EMPLOYMENT TRIBUNALS

Claimant: **Mr G Smith**

Respondent: **Pimlico Plumbers Limited**

JUDGMENT

The claimant's application dated 1 July 2019 for reconsideration of the judgment sent to the parties on 1 July 2019 is refused.

REASONS

Background

1. The hearing of the Claimant's holiday pay claim came before me on 18 and 18 March 2019. The Claimant was represented by Mr Stephenson of Counsel and the Respondent by Mr Smith of Counsel. I gave an oral decision at the hearing and followed this with written reasons that were signed by me on 10 May 2019, but not sent to the parties until 1 July 2019.

2. Following the promulgation of my written reasons the Claimant made an application for reconsideration. In fact he made a number of applications for reconsideration, which began, inappropriately before the written reasons for my decision were promulgated, as I noted in correspondence with the parties. Further applications followed with a number of grounds relied upon, not all of which were easy to understand and some of which have subsequently been made the subject of an appeal to the EAT.

3. This has led to extensive correspondence and some confusion about the basis of the Claimant's application.

4. I reviewed the correspondence on 20 August 2019 and applied the test set out in Rule 70 of the Employment Tribunal (Constitution and Rules of Procedure Regulations 2013 namely whether it was necessary in the

interests of justice for my decision to be reconsidered. I identified what was in my judgment the one potential ground for reconsideration that had a reasonable prospect of leading to the original decision, or part of it,

being varied or revoked, that is, the Claimant's submission "that it is clear from his claim form that he took a period of leave in May 2011". I also expressed the view that if I did reconsider that point, there might be implications for paragraph 6 of my judgment in which I said: “The questions of whether the decision in *Bear Scotland Ltd v Fulton [2015] IRLR 150* and the provision in s23 (4A) are compatible with EU law do not therefore arise on the facts of this case".

5. The Respondent wrote a letter to the Tribunal on 27 August 2019 setting out its views on the argument I had identified, which it referred to in its letter as “the Reconsideration Argument” (a term I will adopt in this judgment) and indicating that it intended to proceed on the basis that the Reconsideration Argument was the only basis on which I considered that there was any prospect of my judgment on the holiday pay claim being varied or revoked.

6. The Claimant made further submissions on the Reconsideration Argument on 4 and 11 September 2019 and appeared to have accepted that that was the only basis on which a reconsideration would proceed. There has been no further correspondence from the Claimant indicating that that is not the case. On the contrary, on 29 November, that Claimant made further submissions making it clear that that is his position.

7. I initially took the view that given the complexity of the arguments made by the Claimant that it would be in the interests of justice to deal with the matter at a hearing. On 13 November the Respondent’s solicitor wrote to say that Mr Smith, Counsel for the Respondent could not provide any available dates before February 2020. The Claimant replied as follows:

> **“We are concerned that the proposed reconsideration hearing is now impacting the substantive appeal. We are reviewing the application and provisionally conclude that the application should be dealt with on the papers on an expedited basis with a provision for both parties to provide written submissions. Dealing with the reconsideration application any other way will cause substantial delays to the appeal which we are under strict instructions to avoid. The reconsideration application is dated 1 July 2019 and we asked for this to be expedited but it was not expedited. These delays are impacting the Claimant’s Article 6 rights.**
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> **The Respondent’s response to the reconsideration application is the same in the appeal so there is considerable and unnecessary overlap.**
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> **In keeping with the overriding objective, we ask that the reconsideration application be dealt with proportionately.”**

8. On 18 November I informed the parties that in light of that response I now considered that the interests of justice would be better served by the application being dealt with on the papers. The case raises a number of important issues that need to be considered by the EAT and it would be in the overall interests of a just resolution of those issues for the proceedings in the EAT not to be impeded by further delays in dealing with the Reconsideration Argument. I noted that as both parties had already made detailed submissions any further submissions should be sent by 29

November. On 18 November the Respondent replied as follows:

> **"We write further to the Tribunal's letter of today's date, in which EJ Morton acceded to the Claimant's application that his reconsideration application(s) be heard on the papers. That application was made by email at 13:59 on Thursday 14 November 2019. We are somewhat disappointed that the Respondent was not given an opportunity to respond to that application prior to EJ Morton making her decision, which was sent by email at 10:01 this morning.**
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> **For the avoidance of doubt, it remains the Respondent's position that, because of the complexity of the issues in this case and the opacity of the Claimant's written submissions on the reconsideration application(s), the interests of justice requires the Claimant's reconsideration application to be heard in person. That was the previously held view of both parties and the Tribunal, and nothing material has changed to alter that position.**

9. The Respondent went on to say that notwithstanding the above, it considered that it might be possible for the application to be heard on the papers fairly, but only subject to clarification from the Claimant regarding the scope of the reconsideration application – I have addressed that point in paragraph 4 above. It also said, on the matter of the timing I had suggested, that if both parties made submissions on the same day that would not allow the Respondent to respond to any new submissions made by the Claimant. On 19 November the Claimant replied as follows:

> **"We write further to the Tribunal's letter dated 18 November 2019, and the Respondent's email sent 18 November 2019 at 18:18.**
> **The Claimant's reconsideration application is clear and is not "opaque". By letter dated 20 August 2019 the Tribunal identified the issues to be determined in the reconsideration application and the potential impact on Paragraph 6 of the Judgment. The Claimant shall be addressing that response in his submissions.**
> **As directed, any further submissions should be made on or before 29 November 2019. We do not agree the Respondent's proposition that the Claimant should serve any further submissions first and then the Respondent shall (if so advised) provide its response within 7 days. There is no good reason for the Tribunal to depart from the usual practice of mutual simultaneous exchange of submissions.**
> **It is not for the Respondent to dictate to the Claimant or the Tribunal how the Claimant's reconsideration application is to be dealt with or determined. If the Respondent had any concerns or issues about the Judgment, it could have made its own reconsideration application. It did not do so.**
> **The Claimant has suffered, by far, the greater disadvantage and prejudice in these proceedings. It is in the interests of justice that his application be dealt with fairly, proportionately, and on paper, without any further delay or wasted cost."**

10. As noted in paragraph 5, the Claimant sent further submissions on 29 November. There has been no further submission from the Respondent since that date. I have therefore concluded that both parties have had the opportunity to say everything that they wish to say on the Reconsideration Argument. I have based my decision on:

    a. The Claimant's written submissions of 29 November 2019;
    b. The Respondent's written submissions of 27 August 2019.

Submissions

11. The Claimant has made two submissions. In summary, the first is that my decision that his holiday pay claim brought under Regulation 30(1)(b) of the Working Time Regulations 1998 ("WTR") and s23 Employment Rights Act 1996 ("ERA") was brought out of time cannot stand in light of the facts as pleaded by him and unchallenged by the Respondent. The second is that if my decision that his claims are out of time is wrong, then I must also reconsider paragraph 6 of my judgment in which I stated that the question of whether the EAT's decision in *Bear Scotland v Fulton [2015] IRLR 105* is out of time does not arise on the facts of this case.

12. In relation to the first point Mr Stephenson submitted as follows:

> **"We specifically challenge Paragraphs 5 and 61 of the Judgment dated 1 July 2019 that the Claimant had brought his claims for pay in respect of unpaid holiday under Regulation 30(1)(b) of the Working Time Regulations 1998 ("WTR") and s.23(1)(a) of the Employment Rights Act 1996 ("ERA") outside the statutory three month time limits set out in Regulation 30(2) WTR and s.23(2) ERA. In so holding the ET erred and failed to take account of a relevant consideration, namely the fact that Friday 29 April and Monday 2 May 2011 [see § 27 of his claim form] were public bank holidays for which he was entitled to paid leave."**

13. He then set out the three month time limits for a claim for under-payment in respect of holiday and unlawful deduction from wages and continued:

> **"5. The ET treated the Claimant's Grounds of Complaint which was attached to his claim form and his witness statement as setting out the facts relevant to paid annual leave [see ET §§7-11, 19, 45-46]. But it failed to consider a highly material (and uncontested) statement in the claim form that he did not work on the bank holidays on 29 April and 1 May (see Grounds of Complaint, §21). Thus, when considering whether or not the claim was in time, and having found as a fact that the Claimant did take holiday from time to time at Christmas, during the summer holidays and on bank holidays [§19 and 45 this was unchallenged evidence] … and his final payslip was issued by the Respondent on 21 May 2011 [§ 46], the ET ought to have regard to the bank holidays as identified in its findings and paragraph 27 of his claim form and found that the claim was brought in time. The Corrigan Judgment dated 17 April 2012, which was before the ET found as fact that the Appellant last undertook plumbing work on Thursday 28 April 2011 §8 of the ET Judgment. There was a bank holiday the next day on Friday 29 April 2011 and the following Monday 2 May 2011. The Claimant asserted in his Grounds of Complaint, §15 that he was dismissed the day after the bank holiday on 3 May 2011.**
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> **6. Had the ET directed itself to consider those bank holidays as it should have done so it would have concluded that the Respondent should have made payment in respect of those bank holidays and all bank holidays in the last leave year including the Easter bank holidays on 22 April 2011 and 25 April 2011, within the Claimant's final payslip on 21 May 2011. In which case the claim for payment in respect of that period should have been presented to the ET on or before 20 August 2011 for the purpose of regulation 30 WTR and s.23 ERA. The Claim was presented on 1 August 2011 and was therefore in time [§ 46].**
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> **7. Accordingly, the ET's finding that the claim should have been presented on or before 4 May 2011 and the finding that his entire claim under Regulations 16(1) and 30(1)(b) WTR [§ 46] and section 23 (1)(a) ERA [§ 47] were presented outside the statutory time limit is wrong and cannot be**

sustained."

14. The Respondent's response to this submission is that it was "not in any way clear" from paragraph 27 of the Claimant's Grounds of Claim that he claimed to have taken annual leave over the bank holiday weekend on Friday 29 April 2011 to Monday 2 May 2011. On the contrary, the Respondent submitted, the Claimant's case was that he was too unwell to work that weekend.

15. Paragraphs 27 and 28 of the Grounds of Claim states as follows:

> "27. **On Thursday 28 April 2011 I had a job at Blackheath which was a free estimate. I range the control room after completing the estimate. I spoke to Katy. She gave me a job up town. I said I did not feel well and was going home. We had a heated conversation. She said I could not go home. She said that if she did not feel well she still had to work. I said I was going home and she put the phone down on me. There was a bank holiday from Friday 29 April 2011 until Monday 2 May 2011. I did not work.**
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> **28. I went to my GP on Tuesday 3 May 2011 and was signed of work for two weeks due to stress. I was having uncontrollable heart palpitations"**

16. The Respondent submits that it is clear from this that it was the Claimant's case that he was absent from work on 29 April and 3 May 2011 on account of ill health and not because he was taking holiday. Mr Smith's submissions continue:

> **"At no time prior to the Claimant's reconsideration application(s) has the Claimant specifically averred that he was absent from work and on holiday on 29 April and/or 2 May 2011. In particular such a statement did not appear in the Grounds of Claim, the Claimant's witness statement for the employment status hearing in 2011, the Claimant's witness statement for the hearing before EJ Morton in March 2019 (the "Holiday Pay Hearing"), the Claimant's counsel's skeleton argument for the Holiday Pay Hearing, or the Claimant's counsel's oral submissions at the Holiday Pay Hearing. The Tribunal was correct to find, as it did in paragraph 46 of the written reasons, that there was no evidence of any period of holiday having been taken by the Claimant after 4 January 2011.**
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> **Indeed the Tribunal will recall that the Holiday pay Hearing proceeded on the basis that the Claimant implicitly accepted that the [holiday] claims were out of time".**

17. This last point is a reference to the following passage in paragraph 49 of my written reasons on the holiday pay claims in which I said:

> **"As regards reasonable practicability the Claimant did not in my judgment advance any argument other than his ignorance of his legal rights at the time (witness statement paragraph 49). The point was not addressed at all in Mr Stephenson's written submissions, which implicitly accepted that the claims were out of time and focused on arguing that the normal limitation rules should be disapplied."**

18. The Respondent maintains the Claimant has not until this point in the proceedings advanced his case on the basis that his claim for holiday pay was in fact presented within the statutory time limit. It is inappropriate, Mr Smith argues, for the Claimant to attempt to recast the legal and evidential basis of his claim now and to allow him to do so would not be in the interests

of justice. He also points out that the Claimant did not at any stage provide a proper statement of when he had taken holiday or for how

long, as I observed in paragraphs 12 and 19 of my written reasons, despite having been asked to do so prior to the Holiday Pay Hearing.

Decision on the first submission

19. I have considered both sets of submissions carefully. I have also not lost sight of the fact that this claim arose form a set of facts and circumstances in which the Claimant erroneously regarded himself as self-employed and conducted himself accordingly. In April and May 2011 he was not aware that in law he was entitled to paid holiday. It was his case from the outset however that he took annual leave but received no pay for it (Grounds of Complaint paragraph 5). It was never his case that he was denied the right to take leave from time to time and in paragraph 12 of my written reasons I record:

> **"Nowhere in the documents or the Claimant's pleadings or witness evidence was there a comprehensive statement of when he had taken holiday in any of the years of his employment or precisely how much holiday he had taken. However he did state in paragraph 29 of his witness statement that in the final year of his employment he had taken a period of leave over Christmas, beginning on 18 December and ending on 4 January. He then had a period of sickness absence from 5 January due to his heart attack. This evidence was not challenged."**

20. The whole of the Claimant's argument about the time limit in this application is based on paragraph 27 of his Grounds of Claim and specifically this passage: *"I said I did not feel well and was going home. We had a heated conversation. She said I could not go home. She said that if she did not feel well she still had to work. I said I was going home and she put the phone down on me. There was a bank holiday from Friday 29 April 2011 until Monday 2 May 2011. I did not work*." The Claimant's application turns on whether I can interpret this passage as meaning that he took holiday over that weekend. What he actually says suggests that he was unwell and taking sick leave. The two are not however mutually exclusive – an individual can take annual leave and be unwell on the same day.

21. But that is not what the Claimant says was what happened. He did not say, even in his witness statement for the hearing, that on the weekend of 29 April 2011 he took annual leave and happened to be feeling unwell throughout. He does however say in his witness statement that he had taken a period of leave over Christmas, from 18 December to 4 January. He was clear about that, whilst in paragraph 27 he is not clear. He mentions the bank holiday, but does not say that he was not working because it was a bank holiday. If he had said that, or had given evidence that he never worked on bank holidays, but always took them as leave, a different interpretation might have been possible. But as noted, a clear statement of when he took leave, was not made available to me at the hearing and in no part of the evidence available to me did Mr Smith say that he always took leave when there was a bank holiday. There is no statutory right to leave on bank holidays per se in UK law, so that the mere fact that there was a bank holiday does not establish that the Claimant was on holiday that day. If that

is the premise of Mr Stephenson's

submission, in my view it is an incorrect premise. In my judgment the onus was clearly on the Claimant to establish on the facts that he was on holiday on 29 April and 2 May 2011 and the evidence he has produced falls short of establishing that. A more natural interpretation of what he chose to say is that he was not working because he was ill. It cannot be assumed from the mere fact that there was a bank holiday that the Claimant was in fact on holiday.

22. I therefore conclude that there is no basis for varying my finding of fact that the last period of leave the Claimant took in 2011 was in January and accordingly no basis for reconsidering my original conclusion that the Claimant brought his claims for holiday pay under Regulation 30(1)(b) of the Working Time Regulations 1998 ("WTR") and s23 Employment Rights Act 1996 ("ERA") out of time.

Decision on the second submission

23. That being my conclusion on the first issue, I also conclude that there are no grounds for reconsidering paragraph 6 of the judgment to the effect that the question of whether the decision in *Bear Scotland Ltd v Fulton [2015] IRLR 150* and the provision in s23 (4A) are compatible with EU law do not arise on the facts of this case. But even if I am wrong in my conclusion on the time limit issue, it would not have been appropriate for me to revisit my decision as set out in paragraph 66 of my written reasons that I am bound to follow the decision of the EAT in *Bear Scotland* as regards interruptions of three months or more in a series of deduction from wages. The correctness of the decision in *Bear Scotland* is a matter that will have to be considered in the appellate courts. Consequently, as set out in paragraph 60 of my written reasons, even if I had reconsidered the time limit issue "*Bear Scotland would have operated to prevent the Claimant from bringing a claim in respect of any underpayment that arose more than three months after that final payment."*

24. That consideration does not strictly apply to the point about the compatibility of s23 (4A) ERA with EU law, which has to date (to my knowledge) not been considered by the appellate courts (and may well will be considered by the EAT in this case). But I do not need to say any more about s 23(4A) in this judgment because the point is now academic, given my decision on the first submission.

25. The Claimant's application for reconsideration is therefore refused.

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Employment Judge Morton

Date 19 December 2019