EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103667/2019

Held via written submissions on 18 June 2020

Employment Judge R Gall

Mr R Scott	**Claimant** **In Person**
Mr S Rose	**Respondent** **Represented by:** **Mr I Maclean - Employment Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal upon reconsideration of its Judgment dated 16 December 2019 and issued to parties on 18 December 2019 is that the original decision is confirmed.

REASONS

1. The claimant in this case has represented himself throughout. The respondents have been represented by Mr Maclean throughout.

2. A Preliminary Hearing ("PH") was held in this case on 16 December 2019. Mr Scott and Mr Maclean both appeared. Mr Scott gave evidence. He referred in evidence to documents which he brought to the PH. Copies were available for the Tribunal and the respondents.

3. At the outset of the PH, before evidence commenced, I explained to Mr Scott that, consistent with the overriding objective, I would ask him questions when he was giving evidence. Those questions would be about which seemed to me to be relevant matters in relation to the point at issue. I emphasised that he remained responsible for ensuring that he gave evidence about any

matters he considered relevant to the matter which had to be decided at the PH. I was satisfied he understood this.

4. The point at issue was the working relationship between the claimant and the respondent. The respondents maintained that the claimant was self-employed. The claimant maintained that he was an employee or a worker. He maintained that he was employed either under a contract of employment or under a contract personally to do work.

5. Having heard the evidence and considered the documents spoken to in that evidence at the hearing, I determined that the claimant was not an employee, was not a worker and was not engaged under a contract of employment or a contract personally to do work. His claims therefore in terms of the Employment Rights Act 1996 and the Equality Act 2010 could proceed no further.

6. In reaching that decision I had regard to documents produced to me by the claimant both during the initial element of hearing and also when I returned to deliver the oral Judgment in this case. Due to production of these documents by the claimant after the evidence appeared to have been concluded, Judgment was not issued at the time initially planned. Instead, further evidence was taken from the claimant in relation to the documents he had produced after what had appeared to have been the conclusion of evidence.

7. In coming to the Judgment in the case in December 2019, I considered the evidence and documentation, together with the additional evidence and documentation. Prior to determination of the matters at issue, I took an additional few minutes to consider this further evidence and documentation. The oral Judgment was then delivered, its terms as being reflected in the Judgment of 16 December, sent to parties on 18 December 2020.

Principles to be applied in a reconsideration application

8. In terms of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the Rules") procedure is set out for reconsideration of a Judgment.

9. If practicable, the reconsideration application is to be undertaken by the Employment Judge who made the original decision. The Employment Judge is to consider the application. If he or she is of the view that there is no reasonable prospect of the original decision being varied or revoked, the application is to be refused. Otherwise, a notice is sent to parties giving time for any response to the application by the other party to the case and seeking the views of parties on whether the application can be determined without a hearing.

10. Rule 70 details the test to be applied by the Tribunal. It provides that a Tribunal may reconsider any judgment where it is necessary in the interests of justice to do so.

11. Consideration of the interests of justice involves weighing up all the relevant factors for and against reconsideration, including the balance of respective prejudice to each party if the application was to be granted or refused. The Tribunal therefore has a broad discretion in considering an application such as this.

12. Reconsideration is not a chance for a party to have a "*second bite at the cherry*". As the case of *Fforde v Black* UKEAT/68/80 highlights, "*every unsuccessful litigant thinks that the interests of justice require review*."

13. Reconsideration is not therefore a chance to run the same arguments as were originally run. Finality of litigation is a principle that requires to be kept in mind by the Tribunal in making a decision upon a reconsideration application. It is in the interests of both parties that cases are litigated to a conclusion within a reasonable time and are not opened up and reargued simply because one party is unhappy with the decision initially reached. For reconsideration to be

appropriately undertaken the interests of justice must require that. The case of *Outasight VB Ltd v Brown* 2015 ICR D11 confirms this.

14. It may be said by a party seeking reconsideration that there is new evidence. If that is so, it is important to know whether that evidence was available to the party who now seeks to present it as a basis for reconsideration at the time of the hearing. In some instances, a party may be able to explain why he/she has only just become aware of particular information. He/she may be able to explain why that documentation was not available at time of the hearing. That explanation may make it appropriate to consider any such evidence or documentation now said to be relevant and of significance to the point involved.

15. In other instances, a party may be seeking to argue that whilst information or documentation was available to them at time of the original hearing, it was not present on the day due to an oversight or some miscalculation in the preparation. A party may, for example, say that they did not appreciate the importance of a particular document. In that scenario, the Tribunal requires to weigh up the submission made as to why relevant evidence which existed at the time of the hearing was not presented at the hearing. It has then to consider any information on that point in light of the desirability of finality of litigation and the hesitancy or indeed inappropriateness, having regard to the interests of justice, to allow a party a "*second bite at the cherry*". The Tribunal should keep in mind that the hearing and the issues to be determined in it were known to the party who now may maintain that further relevant documentation exists and who asks that the original decision be reconsidered in light of that.

16. If evidence was available but was not used then exceptional circumstances require to exist before that evidence can lead to reconsideration. Relevant cases are *Flint v Eastern Electricity Board* 1975 ICR 395 and *General Council of British Shipping v Deria and others* 1985 ICR 198. If documents which were available at time of the original hearing are produced to the Tribunal at the stage of reconsideration and reconsideration is sought on the basis of those

documents, it is unusual therefore for the Tribunal to reconsider the original decision.

This reconsideration

17. In this case I decided, on receipt of the application, that it was not the case that there was no reasonable prospect of the original decision being varied or revoked. The respondents were therefore given the opportunity to reply to the application for reconsideration. They did so and urged that the application for reconsideration be refused.

18. The hearing in respect of the reconsideration application was set down for 23 April 2020. Unfortunately, it did not prove possible to hold that hearing on that day. This was as the coronavirus pandemic had occurred. That meant that an in-person hearing was not possible. In those circumstances a case management PH was held on the day intended for the hearing.

19. As a result of that PH the claimant was given a period in which to set out any points which he wished to make in support of his reconsideration application. The respondents were given time to answer that. The April PH note confirms that the claimant was made aware that in some instances new evidence could be considered at time of the reconsideration application. The Note confirms that in other instances the view taken by the Tribunal is that it was incumbent upon the party in the case to have all relevant evidence available for the hearing. It was emphasised tin the Note that the Tribunal should be made aware of what the documents now to be produced were, what relevance they might have to the point which had been determined at the earlier PH in December 2019, why they were not produced at that PH and when it became apparent to the claimant that they were in fact of significance.

20. The claimant submitted an email of 8 May setting out his position in response to the points raised at the April PH and reflected in the Note. He detailed the basis on which he sought reconsideration. The respondents replied on 2 June.

21. Through the clarification of the reconsideration application given by the claimant, it became clear that the documentation which he referred to as

supporting the need for reconsideration was in fact documentation which was available at time of the PH on 16 December 2019. He said in his email of 8 May "*I had possession of new material I didn't have the materials on me at the time of the hearing, I didn't know the significant* (sic*) of having the material and feel that has relevance and would like this material to be considered*." He also said that he had a photo of a till receipt. That document had been accepted the December PH by the Tribunal as a production. The claimant said however that he did not realise the significance of this document until the day of the PH. He went on to say that he was not asked specific questions about the document which he could have answered and which would have explained some elements in the till receipt.

22. The claimant highlighted that he was not a lawyer and did not know the importance of court procedures or technicalities. He referred to his lack of experience when saying that he did not appreciate the significance of the material which he had and which he now wished to place before the Tribunal.

23. At a PH held on 18 June, both the claimant and Mr Maclean for the respondents agreed that they had set out their respective positions in writing and that there was nothing to be gained by holding a formal hearing to speak to the reconsideration application and opposition to it. They were both content that the application be decided on the papers they each had submitted.

Earlier PHs

24. It is of relevance in considering this application that the claimant was aware of the issue to be determined at the December PH and of the type of matters which would be considered by the Tribunal in determining whether his status was that of working as an employee, being a worker or having entered into a contract for personal service with the respondent.

25. There had been a case management PH on 3 July 2019 at which a PH was set down to determine the identity of the respondent and also the status of the claimant. At that PH in July, the claimant had said that he had entered into an Independent Contractor Licence Agreement. It is noted that the claimant said that he was an employee.

26. At a PH on 8 August 2019 there was an issue regarding attendance of the second respondent in the case at that point. The PH was adjourned and ultimately was set down for the PH in December which proceeded.

Decision upon reconsideration

27. I had a degree of sympathy for the claimant. I understand that preparing and presenting a case as a party litigant is not easy. That said, the claimant was aware of the issue. He knew the point to be determined, its crucial importance to his case and that documentation was of significance. Documentation had been prepared by both parties for use at the PH in December 2019. The issue at the PH did not come as a surprise to the claimant given that it had been discussed and fixed as one of the issues to be determined when the first PH took place in July 2019.

28. Evidence was given by the claimant at the PH in December 2019. He referred to documentation. After hearing evidence and submissions, I adjourned in order to consider the evidence and productions spoken to, with a view to returning to deliver an oral Judgment in the case. When I returned, as the Judgment records and as mentioned above, before I delivered the Judgment the claimant asked that I consider additional documentation. He gave me that documentation. I permitted him to give evidence in relation to it. I then considered the evidence initially led and documentation initially spoken to together with this further documentation and evidence in relation to it. I came to a view and gave the oral Judgment in the case. That Judgment was typed up and sent to parties on 18 December.

29. I have read the reconsideration application submitted by the claimant. I have considered that and have also considered the further detail given by the claimant in his email of 8 May.

30. The points which the claimant makes are in reality points which were made at time of the PH in December 2019. Insofar as the claimant refers to further documentation, the reason he gives for that documentation not being available at the PH in December 2019 is that he did not appreciate its significance at that time. The evidence is not therefore new in the sense that

its existence has only become known to the claimant since the PH. In fact, evidence about the areas to which this additional evidence relates was given at the PH. Insofar as there may be any potential element of information/evidence going beyond any evidence already led, it seems to me to be relatively minimal. I have concluded that to allow the original judgment to be "*opened up*" and varied or revoked would, in the circumstances, be a good example of a party having a "*second bite at the cherry*".

31. It is incumbent upon a party to litigation to present any relevant evidence to the Tribunal at time of the hearing. This was not a novel point which arose on the day. The claimant was not taken by surprise by the evidence or by the topic being considered by the Tribunal. Inexperience on his part and a lack of appreciation of the significance (as he sees it) of a particular document may have led to it not being before the Tribunal on the day or to an absence of evidence by him about a particular matter. That is unfortunate. It does not, without more, in my view lead to it being in the interests of justice to revoke or vary the judgment.

32. I have to balance with a degree of sympathy for the claimant, the desirability of finality of litigation. If a party is unsuccessful in litigation and feels, on reflection, that there were lines of argument open to that party, or potentially documentation available, which ought to have been in front of the Tribunal and would have been had the party thought about it or potentially had their wits about them on the day, that is not a reason for reconsideration leading to revocation or varying of the original decision. A view that things would have been done differently on the day in hindsight does not result in it being in the interests of justice to vary or revoke a Judgment on reconsideration.

33. I should add that I am not in any event persuaded that the Judgment would properly be varied or revoked even if the additional documentation or evidence had been before the Tribunal on the day. I do not see it as adding anything to the information and documentation available to me at the PH in December 2019.

Conclusion

34. I am not therefore persuaded that reconsideration leading to revocation or variation of the original decision in terms of the Judgment dated 16 December 2019 and sent to parties on 18 December 2019 is in the interests of justice. That judgment is therefore confirmed.

Employment Judge: Robert Gall
Date of Judgment: 26 June 2020
Entered in register: 02 July 2020
and copied to parties