EMPLOYMENT TRIBUNALS

Claimant: Mrs S Pagan

Respondent: Thicket Priory Limited

JUDGMENT

UPON APPLICATION made by letter dated 28 September 2021 to reconsider the judgment dated 2 September 2021 under rule 71 of the Employment Tribunals Rules of Procedure 2013, there is no reasonable prospect of the original decision being varied or revoked. The application for reconsideration of the judgment dated 2 September 2021 is refused.

REASONS

1. On 28 September 2021, the claimant's father, Mr John Guildford, who had represented her at a public preliminary hearing on 31 August 2021, wrote to the Tribunal seeking a reconsideration of my reserved judgment dated 2 September 2021 and issued to the parties on 21 September 2021. The request was made to "reconsider, explain further or give further directions in the interests of justice" in relation to the following aspects of my judgment:

    a. "As at the date of termination of employment, the claimant was contractually entitled to 4 weeks' notice of termination of employment".

    b. "On 20 April 2020, the respondent gave the claimant sufficient notice requiring her to take holiday whilst she was on furlough".

2. In summary, in support of the application the claimant says the following:

    <u>TERMINATION</u>

    - *Use wrong contract/email to demonstrate contract was negotiated.*
    - *Negotiated contract should have been considered.*
    - *Unworkable.*
    - *Information provided not used correctly. (Knowledge/history form [sic] previous contracts)*

HOLIDAYS

- *Referred to wrong contracts.*
- *Criminal law for lockdown not taken into account of being a criminal offence and not been reasonably practical[sic] to take holidays during lockdown.*
- *Notice/delivery clause 16.1 and 16.2 not carried out as per the contract of employment.*
- *Not having the contractual right to force the claimant to take holidays at certain times.*
- *Furlough agreement unilaterally applied.*

3. There is an underlying public policy principle in all proceedings of a judicial nature that there should be finality in litigation. Reconsiderations are thus best seen as limited exceptions to the general rule that employment tribunal decisions should not be reopened and relitigated. It is not a method by which a disappointed party to proceedings can get a second bite of the cherry. In **Stevenson v Golden Wonder Ltd 1977 IRLR 474, EAT**, Lord McDonald said of the old review provisions that they were 'not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before'. Courts and tribunals will no doubt view the reconsideration provisions in the same manner.

4. Under rule 70, a judgment will only be reconsidered where it is 'necessary in the interests of justice to do so'. This does not mean that in every case where a litigant is unsuccessful, he or she is automatically entitled to a reconsideration: virtually every unsuccessful litigant think that the interests of justice require the decided outcome to be reconsidered. Instead, a tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases 'fairly and justly' — rule 2. This includes:

    a. ensuring that the parties are on an equal footing;

    b. dealing with cases in ways which are proportionate to the complexity and importance of the issues;

    c. avoiding unnecessary formality and seeking flexibility in the proceedings;

    d. avoiding delay, so far as compatible with proper consideration of the issues; and

    e. saving expense.

5. In in **Outasight VB Ltd v Brown 2015 ICR D11, EAT**, Her Honour Judge Eady QC accepted that the wording 'necessary in the interests of justice' in rule 70 allows employment tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially, 'which means 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'.

6. The reconsideration procedure can be used to correct errors that occur in the course of proceedings, regardless of whether the error was a major or a minor one. In **Trimble v Supertravel Ltd 1982 ICR 440, EAT**, an employment tribunal found that the claimant had been unfairly dismissed and, without hearing her solicitor on the issue of compensation, announced that she would get no compensatory award because of failure to mitigate her loss. The EAT made the following observations:

    a. it is irrelevant whether a tribunal's alleged error is major or minor;

    b. what is relevant is whether or not a decision has been reached after a procedural mishap;

    c. since, in the instant case, the tribunal had reached its decision on the point in issue without hearing representations, it would have been appropriate for it to hear argument and to grant the review if satisfied that it had gone wrong;

    d. if a matter has been ventilated and properly argued, then any error of law falls to be corrected on appeal and not by review.

7. It is clear that the interests of justice as a ground for reconsideration relate to the interests of justice to both sides. In **Redding v EMI Leisure Ltd EAT 262/81** the claimant appealed against an employment tribunal's rejection of her application for a review of its judgment. She argued that it was in the interests of justice to do so because she had not understood the case against her and had failed to do herself justice when presenting her claim. The EAT observed that: 'When you boil down what is said on [the claimant's] behalf, it really comes down to this: that she did not do herself justice at the hearing, so justice requires that there should be a second hearing so that she may. Now, justice means justice to both parties. It is not said, and, as we see it, cannot be said that any conduct of the case by the employers here caused [the claimant] not to do herself justice. It was, we are afraid, her own inexperience in the situation.' Accordingly, the claimant's appeal failed.

8. Turning to the application in hand, I remind the claimant that at the beginning of the public preliminary hearing, it was agreed that the Tribunal would determine the following issue relating to termination of employment:

    What was the effective date of notice of termination of the claimant's employment? This was relevant insofar as to determine whether the respondent had failed to pay the claimant for three days as part of her notice period. The claimant relies upon clause 16.2 of her contract of employment to the extent that any notice given by letter will be treated as being given at the time at which the letter would be delivered in the ordinary course of second-class post. Her contract was terminated by letter and consequently, she argued that notice ran from 2 March 2020. The respondent maintains 26 February 2021 is the date of giving notice given that Mr Guildford had acknowledged receipt of the letter which was also sent by email terminating the claimant's employment. There is no dispute

between the parties that Mr Guildford saw the letter terminating the claimant's employment 26 February 2021.

9. In closing submissions, Mr Guildford argued that on completing one year of service, the claimant had acquired the right to 4 weeks' notice. Thereafter, there was no requirement to complete a further year of service to increase the notice entitlement to 5 weeks. In other words, the right to the additional week of notice "clicked in" after working for one year.

10. The claimant now submits that at the hearing Mr Guildford referred to an email [128] which was not referring to the agreement of the contract terms [118-123] but was in response to a different contract [241-245] containing a termination provision in clause 14.2 which provided that after successfully completing a one-month probationary period, the claimant's employment could be ended by her giving three months written notice. The provision also states that the respondent would give the claimant three months' notice after one month. During the probationary period, the notice period would be one-month probation. It is suggested by the claimant that this is the contractual provision that applied to her employment notwithstanding that the document produced in the hearing bundle is unsigned. This does not make sense and is not consistent with what was agreed at the hearing in terms of the issues. It was always the claimant's position that she was entitled to 5 weeks' notice of termination of employment on completing one year of service. In her application for reconsideration, she is saying something different and is now suggesting that she was entitled to 3 months' notice of termination of employment. She is proposing something completely different to that which formed the subject matter of the hearing. Essentially, she is suggesting that the matter should be relitigated from the outset. It would not be in the interests of justice to do this.

11. Alternatively, on the question of termination, the claimant is essentially disagreeing with the Tribunal's interpretation of the contract. In other words, it is suggested that the Tribunal has made an error in law. That is a matter that cannot be dealt with on reconsideration. On my recollection, It is also not the case that Miss Nowell conceded that the claimant was entitled to 5 weeks' notice. There was discussion with about possible interpretations but ultimately, Miss Nowell submitted that the claimant was entitled only to 4 weeks' notice as per her contract of employment. Alternatively, if she made a concession, she withdrew it and closing submissions were made by both parties on the correct interpretation of the contract (i.e. whether the claimant was entitled to either 4- or 5-weeks' notice).

12. Turning to the application for reconsideration relating to the period of notice that the claimant was entitled to take holiday while she was on furlough, it is also suggested that the wrong contract was considered.

13. I remind the claimant that at the beginning of the preliminary hearing, the Tribunal agreed the following issue to be determined relating to notification for taking holiday:

> *In relation to the claimant's claim for accrued holiday pay in the time that she was on furlough, did the respondent give the claimant sufficient notice requiring her to take holiday? The respondent's position is that sufficient notice was given in terms of emails sent to the claimant [132 & 135]. The claimant says she was not given sufficient notice.*

14. The issue, therefore, was not how many days holiday the claimant was entitled to take in any holiday year and the impact that the furlough had on that entitlement. The issue was what notice the respondent was required to give the claimant to require her to take holiday which was a matter of statute.

15. The application for reconsideration is essentially misplaced because it is in reality, an assertion that the Tribunal has made an error in law in its interpretation of the claimant's holiday entitlement, whether the respondent had the right to require the claimant to take holiday and what notice it should give her. The assertion that the Tribunal made an error in law is not competent in terms of a request for a reconsideration.

Employment Judge A.M.S. Green
Date: 5 October 2021
JUDGMENT SENT TO THE PARTIES ON
Date: 5 October 2021