d) and (e) above) is that Mr Scott did not put forward his case as well as he would have like to at the remedy hearing, due primarily to nerves and lack of experience.

21. In relation to the first category, it is clear from Mr Scott's application for reconsideration that he had copies of all the relevant information with him on the day of the remedy hearing, but did not rely upon it or draw it to my attention.

22. Whilst I have every sympathy for the fact that Mr Scott was representing himself in these proceedings and is inexperienced in Tribunal litigation, that alone does not make it in the interests of justice to reconsider the original remedy judgment. If Tribunals were to reconsider judgments merely because there were unrepresented parties between them who did not put forward their cases as well as they would have liked, that would be 'opening the floodgates'.

23. Mr Scott had been sent two letters by the Tribunal in advance of the remedy hearing in which he had been specifically told that it was his responsibility to bring any documents he wanted to rely upon to the hearing. He had clearly read and understood at least one copy of the letter, because he had complied with the order it contained by producing a Schedule of Loss on 7 June.

24. The evidence that he now wishes to draw to the Tribunal's attention was available to and with him on the day of the remedy hearing. There are, in my view, no exceptional circumstances that would justify reconsidering the judgment to take account of this evidence.

25. In relation to the second category, namely Mr Scott not properly putting forward his case at the remedy hearing, I also have some sympathy. Again, however, the mere fact that a party does not put forward their case as well as they would have liked is not sufficient grounds to reconsider a judgment. He is, in effect, seeking to have a second 'bite at the cherry' through the reconsideration process.

26. Employment tribunals are used to hearing from unrepresented claimants, and Mr Scott was not alone in representing himself at the remedy hearing. All of the claimants represented themselves. Mr Scott knew the other claimants, having worked with them before, and was present when the others explained the sums that they were claiming – including, in the case of Mr Risley, an amount in respect of notice pay.

27. In any event, looking at the sums that Mr Scott now asks the Tribunal to award him as set out in his reconsideration application: -

    a. Notice pay: Mr Scott specifically informed the Tribunal at the outset of the remedy hearing that he was pursuing this with the 'Insolvency services' and had made a claim for that already. He gave no indication that he wanted to pursue that claim before the Employment Tribunal;

b. A "*Redundancy (Statutory Rights) claim of £500*": Mr Scott had less than two years' service when his employment ended. He does not have sufficient service to bring either a claim for a statutory redundancy payment or a claim for unfair dismissal. The Tribunal could not therefore have awarded him either a redundancy payment or a compensatory award for unfair dismissal which includes compensation for loss of statutory rights. In any event there is no mention of a claim for unfair dismissal in the claim form.

c. *A "length of time out of work claim (1.5 weeks) of £463.31 not yet considered*." Compensation for loss of earnings following the termination of employment and before Mr Scott started new work would fall to be awarded were there a successful claim of unfair dismissal. There is no claim of unfair dismissal before the Tribunal and Mr Scott does not have sufficient service to bring one

28. For the above reasons, I have concluded that there is no reasonable prospect of the original decision being varied or revoked, and accordingly the respondent's application for reconsideration is refused.

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Employment Judge Ayre
Date: 23 August 2019

Sent to the parties on:

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For the Tribunal:

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