



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Papa Dialla Gueye Dit Cissoko -and- Rio Tinto Mining and Exploration Ltd

JUDGMENT ON APPLICATION FOR RECONSIDERATION

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

REASONS

1. The Claimant applied for a reconsideration of the Judgment dated 29 April 2020 which was sent to the parties on 1 May 2020. The grounds were set out in his application and supporting grounds of 7 May 2020.
2. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). Under rule 71, an application for reconsideration under rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The application was therefore received inside the relevant time limit.
3. The grounds for reconsideration were only those set out within rule 70, namely that it was necessary in the interests of justice to do so. The earlier case law suggested that the 'interests of justice' ground should have been construed restrictively. The Employment Appeal Tribunal in *Trimble-v-Supertravel Ltd* [1982] ICR 440 decided that, if a matter had been ventilated and argued at the hearing, any error of law fell to be corrected on appeal and not by review. In addition, in *Fforde-v-Black* EAT 68/80 (where the applicant was seeking a review in the interests of justice under the former Rules which is analogous to a reconsideration under the current Rules) the EAT decided that the interests of justice ground of review does not mean "*that in every*

case where a litigant is unsuccessful he is automatically entitled to have the tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in the even more exceptional case where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order”.

4. More recent case law suggested that the test should not have been construed as restrictively as it was prior to the introduction of the overriding objective (which is now set out in rule 2) in order to ensure that cases were dealt with fairly and justly. As confirmed in *Williams-v-Ferrosan Ltd* [2004] IRLR 607 EAT, it was no longer the case that the ‘interests of justice’ ground was only appropriate in exceptional circumstances. However, in *Newcastle Upon Tyne City Council-v-Marsden* [2010] IRLR 743, the EAT stated that the requirement to deal with cases justly included the need for there to be finality in litigation, which was in the interest of both parties.
5. The Claimant relied upon arguments contained within his 4 page application (‘the application’) which were supported by further arguments over 18 pages (‘the grounds’). Although the arguments were not all easy to follow, the main points appeared to be as follows;

- 5.1 That the claim of unfair dismissal had merit because neither Mr Sims nor Mr Burley had the power to dismiss him (see paragraphs 1 to 6 of the application;

Here, the Claimant again displayed an inconsistent approach to his position; by disputing Mr Sims’ and Mr Burley’s power to dismiss him, he appeared to be arguing that he was not dismissed whereas, as stated in the Reasons, he accepted that he had been in 2006 (see paragraph 44 of the Reasons). Without a dismissal, the Claimant had no jurisdiction to bring a complaint of unfair dismissal;

- 5.2 That the discrimination claim was fully particularised and the discrimination itself was continuing;

The Claimant stated, within paragraph 12 of the application, that he “*still suffers discrimination*”, although the nature of that treatment was not explained within the paragraph. Any continuing discrimination may, of course, have had a bearing on any jurisdictional time issues (see 5.3 below).

The discrimination which he sought to complain about was set out in more detail within paragraphs 35 to 42 of his grounds. The 26 particulars contained within paragraph 42 were new and had not been contained within the claim. Asserting, as the Claimant has now done, that these “*facts were well stated in the written representations with supporting*

evidences" (paragraph 53 (a) of the grounds) was not enough if they were not actually part of the claim itself. It was not for a Respondent or Tribunal to divine or discern a claim from documentary evidence and/or other correspondence subsequently submitted.

The particulars now set out within paragraph 42 remain woolly and unclear; allegations that 'wrongdoing was denounced' (sub-paragraph (v)) and of 'badgering' (sub-paragraphs (a) and (b)) and 'harassments' (sub-paragraph (w)) were unspecific. The final allegation, concerning the court proceedings in Mali, did not appear to be an allegation at all;

5.3 That the claim was in time because the discrimination was continuing;

Much of what has been said above applies equally here.

It was noted that the last of the 26 allegations of discrimination within paragraph 42 of the grounds was alleged to have taken place in 2010. No continuing act was identified and none of those complaints had been clearly identified as an act of discrimination within the Claim Form. The Claimant's application for reconsideration was subsequently accompanied by two applications to amend which were received on 9 and May 2020. This was no doubt an attempt by him to rectify the problems identified within paragraphs 1, 41 and 46 of the Reasons but it was not, of course, possible to amend a claim which had already been dismissed;

5.4 That the issue of estoppel and/or *res judicata* did not apply because the judgment in the proceedings in Mali concerned a different respondent;

Whilst the Claimant was correct to point out that the judgment in the Court of Appeal in Mali involved Rio Tinto Exploration-Mali SA, a different legal entity from the Respondent in these proceedings, the fact that a different party may have been involved in the litigation in Mali did not prevent the Respondent from running an argument that the litigation concerned at least some of the same *issues* which would have fallen to have been determined within these proceedings. The principle of *res judicata* concerned the '*res*'; the issue or thing, not necessarily the people or parties. Further, the contents of paragraph 51 of the Reasons was not in any way determinative of the Judgment.

6. What was notably absent from the Claimant's application and/or the grounds was any real attempt to deal with many of the territorial jurisdictional issues covered in the Reasons, particularly those between paragraphs 37 and 41. He repeated his primary assertion that the jurisdiction of the POA trumped the jurisdiction of the contract (paragraphs 14 to 22 of the grounds), but many of

the other factual issues which counted against him were not addressed, particularly those within paragraph 37 of the Reasons.

7. Accordingly, the application for reconsideration pursuant to rule 72 (1) is refused because there is no reasonable prospect of the Judgment being varied or revoked.

Employment Judge Livesey

Dated: 18 May 2020

Judgment sent to parties: 20 May 2020

FOR THE TRIBUNAL OFFICE