EMPLOYMENT TRIBUNALS

Claimants: Mrs J Frudd
Mr I Frudd

Respondent: The Partington Group Limited

JUDGMENT

The claimant's application for reconsideration of the judgment sent to the parties on 20 May 2019 is dismissed.

REASONS

The May 2019 Judgment and July 2019 Reasons

1. My original reserved judgment in this case was sent to the parties on 2 February 2018. Following remittal from the Employment Appeal Tribunal, I conducted a further hearing on 10 May 2019. The purpose of the hearing was to determine whether the claimants had been doing time work between the hours of 7am and 8am ("the morning hour"). I decided that they had not. My decision was recorded in a written judgment sent to the parties on 20 May 2019, followed by written reasons sent to the parties on 5 July 2019. I refer to these documents respectively as the "May 2019 Judgment" and the "July 2019 Reasons".

The reconsideration application

2. By e-mail sent on 19 July 2019, the claimants applied for reconsideration of the judgment. In essence, the claimants' contention is that they were doing time work during the morning hour and that I was wrong to find that they were not.

3. The application runs to just over 16 pages and makes many points. It would be disproportionate to identify every argument and deal with it separately. In broad outline:

   3.1. At paragraphs 5 to 12, the application reminds me of my original reserved judgment. In particular, it reminded me of my rationale for distinguishing between the evening time and the night time. It lists the factors I took into

account in deciding that evening times on call involved time work and night times did not. The claimants now argue that the factors pointing towards time work in the evening were all present in the morning hour, and the factors pointing away from time work at night were absent in the morning hour. By implication, the claimants appear to be arguing that the May 2019 Judgment was inconsistent with my original reserved judgment.

3.2. Paragraph 17 of the application, which spans 8 pages, contains a detailed critique of my further findings of fact contained in the July 2019 Reasons. I group the criticisms into their main themes:

3.2.1. The claimants contend that some of my further findings were inconsistent with evidence that had been given orally, in witness statements, or in documents in the bundle.

3.2.2. The claimants contend that, whilst Mrs Frudd made a concession about issuing customer keys, it was different from what was recorded in the July 2019 Reasons.

3.2.3. They argue that some of my findings are unsupported by the evidence.

3.2.4. Some arguments rely on evidence not previously given, but which if taken into account would alter my findings of fact.

3.3. Paragraphs 18 to 21 engage with the question of what inferences it was appropriate for me to draw from the facts I had found. This includes a recitation of the written and oral evidence and a further explanation as to why the claimants' evidence did not specifically refer to any activities carried out during the morning hour.

Relevant law

4. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides the tribunal with a general power to reconsider any judgment "where it is necessary in the interests of justice to do so".

5. Rule 71 sets out the procedure for reconsideration applications.

6. By rule 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… the application shall be refused…"

7. The overriding objective of the 2013 Rules is to enable the tribunal to deal with cases fairly and justly. By rule 2, dealing with cases fairly and justly includes putting the parties on an equal footing, avoiding delay, saving expense, and dealing with cases in ways that are proportionate to the complexity and importance of the issues.

8. The current 2013 Rules replaced the old procedure for reviewing judgments. Under their statutory predecessor, the 2004 Rules, review applications could only be granted on one of a specified list of grounds. That list has been replaced by a single test: a judgment will be reconsidered where it is "necessary in the interests of justice to do so". There is no specific provision for fresh evidence. Nor is there any express prohibition a party relying on evidence about which he knew or ought to have known before the judgment was given. Nevertheless, the "interests of justice" test must, in my view, incorporate a strong public interest in the finality of

litigation, even if it is not as inflexible as the proviso in the 2004 Rules. Where a party could reasonably have been expected to rely on the evidence first time around, it would take a particularly good reason to give that party a fresh opportunity to rely on it.

Conclusions

9. The claimants' application is well argued and well structured, but I nevertheless consider that it has no reasonable prospect of causing me to vary or revoke the May 2019 Judgment.

10. I deal with the main themes of the application in turn.

Inconsistency with the original reserved judgment

11. The claimants rely on the fact that the contract excluded call-out payments for the morning hour as well as in the evening. I expressly recognised this point in the July 2019 Reasons at paragraph 19. For this reason, I observed there, I would need to distinguish logically between the evening time and the morning hour.

12. It is true that the reconsideration application raises other factors, besides the contract, on which I relied in distinguishing between the evening and the night time. Examples are the fact that the claimants would not be expected to be asleep in the evening, the fact that they had personal responsibility for any queries that were raised at all times, and the fact that the claimants were required to ensure that at least one of them was on the Park in the evening. These were also true of the morning hour.

13. It does not follow, however, that the May 2019 Judgment is inconsistent with the original reserved judgment on these points. The existence of these common factors underlined the point, which I recognised, that there would need to be a logical distinction between the evening time and the morning time. These common factors did not undermine the logical basis for that distinction, which was that the claimants were busy in the evening, but had very little to do in the morning.

14. It is important to remember, as well, that, as the EAT found, the original reserved judgment did not address the morning hour at all. There was no analysis of which factors (present in the evening) were common to the morning hour and which were absent. This point is worth bearing in mind when considering the claimant's argument at paragraphs 5 and 6 (cross-referred to paragraph 66.2 of the original reserved judgment). The original reserved judgment did not make any finding about the extent or otherwise of restriction on the claimants' home life in the morning whilst on call. By contrast, the July 2019 Reasons did make such findings – see paragraphs 14.19 and 28.

Challenge to the further findings of fact

15. I deal with each cluster of arguments separately:

Alleged inconsistency with the evidence

16. I have identified one clear inconsistency here. The claimants contend that a document at page 375 of the original bundle identified that the Park reception opened at 9am, and not 8am as recorded in paragraph 14.1 of the July 2019 Reasons. I have not had access to the original bundle, but take the claimants to

have accurately represented the contents of that page. This is potentially relevant to my finding at paragraph 14.3 that call-outs to replace gas bottles did not happen during the morning hour. Had I taken into account the fact that the Park reception opened an hour later, I might have found that these call-outs occasionally took place, as residents would otherwise have to wait up to two hours to buy a replacement. Overall, however, it would not alter my conclusion that, in general, the claimants had very little to do during the morning hour.

Mrs Frudd's concession

17. My relevant note of the hearing reads (with expanded abbreviations):

> "Customers visitors. That was only at night. Some had private visitors who came out on their own. They wouldn't be entitled to have keys in the morning."

18. The claimants say that, at the point of conceding that there was no entitlement to keys after 11pm, Mrs Frudd added, "that did not necessarily mean that they would not ask for them". I do not have any note of that qualifying remark. In any event, if Mrs Frudd had said it, my decision would not have been any different. She was not suggesting that there was any evidence that any customer had ever asked for a key in the morning.

19. This note also deals with one of the discrete points made by the claimants in relation to customer visitors. I specifically noted Mrs Frudd saying that customer visitors were just at night. There is no reasonable prospect of my finding that they also arrived in the morning hour.

Findings allegedly unsupported by the evidence

20. The remainder of the arguments appear to be about what would be likely or unlikely based on general background facts such as the profile of the residents and activities that were inherently likely or unlikely to take place before 8am. The claimants' arguments are perfectly respectable, but I reject them for two reasons.

    20.1. The claimants have already had one opportunity to make arguments such as these at the hearing on 10 May 2019. I do not think that it would be fair to entertain these arguments without giving the respondent an opportunity to comment on them at a hearing. Listing such a hearing would add to the delay and expense in this already long-running case. It would also be disproportionate to the amounts of money at stake.

    20.2. These arguments are about whether the existence of particular activities can be inferred from background facts. Where there are gaps in the evidence, there is always going to be room for debate as to what inferences should be drawn in order to fill those gaps. The reason for the uncertainty is because there was no direct evidence of what, if anything, the claimants were actually doing in the morning. This state of affairs was actively pursued by both parties: at the hearing on 10 May 2019 both parties' preferred position was for me to make my findings without considering any further evidence. The parties must have known that I would make findings of fact with which a reasonable person could disagree.

New evidence

21. The reconsideration application (point (b) engaging with paragraph 14.3) refers to "the 8.00am gas run". I am not aware of any evidence before me that such an activity existed. I would have regarded such evidence as relevant. In my view, if the claimants are seeking to rely on it now, it ought to be excluded. This is because the claimants could reasonably have been expected to have mentioned it before now. It would not serve the overriding objective to list a further hearing for that new evidence to be considered.

Explanation for lack of examples of work done in the morning hour

22. I have considered the claimants' explanations for not providing specific examples of anything they did in the morning hour. In my view, none of these explanations alters my view that the lack of examples is telling. I explained why I thought this to be a relevant factor in paragraphs 22 to 24 of the July 2019 Reasons.

Balancing the factors

23. The additional evidence drawn to my attention in the reconsideration application does not particularly help me to decide whether the claimants' tasks were done at any particular time of day. For the reasons I explained, when I looked at the individual activities, it seemed to me much more likely that they were done in the evening, rather than the morning hour.

Disposal

24. There is no reasonable prospect of my being persuaded that it is in the interests of justice to vary or revoke the May 2019 Judgment. The reconsideration application is therefore dismissed.

_____

Employment Judge Horne

_____

18 September 2019

SENT TO THE PARTIES ON

3 October 2019

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.