Case Number: 2300321/20/V

EMPLOYMENT TRIBUNALS

Claimant	Mr S Ibrahim
Represented by	Ms B Balmelli (counsel)
Respondents	Maidstone and Tunbridge Wells NHS Trust
Represented by	Dr G Burke (counsel)
Before:	**Employment Judge Cheetham QC**

Hearing of Application for Reconsideration
held on 29 January 2021 at
London South Employment Tribunal by Cloud Video Platform

JUDGMENT

1. The application for reconsideration is refused.

2. The case is provisionally listed for a remedies hearing on 27 and 28 September 2021, as set out below.

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, the previous hearing bundle and a supplementary bundle, the parties' written submissions and authorities, as well as correspondence regarding the application for reconsideration.*

2. At a hearing on 22 August 2020, the Claimant was held to be entitled to receive "full pay" throughout the period of his suspension.

The application

3. On 6 October 2020, the Respondent applied for reconsideration of that judgment. As clarified by Dr Burke at the start of this hearing, there were three grounds to the application:

   (i) the Respondent was not afforded a fair hearing, because it was not given sufficient opportunity to argue its full case, given its expectation of what the hearing would cover, namely a discrete jurisdictional issue.

   (ii) If the claim were to proceed at all, it could only proceed as a breach of contract claim. It could not proceed on the basis of an unauthorised deduction of wages and to find it did so was an error of law.

   (iii) The finding that the claim could proceed was irrational, because there was no proper basis for any sums to be payable. There would have to be an exercise of discretion over whether the Claimant would receive any pay.

4. I asked Dr Burke to clarify the grounds upon which the application was made, because it was not completely clear what they were from the application letter. That letter goes further than the grounds set out above, in that it also includes: criticisms of the Claimant's counsel; that, although the hearing was an open hearing, it was – in terms – wrongly converted to a "full hearing": further, the grounds of resistance were not considered in detail and no material evidence was presented. However, we proceeded with the application on the basis of the three grounds set out above.

Reconsideration

5. 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.

6. I was referred to a number of authorities on the correct approach to applications for reconsideration, which I have taken into account. In particular, in ***Outasight VB Ltd*** UKEAT/1253/14, 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].

7. 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*."

Submissions

8. Both counsel had prepared helpful written submissions, which they developed orally. In support of the application, Dr Burke submitted that the judgment should have been confined to whether the claim could proceed as pleaded. The hearing "morphed" into something more, whereas its purpose was to determine jurisdiction only. He referred to the previous case management orders, which referred to the jurisdictional issue. Preparation for the hearing was therefore confined to that issue.

9. Dr Burke drew a distinction between deciding in principle whether the Claimant was entitled to be paid and actually deciding his entitlement. The hearing should not have strayed beyond the former. He said that the following wording at §2 of the Reasons was too broad: "*… the purpose of today's hearing is to determine whether the tribunal has jurisdiction to hear his claim. In other words, the question is whether the Claimant, who was on a zero hours contract, was entitled to be paid when he was suspended*".

10. The crux of Dr Burke's submissions was that there should have been a further stage of applying the principle established (in other words, that the Claimant was held to be entitled to receive "full pay" throughout the period of his suspension) to the factual matrix of the case and therefore of asking whether the Claimant was nevertheless permitted to receive what he sought. That stage was in addition to a remedies hearing (which therefore might be unnecessary), even if the remedies hearing were to find that the Claimant was entitled to receive nothing. Expanding the ambit of the hearing and not seeking the parties' consent to convert it to a full merits hearing was prejudicial to the Respondent.

11. Dr Burke identified the arguments that could have been raised at the additional stage as follows:

    (i) whether the Claimant was able to work for a third party;

    (ii) any arguments relating to fraud; and

    (iii) contractual analysis; in other words, regardless of the principle, whether this contract allowed any payment.

12. These are not quite the same as those contained in the written application for reconsideration, which also refers to the lack of any mutuality of obligation.

13. Dr Burke also said that the decision was irrational, which amounted to an error of law. There could be no contractual right to payment in the absence of both parties' agreement. Any payment would not be pursuant to any legal obligation.

14. For the Claimant, Ms Balmelli went through what had been considered at the previous hearing by way of pleadings and documentary evidence. That hearing dealt with the specific contract and there was nothing further that needed to be analysed. The Respondent's argument ignored the fact that, once the decision had been made that the wages were "properly payable" and the Tribunal therefore had jurisdiction to hear the matter, there were no defences pleaded to the claim for unlawful deductions. There were therefore no remaining merits issues that needed to be dealt with. She made the particular point that fraud was not pleaded and neither was it argued previously.

15. As to the contract, there was no dispute that the contract referred to was concluded and that the correct policy was incorporated into the contract. It was therefore unclear what other contractual representations needed to be made, as it was common cause between the parties at the Hearing which documents were applicable.

Discussion and conclusion

16. This is not an appeal hearing, but a reconsideration, so the question is whether it is necessary in the interests of justice to vary or revoke the judgment. Therefore, I do not think the arguments around irrationality and errors of law can go further at this hearing, as they are issues for the appeal. To be fair to Dr Burke, he accepted in argument that was probably the case, but it brings the focus of the application to the first ground, as grounds two and three both amount to arguments around errors of law.

17. I asked Dr Burke what purpose would be served by the additional hearing he said should take place. If the principle was correct and the Claimant was entitled to receive "full pay" throughout the period of his suspension, then the only issue that remained was the extent of any entitlement, which could of course be nothing. I asked whether that could not be considered at a remedies hearing, when the additional arguments that he identified could be raised (although I struggle fully to understand the third argument)? Dr Burke's response was that there should be an opportunity to hear witness evidence and he drew the distinction between liability and remedy, between the liability to make a payment and the extent of that payment.

18. However, if these further arguments do not challenge the principle itself, but only the "factual matrix of the case", I cannot see that the Respondent is denied the opportunity of raising them or otherwise prejudiced if the case remains listed for a remedies hearing. If the crux of this application is that the Respondent was denied the opportunity to raise arguments, then the short answer is that they can do so at the remedies hearing. The Claimant may, as a result, be entitled to nothing. Putting that in terms of the

application for reconsideration, I am not persuaded that it is in the interest of justice to vary or revoke the judgment.

19. Dr Burke also raised the question of a stay, which we briefly discussed at the end of the hearing, because the Respondent has sought permission to appeal to the Employment Appeal Tribunal. Ms Balmelli objected and I note when writing up this decision that the application for a stay was first raised only in the Respondent's written submissions.

20. I am not going to order a stay. As I understand it, the application for permission has yet to be considered in "the sift" and, if granted, there is unfortunately likely to be a considerable delay before any appeal is heard. At the same time, the delays in the employment tribunal system mean that a 2 day remedies hearing in this matter would not be listed before mid-September 2021. It therefore makes better sense to list the remedies hearing, so at least that is in the diary. If permission to appeal is granted, then the application for a stay can be renewed, if so advised.

21. The remedies hearing has therefore been provisionally listed for **27 and 28 September 2021**. The parties are asked to confirm by email their availability for that hearing (in emails marked for the attention of EJ Cheetham) **within 14 days** of this Judgment being sent to the parties. If that date is not convenient, they are asked to provide dates to avoid for October and November 2021.

22. Upon the hearing date being confirmed, they will then be asked to agree a timetable between them, to include a schedule of loss and any counter schedule, disclosure, a hearing bundle (in electronic form) and the exchange of witness statements.

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Employment Judge S Cheetham QC
Dated 14 February 2021