Case Number: 1400498/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr A J Cambridge**

Respondent: **Mott MacDonald Limited**

DECISION ON AN APPLICATION FOR RECONSIDERATION

I reject the claimant's application for reconsideration under Rule 70(1) of the Tribunal's Rules of Procedure 2013: there is no reasonable prospect of the tribunal's original judgment being varied or revoked.

Introduction

1. On the 24th April 2021 Mr Cambridge, the claimant in this case, presented an application for the reconsideration of my judgment with reasons which had been promulgated on the 14th April 2021.

2. That judgment and reasons related to the Open Preliminary Hearing which took place on the 19th March 2021 at which I was asked to determine Mr Cambridge's application for an interim order under section 128 and 129 of the Employment Rights Act 1996. I concluded that his case did not meet the threshold for such an order and accordingly I did not grant his application.

3. The hearing of the 19th March was subject to some delay. Mr Cambridge had been sent a revised notice of the hearing to one of his email accounts which he did not access. Consequently, he was unaware that the hearing had been converted from an "in person" hearing to the CVP video hearing format.

4. The administrative staff, with Mr Cambridge's co-operation, were after some delay, able to facilitate Mr Cambridge's access to the CVP hearing in one of the Employment Tribunal's hearing rooms whilst I and the respondent's counsel took part remotely.

5. The hearing was listed for three hours commencing at 10.00. The hearing effectively commenced at around 10.30 but I was able to extend its duration until around 13.50; shortly before I was due to commence another case listed at 14.00.

6. The parties had each prepared and served a copy of their respective electronic bundle. The cumulative total of the two bundles amounted to 561 pages, along with an electronic file of documents exhibited by Mr Cambridge (exhibits A – V). It was thus apparent that it may not be possible for me to give judgment on the day. At the outset of Mr Cambridge's submission, it became apparent that his bundle had not reached me and I consequently received a copy direct to my judicial email and looked at the key documents to which Mr Cambridge referred and undertook to review the entirety before commencing my deliberations.

7. For the above reasons, and judicial commitments in the following weeks, the judgment was promulgated on the 14th April 2021.

8. During the course of the hearing Mr Cambridge was afforded the greater part of the time to develop his arguments which he did with diligence and in detail. Ms Balmer consequently framed her oral submissions succinctly and urged me to read her detailed written submission during my deliberation.

9. I received Mr Cambridge's reconsideration application on the 2nd of May 2021 and gave directions for the respondent, if it so wished, to respond to certain elements of Mr Cambridge's reconsideration application which related to the conduct of the hearing. Such responses to be received by the 24th May. As of the date of this decision, no response has been received.

10. Matters were further complicated when Mr Cambridge forwarded an item of without prejudice correspondence to the Employment Tribunal and, upon notice of that communication, on the 11th May 2021 the respondent made an application for me to recuse myself from any further decision in this case.

11. For the reasons set out in a separate document, I declined the application for recusal.

The relevant rules on reconsideration

12. Applications for reconsideration are governed by Rules 70 to 73 of the Tribunal's Rules of Procedure 2013.

13. Rule 70 provides that a tribunal may, either on its own initiative or on the application of a party, reconsider any judgment where it is "necessary in the interests of justice to do so". Following a reconsideration, a judgment may be confirmed, varied or revoked (and, if revoked, it may be taken again).

14. Rule 72 describes the process by which an application for reconsideration should be determined. The application should, where practicable, first be considered by the Employment Judge who made the original decision or who chaired the full tribunal that

made the original decision. Rule 72(1) requires that judge to refuse the application if he or she "considers that there is no reasonable prospect of the original decision being varied or revoked". If the judge considers that there is a reasonable prospect of the original decision being varied or revoked, the Rules go on to provide for the application to be determined with or without a further oral hearing.

15. This document sets out my initial consideration of the claimant's application under Rule 70(1).

Mr Cambridge's Application

16. Mr Cambridge's application is set out in a three-page letter under four titles; "Preparation", "Unfair Advantage Technology", Non-Compliant Respondent Bundle" and "Grounds of Refusal – Unfair Dismissal". I will address each in turn.

Ground One: Preparation

17. As I have noted above, the parties were notified of the change of format of the Interim Relief hearing by email. Mr Cambridge had communicated with the Employment Tribunal on the 15th March 2021 via one of his email accounts (james.cambridge00@icloud.com); attaching his electronic bundle for the 19th March Open Preliminary Hearing. The Employment Tribunal's email; attaching the notice of the altered format of the hearing, was sent to Mr Cambridge's "protonmail.com" account. That account is the one Mr Cambridge identified on the ET1 form (section 1.8-1.9) as his preferred means of contact. Mr Cambridge had used the "protonmail" address for his initial communication with the Bristol Employment Tribunal on the 23rd and 27th January 2021.

18. Mr Cambridge's argument then states that he had informed the Bristol Employment Tribunal on the 5th February that he was not able access the "protonmail" account and provided an alternative and consequently he did not receive the Croydon Employment Tribunal's notice of the change of hearing format.

19. I accept Mr Cambridge's case on the facts noted above. I also accept that, when Mr Cambridge attended the Croydon Employment Tribunal to commence the hearing at 10.00 he was surprised by the change of circumstances and that the hearing was delayed whilst a hearing room, with access to the CVP format, was made available to him.

20. On my own recollection, I asked Mr Cambridge if he felt he was able to continue with the hearing, I confirmed his agreement. Mr Cambridge's oral presentation was articulate, detailed and cross referenced to his documentary evidence.

21. His application does not identify in what specific manner his preparation was disadvantaged by the delay of the commencement of the hearing (whilst the above arrangements were made).

22. Given the extension of the length of the hearing and the greater proportion of the available time I allowed for Mr Cambridge's submissions, the volume of documentary evidence which

he adduced and the grounds of this application I cannot deduce any actual disadvantage or unfairness.

23. I find that this ground of complaint has no reasonable prospect of leading to the revocation or variation of the judgement.

Ground Two: Unfair Advantage – Technology

24. Mr Cambridge argues that Ms Balmer of counsel was:

"Relying on information and material on screens without actually physically moving to instruct a mouse or keyboard to move material on screen." and;

"…thus people that were directing Barrister Kate Balmer of Deveraux Chambers, that could be drawn up and directed into the hearing through Barrister Kate Balmer of Deveraux Chambers to provide unfair advantage."

25. I first note that it is common for counsel to take instructions from their professional client in the course of a hearing and that, during the pandemic, such instructions will often be provided electronically. Such conduct would not of itself be unfair.

26. I cannot comment on what material was on Ms Balmer's screen(s); that was not visible to me. I can recall that Ms Balmer, with the assistance of Ms Blekkenhorst of the Respondent and Mr Charles Jeremy of Clyde & Co, arranged for copies of Mr Cambridge's documents to be forwarded to me during the hearing.

27. Further, Ms Balmer's submissions, which were served before the commencement of the hearing, cross referenced the documents upon which she relied in her oral submissions and her principal emphasis in those submissions centred on her argument that the decision to dismiss was unrelated to protected disclosures. That submission was framed by reference to correspondence and minutes of meetings between the respondent and Mr Cambridge during his employment; all of which was within the documents provided to Mr Cambridge.

28. Mr Cambridge, does not identify the character of the "information" which he perceives was provided to counsel, nor does he identify how such information might have put him at a disadvantage.

29. I cannot detect any basis for concluding that the respondent's conduct was unfair or prejudicial to Mr Cambridge. I find that this ground of complaint has no reasonable prospect of leading to the revocation or variation of the judgement.

Ground Three: The Claimant was effectively in an environment where his compliant bundle had been discounted and disregarded and the Respondent's non-compliant Information utilised as a basis for the Hearing.

30. Mr Cambridge's reference to "non-compliant" refers to the date on which documents were exchanged electronically between the parties.

31. On the 16th March, at 22.18, Clyde & Co sent a link to Mr Cambridge to enable him to down load the respondent's bundle. Early the next morning Mr Cambridge notified Clyde & Co that; "I do not click links embedded in emails…".

32. The content of the respondent's bundle was then sent to Mr Cambridge in four separate emails, the last of which was sent at 11.50 on the 17th. Whilst I have not seen the notice of the hearing it is common ground that it contained a direction for exchange of documents three days before the hearing. The respondent's first email complied with the letter, if not the spirit, of that direction.

33. The content of the respondent's bundle reflected the claimant's relatively short employment history with the respondent; contract of employment, emails to and from the claimant, performance reviews, the claimant's written complaints and minutes of meetings and grievance/ performance review outcomes as well as the correspondence and minutes of meetings leading to the claimant's dismissal and appeal against his dismissal.

34. As noted above, the claimant's bundle, although served on the tribunal in good time had not reached me, and I was unaware of it until the claimant first made reference to documents within it. I received the bundle, after an adjournment, at around 12.00 and had it before me for the balance of the hearing which concluded around 13.50.

35. I also canvassed with the parties whether the hearing should be adjourned. Neither party wished to adopt that path.

36. Further, I read the entirety of the claimant's bundle and his file of exhibited documents before commencing my deliberations.

37. A large portion of his documents focused on the issue of establishing his protected public interest disclosures; a point which, for the purposes of the interim relief hearing, the respondent did not dispute.

38. To the extent that Mr Cambridge asserts his documentary evidence was discounted and disregarded, that was not the case. As soon as I became aware of its existence it was given regard and was thereafter taken into account before I made my decision.

39. It is correct that I did not accede to Mr Cambridge's request to exclude the respondent's bundle. The degree of "non-compliance" was modest, the documents were ones of which the claimant was largely aware during his employment or appeal against dismissal and they were relevant to the issues which I had to determine.

40. After the parties had declined the option of an adjournment, I considered rejection of relevant information (which was known to the claimant and with which he had, if he had chosen to download the documents, two full days to consider) would have been contrary to the overriding objective.

41. I find that this ground of complaint has no reasonable prospect of leading to the revocation or variation of the judgement.

Ground Four – Unfair Dismissal

42. Mr Cambridge first complains of the judgment's reference to the respondent's argument that the did not have a "pretty good chance of establishing that the public interest was part of his motivation". He goes no to cite three of the documents he exhibited.

43. Paragraph 48 of the judgment, records the respondent's concession, for the purposes of the interim relief hearing, that it did not contest this point. Thus, the prospects of Mr Cambridge succeeding in his application for interim relief were not inhibited by my discussion of the merits; the decision was based on the respondent's temporary concession.

44. Mr Cambridge's second argument, notes that the respondent had the contractual right to terminate his employment on one week's written notice. He asserts that its failure to do so undermines the respondent's assertion that it had genuine concerns about his performance and conduct. He submitted that such conduct was indicative of a continuous manipulation of the respondent's HR processes; trying to disguise the real reason for his dismissal (the protected public interest disclosures) by delaying the dismissal to point where, on a superficial inspection, the respondent had shown no animus in response to the disclosures and also had time to "manufacture a sound argument for dismissal" with which to cloak its real intent.

45. This is not a new argument and it is clearly arguable, but it is was met by a forceful counter argument from Ms Balmer [written submissions paragraphs 29-33] which she cross referenced to contemporaneous documentary evidence [paragraphs 21-27] from a number of potential witnesses for the respondent.

46. Her arguments included the fact that the respondent had not terminated Mr Cambridge's employment after problems with his behaviour had become evident by June and remained present in July 2020; before Mr Cambridge's first pleaded protected act of the 31st July. Ms Balmer further argued that the respondent appeared to have taken active steps to help the claimant after he made the disclosures and, that the principal incidents of misconduct, in particular those which were not disputed by Mr Cambridge, had occurred in late 2020 and January 2021.

47. The apparent available evidence and the cogency of the respondent's argument led to, and still leads me, to the conclusion that Mr Cambridge may have an arguable case but it is not sufficiently strong to fulfil the statutory test of section 128 of the Employment Rights Act 1996.

48. I find that this ground of complaint has no reasonable prospect of leading to the revocation or variation of the judgement.

49. For the above reasons I do not consider that this application for reconsideration has any reasonable prospect of success.

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Employment Judge R F Powell

Dated: 7th June 2021