EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113171/2018

Held in Glasgow on 7 February 2019

Employment Judge: Iain F. Atack

David Flood	**Claimant** **In Person**
Emblation Limited	**Respondents** **Represented by:** **Ms K Beattie - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the judgment of 15 November 2018 and copied to parties on 16 November be confirmed.

REASONS

Background

1. The judgement in this case was dated 15 November 2018 and was entered in the Register and copied to parties on 16th of November 2018. The claimant sought a reconsideration of the judgement on 26 November 2018.

2. The parties were given the opportunity to set out their submissions. They did so and agreed the application would be dealt with on paper.

3. The claimant's final submission is contained in an email of 24 January 2019 and the respondent's in an email of 24th of January 2019 confirming they had

nothing further to add to their initial submission dated 19 December 2018. The case has been reconsidered on the basis of these submissions.

4. The application is made on the basis that it is necessary in the interests of justice. The claimant's submissions extend to 7 pages which I have carefully read but the main points of which can be summarised as follows:-

- That clause 5.5 of his contract of employment cannot authorise a deduction from wages in respect of training costs or bonus.
- That there is no contractual right or obligation for any discretionary sum to be refunded under clause 5.5 in respect of a bonus or training costs.
- The use of the word "may" in clause 5.5 indicates a discretionary power not a mandatory one. The clause is unenforceable because of vagueness.
- That clause 5.1 does not relate to discretionary deductions.
- There was no written permission for a deduction from wages.
- That although the claimant had signed his contract on the firstday of his employment, he not having been given a copy of it, did not have adequate prior knowledge of all the clauses.

5. The respondent's position was that it was not in the interests of justice to allow the application. They submitted that the claimant was seeking to have the case reheard on a different ground, having argued at the original hearing that the FPGA training he had undertaken was not personal training which he had requested. The new ground was that the contract did not sufficiently authorise a deduction from wages.

6. The respondent's position was that the claimant was not entitled to try to have a rehearing at which the same evidence could be rehearsed with a different emphasis. The claimant had ample opportunity to advance his new argument before the original decision had been reached but had not done so.

Decision

7. Rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "rules") provide that a tribunal may reconsider a judgement **"where it is necessary in the interests of justice to do so"**. This application was brought by the claimant under rule 71 and having not been refused by the employment judge in terms of rule 72 (1) was considered under rules 72 (2) and (3).

8. The claimant's case as set out in his ET 1, in so far as relating to the deductions, was that he did not request the FPGA training which he had undertaken and that had not been undertaken for his own personal development, see pages 16 and 17 of the bundle. He stated in paragraph 5 on page 18 of the bundle **"(1) clause 5.5 in my contract is not applicable for the FPGA training, as it was not training I requested."**

9. The claimant had argued that the use of the word "may" in clause 5.5 meant that any training refunds were discretionary and not mandatory. Further he had argued a deduction was not a refund. Those were the arguments presented at the Hearing.

10. In my judgement of 15 November 2018, I held that the claimant had requested the training in question and that it was personal development training, paragraph 29, and had been requested by the claimant, paragraph 30.

11. The discussion at the Hearing centred on clause 5.5 given the nature of the claimant's argument at the time. There was no discussion about the respondent's right to be refunded if the training in question had been requested by the claimant. The argument was about whether the training had been requested by the claimant and whether it was properly classed as personal development training. The whole focus of the claimant's case at the Hearing was that the FPGA training was not properly classed as personal development training and therefore the respondent had no right to seek to recover the payment.

12. There was no argument at the Hearing that clause 5.5 did not give the respondent the right to make deductions from wages the way the case was presented and argued at the Hearing indicated it was accepted by the parties that the clause did give the respondent the right to deduct payments from wages. The argument, as referred to above, was that the training in question had not been requested by the claimant. I accept the respondent's submission in this regard.

13. The application is an attempt by the claimant to introduce a new argument which could have been made at the original Hearing but which was not.

14. In **Stevenson v Golden Wonder Ltd [1977] IRLR 474** which dealt with the provisions under the rules then in force it was stated that review proceedings (as they were then called) **"..are not intended to provide parties with the opportunity of a rehearing at which the same evidence can be reheard with a different emphasis ".** That judgment applies equally to the current rules. I accept respondent's argument that this is an attempt to rely upon arguments which were open to the claimant at the time of, but which had not been raised by him at, the original Hearing.

15. At the original Hearing the claimant argued that discretionary deductions were not covered under clause 5.1. His argument was that the use of the word" may" in clause 5.5 meant that the deduction was discretionary and not mandatory. That is an argument he repeats in this application. The use of "may" entitles the respondent to recover sums paid by way of bonus or for personal development training, if they choose to do so. It is for the respondent to determine whether they will exercise that power or not. They are not obliged to do so but can do so if they so wish. In this case they have chosen to exercise their discretion to recover part of the sums expended by them in respect of personal development training from the claimant.

16. The respondent in their submissions referred to the case of **Outasight VB Ltd v Brown UKEAT/0253/14**. In that case the EAT held that not only did the interests of justice ground, contained in the 2013 rules, require the same

approach to be taken as under previous rules but the principles in the case law that had built up under the previous rules, including the specific grounds, were still relevant post 2013.

17. The rule gives a wide discretion and has been held not to be boundless; it must be exercised judicially and with regard not just to the interests of the party seeking the review, but also to the interests of the other party and to the public interest that there should, as far as possible, be finality of litigation.

18. There is an underlying public policy principal in all proceedings of a judicial nature that there should be finality in litigation. Reconsideration is thus best seen as a limited exception to the general rule that employment tribunal decisions should not be reopened and relitigated. It is not a method by which a disappointed party to the proceedings can get a second bite of the cherry. Moreover, as with the exercise of any power under the rules, the employment tribunal must seek to give effect to the overriding objective, contained in rule, 2 of dealing with cases fairly and justly in exercising their discretion in respect of an application for reconsideration.

19. I considered all that the parties had said in their respective submissions and concluded that the claimant had not satisfied me that it would be in the interests of justice to reconsider my decision. Accordingly, I confirm my decision as contained in the judgement.

Employment Judge: Iain F. Atack
Date of Judgement: 07 February 2019

Entered in Register,
Copied to Parties: 13 February 2019