EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113127/2019

Held in Glasgow on 10 February 2020 (Reconsideration Hearing)

Employment Judge I McPherson

Mr Donald Gabel	**Claimant** **In Person**
Health & Safety Executive (HSE)	**Respondents** **Not present and** **Not represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

(1) Having heard from the claimant in person, at this **Rule 13** Reconsideration Hearing, attended by the claimant only, the respondents having not been served with an accepted ET1 claim form (it having been originally rejected by Employment Judge Rory McPherson on 18 November 2019, on the basis that it appeared to that Employment Judge that the claim was defective), this Tribunal, having considered the claimant's re-presented ET1 with amended paper apart, as enclosed with his letter to the Tribunal, dated 25 November 2019 seeking reconsideration of that rejection, decides that the original decision to reject the claim was correct, but that the ET1 paper apart having been amended at paragraph 8 to delete reference to the decision of the Health and Safety Executive being "***above Law***", the claimant rectified that as a defect, and his claim shall be treated as presented on the date that the defect was rectified by him, being 25 November 2019, this Tribunal being satisfied

that the Employment Tribunal does have jurisdiction to consider the claim against the respondents.

(2) Accordingly, having **granted** the claimant's reconsideration application, this Tribunal instructs the clerk to the Tribunal to accept the ET1 claim form, as represented on 25 November 2019 and, in terms of **Rule 15**, the claim having now been accepted by the Tribunal, this Tribunal further instructs the clerk to send a copy of the accepted ET1 claim form, together with an ET3 response form, to the respondents, allowing them, in terms of **Rule 16**, the usual 28 day period to respond to the now accepted claim against them.

(3) As the claimant complains of unlawful disability discrimination against him by the respondents, the Tribunal further directs that the case shall be listed for a Case Management Preliminary Hearing in due course, as per the Notice of Claim and Notice of Preliminary Hearing to be issued under separate cover along with this judgment, together with Equality Act Discrimination Preliminary Hearing agendas to be issued to both parties for completion and return to the Tribunal.

(4) Any further procedure required in this case shall be determined by an Employment Judge at Initial Consideration under **Rule 26**, following receipt of any ET3 response form to be lodged by the respondents, or at that Case Management Preliminary Hearing.

REASONS

Introduction

1. This case called before me at 10.00am on the morning of Monday, 10 February 2020, for a claimant only Reconsideration Hearing, further to Notice of Hearing issued to the claimant by the Tribunal on 11 December 2019.

Rejection of Claim

2. The claimant originally presented an ET1 claim form received by the Tribunal on 18 November 2019, following ACAS early conciliation between 13 and 14 November 2019.

3. When it was referred to the duty Judge, Employment Judge Rory McPherson, for consideration on 18 November 2019, a clerk to the Tribunal had proposed rejection of the claim, on a number of basis, being potential "***substantive defects***" under **Rule 12 of the Employment Tribunal Rules of Procedure 2013**, in particular:- **Rule 12 (1) (a)** – the Tribunal does not have jurisdiction; and **Rule 12 (1) (b)** – the form cannot sensibly be responded to or is otherwise an abuse of process.

4. From the clerk's referral to the duty Judge, while it was confirmed that the ET1 claim form presented on 18 November 2019 was on a prescribed form, and it contained the minimum information required of name and address of both claimant and respondents, and that an ACAS early conciliation certificate was in place, all as per **Rule 10**, the Tribunal clerk referred the two potential substantive defects to the Employment Judge for judicial consideration. It was on that basis that the claim first came before Employment Judge Rory McPherson on 18 November 2019.

5. The Tribunal clerk had noted that the claim appeared to be unclear as to jurisdiction, as it was not stated whether the claimant was employed, and it was not clear where the offshore diving job referred to was, and it also appeared to have been submitted outwith 21 days of the decision of the Health and Safety Executive, on 17 September 2019, as referred to also, and so appeared to the clerk to be time barred.

6. I pause to note and record that the potential time bar point noted by the clerk seems to have arisen, because the clerk had treated the claim as an appeal against an enforcement, improvement or prohibition notice issued by HSE, where the relevant time limit for an appeal is within 21 days of the date of the notice made by HSE, rather than the more usual period of within 3 months of the date of the act complained of by a claimant, as in most other Tribunal complaints.

7. Having considered the clerk's referral, Employment Judge Rory McPherson directed that the claim be rejected, but only on the basis of ***"no jurisdiction"***, under **Rule 12 (1) (a).** The standard "***Rejection of Claim***" letter was issued by the Tribunal clerk to the claimant on 19 November 2019. It stated that Employment Judge Rory McPherson had decided that the claim could not be accepted because : ***"it is defective for the following reason: - (a) the claim is one which the Employment Tribunal has no jurisdiction to consider."***

8. The clerk therefore returned the original ET1 claim form to the claimant, and advised that the relevant time limit for presenting the claim had not altered. It being a standard letter, no further specification of the reason for rejection was provided, just the wording of **Rule 12(1)(a).**

9. The claimant was also advised, in the Tribunal's letter of 19 November 2019, that he had the right to apply for a reconsideration of that rejection decision under **Rule 13**, and if he wanted to apply, he must do so in writing within 14 days of the date the rejection letter was sent to him, explaining why he believed the decision to reject was wrong or rectify the identified defect, and to say if he wished to request a hearing to consider his reconsideration application.

Application for Reconsideration of Rejection

10. By letter dated 25 November 2019, posted to the Glasgow Tribunal Office the following day, and received on 27 November 2019, the claimant wrote to the tribunal requesting reconsideration and stating as follows:

> *"**The defect contained in the claim has been rectified in the "Paper Apart". Under Part 9 Section 120 of the Equality Act an Employment Tribunal has jurisdiction to determine complaints dealing with the contravention of Part 5 – Work, which would include the Prohibited Conduct mentioned in the claim. The Court of Sessions*** (sic) ***has ruled that it does not have jurisdiction to hear the merits of this case. I do not request a hearing to***

consider my application since the problem contained in the original claim has been rectified."

11. The claimant returned his ET1 claim form, originally presented on 18 November 2019, along with an amended "***Paper Apart***". At this Reconsideration Hearing, the claimant clarified that the amended "Paper Apart" included revised text at paragraph 8.

12. In the original, presented on 18 November 2019, he had stated: "***the decision made by the HSE can be viewed as being above Law."*** The revised text, submitted with his letter of 25 November 2019, does not contain that text, and it makes clear that the Parliamentary and Health Service Ombudsman, as mentioned in his ET1 claim form, "***cannot do anything more for the claimant".***

Factual and Legal Basis of the Claim

13. As per section 4.1 of the ET1 claim form, the claimant explains this being a case where the respondents were not his employer, that the claim against them is of alleged breach of the **Equality Act 2010** by the Health and Safety Executive. At section 8.2, the claimant refers to "***the last time the Health and Safety Executive (HSE) confirmed their*** (sic) ***continued discrimination against the claimant was on 17 September 2019."***

14. Paragraph 18 of the Paper Apart refers to a letter of that date from the HSE's Chief Inspector of Diving. Further, section 8.2 of the ET1 claim form also referred to "***a similar case was raised where the HSE was named as a Second Respondent (#4103960/118). The case was dismissed at Preliminary Hearing on time-bar issues. The merits of this case have never been heard or judged by any court."***

15. At section 9.2 of his ET1 claim form, when asked to detail what remedy he sought if his claim was to be successful against the respondents, the claimant stated he is seeking ***"£1,700,000 in compensation and psychological distress caused by the HSE's failure to adhere to Diving Regulations and breaches of the Equality Act 2010."***

16. The Paper Apart refers to the HSE being a "***qualification body"*** within the terms of **Section 53 of the Equality Act 2010**, and the claimant alleges various breaches of **Sections 49 and 53**, as well as alleging indirect discrimination under **Section 19**, failure to make reasonable adjustments under **Sections 20 and 21**, and victimisation in breach of **Section 27**.

17. As per paragraph 21 of his "Paper Apart", the claimant further alleges that:

"***The HSE's stance has prevented the Claimant from gaining meaningful employment within his chosen profession."***

Preliminary Consideration of Reconsideration Application

18. On 27 November 2019, the claimant's reconsideration application was referred to me when I instructed that the case be listed for a Reconsideration Hearing, with the claimant only to attend, and I further instructed that the claimant be asked to provide the further information referred to in his claim form, being from the Parliamentary and Health Services Ombudsman, and whatever was the Court of Session ruling referred to in his covering letter of 25 November 2019.

19. I also asked the Tribunal clerk to let me see the Tribunal's case file in the earlier claim brought by the claimant, as referred to in section 8.2 of his ET1 claim form, where he referred to it as being "***a similar case***".

20. The clerk to the Tribunal advised me, from the Tribunal's ETHOS electronic case record, that judgment had been issued by Employment Judge Robert Gall on 11 October 2018 but, as case files are destroyed after one year, the case file could not be referred to me.

21. However, from the GOV.UK online database of Tribunal judgments, I was able to obtain a downloaded print of the judgment issued by Employment Judge Gall in case number **4103960/2018**, brought by the claimant against (1) The Secretary of State for Work and Pensions, and (2) The Health and Safety Executive.

22. On my instructions, given on 29 November 2019, a clerk to the Tribunal wrote to the claimant, on 9 December 2019, requesting him to provide the further information required. Thereafter, by letter dated 11 December 2019, received at the Glasgow Tribunal Office on 13 December 2019, the claimant replied, enclosing three enclosures, as follows: (1) copy of letter of 10 October 2012 to him from Anna Jackson, assessor, at the Parliamentary and Health Service Ombudsman; (2) letter of 6 March 2013 to him from Jack Kellett, Director of Complex Investigations at the Parliamentary and Health Service Ombudsman; and (3) copy of an interlocutor pronounced by Lord Woolman in the Court of Session dated 10 November 2017.

23. In his letter of 11 December 2019, the claimant stated to the Tribunal that he did not have a copy of any written ruling from the Court of Session, other than this interlocutor, which stated that the pleas-in-law for the defender were sustained by Lord Woolman, who upheld the Secretary of State's plea that the claimant's action at the Court of Session was incompetent, because it should have been brought in the Employment Tribunal.

24. The claimant's letter further explained that ***"due to the requirements of the Equality Act, the merits of this case cannot be heard in the Court of Sessions and must be heard at an Employment Tribunal."***

25. By letter to the claimant dated 16 December 2019, his correspondence dated 11 December 2019 was acknowledged, and referred to me. I directed that the claimant be asked to provide a copy of the Court of Session summons and defences referred to in the interlocutor of 10 November 2017.

26. By letter dated 19 December 2019, received at the Glasgow Tribunal office on 23 December 2019, the claimant enclosed for my perusal a copy of the Court of Session Closed Record, running to 18 pages.

27. Following referral to me, on 31 December 2019, a clerk to the Tribunal wrote to the claimant, on that date, acknowledging his correspondence of 19 December 2019, and advising that it had been placed on the case file.

Reconsideration Hearing

28. When the case called before me, on Monday, 10 February 2020, the claimant attended, in person, unrepresented and unaccompanied. As the respondents were not yet served with any accepted claim, they had not been sent the Notice of Hearing issued on 11 December 2019, and so they were not present nor represented at this Hearing. It was a claimant only Reconsideration Hearing.

29. The claimant produced, at the start of this hearing, for my further perusal, a 22 page copy of what he referred to as the "***finalised"*** Closed Record in the Court of Session action by him against the Secretary of State for Works and Pension, under Court of Session case number **A118/17** , and he asked that it be substituted for the 18 page copy Closed Record enclosed with his letter of 19 December 2019, explaining that this finalised copy Closed Record included some copy interlocutors not included in the earlier Closed Record print forwarded with his letter of 19 December 2019.

30. Further, and more substantially, the claimant provided me with a typewritten, five page document entitled "***Document List of Evidence***", detailing 38 separate documents, each of which was included in a separate poly-pocket folders, which included, as his document 1, the Health and Safety Executives' reply of 17 September 2019 to his letter of 4 September 2019. This is the HSE decision letter from the respondents founded upon by the claimant in bringing this claim

31. I explained to the claimant that this was a Reconsideration Hearing, in terms of **Rule 13**, further to his reconsideration application after Employment Judge Rory McPherson's rejection of his original ET1 claim form, and that it is <u>not</u> an evidentiary Hearing, at which I would be taking evidence, which would be for a later date, if his reconsideration application was allowed, and the respondents thereafter entered appearance to defend this claim.

32. For his information, I provided the claimant with a copy of **Rules 8 to 16 of the Employment Tribunal Rules of Procedure 2013** and referred him, in particular, to **Rules 8, 12 and 13**.

33. Discussion then ensued with the claimant, who was keen to take me through all of the various documents in his bundle. As they were not tagged or bound in any secure way, and each poly-pocket contained one, or more, separate pages, individually numbered, but not consecutively numbered from start to finish, navigation through the various documents was slow, but methodical.

34. The claimant stated that the letter (document number 2 in his bundle), being a letter of 13 August 2018, from a Judith Tetlow, Chief Inspector of Diving at the HSE, had been in reply to his letter to HSE's Mr C. Sherman on 31 July 2018. He recalled that as having been sent to Mr Sherman after Employment Judge Gall's judgment was issued.

35. When I stated that, from the information held by me, from ETHOS, and the online judgments database, Employment Judge Gall only heard the claimant's case 4103960/2018, presented on 5 April 2018, at a Preliminary Hearing on 17 and 18 September 2018, signed off his judgment on 9 October 2018, and it then being issued to parties' representatives by the Tribunal on 11 October 2018, the claimant brought to my attention that he had also brought another Employment Tribunal claim, but he had not mentioned it in his 2019 ET1 claim form, the subject of this reconsideration hearing, nor in correspondence with the Tribunal to date.

36. Further, the claimant advised me that it related to a claim brought against the Chief Inspector of Diving, and he apologised that he did not have with him relevant details, but he recalled that another judge had dismissed that claim but he could not recall who, or when.

37. While I continued discussion with the claimant, seeking to clarify the factual and legal background to his various claims, and what it is that he wanted me to do with his reconsideration application before me at this Hearing, the claimant advised that he had not seen the written Judgment and Reasons by Employment Judge Gall, although he recalled having been told the result verbally at the Tribunal Hearing, at which he was present.

38. In reply, I commented that, from the online judgments database, it appeared that this was a reserved decision, rather than written reasons for an oral

judgment given on the day, but, be that as it may, the claimant's recollection was what it was, and so I instructed the clerk to the Tribunal to provide him with a copy of the downloaded copy of the online judgments database judgment by Employment Judge Gall.

39. The claimant further stated that, while before Employment Judge Gall, he had been represented by counsel, Mr J Murphie, Advocate, instructed by Mr Peter Harvey of Blair & Bryden Solicitors, Greenock, he did not recall seeing Employment Judge Gall's written judgment, and he was not aware of any application for its reconsideration, or any appeal to the Employment Appeal Tribunal on a point of law.

40. In reply, I stated that from the ETHOS print, provided to me by the Tribunal clerk, the Tribunal's electronic record did not disclose any action on the case file after issue of Employment Judge Gall's judgment on 11 October 2018, published online on 4 December 2018.

41. When, later on in the course of this Hearing, the clerk to the Tribunal appeared, having traced, on my instructions, the other claim brought by the claimant against the **Chief Inspector of Diving**, it emerged that claim (case number **4121845/2018**) had been presented on 18 October 2018. That claim was defended by that respondent, by ET3 response lodged on their behalf, by solicitors, on 20 November 2018.

42. Following a Case Management Preliminary Hearing in private before Employment Judge Claire McManus, on 11 January 2019, a further public Preliminary Hearing was arranged for 24 April 2019 to determine whether the Employment Tribunal had jurisdiction to hear the claim against the Chief Inspector of Diving, that respondent arguing that that respondent was not a "***qualification body***", and so **Section 53 of the Equality Act 2010** does not apply, and so, that respondent argued, the claimant had pursued the wrong respondent. That Preliminary Hearing took place before Employment Judge Mark Mellish, in the Glasgow Employment Tribunal, on 24 April 2019.

43. By written judgment and reasons, dated 28 July 2019, issued to the claimant, and that respondent's representative, Ms Lindsey Cartwright, at Morton

Fraser LLP, solicitors, Glasgow, on 30 July 2019, Employment Judge Mellish held that the Chief Inspector of Diving is not a qualifications body in terms of **Sections 53 and 54 of the Equality Act 2010** and, therefore, the Tribunal does not have jurisdiction to hear the claimant's case against that respondent, and consequently, the claimant's claim against that respondent was dismissed by Judge Mellish.

44. When the case file in the claim against the Chief Inspector of Diving was brought to me to peruse, during this Reconsideration Hearing, the last correspondence on the file was instructions from Employment Judge Mellish, on 1 September 2019, refusing the claimant's application of 13 August 2019 for reconsideration of the judgment issued by Employment Judge Mellish on 30 July 2019.

45. While the claimant thought he had been advised that his reconsideration application in that earlier case was unsuccessful, he had no copy correspondence with him to check, and there was nothing on the Tribunal's casefile to confirm what, if anything, had been sent to him.

46. After close of this Hearing, discussion with the relevant Tribunal clerk disclosed that an email was sent to the claimant, and the respondent's solicitor, Ms Cartwright, on 3 September 2019, confirming Employment Judge Mellish's decision to refuse the claimant's application for reconsideration of that judgment issued on 30 July 2019.

47. It appears that, due to some administrative error, or oversight, the file copy of those emails was not put on that case file at that time. They have now been put in the case file, and so no further administrative action is required by the Tribunal. That case file is "***dormant***", and it is currently marked to be destroyed in July 2020. As I detail, later, at paragraph 66 of these Reasons, I have directed the Tribunal administration to link that file to this, so that it is available in the future, if required.

48. By way of update, the claimant emailed the Tribunal on the evening of Monday, 10 February 2020, stating that, on his journey home, he was viewing

Judge Gall's judgment, in **4103960/18**, and having done so he recalled the reason for the date difference we discussed at this Hearing.

49. He enclosed a copy of the Tribunal's letter of 3 September 2019, enclosing Judge Mellish's reasons for refusing the claimant's reconsideration application in **4121845/18**, and he stated that the letter of 31 July 2018, and more importantly the reply of 13 August 2018 from HSE, included in his documents pack for me, were submitted ***"to show that HSE's stance had not changed and continues to be held".***

50. In his discussion with me, at this Reconsideration Hearing, the claimant stated that he had been medically retired from the United States Navy in 1991 and, since that date, he has had no working dives, since his last working dive in 1990. He believes that, in terms of what he referred to as "***grandfather rights",*** he can be a diving supervisor, and that he has the appropriate qualification although the HSE would seem to dispute that view.

51. Further, the claimant confirmed to me that he recognises that Lord Woolman, the Court of Session judge, having ruled that his complaint against the HSE must be determined by the Employment Tribunal, and not the Court of Session, it is to the Employment Tribunal that he has come, suing HSE, and not the Chief Inspector of Diving.

52. While the claimant advised me that he still believes that HSE are acting unlawfully, or ***ultra vires***, and beyond their statutory powers, the claimant informed me that while he had applied for other diving jobs, in June/July 2016 to Underwater Centre, Inter Dive, Commercial Diving Training, and Puffin, as per document 35 in his bundle, none of those job applications had been successful, or progressed, and he had brought his 2018 claim against the Chief Inspector of Diving because his former solicitor, Mr Harvey, had advised him to do so.

53. Further, the claimant also advised me, having regard to the terms of **Rule 8 of the Employment Tribunals Rules of Procedure 2013,** contained within the copy extract of the Tribunal's Rules provided to him by me at this Hearing, that he believes the Employment Tribunal in Scotland has jurisdiction in this

case, because the HSE, as the proposed respondent, carries on business in Scotland, and anyway this Tribunal has jurisdiction by virtue of a connection with Great Britain, and the connection in question is that at least partly a connection with Scotland, as per **Rule 8 (3) (d).**

54. Having perused a copy of the finalised Closed Record in the Court of Session action, containing both parties' legal pleadings, and the Court's rulings, the claimant stated that he still believed that the HSE was acting ***ultra vires***, but he recognised that is a matter for the Court of Session, in the exercise of its supervisory jurisdiction, by way of a petition for judicial review, and he confirmed there is no such judicial review application pending, or in progress.

55. He further explained that the 2019 claim brought by him against HSE has arisen because of Employment Judge Mellish's decision that it is the HSE who is the relevant person for him to sue, and not the Chief Inspector of Diving.

56. The claimant further stated that is why he had deleted, from the original Paper Apart, the text stating "***the decision made by HSE can be viewed as being above Law".*** He explained that he had deleted that, on re-presenting his Paper Apart, and he had rewritten paragraph 8 to refer to the Parliamentary and Health Service Ombudsman, having come to the end of their complaints process, and that they could not do anything more for him.

57. Thereafter, the claimant apologised to me for the lack of professional representation at this Hearing, and stated that he appreciated that his claim is a "***very technical case***".

58. I advised him that the Employment Tribunal is well used to dealing with unrepresented, party litigants, and that there was no need to apologise for lack of professional representation. **Rule 2** requires the Tribunal to ensure any case before it is dealt with fairly and justly, including ensuring, so far as practicable, that both parties are on an equal footing.

59. The claimant then stated that, having received the HSE letter dated 17 September 2019, by post, on or around Monday, 20 September 2019, he had notified ACAS on 13 November 2019 that the Health and Safety Executive

were a prospective respondent in Tribunal proceedings he was proposing to institute, and that he had received the ACAS early conciliation certificate on 14 November 2019.

60. Further, by way of explanation of his position, the claimant advised me that he sought a "***green light***" to go ahead with his claim against the Health and Safety Executive. He submitted that it has been presented within time, having been lodged within 3 months of the date of their letter of 17 September 2019, and that it had been submitted some two months into that three months time limit.

61. He felt that the Employment Tribunal had misread his original ET1 claim form when first presented on 18 November 2019, and that Employment Judge Rory McPherson was wrong to reject his claim, when it should have been allowed in, particularly as from 25 November 2019, when he re-presented it, with the revised Paper Apart, at paragraph 8.

62. The claimant further submitted that there is no defect in his claim, and that it has been presented within three months of the letter from the HSE dated 17 September 2019. He clarified that "***the problem"*** referred to, in his letter to the Tribunal of 25 November 2019, is the ***ultra vires*** point, and as his ET1 claim form was re-presented within the three month time frame, he argued that I should allow his reconsideration application, with effect from the date of his amended paragraph 8 submitted in his letter of 25 November 2019.

Discussion and Deliberation

63. In private deliberation since close of this Hearing, I have given careful consideration to the claimant's reconsideration application, and to the submissions he made to me at this Hearing, both orally, and in the documents included in his bundle provided to the Tribunal. I have also taken into account the relevant law, set forth in **Rules 2, and 8 to 13 of the Employment Tribunal Rules of Procedure 2013.**

64. Having done so, I am satisfied that while Employment Judge Rory McPherson's original decision to reject the ET1 claim form presented on 18

November 2019 was correct, at that time, it appearing to that Judge that this Tribunal had no jurisdiction, the claimant, having since submitted his amended Paper Apart, at paragraph 8, with his letter of 25 November 2019, it is appropriate that I allow his reconsideration application, and order that his claim shall be accepted as presented on 25 November 2019, being within 3 months of the HSE letter of 17 September 2019 complained of by him. I am also satisfied, on the information available to date, that the Employment Tribunal in Scotland has territorial jurisdiction in this case.

Further Procedure

65. As regards further procedure, I have provided for this at paragraphs (2) to (4) of my Judgment above. After 28 days, or sooner if an ET3 response is lodged by the respondents, prior to that 28-day period, I have instructed the clerk to the Tribunal to refer the case file back to me, for Initial Consideration under **Rule 26**.

66. For reasons of judicial continuity, I have also instructed the Tribunal administration to allocate this case to me, and to link it with the dormant file, **4121845/18**, lest there is any need to refer to that file in the future.

Employment Judge:	I McPherson
Date of Judgement:	14 February 2020
Entered in Register,	
Copied to Parties:	19 February 2020