EMPLOYMENT TRIBUNALS

Claimant: Mr A Androne-Alexandru

Respondent: First Greater Western Limited

JUDGMENT

UPON a reconsideration on the tribunal's own initiative under rule 73 of the Employment Tribunals Rules of Procedure 2013, and without a hearing, the judgment sent to the parties on 1 March 2021 has been varied as set out below.

REASONS

1. Under the Employment Tribunal Rules of Procedure 2013 an application for reconsideration may be made within 14 days of the judgment being sent to the parties. By rule 70 a tribunal may "reconsider any judgment where it is necessary in the interest of justice to do so" and upon reconsideration the decision may be confirmed, varied or revoked.

2. Under rule 73, where a tribunal proposes to reconsider a judgment on its own initiative it shall inform the parties of the reason for this and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made by a party and not refused).

3. Rule 72 provides that an Employment Judge should consider the application to reconsider, and if the judge considers there is no reasonable prospect of the decision being varied or revoked the application shall be refused. Otherwise it is to be decided, with or without a hearing, by the tribunal which heard it, unless that is not practicable. Before making such a determination the tribunal is required to send a notice to the parties setting a time limit for any response and seeking their views on whether the application can be determined without a hearing. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

4. In Banerjee v Royal Bank of Scotland [2021] ICR 359, the EAT confirmed that a tribunal is still able to act autonomously under rules 70 and 73 even where a party has made submissions to it on that issue.

5. Under the 2004 rules prescribed grounds were set out, plus a generic "interests of justice" provision, which was to be construed as being of the same type as the other grounds, which were that a decision was wrongly made as a result of an administrative error, a party did not receive notice of the hearing, the decision was made in the absence of a party, or that new evidence had become available since the hearing provided that its existence could not have been reasonably known of or foreseen at the time. In Outasight VB Ltd v Brown UKEAT/0253/14/LA the EAT confirmed that the 2013 rules did not broaden the scope of the grounds for reconsideration (formerly called a review).

6. The Court of Appeal in Ministry of Justice v Burton [2016] EWCA Civ 714 has since provided the following guidance on the approach to be taken by a tribunal when exercising its discretion under rule 70 on the ground of 'interests of justice': (1) the discretion must be exercised in a principled way; (2) there must be an emphasis on the desirability of finality, which militates against the decision being exercised too readily; (3) it is unlikely to be exercised because a particular argument was not advanced properly; and (4) it is unlikely to be exercised if to do so would involve introducing fresh evidence, unless the strict rules on admissibility are satisfied (see Outasight; and also Flint v Eastern Electricity Board [1975] ICR 395, QBD).

7. The importance of finality in litigation was also emphasised by Underhill J, as he then was, in Council of the City of Newcastle-Upon-Tyne v Marsden [2010] ICR 743, EAT:

> "The weight attached in many of the previous cases to the importance of finality in litigation…seems to me to be entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final (subject, of course to appeal)."

8. A reconsideration will not generally be appropriate if the reason for a point of importance not being dealt with at the hearing is the mistake of oversight of a party or their representative (see Ironsides Ray and Vials v Lindsay [1994] IRLR 318, EAT).

9. The test laid down in Ladd v Marshall [1954] 3 All ER 745, CA in conjunction with the overriding objective will apply where a party applies for reconsideration on the basis of new evidence. This test has the following three elements: (a) the evidence could not have been obtained with reasonable diligence for use at the original hearing; (b) it is relevant and would probably have had an important influence on the hearing; and (c) it is apparently credible. Although there may be other circumstances or mitigating factors relating to the failure to produce evidence at the original hearing which would permit fresh evidence to be adduced.

10. The claimant wrote to the tribunal on 30 March 2021 to invite us to reconsider, on our own initiative, the following highlighted parts of paragraphs 142 and 182(5) of our judgment on liability:

> *142 We find that the claimant did not have a contractual right to overtime. The claimant's offer letter which sets out the main conditions of employment provided that Sundays were additional to his contracted hours.* ***Nor we do find that the claimant had worked overtime regularly. The respondent's attendance records showed that the claimant worked four Sundays in 2016, 11 in 2017 and only one Sunday between January and 20 April 2018. We were not taken to any evidence of any overtime, other than Sundays, which the claimant worked at Paddington prior to his sickness absence in 2018.***
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> *182(5) In respect of 8 (h), we have found that the reason that the claimant did not work any overtime at Maidenhead Station was that this was not available at this station. This was therefore a consequence of the claimant's redeployment and was not because the claimant did a protected act.* ***We have also found on the evidence before us that the claimant did not work overtime on Sundays regularly at Paddington and it is therefore unlikely that he would have worked such overtime regularly at Maidenhead even had this been available to him when he returned to full-time hours in September 2019.***

11. Having reviewed this correspondence, I invited the respondent to make written representations and both parties were ordered to confirm their views on whether a hearing would be necessary to determine this matter, if such a determination were required.

12. I was satisfied that this reconsideration could be determined without a hearing, having reviewed: the claimant's correspondence dated 10 & 27 June 2021 confirming that he agreed to proceed without a hearing and in which further representations were made to support a reconsideration; and the respondent's correspondence dated 25 June 2021 in which it objected to a reconsideration and disputed the claimant's submission that the documentary material at pages 667-672 of the hearing bundle showed that he "was doing significant amount of overtime each month". The parties also confirmed that they were content for the tribunal to proceed without a hearing at a case management preliminary hearing held before me on 28 June 2021.

13. It was therefore necessary to give the parties a further and final opportunity to make any written representations before a determination was made. In doing so, I set out my preliminary view that justice would be served by varying the relevant parts of the judgment as follows (as highlighted):

> *142 We find that the claimant did not have a contractual right to overtime. The claimant's offer letter which sets out the main conditions of employment provided that Sundays were additional to*

*his contracted hours. Nor we do find that the claimant had worked overtime **on Sundays** regularly. The respondent's attendance records showed that the claimant worked four Sundays in 2016, 11 in 2017 and only one Sunday between January and 20 April 2018. We were not taken to any evidence of any overtime, other than Sundays, which the claimant worked at Paddington prior to his sickness absence in 2018.*

*182(5) In respect of 8 (h), we have found that the reason that the claimant did not work any overtime at Maidenhead Station was that this was not available at this station. This was therefore a consequence of the claimant's redeployment and was not because the claimant did a protected act. We have also found on the evidence before us that the claimant did not work overtime **on Sundays** regularly at Paddington and it is therefore unlikely that he would have worked **such** overtime regularly at Maidenhead even had this been available to him when he returned to full-time hours in September 2019.*

14. I explained that this was because of the following reasons:

(1) Both parties agreed that the tribunal was not taken to any documentary evidence at the liability hearing which showed that the claimant worked overtime in addition to Sundays. Nor did the claimant say that this evidence on its own showed that he regularly worked a significant amount of overtime.

(2) Both parties also agreed that there was material in the hearing bundle at pages 667-672 which we were not taken to at the liability hearing and which showed that the claimant worked on Sundays and/or on rest days and/or other overtime in each month between November 2017 – April 2018 although there was a dispute about whether this showed that the claimant worked a "significant amount" of monthly overtime.

(3) These findings (at paras 142 & 182(5) of our judgment) related to the relevant issue on liability i.e. issue 8(h) and would not, as varied, preclude the claimant from relying on any relevant material at the remedy hearing which the tribunal was not taken to at the liability hearing.

15. The claimant sent in further representations on 26 July 2021. They did not add anything to the previous submissions made save for paragraph (i) in which the claimant contends that overtime was available and undertaken at Maidenhead during his redeployment there whereas he was restricted to basic hours and duties. We have already made findings on this, on the basis of the evidence we heard, in a part of our judgment (also at paragraph 182(5)) which the claimant did not invite us to reconsider on 30 March 2021. As such, and mindful of the importance of finality in litigation, this submission does not provide any basis for reconsideration nor would it be in the interests of justice for this part of the claim to be relitigated.

16. Having conferred as a panel, we find unanimously that justice is served by varying the judgment to make the minor and clarificatory changes set out above for these reasons.

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Employment Judge Khan

03.09.2021

JUDGMENT SENT TO THE PARTIES ON

.03/09/2021..

FOR THE TRIBUNAL OFFICE