EMPLOYMENT TRIBUNALS

Claimant: Mr David McKenzie

Respondent: Capital Staffing Services Limited

Tribunal: Employment Judge Rahman
London South Employment Tribunal

JUDGMENT ON RECONSIDERATION

The judgment of the Tribunal is that the application for reconsideration of the orders made on 17 March 2021 is refused.

REASONS

1. This is an application by the Claimant for reconsideration of the Judgment (including written reasons) sent to the parties on 17 March 2021. The application was made by email on 30 March 2021.

2. The Claimant seeks reconsideration of the Tribunal's decision on the basis that a review of the Judgment is necessary in the interests of justice.

3. The history of the case is this.

4. The final hearing took place on 1 and 2 March 2021. Judgment was reserved and written reasons then sent out to the parties. The Tribunal rejected the Claimant's claim for unfair dismissal. For a full history of the case recourse must be had to the Tribunal's earlier judgment and reasons.

5. The tribunal's powers concerning reconsideration of judgments are contained in rules 70 to 73 of the Employment Tribunals Rules of Procedure 2013. A judgment may be reconsidered where "*it is necessary in the interests of justice to do so*." Applications

are subject to a preliminary consideration. They are to be refused if the judge considers there is no reasonable prospect of the decision being varied or revoked. If not refused, the application may be considered at a hearing or, if the judge considers it in the interests of justice, without a hearing. In that event the parties must have a reasonable opportunity to make further representations. Upon reconsideration the decision may be confirmed, varied or revoked and, if revoked, may be taken again.

6. Under rule 71 an application for reconsideration must be made within 14 days the date on which the judgment (or written reasons, if later) was sent to the parties. I accept that this application was clearly made in time.

7. The approach to be taken to applications for reconsideration was set out in the case of *Liddington v 2Gether NHS Foundation Trust* UKEAT/0002/16/DA in the judgment of Simler P.

8. The tribunal is required to:
   (a) identify the Rules relating to reconsideration and in particular to the provision in the Rules enabling a Judge who considers that there is no reasonable prospect of the original decision being varied or revoked refusing the application without a hearing at a preliminary stage;
   (b) address each ground in turn and consider whether is anything in each of the particular grounds relied on that might lead ET to vary or revoke the decision; and
   (c) give reasons for concluding that there is nothing in the grounds advanced by the Claimant that could lead him to vary or revoke his decision.

9. In paragraphs 34 and 35 of the judgment Simler P included the following: "*A request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered. Tribunals have a wide discretion whether or not to order reconsideration. Where … a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application*."

10. Seven grounds are advanced by the Claimant in support of his application for reconsideration ('the Application'). I will address each ground in turn and in particular consider whether there is anything in each of the particular grounds relied on that might lead this Tribunal to vary or revoke the original decision.

11. Ground 1 asserts that the conclusion that payments made to the Claimant by Mr Rivera were not for commission, is perverse. Para 4.1 in the Claimant's Application is clearly correct – the letter of 1 October 2017 did contain the entitlement to commission – however the Tribunal heard extensive evidence as to whether this meant the higher rate of commission applying to packages before 1 October 2017 or after. The Tribunal is entitled to form a view on the documentary evidence and to attribute to it, the natural

and ordinary meaning of the letter. Moreover it is noted earlier (paragraph 43(i)) that this was in fact an assertion raised by the Claimant, for the first time at the hearing, it being absent from his written evidence. The Tribunal formed a view on the evidence and arguments it heard and the conclusions are set out in the original reasons. The matters set out at 4.2 and 4.3 in the Application repeats arguments made at the Tribunal hearing, which were heard and considered. The Tribunal was entitled to form a view that a significant change – that the higher rate applied to earlier packages – should have been made clear in the October letter. The fact that the Judgment does not identify that the only evidence came from the Claimant, does not make the reasoning perverse. Other and sufficient reasons are provided for this finding,

12. Ground 2 argues that the Tribunal failed to weigh the Claimant's evidence with the evidence provided by Mr Lee. Ground 2 further refers specifically to Mr Lee's evidence that the Claimant was paid deliberately by Mr Rivera and that this bound the Respondent. The issue before the Tribunal was whether the Claimant was unfairly dismissed and the Claimant sought to argue the Respondent failed to pay him commission he was contractually entitled to. The Tribunal has found as a fact that the Claimant was not contractually entitled to the higher rate of commission on older packages as he sought to argue. The argument in para 5.3 of Ground 2 was raised at the Tribunal hearing and is referred to in paragraph 49 onwards. It was specifically considered and referred to and the Tribunal's conclusion was that the Claimant was in fact paid a sum greatly in excess to which he was contractually owed (paragraph 56 of the Judgment). It is implicit in the Judgment that the actions of Mr Rivera did not bind the Respondent.

13. Ground 3 is critical of the significant weight given to the fact there is no breakdown of the sums claimed. This is the claim of the Claimant – he must set out the basis of his claim. The appropriate weight was given to the Claimant's failure to particularise his claim. The fact that Mr Rivera was not called as a witness is immaterial to this issue. The fact it was not put to the Claimant in cross-examination does not relieve the burden of proof from the Claimant to establish his case to the requisite standard. He seeks to recover the sums – he must set out the basis for this. He was also legally represented throughout.

14. Ground 4 – this is a new argument that was not raised at the hearing. The assertion that there had been a breach of trust and confidence had been argued in relation to the conduct of Mr McHugh. The Tribunal cannot address arguments belatedly at this stage that were not advanced at the hearing.

15. Ground 5 – the reference to fake payslips – as is clear from the context of paragraph 54 – is described by Mr Lee. There is a detailed narrative of the account in relation to payslips at paragraph 8 of the Claimant's Application - it is not clear what ground is advanced. A number of the general arguments set out herein were set out at the hearing and considered by the Tribunal. The fact that parts of the Claimant's evidence are absent from the Judgment does not mean it was not considered.

16. Ground 6 – this repeats the Claimant's case as set out at the Tribunal hearing. The Claimant appears to disagree with the finding made rather than set out any perversity.

In relation to paragraph 9.4 – the Tribunal is clearly entitled to make this finding on the basis of the evidence it heard. It is not clear why the Claimant asserts it is 'breathtaking' or 'cannot be right' save for repeating his original arguments. The Tribunal has not applied a test of reasonableness by making reference to the apology of Mr McHugh – it is a reference to the factual circumstances and in the context of considering whether the Claimant affirmed his contract.

17. Ground 7 – it is express in the judgment at paragraph 65 that - on the basis of all the evidence heard and read, that the conduct complained of was not likely to destroy or seriously damage the relationship of trust and confidence. The Tribunal does not articulate further that the behaviour – individually or together – amounted to repudiatory conduct. The agreed law (paragraph 13) makes clear every breach of the implied term of trust and confidence is a repudiatory breach of contract. The Claimant argues against the finding that the allegations of aggression are not particularised and are general and unspecific saying this is 'plainly wrong' but failing to explain why. The matters described at 10.3-6 of the Application were referred to at the hearing and considered by the Tribunal. They are specifically referred to in the body of the Judgment.

18. In conclusion and for the reasons set out above the Tribunal is satisfied that there is nothing in the grounds advanced by the Claimant that could lead the Tribunal to vary or revoke it's decision.

19. I therefore do not find it is necessary in the interests of justice to reconsider the original decision. I refuse the application for reconsideration as I consider there is no reasonable prospect of the decision being varied or revoked. This is for the reasons set out above.

EMPLOYMENT JUDGE RAHMAN
30 April 2021