EMPLOYMENT TRIBUNALS

Claimant	Mr John Ellis
Represented by	Mr J Frater (consultant)
Respondents	GB+I Limited
Represented by	Mr N Smith (counsel)
Before:	**Employment Judge Cheetham QC**

Hearing of Application for Reconsideration
held on 8 February 2021 at
London South Employment Tribunal by Cloud Video Platform

JUDGMENT

1. The application by the Claimant for reconsideration is refused.

2. The claim remains listed for a 6 day hearing commencing 15 April 2021. It is suggested that the issue of employment status is considered at the outset of that hearing and the Judge then decides how the rest of that hearing should progress.

REASONS

1. *This has been a remote hearing on the papers, which the parties have not objected to. The form of remote hearing was: V - video. A face to face hearing was not held because it was not practicable and the issue of the future determination of the claim could be resolved from the papers. The documents that I was referred to are those contained in the Tribunal case file, an agreed hearing bundle, the parties' written submissions and correspondence regarding the application for reconsideration.*

2. At a Preliminary Hearing on 6 October 2020, the Claimant applied to amend the claim and parts of that application were allowed, as set out in that Judgment. However the application to add the prospective Fourth and Fifth Respondents (as well as a third Respondent) was refused.

The application

3. On 28 October 2020, the Claimant applied for reconsideration of that part of the Judgment relating to the prospective Fourth and Fifth Respondents. For ease of reference, the paragraph of the Judgment in issue in this application is set out as follows:

> *17. As to Mr Wong and Mr Hughes, I accept that accusations were made against them as individuals in the original particulars of claim, but it is almost always the case that allegedly responsible individuals will be named in particulars of claim. However, there is a huge difference between being named in a claim and being a named respondent. It causes prejudice to that individual to add them as a party 18 months after a claim was brought, especially where – as here – the Claimant could quite easily have added them as respondents at the time if he had wished to do so. The Claimant gains very little from adding them now, but they would suffer significant prejudice. The application to add them as Fourth and Fifth Respondents is refused.*

4. The application was made on 4 grounds, as follows:

> *"1. The Decision at paragraph 17, confirms that allegations were made against Mr Hughes and Mr Wong.*
> *It is thus respectfully submitted that this is not adducing new parties per se but simply putting the correct legal label upon the allegations as made, namely allegations of discrimination by Mr Hughes and Mr Wong.*
>
> *2. The Decision at paragraph 17 states that it causes prejudice to a party to add them "18 months after a claim is brought", The application was made in May 2018, the delay to the matter being disposed are as a result of the Tribunal not listing the same sooner. It is respectfully submitted it is unjust and inequitable to hold any such delay against the Claimant.*
>
> *3. The Decision at Paragraph 17 states "The Claimant gains very little from adding them now, but they would suffer significant prejudice". In fact the current situation is that there will be a hearing on 17-18 December 2020 to determine whether the Claimant was a worker or employee of the remaining Respondent. The Respondent's contention (as set out in their letter of 27 September 2018 … is that the Claimant was a "Consultant" of The Limited Company.*
> *In the event that the Claimant is determined at that hearing to be a consultant of The Limited Company or in the alternative to have no relationship with The Limited Company, his claims fall away entirely.*
> *The net result of the above would be that Mr Hughes and Mr Wong would not be held accountable at all for their discriminatory conduct.*
> *…*
>
> *4. The Decision at Paragraph 17 states "The Claimant could quite easily have added them as Respondents at the time if he wished to do so"*

In fact the Claimant, as is the case with many litigants in person, was wholly unaware that any personal liability could be attached to individuals in the employment context, or at all. It was only upon our taking instructions that this point become live. The Claimant is content to produce a Witness Statement which so states if required.
It is further noted that the correspondence from "Renders" found at page 1-7 of the Hearing Bundle, does not state that Mr Hughes and Mr Wong are being considered as personally liable, indeed the first sentence notes "…. we represent our client in relation to problems he has experienced at work with GB&I Ltd ("The Company") and its representatives"."

5. At the hearing of the application today, Mr Frater sought to adduce a witness statement from the Claimant (who was not present at this hearing). He said that it concerned the Claimant's state of knowledge at the time he brought his claim.

6. Mr Smith objected to this evidence being adduced. Apart from the fact that he had first seen it at 9.45 on the day of the hearing, which began at 10.00, he pointed out that the evidence could have been adduced at the amendment hearing and the Claimant was not present to be questioned on the statement. Absent a compelling reason why it could not have been adduced previously, there was no basis for calling this evidence at a reconsideration hearing (see ***Ladd v Marshall*** [1954] 3 All ER 745, CA, which was considered in the context of reconsideration hearings in ***Outasight VB Ltd v Brown*** UKEAT/0253/14).

7. As Mr Frater could not provide any reason why this evidence could not have been adduced at the previous hearing, I decided not to allow the witness statement.

Reconsideration

8. Under Rule 70 of the Employment Tribunal Rules, a Tribunal has power to reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the original decision may be confirmed, varied or revoked. If it is revoked it may be taken again.

9. In ***Outasight VB Ltd***, HHJ Eady QC held that, although tribunals have a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances, this discretion must be exercised judicially. This meant, "*having 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*" [§33].

10. In ***Trimble v Supertravel Ltd*** [1982] ICR 440, the EAT made the following observation: "*We do not think that it is appropriate for an industrial tribunal to review their decision simply because it is said there was an error of law on its face. If the matter has been ventilated and properly argued, then errors of law of that kind fall to be corrected by this appeal tribunal*."

Discussion and conclusion

11. Both Mr Frater had helpfully provided written submissions, which they developed in their oral submissions. They each referred to authorities, which I considered, but which I have not referred to further in this judgment (save under ground three).

12. Ground one. In his written and oral submissions, Mr Frater argued that this was simply a question of relabelling, as he had argued at the previous hearing, and that the decision was therefore wrong. Mr Smith referred to the "Selkent" principles and that "relabelling" was indeed a recognised basis for an amendment. However, this was not just relabelling, but adding new parties. He addressed the principles to be applied, but – as he said – these had been addressed previously and this was essentially an appeal.

13. In my view, it is not necessary in the interests of justice to allow the application on this ground. These arguments were very much the substance of the last hearing. At paragraph 8 of the Reasons, I described the claim, which was drafted by the Claimant in person, as being quite usual for such claims, in that it was a clear narrative, "*but it lacks the legal labels*". The issue of relabelling and whether the amendment sought was simply a relabelling of pleaded facts was at the front of everyone's mind at that hearing. However, as set out at paragraph 17, there is a gulf between accusing an individual in particulars of claim and bringing a claim against them individually.

14. Ground two. Mr Frater's submission on this second ground was that it was not the Claimant's fault that the application to amend was not heard until 18 months after the claim was brought. Mr Smith argued that it was not a question of the fault of either party, so to that extent the delay was neutral. However, he said, it remained a fact that the Claimant could have included Mr Wong and Mr Hughes from the outset. He also had the benefit of legal advice at the time.

15. I agree with Mr Smith. The Claimant was not being blamed for the delay; the point was that the delay caused further prejudice to Mr Wong and Mr Hughes in circumstances where there was no obvious reason why they could not have been included in the original claim. I do not find it necessary in the interests of justice to allow the application on this ground.

16. Ground three. Mr Frater referred to this ground as "*the balance of prejudice*" and said that the reasoning failed to acknowledge that, were the Claimant held not to be a worker or employee as against the company, he would continue to have a claim against Mr Wong and Mr Hughes if they were named Respondents. He relied upon ***Anyanwu v South Bank Student Union*** [2001] ICR 391 HL, although – as Mr Smith pointed out and as I would agree – that case concerned striking out claims, rather than amendments.

17. At the start of this hearing, I said to Mr Frater and Mr Smith that, on re-reading paragraph 17, I thought the words "*The Claimant gains very little*" were poorly expressed, because they did not acknowledge that the Claimant might have a claim against Mr Wong and Mr Hughes as named Respondents if he was found not to be an employee or worker of GB + I Limited. However, at the amendment application, I weighed the prejudice against the Claimant on the one hand and Mr Wong and Mr Hughes on the other, which included taking this point into consideration. I do not find it necessary in the interests of justice to allow the application on this ground.

18. Ground four. The fourth ground was the Claimant's state of knowledge. In his written submissions, Mr Frater said the decision was made in the absence of evidence from the Claimant, which was what he had tried to remedy today. However, as he acknowledged, the Claimant could have given evidence at that hearing, but did not do so. He also referred to contemporaneous correspondence from the Claimant's representatives (contained in the hearing bundle previously) which did not refer to Mr Hughes and Mr Wong being liable. However, I am not sure that point greatly assists him.

19. Overall, therefore, the application for reconsideration is dismissed.

20. Next steps. The Claimant has brought an appeal against the amendment judgment and I understand that is awaiting "the sift". However, the substantive hearing begins on 12 April 2021 and there has as yet been no hearing to determine the Claimant's employment status.

21. Mr Frater did not have instructions to apply for a stay and I was not able to offer the parties a listing for a hearing to determine employment status (which I was told would require 2 days) between now and 12 April. Therefore, I would suggest that the issue of employment status is dealt with at the start of the 6 day hearing and the Judge then decides how the rest of that hearing should progress.

22. I am sending a copy of this Judgment to the representatives at the same time that it is sent to the tribunal for promulgation, because I am aware of delays in sending out judgments and I appreciate that, for the purposes of the appeal, the parties will want to receive this sooner rather than later.

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Employment Judge S Cheetham QC
Date 12 February 2021