EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4122844/2018

Employment Judge: Rory McPherson
Members Eddie McCall
Martha McAllister

Glasgow on 25 June 2020 (in Chambers)

Mrs C Stones **Claimant**

Civil Nuclear Police Authority **Respondents**

RECONSIDERATION JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that

1. On reconsideration under **Rule 70** of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the 2013 Rules), the judgment dated 28 April 2020 and sent to the parties on 13 May 2020 is not revoked, on the basis of subsequent application for reconsideration; and
2. The claimants' application for reconsideration as set out in paragraphs 4 to 16 of her application is dismissed; and
3. The claimant's application for reconsideration as set out in paragraphs 17 to 67 restricted to her claims in respect of s13 of the Employment Rights Act 1996 for unlawful deduction of wages and breach of contract claims in terms of Reg 3 Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994/1624 arising or outstanding on the termination of the employment of the employee, are allowed to proceed in respect those issues were not fully

ventilated at the final hearing on 4, 5, 6, 7, 10, 11, 12 and 13 February 2020; and

4. The claimant's remaining claims are dismissed;

5. The Tribunal has issued separate Case Management Orders in relation to the appointment of a one day remote Final Hearing restricted to her claim in respect of s13 of the Employment Rights Act 1996 SI for unlawful deduction of wages and breach of contract claims in terms of Reg 3 Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994/1624 arising or outstanding on the termination of the employment of the employee.

REASONS

1. No findings of fact are made. The following background narrative reflects the documentation available to the Tribunal and or where appropriate the existing finds of fact set out in the judgment dated 28 April 2020 and sent to the parties on 13 May 2020 (the judgment).

2. The claimant presented her ET1 on Friday 16 November 2018.

3. The respondent presented its ET3 timeously.

4. As set out in the judgment, at para 2, the claimant's ET1 included a number of claims including "*failure to pay capability and sick pay".*

5. At page 6 of the ET1 the claimant had ticked boxes to indicate that she was claiming redundancy pay, holiday and "*other payments".* In the description in the ET1, the claimant sets out her belief that the respondent dismissed her without notice, gave her a figure of money owed to include PILON (Pay In Lieu of Notice), annual leave, capability payment and backdated sick pay, although for reasons which the claimant attributes to these failures do not fall to be considered further. The claimant sets out that different exit payment

figures were issue by the respondent. The claimant continues at the foot of page 6 *"I believe I am owed"* and sets out at page 8 of the ET1 the sums she believed she was owed at termination.

6. The ET3, in the grounds of resistance, sets out the respondent's position on what it labels as Capability Payment and Sick Pay at para 70 to 71. The respondent concludes para 71 *"If the Respondent has misunderstood this claim, it will seek permission to amend its Response once the basis of this claim is clarified".*

7. An order was granted on 27 November 2018 for the claimant to further information in relation to her disability discrimination claim. Following that order she prepared, what was subsequently described in the Note to the Preliminary Hearing on 22 January 2019 (the Jan 2019 Note) at which the claimant represented herself, as a lengthy letter.

8. The claimant provided a document headed *"Additional Information to be added to the ET1 form*". Within that document the claimant provided paragraph headings including a heading of "*harassment"* to paragraphs 58 to 62 of the document within which she set out a criticism of the methodology of the exit calculation.

9. At Preliminary Hearing on 19 March 2019 at which the claimant was unrepresented, the respondents, as set out in the note dated 2 April 2019 proposed, at para 13, that they set out their understanding of the claimant's claims utilising what they described as a Scott Schedule. The claimant agreed to participate. The respondents stated that "*if details are lacking in any particular, to raise questions to the claimant to fill in those details".*

10. The Scott Schedule as prepared by the respondent, reflected the labelling exercise by the claimant in January 2019 and set out 22 heads of claim. Claim 6 of the Scott Schedule set out that that it was understood that the claimant asserted that she was subject to "harassment" in respect of the mechanism

of the exit payment arrangement. The claimant provided her narrative to the 22 heads of claim as set out set out in the Scott Schedule. The claimant, who it appears remained unrepresented at this stage, did not set out that she maintained as a separate head of claim that she had suffered an unlawful deduction of wages and or breach of contract

11. The judgment dated 28 April 2020 and sent to the parties on 13 May 2020, addressed the 22 heads of claim listed for consideration at the Final Hearing.

12. The claimant was unrepresented at the Final Hearing on 4, 5, 6, 7, 10, 11, 12 and 13 February 2020, although assisted by her husband.

Relevant Law

13. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides as follows.

Rule 70 Principles

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.

Rule 71 Application

Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

Rule 72 Process

(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application. …

14. The approach to be taken to applications for reconsideration was set out in the recent case of **Liddington v Gether NHS Foundation Trust** UKEAT/0002/16/DA (**Liddington**) in the judgment of Simler P. The tribunal is required to:

    14.1. identify the Rules relating to reconsideration and in particular to the provision in the Rules enabling a Judge who considers that there is no reasonable prospect of the original decision being varied or revoked refusing the application without a hearing at a preliminary stage;

    14.2. address each ground in turn and consider whether is anything in each of the particular grounds relied on that might lead ET to vary or revoke the decision; and

    14.3. give reasons for concluding that there is nothing in the grounds advanced by the Claimant that could lead him to vary or revoke his decision.

15. In paragraph 34 and 35 of the judgment Simler P included the following:

"A request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that

rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered. ***Tribunals have a wide discretion whether or not to order reconsideration. Where … a matter has been fully ventilated and properly argued****, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application."*

6. For the respondent, reference has been made to;

6.1, the interests of justice include the public interest in the finality of litigation: see **Flint v Eastern Electricity Board** [1975] ICR 395 (**Flint**) per Phillips J at 404G-405B: "*it is very much in the interests of the general public that proceedings of this kind should be as final as possible; that is should only be in unusual cases that the employee, the applicant before the tribunal, is able to have a second bite at the cherry."*

6.2 **Council of the City of Newcastle upon Tyne v Marsden** [2010] ICR 743 (**Marsden**), Underhill J, having reviewed the relevant case law, said at [17]:

" … the weight attached in many of the previous cases to the importance of finality in litigation – or, as Phillips J put it in Flint (at a time when the phrase was fresher than it is now), the view that it is unjust to give the losing party a second bit of the cherry – seems to me entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final …"

6.3 Judge Hand QC, considering the new reconsideration jurisdiction under the 2013 ET Rules in the light of the previous case law, said in **Serco Ltd v Wells** [2016] ICR 768 (**Wells)** at [43(a)]:

"*The draftsmen of both sets of Rules must be taken to have drafted them with the same universal principle in mind, namely what I have described*

as finality and certainty of decision and orders and the integrity of judicial decisions and orders; this principle, as the authorities in both jurisdictions illustrate, usually directs any challenge to an order towards an appeal to a tribunal of superior jurisdiction and discourages seeking the same judge or another judge of equivalent jurisdiction to look again at an order or decision, save in carefully defined circumstances."; and

6.4 The Court of Appeal considered Rule 70 in **Ministry of Justice v Burton** [2016] ICR 1128 (**Burton**). Elias LJ said at [21]:

"An employment tribunal has a power to review a decision 'where it is necessary in the interests of justice': see rule 70 of the Employment Tribunals Rules of Procedure 2013. This was one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, as Underhill J pointed out in **Newcastle upon Tyne City Council v Marsden** *[2010] ICR 743, para 17 the discretion to act in the interests of justice is not open ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality* (**Flint v Eastern Electricity Board** [1975] ICR 395) *which militates against the discretion being exercised too readily; and in* **Lindsay v Ironsides Ray & Vials** [1994] ICR 384 *Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."*

7. **The Employment Tribunals Act 1996** provides at ss (2) and (3) that:

(2) Subject to subsection (3), this section applies to—

(a) a claim for damages for breach of a contract of employment or other contract connected with employment

(b) a claim for a sum due under such a contract, and

(c) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract,

if the claim is such that a court in … Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.

(3) This section does not apply to a claim for damages, or for a sum due, in respect of personal injuries.

8. **The Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994** provides that

"***3 Extension of jurisdiction***

Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

(a) the claim is one to which (s 3(2) Employment Tribunals Act 1996) applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;

(b) …

(c) the claim arises or is outstanding on the termination of the employee's employment.

9. In terms of s13 of the **Employment Rights Act 1996 (ERA 1996)** provides that an employer shall not make unlawful deduction of wages. s23 of the ERA 1996 provides that such claims may present such a complaint to the Employment Tribunal. s24 of ERA 1996 provides for determination of such complaints.

DISCUSSION AND DECISION

10. The tribunal's powers concerning reconsideration of judgments are contained in rules **70** to **73** of the Employment Tribunals Rules of Procedure 2013 (the 2013 Rules). A judgment may be reconsidered where "*it is necessary in the interests of justice to do so."* Applications are subject to a preliminary consideration. They are to be refused if the judge considers there is no

reasonable prospect of the decision being varied or revoked. If not refused, the application may be considered at a hearing or, if the judge considers it in the interests of justice, without a hearing. In that event the parties must have a reasonable opportunity to make further representations. Upon reconsideration the decision may be confirmed, varied or revoked and, if revoked, may be taken again.

11. Under rule 71 of the 2013 Rules an application for reconsideration must be made within 14 days the date on which the judgment (or written reasons, if later) was sent to the parties.

12. As the respondents identify, in their response to the reconsideration application the claimant's application is founded on her assertion that

    a. "*some of the evidence has been misunderstood*" and
    b. she "*believe[s] wages remain outstanding*" (see para 1).

13. In the claimant's application for reconsideration she makes a number of comments at paragraphs 4 to 16. It is the unanimous decision of the Tribunal that the issues raised within those paragraphs were fully ventilated as falling within the 22 heads of claim listed for consideration at the Final Hearing and were properly argued and ventilated at the Final Hearing on 4, 5, 6, 7, 10, 11, 12 and 13 February 2020. Further, the Tribunal is satisfied that there was no identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice arising from the claimant's comments at paragraphs 4 to 16 of her application for reconsideration. Reconsideration to that extent is refused.

14. The claimant, additionally refers at paragraphs 17 to 67 of her application, as noted by the respondent in their response, that she "*was not paid all sums due to her on her termination of employment"* and as the respondent puts it "*sets out a detailed analysis of what she believe she believes she should have been paid*".

15. The respondent, sets out that they consider that the "*short answer to the application is that Mrs Stones did not make any claim for breach of contract or unpaid wages under Part II of the Employment Rights Act (and it would be far too late to make such claims now).*" The respondent continues, that the claimant's "*only relevant claim, which was numbered Claim 6 in the Scott Schedule, was that errors in her final termination payment amounted to unlawful harassment*". That is to say, claim 6, was one of the 22 heads of claim listed for consideration and which the Tribunal is satisfied were properly argued and ventilated at the Final Hearing on 4, 5, 6, 7, 10, 11, 12 and 13 February 2020.

16. The Scott Schedule reflected the written statement provided by the claimant to respondent and the Tribunal on or about 31 January 2019. That document was headed "*Additional Information to be added to the ET1".*

17. The Scott Schedule containing the 22 Heads of Claim referred to above, was formulated for the claimant, by the respondent.

18. Having regard to the claimant's reconsideration, Tribunal considers that there has been an inadvertent labelling error arising from the claimant's communication of 31 January 2019 which resulted in the claimant's existing claim, for breach of contract/ unlawful deduction of wages being labelled exclusively as a claim based on harassment.

19. The Tribunal considers that the claimant, who on the information available appears to have been unrepresented at all material times in the period of the Tribunal claim, offered a causal label of harassment (that is say the reason), for her assertion that an underpayment occurred at the termination. The claimant did not expressly articulate, in response the respondent drafted Scott Schedule, that regardless of that proposed reason, she continued to assert that there was such an underpayment (or unlawful deduction). However within narrative she provided in response to the Scott Schedule Claim 6 (harassment), the claimant asserted *"As per already supplied*

documentation I believe I am owed several thousand pounds wrongly deducted from my final payment", and sets out a number of arguments on where she believes error may have arisen.

20. The Tribunal's relevant findings of fact in relation to asserted Scott Schedule Claim 6 (harassment) are set out at 339 to 340 of the Judgement.

21. The respondent observes at para 18 of its response to the reconsideration, that the Tribunal found the respondent witnesses to be straightforward and honest. The finding in fact are in respect of the 22 Heads of Claim which were the subject of the Final Hearing and which had been set out in the Scott Schedule.

22. From the claimant's reconsideration, it is now considered that it had not been the claimant's intention to not insist upon an underlying claim for unlawful deduction of wages as a Head of Claim.

23. The Tribunal notes that unlike the position **Burton** and indeed **Lindsay** there is no indication that there was a representative acting, who failed to draw attention to the particular argument in terms of the Employment Rights Act 1996 and indeed The Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994. The claimant had articulated that she was critical of the methodology adopted around the exit payment in the ET1. That criticism was, to a limited extent, responded to in the ET3 (and the respondents expressly reserved their position to provide Further and Better Particulars). The criticism of the methodology of the exit payment calculation was further identified by the respondents as the 5th bullet point in Tribunal's Note of the Preliminary Hearing on 19 March 2019.

24. The Scott Schedule as prepared by the respondent, reflected the labelling exercise by the claimant in January 2019. The claims as set out in the Scott Schedule have been dismissed. Those claims were fully ventilated and properly argued, there was no administrative error nor any event occurring after the hearing that that requires a reconsideration in the interests of justice

25. The claimant's claim for unlawful deduction of wages and breach of contract as set out in her ET1 and which was referenced by the respondent, subject to seeking permission to amend, in the ET3 response as out above, were not fully ventilated nor argued before the Tribunal. While there was no event occurring after the hearing, the Tribunal is satisfied that the claimant's claims for unlawful deduction of wages and breach of contract as set out in her ET1 having not been fully ventilated nor subject to findings of fact and thus satisfy the requirements for reconsideration in accordance with the interests of justice.

26. The Tribunal wishes to record that it offers no criticism of the respondents in their formulation of the Scott Schedule. Further, and while the claimant did not take steps to make clear that additional to the 22 Heads of Claim within the Scott Schedule, she insisted upon a sole additional 23rd Head of Claim, originating from her ET1, it appears she was unrepresented at all material times.

27. The respondent argues that "*typically, applications based on the interests of justice have succeeded only where there has been a serious procedural irregularity, where a jurisdictional question has not been addressed, where there has been a manifest error of law or where significant new evidence has come to light since the hearing*." The Tribunal notes the respondent's position and has reviewed the case law provided and as set out above. However, the unanimous decision of the Tribunal is that, in light of the reconsideration application, it is necessary in the interest of justice to address her claims in respect of s13 of the Employment Rights Act 1996 SI for unlawful deduction of wages and breach of contract claims in terms of Reg 3 Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994/1624.

28. While the Tribunal considers that such limited reconsideration is necessary in the interest of justice, the Tribunal recognises that in its ET3 the respondent, in effect, reserved its position on the provision of Further and Better Particulars. In these circumstances, it is considered that having regard

to the overriding objective, the respondent should be afforded to 30 July 2020 to provide Further and Better Particulars setting out its response to the claimants articulated position on asserted breach of contract and unlawful deductions as more fully set out in paragraphs 17 to 67 of the claimants application for reconsideration.

Conclusion

29. A tribunal is required to receive the submissions of the parties before it. It is required to form a judgment as to the submissions which have persuasive force in coming to a conclusion. It is not required to set out extensively the submissions of the parties in every case. It is required to explain the basis upon which it reaches its conclusion. Sometimes that requires it to set out submissions in summary and on other occasions more fully.

30. Having regard to paragraph 4 to 16 of the claimant's application, it is the unanimous decision of the Tribunal that they do not support an application for reconsideration. The claimant appears to be arguing that she considers that the Tribunal ought to have made different findings of fact. If the claimant considers that tribunal erred in law, that is a matter that can be canvassed before the Employment Appeal Tribunal.

31. Taking all these matters into account the Tribunal concludes that there is no reasonable prospect the original decision in respect of the 22 Heads of Claims being varied in the interests of justice.

32. For those reasons the Tribunal, refuses the claimant's application for reconsideration set out in 4 to 16 of the claimant's application.

33. The claimant's application for reconsideration, as set out in paragraphs 17 to 67, restricted to her claims in respect of s13 of the Employment Rights Act 1996 for unlawful deduction of wages and breach of contract claims in terms of Reg 3 Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994/1624 arising or outstanding on the termination of the employment of the

employee, are allowed to proceed to a one day Final Hearing, in respect those issues were not fully ventilated at the Final Hearing on 4, 5, 6, 7, 10, 11, 12 and 13 February 2020; and the Tribunal has made Orders in respect of same which are set out separately.

Employment Judge	**Rory McPherson**
Date of Judgement	**30 June 2020**
Date sent to parties	**30 June 2020**