EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR ANTHONY ACKAH	**AND**	**PEAK- RYZEK PLC**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD : BRISTOL **ON: 31ST MARCH 2021**

EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE) **MEMBERS:**

APPEARANCES:-

FOR THE CLAIMANT:- **WRITTEN SUBMISSIONS**

FOR THE RESPONDENT:-

RECONSIDERATION JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's application to vary or revoke the Judgment is dismissed.

Reasons

1. By a judgment promulgated on 11th December 2020 following a hearing on 1st / 2nd / 3rd December 2020 the tribunal dismissed the claimant's claims for the reasons set out in the decision. The claimant has subsequently submitted a substantial application for reconsideration running to 50 paragraphs over 11 pages. In many cases they repeat submissions made to us in the course of the hearing; although as set out below in some cases the claimant advances factual propositions that differ from those originally

before us. As is set out in the original decision we very substantially accepted the respondent's factual evidence and in the main rejected that of the claimant.

2. As a general proposition there is nothing in the application for reconsideration which in my judgement has a reasonable prospect of causing the tribunal to alter its original factual conclusions, nor therefore to vary or revoke its decisions based on them ; and where the claimant advances a new factual case that leads to the same conclusion as the tribunal can only determine a claim on the evidence before it at the time. Looked at overall there is therefore nothing in the reconsideration application to lead me to conclude that there is any reasonable prospect of the decision being revoked or varied and the application is dismissed. However for completeness sake the specific reasons in respect of the specific points are set out below.

3. I will deal with the applications in the order in which they appear in the reconsideration application.

4. Holiday –3rd - 6th December - The first allegation as set out in the pleadings was of cancelling pre-booked holiday 3rd -6th December . As set out in the reasons the claimant was cross-examined and taken to the holiday records which he contended were forged (paragraphs 9 and 10 original decision). The factual claim put forward in the reconsideration application is wholly different and accords with the respondent's case that he had not had holiday cancelled but had been rostered for a period during which he had not taken holiday (paragraph 10 reconsideration application). In the reconsideration application the claimant now advances as the basis of his claim not that pre-booked holiday had been cancelled but that he had been rostered when other members of his team had not. This bears no relation to the pleaded claim or the claim as presented before us. The tribunal can only determine a claim on the basis of the evidence placed before it by the parties and it is not open to the claimant to seek reconsideration on the basis of a wholly new factual claim which was never originally factually advanced.

5. Holiday 28th - 31st December 2018 – As is set out in the original decision (paras 11 and 12) the factual basis of the claimants claim changed during the course of the hearing but both the pleaded version and the new version were contradicted by the respondent's evidence which we accepted. As the factual basis of the claimant's claim (on either basis) was not accepted by us as being accurate the claim was bound to fail.

6. Disciplinary action – The central point made by the claimant is that it was not open to us to conclude that decision to embark on the disciplinary process was not discriminatory because the evidence before us was that other white employees had taken unauthorised leave and not faced disciplinary charges. The claimant is correct that a number of the respondent's witnesses accepted that there may have been occasions on which other employees had taken unauthorised leave and had not faced disciplinary charges. However the claimant did not advance any specific comparator which would have allowed us to determine whether the circumstances were genuinely comparable. There was no evidence before us that this occurred in sufficiently similar circumstances to those relating to the claimant to allow us to draw any conclusions from it. In any event we accepted the respondent's evidence as to the reason that he had been invited to the meeting. As no disciplinary action was ever imposed the only

potentially discriminatory act could have been instituting the disciplinary proceedings themselves which we accepted was for the reasons given by the respondent. Even had we found that the fact that other employees had not been disciplined was sufficient to satisfy stage 1 of the Igen v Wong test, as we concluded that we accepted the respondent's evidence as to why disciplinary proceedings were instituted the respondent would necessarily have discharged any burden on it.

7. 13th February email – There is nothing in the reconsideration application which was not before us at the original hearing.

8. Telling staff members they were gathering evidence against the claimant – For the reasons set out in the decision there was simply insufficient evidence to allow us to conclude on the balance of probabilities that this was ever said and there is nothing in the reconsideration application that was not before us originally.

9. Restructure/Pay – Our conclusions are set out at paragraphs 21- 28 of the decision and there is nothing in the reconsideration application which was not before us originally.

10. It follows that there is in my judgement no reasonable prospect of the original decision being varied or revoked and the application is refused.

Employment Judge Cadney
Date: 31 March 2021

Judgment sent to the parties: 21 April 2021

FOR THE TRIBUNAL OFFICE