



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss J George

**Respondent:** Clements Agency Limited

## JUDGMENT

The Respondent's application dated 20<sup>th</sup> February 2020 for reconsideration of the judgment sent to the parties on 27<sup>th</sup> January 2020 is refused because there is no reasonable prospect of the original decision being varied or revoked.

## REASONS

### Application for reconsideration and time point

1. The Respondents had sent two very detailed applications, together with supporting documentation. All of these were put before me. The first document was headed "Comments on the Anomalies in the Judgment Written Report/Reasons". The second was headed "Reasons for Appeal".
2. While the headings would suggest that the latter document was created in support of an application to the Employment Appeal Tribunal, this is not expressly stated, and I have therefore also considered the matters set out in that document.
3. The application was received outside the applicable time limit, but I accepted the Respondent's explanation that they had received the judgment only on 8<sup>th</sup> February and extended the time limit. The Claimant did not object.
4. The Claimant was asked to comment on the Respondent's application but has not done so. Accordingly, to avoid further delay I have made my decision in the absence of any comments from the Claimant.

### Grounds for reconsideration.

### Comments on the Anomalies in the Judgment Written Report/Reasons

5. The comment on anomalies document made three main points. Firstly, there were detailed comments on what it said were either errors by me, contradictions, or recording different versions of what was said. Secondly, I did not adhere to my schedule of finding the unlawful deduction of wages before considering the constructive dismissal so that the Respondent was not given any opportunity to explore that matter further. This decision is therefore challenged as neither fair nor legal. Thirdly, the Respondents consider they were hijacked into not producing additional witnesses or requesting postponements and this was due to judicial discouragement and impressions given.

#### Reasons for appeal

6. There is a degree of overlap in the grounds in this document and the anomalies reasons. In summary it states that the case has been conducted unfairly because the conduct of two judges misguided them and influenced decisions the Respondent took which had a detrimental effect on the outcome of the final hearing. They were intimidated by judicial conduct.

7. Specifically, the outcome is disputed because my ill-health on the day meant that the proceedings were halted, and this interrupted the Respondent's train of thought which was difficult for a layperson. The Respondent was hijacked by the Claimant's conduct and encouraged not to apply for postponement which was an error. Again, I did not do what I had said, that is deal with the unlawful deduction of wages first and then address the constructive dismissal. The Respondent had little opportunity to address the constructive dismissal element, including it says being discouraged bringing witnesses. It also said that I overlooked a point on continuity of service which proved the Respondent's case.

#### Response to the anomalies document.

#### Errors

8. My responses to the anomalies are based on either the paragraphs of my judgment or the notes I took during the hearing. The numbers refer to paragraphs in the judgment disputed by the Respondent: -

7. This information was given by the Claimant and described the issue as she saw it. It is appropriate for the Claimant to specify what she says she is claiming.

8. I made a finding of fact that the Claimant was employed by the Respondent under the terms of the 2013 contract. My notes record that the Claimant was asked a question which suggested that it was the Respondent's case this was not a valid contract, but this was not evidence given by any of the Respondent's witnesses whose statements do not refer to this contract.

10. I agree that I made an error in paragraph 10 in attributing evidence to Mrs. Leigh which was in fact given by Ms. Leslie. I apologise for that error, but the Respondent did not dispute that this evidence was given. In the comments of the anomalies this is again repeated when it specifies that the claimant had returned 10 days after her resignation. It was common

ground that the claimant had resigned. The issue was whether not that resignation had broken her continuity of employment. The claimant was adamant that it had not. The Respondent focused on the fact of the resignation and did not challenge the fact that the gap in the claimant's employment did not break continuity. My reasons for preferring the Claimant's account are set out in this paragraph 10.

The point is made in this paragraph that during an adjournment the Claimant provided pay slips which the Respondent now says in its comments ratifies the Respondent's case that there was a break in service. The pay slips are in the bundle before me marked B. It is said my notes do not reflect true events. I have noted the adjournment and the questions on the pay slips that were put the Claimant following the break. The Claimant did not accept that these documents showed that she left between 14th April and 6th May. All one can say with certainty is that there were no pay slips available in court on the day for this period. I have preferred the claimant's account for the reason given in paragraph 10.

12. Mr. Davis statement does refer to the fact that changes were made to wages prior to the move to new premises. He states that this was a change to being paid in arrears and increase in weekly basic salary to meet national minimum wage requirements. Reference is made to the potential of additional earnings, but no evidence was given that this included deductions at this point. The meeting with staff is recorded at paragraph 13. It predates the issue of the contract to the claimant.

16. This is a finding of fact on contract wording. The Respondent's point in this paragraph is a re-rehearsal of its evidence.

18. This is again a finding of fact on a contract. There is no express incorporation of any policy or rules document.

24. Mr. Cashman accepted he was aware of the system. The Claimant said that she was not. The reasons for preferring the claimant's account are set out in the judgment.

25. The point the Respondent makes here is adding to its evidence. It does not provide any reason for reconsideration.

26. There are two points in this paragraph. It is said this paragraph contradicts paragraph 24. The fact Mr. Cashman was aware of the system because he had deal flow below 12 on average does not detract from the finding that an employee who had not been in this position would not be aware, or the finding this was not explained in a consistent way or clearly documented. The Respondent also refers in this application to the fact the Claimant was put through a disciplinary process which I have found was to acquaint her with the scheme and was therefore an acknowledgement by the Respondent that she was not aware.

The second point is that both I and a previous judge discouraged

bringing additional witnesses. My notes record the fact that once the Claimant produced an additional witness, I agreed with the Respondent they would have the overnight adjournment to consider if they needed to bring more documents and more evidence. On the second day no application was made to bring additional witnesses for the Respondent. It is not for the judge to give parties legal advice on how to present their claim.

31. I do not accept the Respondent's position here. My notes are clear about the evidence given in answer to questions. They record that when asked about the document at page 15 the witness said "did not change the internal document in line with the new pay slip layout. It was an evolutionary process as we entered the dispute." He expanded on this and said, "the bookkeeper did not change the layout because it's always been like this". When it appeared that the Respondent's witness had not given the answer he wished to give, I allowed a degree of latitude because he was unrepresented and accepted his revised answer, even though that was given as part of submissions.

34. This is a summary of the Claimant's pay history. It does not go through week by week. My notes state that the claimant said in evidence when asked about these variations that this was due to sickness absence. This was not challenged by the Respondent.

35. My finding that the witness said he took this action to make sure the claimant understood the terms of her employment is based on his written witness statement when this is what he says.

39. This is my finding of fact based on the evidence I heard.

40. The minutes of the meeting are referred to in this paragraph.

41. This paragraph records the fact that pay was increased based on outstanding performance.

48. I accept I have not made reference to the Claimant's statement that she always had a difficult relationship with the Respondent but not sufficient to contradict her evidence, which was supported by Mrs Leslie, that she had always loved her job.

55. This is a statement of the law. It was the evidence of the Respondent's witness that the Claimant had not agreed to any deduction at this meeting.

58. This is a statement of law. In terms of this paragraph the Respondent restates the evidence as it sees it. I have made different findings of fact.

61. This is again a statement of the relevant law.

62. It is a finding of fact that the contract only states that PRP will be paid not that it will be reduced or deducted.

65. It is my findings of fact, based on the evidence I accepted for the reasons set out in the judgment, that the Respondent had accepted the claimant didn't understand reductions were part of the contract prior to February 2018

9. While I accept that I made one error in attributing evidence to the wrong individual, this is not material. I do not consider that the other points the Respondent has made show any inaccuracy in noting evidence. I conclude that none of the matters addressed at paragraph 7 above are sufficient for there to be a reasonable prospect that the decision be overturned on this basis.

Not adhering to the schedule

10. This is a complaint that the Respondent was not given an opportunity to dispute the constructive dismissal because I had said that it would be dealt with after the issue of the deduction of wages. This is not an accurate recollection; the Respondent is referring to the split between liability and remedy which I did specify.

11. The context of the discussion on a split hearing was in relation to documents produced by the claimant on the morning of the hearing which related to ill-health after the termination of employment. My recollection is that I explained to the parties we would deal with liability first and remedy second, if needed. On that basis the Respondent would have an opportunity to dispute whether the claimant was or was not working, should or should not have found another job and was or was not competing with the Respondent after, and if, a decision on liability against the Respondent had been made. This is not uncommon when it appears likely there is insufficient time to deal with both liability and remedy in the time allotted.

12. At the subsequent remedy hearing the Respondent will be given every opportunity to discuss the doctors letter and the impact of a competing business.

13. The Respondent also complains that in not considering the constructive dismissal it was denied an opportunity to make its case. The Respondent states that intended to say that the Claimant deliberately did not attain deals knowing her pay would be adjusted she could then claim ignorance of that scheme and achieve a constructive dismissal claim. The Claimant's motive was something that the Respondent did address. This was in Mrs Leslie's witness statement, and although my findings are brief, I deal with it at paragraph 49.

14. I conclude that I set up a comparatively standard way of dealing with the case, that is liability first and remedy to follow if needed. The Respondent was not prevented from making its case in relation to the constructive dismissal point.

15. I further conclude that there is no reasonable prospect of the original decision being varied or revoked on this ground.

Hijacked and discouraged from bringing more witnesses

16. As to the discouragement from bringing more witnesses, I repeat as stated above my notes record the fact that once the Claimant produced an

additional witness, I agreed with the Respondent they would have the overnight adjournment to consider if they needed to bring more documents and more evidence. On the second day no application was made to bring additional witnesses for the Respondent. It is not for the judge to give parties legal advice on how to present their claim.

17. On the morning of the hearing both parties complained about lack of timely exchange of witness statements and documents from the other. The Respondent was not prepared, and my notes record that we agreed a short adjournment to read the witness statements. This was expanded to 40 minutes at the Respondent's request. My note records that I advised both parties before the reading break that they could apply for an adjournment after that reading break if they felt they needed to. The Respondent did not make any such application.

18. I conclude that there is no reasonable prospect of the original decision being varied or revoked on this ground.

#### Response to the appeal document

##### Intimidation by judicial conduct

19. A complaint is made about hearing in July 2019. This was not before me and I do not propose to deal with it. No complaints were raised at the time.

20. The concerns about the hearing in January 2020 are said to be about the claimant being given greater latitude to the detriment of the Respondent. This was when the Claimant was legally represented but the Respondent was not. There are three points made. The Claimant delivered her witness statement overnight before the hearing whereas she had had 14 days to consider the Respondent's statements. The Claimant was allowed to produce medical documents. The Claimant was allowed a further witness.

21. As set out in the response to the previous document, the parties were given an opportunity to ask for an adjournment and did not do so. The Respondent now says they were intimidated by me and agreed only under protest. I have no note of any protest being made at the time.

22. The medical documents are relevant to remedy and will be dealt with at that point. The Respondent therefore did not suffer any prejudice from their late inclusion.

23. The Respondent was offered the opportunity to consider if it needed to produce more evidence after the Claimant's new witness was permitted. It did not do so. I did advise them on the possible impact on the timing of a conclusion of the case if they sought to do so. That is a relevant consideration that needs to be brought to the parties' attention when they make their decision.

24. There is a specific complaint made about a matter that was addressed on the day. It is a complaint by the Respondent that the witness was privy to conversations and documents. The complaint in this appeal document is that I after I asked the solicitor as to what had transpired. I did not take up Respondent's further objection.

25. My notes show that a concern was raised to the clerk about a witness being seen in conference with the Claimant and her representative. At the start of the hearing I therefore explained to the parties that because new documents had been produced it was appropriate for the Claimant's representative to ask the witness about these. The representative confirmed to me that any conversation had been limited to this. The Respondent still had a concern about the conversation and its length and that when they went into the room the witness was hiding a document. It was following this comment that I then asked the claimant's representative if, as a trainee solicitor, she had limited her conversations appropriately and she confirmed that she had.

26. I do not accept that the Respondent was intimidated by judicial conduct. There is no reasonable prospect of the decision being overturned on these grounds.

#### My ill-health

27. It is correct that during this hearing I was suffering from a bad cough and blocked left ear. I did not have a temperature and, having listened to recorded advice at my GP surgery as to the need to see a doctor with the symptoms I had and how to deal with them, I concluded I was sufficiently well to be able to attend court.

28. Two things are said to arise from this. Firstly, that I did not hear things correctly and this had led to factual errors. I have provided a very detailed response to what is said to be factual errors and do not find this to be the case. I did ask the parties to repeat things when I was unable to hear. I should add that the noise of the air conditioning provides a continual hum and almost every hearing parties are asked to repeat themselves.

29. Secondly, that my coughing interrupted the Respondent's train of thought. No point was raised at the time. A number of adjournments were granted during the day, either at my volition or at the request of the parties.

30. There is no reasonable prospect of the decision being overturned on this ground.

#### Hijacked by the claimant's conduct and lack of postponement

31. This has been addressed above

#### Constructive dismissal not addressed

32. This point has been made and answered above. This was a split hearing on liability and remedy. There is no reasonable prospect of the decision being overturned on this ground.

#### Overlooking evidence which proves continuity was broken

33. I have dealt with this point above

Conclusion

34. For the detailed reasons set out above I find there is no reasonable prospect of decision being overturned on any of the grounds raised by the Respondent in either of the documents.

Employment Judge McLaren  
Date: 17 April 2020