EMPLOYMENT TRIBUNALS

Claimant: Mr G Hill

Respondents:
1. Canute UK Limited (in Administration)
2. Canute Distribution Limited (in Administration)
3. George Walker Transport Limited
4. Bibby Distribution Limited
5. James Nuttall Transport Limited
6. Tetrosyl Limited
7. Almtone Limited
8. Canute Haulage Group Limited (in Administration)

UPON APPLICATION made by letter dated **7 January 2020** to reconsider the Judgment dated **18 November 2019** under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing,

JUDGMENT

The claimant's application for reconsideration of the Judgment dated 18 November 2019 is granted and that Judgment is revoked. The claimant performed the role of Night Trunker for the second and seventh respondent. There was therefore no relevant transfer to the third respondent and the seventh respondent is the correct Respondent in this claim.

REASONS

Introduction

1. The claimant brought a claim for unfair dismissal, deductions from pay, holiday pay, notice pay, a redundancy payment and a protective award following termination of his employment as a Class 1 HGV driver with the first respondent, Canute UK Limited, the second respondent, Canute Distribution Limited and the seventh respondent, Almtone Limited.

2. Following a preliminary hearing on 14-22 October 2019 in the combined matters of 2413420/2018 Mr Draper & Others v Canute UK Limited & Others, the claimant's claim was dismissed as a result of his non attendance at that

preliminary hearing. The dismissal of the claim was in accordance with rule 47 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

3. By email of 7 January 2020 the claimant applied for a reconsideration of that Judgment.

4. On 18 February 2020 I extended time for the claimant's reconsideration application in accordance with rule 5 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

5. On 9 March 2020 the sixth respondent provided a response to the application, and it was determined that the matter would be dealt with without a hearing on 3 July 2020.

The Proceedings

6. On 7 and 8 August 2018, the claimant started early conciliation and was issued with certificates on 7 and 8 September 2018. On 21 September 2018, the claimant submitted an ET1 and grounds of claim, for the purposes of a claim of unfair dismissal, deductions from pay, holiday pay, notice pay, a redundancy payment and a protective award. Within that ET1 form, the claimant alluded to other claims in which claimants had legal representatives and asked that a judgment in those claims apply to all employees affected by the administration of the respondents.

7. On 24 September 2018, a response was submitted on behalf of the first, second and seventh respondents.

8. On 28 September 2018, 2413420/2018 Mr Draper & Others v Canute UK Limited & Others was subject to a Case Management Order. At the preliminary hearing from which the Case Management Order was produced, Employment Judge Franey listed these cases for a preliminary hearing from 14 to 22 October 2018. Employment Judge Franey also produced a schedule of claimants, which did not include this claimant. A copy of that Case Management Order was sent to the parties privy to that hearing on 26 October 2018.

9. The claimant's ET1 was accepted by the Tribunal on 6 November 2018 and a copy of the Case Management Order produced in the related proceedings was sent to him on that date. On the same date, the Tribunal combined the claimant's claim with 2413420/2018 Mr Draper & Others v Canute UK Limited & Others, and a copy of the claim was sent to the first, second and seventh respondents.

10. On 15 November 2018 the first, second and seventh respondents submitted an ET3. Within that ET3, reference was made to the claimant's employment transferring to the third respondent, George Walker Transport Limited. As a result, on 18 January 2019, the claimant was asked if he wanted to join the third respondent to his claim and was sent another copy of the Case Management Order produced in the related proceedings on 28 September 2018. In addition, the claimant was given notice that his claim would be considered

alongside the related proceedings.

11. On 28 January 2019, the claimant asked that the third respondent and all other respondents be joined to his claim.

12. On 27 February 2019, the third respondent was added to this claim and was given an opportunity to respond. The claimant was duly notified by the Tribunal.

13. On 6 March 2019, the claimant was copied into a letter from Pattinson & Brewer who represented a group of claimants in the related claim, seeking the Tribunal's authority to extend time for exchange of witness statements. Subsequently, the claimant was copied into a letter from the Tribunal to all parties agreeing to extend time for exchange of witness statements to 10 May 2019.

14. On 27 March 2019 the third respondent submitted an ET3 response.

15. By a letter of 24 April 2019, the Tribunal accepted the response and copied the acceptance to all parties.

16. On 2 October 2019, following correspondence from the administrators that the first and second respondents had been dissolved, the Tribunal confirmed that the preliminary hearing listed for 14-22 October 2019 would go ahead. This letter was copied to the claimant.

17. Due to a flood at the Tribunal building, on 11 October 2019, the legal representatives of the claimants involved in that hearing were notified that the preliminary hearing would take place at the Crown Court at Crown Square. The claimant was not included in that correspondence.

18. On 14 October 2019, the preliminary hearing commenced, and enquiries were made as to why the claimant was not in attendance. None of the legal representatives for the other claimants could explain why the claimant was not in attendance. Unfortunately, due to the temporary location of the Tribunal hearing, it was not possible to make further enquiries as to why the claimant was not in attendance.

19. After hearing evidence and submissions from the parties in the related matters, it was my judgment that there had been no relevant transfer of a Class 1 driver to the third respondent, and therefore the seventh respondent was liable for any award made on behalf of Class 1 drivers. However, in light of the claimant's non attendance and non explanation, his claim as a Class 1 driver was dismissed.

Claimant's Application

20. The Judgment was sent to the claimant on 12 December 2019. Any application for reconsideration should have been made on or before 26 December 2019. The application for reconsideration was made by email on 7 January 2020. The claimant submitted that he in fact did not receive a copy of the Judgment until 3 January 2020, and asked that there be an extension of time to

submit his application for reconsideration. That extension of time was granted by me on 18 February 2020.

21. The claimant submits that he received the Tribunal correspondence from 18 January 2019 and responded asking that his claim be combined with others. The claimant has no evidence of making telephone calls to the Tribunal, but asserts that he would have made calls asking whether he needed to take any further action. It is the claimant's submission that on each time he phoned the Tribunal office he was told that he did not need to take any further action and the claim would be decided and he would be paid an award.

22. The claimant also contends that the only correspondence he received from other parties was the letter from Pattinson & Brewer Solicitors dated 6 March 2019 in which they sought an extension of time for exchange of witness statements. The claimant again asserts that he would have phoned the Tribunal office and asked whether he needed to take any further action. The claimant submits that he was told that because he had submitted a statement to ACAS, he did not need to submit a further statement because the same would be attached to his claim. The claimant contends he did not receive nor was he copied into any other correspondence between the parties in this case. The claimant asserts that the lack of communication has contributed to him missing out on valuable information, and he does not believe that the advice received from Tribunal staff assisted.

23. The claimant accepts that he fully expected to attend a hearing but in light of the assurances he alleges he received from the Tribunal office, he understood he did not need to do anything further, including he would not need to attend the hearing even after receiving confirmation of the hearing date.

24. The claimant submits that the alleged poor advice he received from the Tribunal staff, the lack of correspondence from the other parties and naivety on his part, all contributed to his non attendance.

Sixth Respondent's Response

25. By a letter of 18 February 2020 I requested that the respondents provide any comments on the claimant's application by 9 March 2020.

26. On 9 March 2020 the sixth respondent, Tetrysol Limited, objected to the claimant's application for reconsideration on the grounds that it was highly unlikely that there was such a series of miscommunications as outlined by the claimant in his application. The sixth respondent's representative highlighted that the claimant was in receipt of the Tribunal Case Management Orders and conceded that he fully expected to be required to attend a hearing. It was also highlighted that the claimant confirmed he was in receipt of the hearing dates. Finally, it was submitted that the claimant had no evidenced of his multiple communications with the Tribunal office staff and had no reasonable excuse for not attending the preliminary hearing.

Relevant Legal Principles

27. Rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides as follows:

> **"A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any Judgment where it is necessary in the interests of justice to do so. On reconsideration the decision ('the original decision') may be confirmed, varied or revoked. If it is revoked it may be taken again."**

28. Rule 71 provides that any application for a reconsideration should be presented in writing within 14 days of the date on which the written record is sent to the parties, and shall set out why a reconsideration is necessary.

29. Rule 72 provides that if after considering the application an Employment Judge is of the view that there is some merit in the application, a notice will be sent to the parties asking for their views on the application itself and whether it can be determined without a hearing.

30. Rule 72(2) states:

> **"If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice."**

31. Rule 72(3) goes on to state:

> **"Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision, or as the case may be, chaired the full Tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full Tribunal which made the original decision."**

32. The Employment Appeal Tribunal in the case of **Outasight VB Limited v Brown [2015] ICR D11**, EAT, determined that when a Tribunal decides whether a reconsideration should be made in the interests of justice, this will include whether the decision was made in the absence of a party.

33. In the same case, Her Honour Judge Eady QC commented that the Tribunal must "have regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation".

34. Rule 2 sets out the overriding objective:

> **"The overriding objective of these Rules is to enable the Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –**
>
> **(a) Ensuring that the parties are on an equal footing;**
>
> **(b) Dealing with cases in ways which are proportionate to the complexity and importance of the issues;**

(c) Avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) Avoiding delay, so far as compatible with proper consideration of the issues; and

(e) Saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by these rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall cooperate generally with each other and with the Tribunal."

Discussion and Conclusions

35. The claimant is a litigant in person. At the hearing on 14-22 October 2019, all claimants, save for this claimant, were privy to legal representation.

36. It is clear from the chronology that the claimant's case was on the back foot from the outset. Whilst it was issued on 21 September 2018, it did not form part of Employment Judge Franey's Case Management Order on 28 September 2018 because, at that time, the claim had not been processed nor acknowledged by the Employment Tribunal. It therefore seems quite probable that being added to the schedule of claimants after the preliminary hearing compounded the inclusion of this claim in the minds of those conducting the litigation on behalf of the other parties.

37. The claimant submits that he was only copied onto one piece of correspondence between the parties, the letter from Pattinson Brewer on 6 March 2019. I have looked through the files in this matter and the related matters, and whilst the Tribunal is not to be copied into all party correspondence, the only letter to which the Tribunal is copied in between the parties is that from Pattinson & Brewer on 6 March 2019.

38. The claimant submits that the failure to copy him in to correspondence as ordered by Employment Judge Franey in his Case Management Order of 28 September 2018 led to his lack of understanding about what he needed to do to prepare for the hearing.

39. The claimant did have sight of the Case Management Order which set out the requirement of the parties in preparation for the hearing. The claimant also had the notice of hearing and was copied in to the letter reminding the parties that the hearing would go ahead despite the dissolution of the first and second respondents respectively.

40. However, it is clear that the parties were not on an equal footing, given that the claimant was the only claimant without legal representation.

41. The matter was a complex one. On the first day of the preliminary hearing there were six advocates before me to represent the various parties. The preliminary hearing was listed for seven days to decide the preliminary issue of whether there had been a relevant transfer.

42. The venue of the hearing was changed at a late stage because there had

been a flood in the Employment Tribunal building. It was necessary for all the parties, the witnesses and the Tribunal to move over to the Crown Court at short notice, and this impeded the clerk in making contact with this claimant.

43. The various representatives for the other parties had no information about this claimant and it was not clear whether there had been communication between all parties as requested by Employment Judge Franey. I took the decision to dismiss the claimant's claim in light of his absence and any explanation for his absence.

44. The claimant has now provided me with an explanation that, whilst he was on notice of the hearing, he did not understand, as a litigant in person, what he needed to do to prepare for that hearing, and claims to have been assured by Tribunal staff that, as a claimant in a large multi claimant claim, he needed to do no more other than await the outcome of the hearing. It is quite possible that Tribunal staff misunderstood the nature of this claimant's role and it is possible they assumed he was one of the group of claimants legally represented.

45. In order to give effect to the overriding objective and the interests of justice, I will revoke my Judgment of dismissal of this claimant's claim.

46. The grounds for reconsideration included a statement from the claimant about his role with the second and seventh respondent. In response to my query as to whether a hearing was necessary for this reconsideration, on 3 May 2020, the claimant asked if the matter could be determined without a hearing and provided further information of his role with the second and seventh respondent.

47. This claimant was a Class 1 driver for the second and seventh respondents. With reference to the Judgment of 18 November 2019, this claimant performed the role of a "night trunker" and, had he attended the preliminary hearing, he would have formed the group that comprised of Mr Balmforth, Mr Gilmore and Mr Lynch working on Tetrosyl's contract as found at paragraph 62 of that Judgment.

48. At paragraph 82 of the Judgment, I found that the activity of night trunking did not transfer over and that that group remained in employment of the second and seventh respondents. As the second respondent has been dissolved, liability for any claims of this claimant lies with the seventh respondent, Almtone Limited.

49. The related proceedings are to be determined by way of a Rule 21 Judgment as the seventh respondent is also now in administration and has not taken part in these proceedings. I will therefore refer this claim to be combined with the other claims and any Judgment given with those claims will also apply to this claim.

Employment Judge Ainscough

Date: 24 July 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

28 July 2020

FOR THE TRIBUNAL OFFICE