Case No: 2200260/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr. B. Allen**

Respondent: **G4S Secure Solutions UK Limited**

Employment Judge Goodman

26 November 2019

JUDGMENT

The respondent's application for reconsideration of the judgment sent to the parties on 20 August, and reasons sent 5 November, is refused under rule 72 of the Employment Tribunals Rules of Procedure 2013.

REASONS

1. On 18 November 2019 the claimant wrote asking for the judgment for which the written reasons were sent to the parties on 5 November 2019 to be reconsidered.

2. The claim was heard on 19 August 2019, when the judgment, and the reasons for it, were given orally and recorded. The judgment dismissed claims brought under the Working Time Regulations and in breach of contract, but made a finding as to the correct particulars of employment with respect to holiday entitlement.

3. Written reasons were requested at the hearing, and the corrected transcript was sent to the parties on 5 November 2019. Under the Employment Tribunal Rules of Procedure 2013 a request for reconsideration may be made within 14 days of the judgment being sent to the parties. This request was made in time.

4. By rule 70 a Tribunal "may reconsider any judgment where it is necessary in the interest of justice to do so", and upon reconsideration the decision may be confirmed varied or revoked.

5. Rule 72 provides that an Employment Judge should consider the request to reconsider, and if the judge considers there is no reasonable prospect of the decision being varied or revoked, the application shall be refused. Otherwise it is to be decided, with or without a hearing, by the Tribunal that heard it.

6. Under the 2004 rules prescribed grounds were set out, plus a generic "interests of justice" provision, which was to be construed as being of the same type as the other grounds, which were that a party did not receive notice of the hearing, or the decision was made in the absence of a party, or that new evidence had become available since the hearing provided that its existence could not have been reasonably known of or foreseen at the time. The Employment Appeal Tribunal confirmed in Outasight VB Ltd v Brown UKEAT/0253/14/LA that the 2013 rules did not broaden the scope of the grounds for reconsideration (formerly called a review).

The Application

7. The respondent seeks reconsideration on the basis that the issue of whether the particulars of employment were deficient or incorrect was not listed at the preliminary hearing on 12 July by Employment Judge Elliott. The application is made by Mr N. Sheppard, in house counsel for the respondent. He did not represent the respondent at either hearing.

8. It is argued that an order declaring the issues should not be overturned or varied by another judge save where (a) there is a material change in circumstances (b) the order was based on misstatement or omission (c) there is some other rare or out of the ordinary circumstance. It is asserted that the issues E. J. Elliott listed were (i) whether the respondent refused to permit the claimant to exercise any right under the WTR and (ii) whether the calculation of holiday pay was correct under WTR, and that as particulars of employment were not mentioned, the tribunal hearing the claims had no jurisdiction to decide anything else, and, in effect, the tribunal "disregard(ed) the orders made by a different tribunal" and went off "on a frolic of its own". In consequence the respondent had not prepared to defend any other claim. In particular it had not checked whether the claimant had signed and returned a contract of employment purportedly sent to him in 2015 because they did not need to. The respondent has been denied natural justice.

9. The application contains a full account of the case law on interest of justice and some case law on lists of issues. There is no reference to the invitation to counsel to make a submission on a section 11 reference, nor any outline of the respondent's case, had there been more notice that this was an issue. This suggests that the ground for the application is that the claimant was not pursuing his request for a contract, in effect, that there never was such a reference, or that it had been withdrawn.

History of the Claim

10. The claim made by the claimant in January 2019 included that he wanted an employment contract, and that he had been and was entitled to 28 days a year (Reasons:17). The respondent on ET3 disputed he was entitled to anything but the entitlement under the Working Time Regulations and asserted that previous payment of 28 days had been by mistake. It was denied there was any breach of contract.

11. The parties were sent a list of orders. These included an order for service of a schedule of loss, and for mutual disclosure by 7 May.

12. The schedule of loss filed by the claimant said he wanted a contract stating he was entitled to 28 days (Reasons:19).

13. The claim was listed for a final hearing on 21 June, but postponed to 12 July as the respondent's witness Robert Ayling was unwell.

14. There then ensued correspondence between the parties and the tribunal: the claimant wanted witness orders for two of the respondent's employees, the respondent denied their relevance and complained the claimant bombarded them with emails. The tribunal converted the 12 July final hearing to a case management hearing. The parties were asked to complete the usual agenda for the hearing, including the issues to be decided at the final hearing, but if they did complete agendas they are not on the file.

15. The hearing on 12 July lasted from 11.20 to 12.10. The judge explained to the claimant the desirability of taking legal advice, that she would not make witness orders until he had had a chance to do so, that the parties should not litigate by correspondence, and that under the Extension of Jurisdiction Order he could not bring a claim in contract before the employment had terminated.

16. The issues listed by Judge Elliott after the discussion on 12 July were listed at paragraph 12 (i) to (viii) of the case management summary. This starts: "the issues between the parties which potentially fall to be determined by the tribunal are…". They are not listed among the orders. The list of issues numbered (i) to (viii) is in effect a narrative until (iv), which identifies: "the issue for the tribunal is the method and calculation of holiday entitlement and whether the claimant's entitlement to leave is in accordance with the "Working Time Regulations". She noted at (v) that the claimant said he had not suffered any loss of pay to date so there was no unlawful deductions claim, and at (vii) there was no breach of contract clam because he was still employed. At (vi) it is recorded that the issue under regulation 30 (WTR) is whether the claimant has been refused to exercise his right to annual leave, the claimant's case being that 8 days had been removed. As to remedy, (vii) records this was about how much should be awarded.

Discussion

17. The note makes no mention of the claimant wanting a "contract", nor of any issue as to the existence or accuracy of any particulars of

employment, nor identify a reference under section 11 as an issue, but neither does it record that the claimant had withdrawn, or was no longer pursuing, a claim that his entitlement was in fact 28 days and that he wanted not money but a contract to say so. I identified this omission during the hearing and for that reason invited a submission (reasons:26).

18. Relevant context to the absence of mention of the claimant's request for a contract is:

18.1 Lawyers understand that a contract is an agreement for consideration which may be written or oral, and so on, but by contract lay people usually mean a document.

18.2 The respondent had discussed the claims at length in its correspondence before 12 July in the context of a claim for money, and insisted there was no breach of contract claim because of the Jurisdiction Order, but never considered the reference point.

18.3 The claimant has never had legal advice.

18.4 The time for examination of the issues was of necessity limited.

19. I have considered **Serco v Wells UKEAT/0330/15** and **Kouchalieva v LB Tower Hamlets UKEAT/0188/18** on the list of issues point..

20. I conclude:

20.1 The claimant did not refer to section11 in so many words, but in layman's language what he wanted was a document setting out his holiday pay term, that is, a reference and determination under sections 11 and 12;

20.2 There is no suggestion that he retreated from this on 12 July. Judge Elliott recorded he was not pursuing an unlawful deductions claim, and could not bring a breach of contract claim, but made no mention of him no longer needing a document about terms which, on her record, were in dispute;

20.3 I am reluctant to infer from this that the claimant had *withdrawn* the claim for a document; he was unrepresented and did not understand the law, and the respondent did not deal with the need for a document at all, but focused on whether he had been correctly paid. This was not a complex set of discrimination or whistleblowing allegations, where it might be said that some were no longer being pursued. It was always about a dispute on holiday entitlement, whether 20 days or 28 days (and here I remind myself that in evidence the respondent's witness Ms Marriott said in fact they were paying 23 days);

20.4 In cross examination the claimant said of the new booking system "it's different to what I was promised, it's the amount of holiday that has changed. They've stopped me booking my entitlement", indicating he did not concede the dispute as to what his entitlement was.

20.5 If there was a claim which was not withdrawn, but not included on the list, that must have been through omission or oversight;

It cannot therefore be said the tribunal had no jurisdiction to consider a section 11 reference; when the conclusion is that the claim had been omitted from the list. On this, at first sight I find there is no reasonable prospect of success in the application for reconsideration.

21. I have gone on to consider other points made by the respondent about the interests of justice, and whether they indicate that the reconsideration might have prospects of success and should be argued at a hearing.

22. The first is on whether they would have searched to see if there was a signed contract if the reference point was listed as an issue. I observe:

22.1 At the time of disclosure of documents (early May), before the issues were defined, it was clear to the respondent that the claimant disputed as a matter of fact he had ever received the purported 2015 contract before it was sent to him in 2018 with the grievance outcome. The respondent would have looked at their own HR file to see what was there about contract terms, whether a signed contract or a statement of particulars.

22.2 The signed but undated witness statement from the respondent's Mr. Ayling says at the end of paragraph 8: "the respondent does not have the original contract", which indicates a check had been made.

23. The second point is the respondent's concern that:

> "there are profound operational and commercial implications for the respondent employer in this case which extend far beyond a mere declaration in the claimant's favour, a matter which when considered in the wider public interest must be taken into account".

In this respect I note that:

23.1 The decision only binds the respondent in respect of the claimant on these particular facts.

23.2 The respondent does not say how many other employees are in the claimant's position, of not having received a statutory statement of employment particulars, not having been sent a 2015 contract setting out WTR terms only for holiday pay, and of being paid 28 days holiday a year until 2018.

23.3 As the respondent has decided to pay for 23 days (on their calculation more than the WTR entitlement), in practice the money difference between the claimant and respondent amounts only to 6.5 hours pay per annum (Reasons:25). It is not therefore clear what the profound operational and commercial implications are.

23.4 The wider public interest is not explained, and it is hard to see what it is.

24. The finding as to what term had been agreed as to holiday pay was based on evidence (Reasons:29). It is hard to understand what other *evidence* the respondent would have adduced had the reference point been listed.

25. As for the *law*, the respondent's concern that they were not prepared to argue a section 11 reference is understandable. A tribunal must not go off on a frolic of its own and substitute its own view of the claim for that of the claimant bringing it. On the other hand, a tribunal must be careful to deal with all claims raised, especially where a party is not represented. I have discussed why I concluded there always was such a claim but it was omitted or overlooked. Even so, it is not justice if a party is unaware a claim or argument is being considered and has no opportunity to state its case on that. The reference point was raised with counsel in submissions (and also, more tentatively, during the claimant's cross examination, as what might be "properly payable"). Had counsel asked for more time to consider, or to submit a written submission on the issue when the tribunal raised it, the tribunal would have been sympathetic. According to my note, the submission made orally was that the claimant had got particulars of employment in 2015 and so he could not raise it now, it was not a live issue; going on to restate that there was no breach of contract claim - had he resigned it would have been different; the tribunal was only concerned with regulations 13 and 13A. Importantly, the respondent does not state now, with time for reflection, what other submission *would* have been made on the law had a section11 reference been on the list, which should now be considered.

26. Decisions must be made in the light of the overriding objective to deal with cases justly and fairly. Having regard to the need for finality in justice, the amount in issue, and the prospects of success in the respondent's stated grounds for reconsideration, I conclude that the application has no reasonable prospect of success. It is refused under rule 72.

Employment Judge GOODMAN
26th Nov 2019

JUDGMENT SENT TO THE PARTIES ON

27/11/2019

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FOR THE TRIBUNAL OFFICE