Case No: 2405470/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr M Belkacem

Respondent: Pasha Restaurant and Lounge Ltd

JUDGMENT

The claimant's application dated 14 October 2019 for reconsideration of the judgment sent to the parties on 4 October 2019 is refused.

REASONS

1. I have undertaken preliminary consideration of the claimant's application, by letter dated 14 October 2019. This application is for reconsideration of the judgment dismissing his claim of unfair dismissal and unlawful deductions/breach of contract in respect of unpaid wages as being out of time.

The Law

2. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70).

3. Rule 72(1) of the 2013 Rules of Procedure empowers me to refuse the application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked.

4. The importance of finality was confirmed by the Court of Appeal in **Ministry of Justice v Burton and anor [2016] EWCA Civ 714** in July 2016 where Elias LJ said that:

> **"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] ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Ironsides Ray and Vials [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."**

5. Similarly in **Liddington v 2Gether NHS Foundation Trust EAT/0002/16** the EAT chaired by Simler P said in paragraph 34 that:

> **"a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or by adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered."**

6. In common with all powers under the 2013 Rules, preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay. Achieving finality in litigation is part of a fair and just adjudication.

The Application

7. The application for reconsideration arises in the following context. The claimant was suspended from work on 1 November 2018 by text message. As matters transpired, he never returned to work. He commenced the Early Conciliation process for the first time on 6 December 2018. An Early Conciliation certificate was issued on 18 December 2018. He then submitted a claim to the tribunal on 23 December 2018. He was unrepresented throughout this period.

8. In the new year, the claimant obtained legal advice. By a letter dated 1st February 2019 the claim was withdrawn. A second period of Early Conciliation ran from 8 to 27 February 2019 and a second claim was presented on 23 May 2019.

9. The was a dispute between the parties about the circumstances of termination and the effective date of termination. The claimant contended for a termination date of 5 February 2019. The respondent contended that the employment had ended on 30 November, and that the claim was out of time on that basis. The hearing on 1 October 2019 was a preliminary hearing to determine whether the claim was out of time and, if so, whether time should be extended on the 'not reasonably practicable' basis.

10. Both parties were represented at the hearing and had witnesses in attendance. The claimant was alleging that the Respondent had fabricated two letters dated November 2018 to support its case.

11. However, at the outset of the hearing the respondent's counsel raised an argument that that the claim was out of time even on the effective date of termination contended for by the claimant. This proposition relied on the argument that the second period of Early Conciliation did not operate to extend time because it was a second period in respect of the same matter. She relied on the EAT case **Revenue and Customs Commissioners v Serra Garau [2017] ICR 1121** as well as on other cases cited within that judgment, including **Compass Group v Morgan [2017] ICR 73**. The claimant's counsel relied on the case of **Akhigbe v St Edwards Home Ltd UKEAT/110/18**.

12. It was accepted by the claimant's counsel in the hearing, and is acknowledged in the letter setting out the application, that the early conciliation provisions do not allow for an extension of the limitation period where a second period of conciliation is entered into in respect of the same "matter". The parties, and the tribunal, therefore directed their attention at the hearing as to whether the first claim and the second claim related to the same matter, taking account of the guidance given in relation to that term in **Akhigbe** and the other relevant authorities.

13. When this new point was raised I discussed with the parties the appropriate way to proceed. The respondent was of the view that no evidence was required as the matter could be determined on the basis of the effective date of termination contended for by the claimant. The claimant's counsel wished to lead evidence from the claimant. I directed that she could call that evidence if she considered it helpful, and noted that the claimant may have relevant evidence to give in any event in relation to whether (assuming no extension for early conciliation) it had not been reasonably practicable to present the claim in time. The claimant's counsel did not suggest that it was necessary for the respondent's evidence to be called or subjected to cross examination.

14. For reasons given orally at the end of the hearing, I found that the first claim and the second claim were claims in respect of the same matter for these purposes. In essence, both claims were unfair dismissal claims relating to the termination of the claimant's employment, with ancillary claims in respect of monies alleged to be owed on termination. The withdrawal of the first claim and submission of the second claim reflected a change in the claimant's understanding (having gained legal representation) as to how and when that dismissal came into effect. It was common ground that the claimant had not actually worked since 1 November 2018, nor had he been paid in respect of any part of that period.

15. Having analysed both the claims brought and the surrounding circumstances, I was satisfied that the differences between them were not sufficient to support a conclusion that the claims (and their related conciliation proceedings) comprised two different matters. In reaching that conclusion it was not necessary to determine whether the claimant's allegations that the respondent had fabricated documents were well-founded. By agreement, the decision was premised on the effective date of termination contended for by the claimant being correct (without any formal concession to that effect from the respondent).

16. Reasons for that decision were given orally at the hearing. Neither party applied for written reasons in the hearing and neither party has applied for written reasons to date. This judgment summarises the reasoning behind my decision sent to the parties on 4 October 2019 only insofar as is necessary to understand the basis for my rejection of the application for reconsideration.

17. The claimant's representatives now appear to contend that it was necessary to hear evidence from the respondent and to determine the issue of whether the letters were fraudulent in order to determine whether the first and second claims related to the same matter. I disagree. Their case seems to be that the new 'matter' of whether the respondent had engaged in fraudulent (and, as they put it, criminal) conduct was not before the tribunal in the first claim. This misses the point: by both claims the claimant was asking the tribunal to determine that he had been unfairly

dismissed, and that the purported dismissal in both cases stemmed ultimately from the 1 November 2018 suspension and the matters lying behind that. A tribunal hearing the second claim would most likely have found it necessary to determine the genuineness or otherwise of the respondent's letters as part of its relevant factual findings, but that does not mean that that question itself is the issue which defines the 'matter' which the claim is concerned with. The letter form part of the factual matrix, but are not a matter in themselves.

18. By this application the claimant's representatives are attempting to re-open the decision made on the 1 October 2018 on which the tribunal heard full argument and came to a determination. In that sense it represents an attempted "second bite at the cherry" which undermines the principle of finality. Such attempts have a reasonable prospect of resulting in the decision being varied or revoked only if the Tribunal has missed something important, or if there is new evidence available which could not reasonably have been put forward at the hearing. A Tribunal will not reconsider a decision just because the claimant wishes it had gone in his favour.

Conclusion

19. Having considered all the points made on behalf of the claimant I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The points of significance were considered and addressed at the hearing. The application for reconsideration is refused.

Employment Judge Dunlop

20.11.19

JUDGMENT AND REASONS SENT TO THE PARTIES ON

22 November 2019

FOR THE TRIBUNAL OFFICE