



EMPLOYMENT TRIBUNALS

Claimant: Mr Rafal Rawski

Respondent: A & H Structures Ltd

JUDGMENT ON A RECONSIDERATION

The Claimant's application for a reconsideration is refused because there is no reasonable prospect of the decision being varied or revoked.

REASONS

1. The Claimant has applied for a reconsideration of the judgment dated 2 August 2019 which was sent to the parties on 5 August 2019. The grounds are set out in his application of 19 August 2019.
2. Under rule 70, of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"):

"70. A Tribunal may, either on its own initiative ... 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."

3. Broadly, it is not in the interests of justice to allow a party to reopen matters heard and decided, unless there are special circumstances, such as a procedural mishap depriving a party of a chance to put their case or where new evidence comes to light that could not reasonably have been brought to the original hearing and which could have a material bearing on the outcome.

The application

4. The Claimant has asked the Tribunal to reconsider the judgment because it would be in the interests of justice to do so. He says that new potentially

conclusive evidence became available to the Claimant after the judgment was made on 2 August 2019 in the form of a recording of a conversation between him and the Respondent's owner, Mr Mick Allen, on 16 April 2018. The recording was made by Mr Daniel Buraczeski, a translator who accompanied the Claimant to the Respondent's premises on 16 April 2018. The recording was transcribed by Mr Tomasz Gracka who is fluent in both Polish and English. The Claimant's application was supported by a witness statement.

5. The Claimant states in his application that he used:

"... all reasonable diligence to obtain all evidence that could potentially be available at the hearing but he only found out about the existence of the recording on 8 April 2019 from Mr Buraczewski, who was supposed to act as his witness. Mr Buraczewski, who was instructed as the Claimant's interpreter, did not disclose the fact that he recorded the conversations on 16 April 2018 and did not mention that he had recorded in his signed statement which was available to the tribunal during the hearing"

6. He continues to say that *'the new evidence can not only have important influence on the outcome of the Claimant's case but is likely to be decisive'*.

Considerations

7. At the hearing on 15 and 16 July 2019, the Claimant submitted a witness statement on behalf of Mr Buraczewski which was signed and dated 17 September 2018. He was not in attendance at the hearing and when I made enquiries as to why not, the Claimant's representative, Mr Donovan, told me that they could not contact him so could not offer any explanation for his absence. I confirmed at the time that, as a result, less, if any weight at all, would be given to his statement.
8. Mr Buraczewski's witness statement describes a meeting at which he was present, between the Claimant and Mr Allen. In summary, he supports the Claimant's case in that the Claimant gave Mr Allen two weeks' notice; told Mr Allen that he wanted to work his notice but Mr Allen responded by saying that he had already employed somebody else; and that there was no more work for him.
9. A transcript of the recording has been produced in support of the application but not the recording itself. Having read the transcript, I am not persuaded that it is likely to have an important influence on the outcome of the Claimant's case and it is certainly not conclusive. The interpreter has himself acknowledged that some parts of the recording were *"illegible to me"* but he believed that they did not have an important impact on its

overall content. Respectfully, this is not a decision for him to make.

10. It is clear from the transcript that the Claimant gave Mr Allen two weeks' notice. However, prior to him communicating that he says:

" ... Tell him to terminate the contract on Monday and give him my notice". After discussions about the length of notice required under the contract Mr Allen asked the Claimant *"When are you finishing, when do you want to finish?"*. The Claimant relied *"30 April"* and went on to explain that he would be earning more money in the new job. Mr Allen says:

"Yeah you finish on the 27th yeah? No, I've got somebody starting tomorrow". Mr Buraczewski says (interpreting for the Claimant): *"now he starts to be come up with something and tells you he has somebody is starting from tomorrow and you may go home, shall ask for his final decision".* He asks Mr Allen: *"What is your final decision, you want Rafal to stay here for another two weeks?"*. Mr Allen replied *"No, no"*. At the end of the conversation Mr Allen says *"see you Ronald [sic], thanks so much for your help. Good luck"* and the Claimant replies *"you too, thank you so much"*.

11. In context, I am not persuaded that this is conclusive that the Claimant was dismissed by Mr Allen. On the contrary, it could also be said to be supportive of Mr Allen's evidence that he agreed to release the Claimant early so that he could start a better paid job with more convenient hours as soon as possible.
12. More importantly, the Claimant asked Mr Buraczewski to prepare a witness statement in anticipation of his claim, which he duly did, and was expecting him to attend the full hearing. This was his opportunity to adduce all the evidence available in support of his case. I find it perplexing that Mr Buraczewski did not mention the recording to the Claimant when he was preparing his statement. He chose not to mention it to the Claimant for reasons that I do not know but, regardless, the opportunity was there for it to have been adduced. Accordingly, this is evidence that could reasonably have been brought to the original hearing.
13. Additionally, had Mr Buraczewski attended at the hearing, this would have been a further opportunity for him to tell the Claimant and the tribunal that he had this recording in his possession. Consequently, this information could have been reasonably known or foreseen at the time.
14. I am satisfied that the Claimant had the opportunity to provide this evidence at the time and he is not entitled to a second bite of the cherry.

Conclusion

15. Having considered all the points made by the Claimant, I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The application for a reconsideration is refused.

Employment Judge Victoria Butler

Date: 16 October 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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