EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4120664/2018

Held in Glasgow on 16 March 2020 (in Chambers)

Employment Judge R McPherson

Mr C Kerr	**Claimant** **Represented by** **S Wilson -** **Solicitor** **(Written Submission)**
GM Pub Ltd	**Respondents** **(Written Submission)**

RECONSIDERATION JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that;

1. On reconsideration under **Rule 70** of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the 2013 Rules), the judgment dated 14 August 2019 and sent to the parties on 21 November 2019 **is varied** on the basis of the respondent's application for reconsideration, limited to the issue of whether there was a relevant transfer in January 2017; and

2. In that limited regard, both awards in the judgment, dated 14 August 2019 and sent to the parties on 21 November 2019, **are revoked only to the extent of the quantum** of;

   (1) damages in respect of breach of contract (notice pay) which the respondent is ordered to pay to the claimant being in the sum of **Four Thousand and One Hundred and Seventy Seven Pounds and Sixty Eight Pence (£4,177.68);** and

(2) monetary award for unfair dismissal which the respondent is ordered to pay to the claimant being in the sum of **Eleven Thousand and Five Hundred and Eighty Six Pounds and Sixty Five Pence (£11,586.65**);

pending a Final Hearing on whether there was a relevant transfer to the respondent in January 2017 which matter was not fully ventilated at the Final Hearing on 13 August 2019; and

3. I have issued separate Case Management Orders in relation the appointment of the one day Final Hearing to consider whether there was a relevant transfer in January 2017 and in consequence the impact on both the quantum of breach of contract and unfair dismissal but which judgment dated 14 August 2019 and sent to the parties on 21 November 2019 is confirmed.

REASONS

1. The appointed Final Hearing of 25 June 2019 was notified by the Tribunal to the respondents at the address, provided by the respondent in its ET3 by letter dated 17 April 2019.

2. The respondents did not attend that Final Hearing. Order granted on said dated 25 June 2019 and confirming a new Final Hearing date of 13 August 2019 was issued to the parties at the respondent's registered address by the Tribunal under letter 30 June 2019. The terms of that order are referred to herein.

3. The Tribunal wrote to the respondents at their registered address on 5 July 2019 confirming the date of the Final Hearing being 13 August 2019.

4. The Tribunal sought the respondent's comments as to the claimant's written statement provided in light of Order dated 25 June 2019 by letter issued to the respondent's registered address dated 29 July 2019. The respondent provided its response under cover of letter dated 1 August 2018 received at the Tribunal on 5 August 2019.

5. The respondent was advised, by letter from the Employment Tribunal dated 6 August 2019 that the case would proceed to the Final Hearing fixed for 13 August 2019.

6. The respondent did not attend on 13 August 2019. Judgement dated 14 August 2019 was issued to the parties on 21 November 2019.

7. The respondent has sought reconsideration, by letter which was dated 22 November 2019 but which was received by the Tribunal on 6 January 2020. That letter from the respondent set out that "*we have no contract of TUPE with Iona Pubs, we have no record of Mr Kerrs employment before 2017".*

8. Parties were notified by the Employment Tribunal, by letter dated 9 January 2020 that the application for reconsideration was not refused and views were sought as to whether the application could be determined without a hearing.

9. By letter from the Tribunal dated 24 January 2020, the respondent was asked to set out its position on whether reconsideration can be considered on written submissions and requested to set out in terms why the reconsideration which bears to have been dated 22 November 2019 was not received by the Tribunal until 6 January 2020.

10. The claimant confirmed that it was content that reconsideration could be determined without a hearing having already expressed the view that the Tribunal had before it what is said to be the line of argument for the respondent and had "*required to consider that in light of evidence led by the claimant*". The respondents further express specific criticism of the respondents noting the "*past failure of the respondents to appear or be represented".*

11. On 30 January 2020, the respondent provided an e-mail response to the Tribunal setting out the terms of the respondent's position. In relation to the respondent's non-appearance at the hearing on 13 August 2019 the respondent explained that it "*did not appear for the hearing on 13th August 2019 as I was waiting to hear back from ACAS… My argument is that we do*

not have a tupe with Iona, so Colins employment does not go all the way back to 2001 but simply starts at 2017".

Relevant Law

12. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the 2013 Rules) Rule 3 provides:

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(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."

13. Rules 70, 71 and 72 of the 2013 Rules provides:

"Rule 70 Principles

A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

Rule 71 Application

Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written

communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

Rule 72 Process

(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision…"

14. The approach to be taken to applications for reconsideration had been set out in the case of **Liddington v Gether NHS Foundation Trust** UKEAT/0002/16/DA (**Liddington**) in the judgment of Simler P. The tribunal (as set out at para 34) 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";* and

b. address *"each ground in turn"* and consider *"whether is anything in each of the particular grounds relied on that might lead him to vary or revoke the decision*"; and

c. give reasons for concluding *"that there was nothing in the grounds advanced by the Claimant that could lead him to vary or revoke his decision."*

15. Further at paragraph 34 and 35 of **Liddington** Simler P set out that: "*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."*

16. Her Honour Judge Eady QC, EAT Judge, in her judgment delivered on 19 February 2018, in **Scranage v Rochdale Metropolitan Borough Council** [2018] UKEAT/0032/17 (**Scranage**), at paragraph 22, when considering the relevant legal principles, stated as follows: -

"The test for reconsideration under the ET Rules is thus straightforwardly whether such reconsideration is in the interests of justice (see Outasight VB Ltd v Brown UKEAT/0253/14 (21 November 2014, unreported). The "interests of justice" allow for a broad discretion, albeit one that 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."

17. Section 211 of the Employment Rights Act 1996 (ERA 1996) provides:

"211 Period of continuous employment.

(1) An employee's period of continuous employment for the purposes of any provision of this Act

(a) …. begins with the day on which the employee starts work, and

(b) ends with the day by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision."

18. Section 218 of ERA 1996 provides:

"Section 218 Change of employer.

(1) Subject to the provisions of this section, this Chapter relates only to employment by the one employer.

(2) If a trade or business, or an undertaking (whether or not established by or under an Act), is transferred from one person to another—

(a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and

(b) the transfer does not break the continuity of the period of employment."

19. Regulation 4 of Transfer of Undertakings Regulations 2006 (TUPE) provides:

"4. *Effect of relevant transfer on contracts of employment*

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee."

20. Regulation 8 of TUPE provides:

Insolvency:

"(1) If at the time of a relevant transfer the transferor is subject to relevant insolvency proceedings paragraphs (2) to (6) apply.

(2) In this regulation 'relevant employee' means an employee of the transferor –

(a) whose contract of employment transfers to the transferee by virtue of the operation of these Regulations; or

(b) whose employment with the transferor is terminated before the time of the relevant transfer in the circumstances described in regulation 7(1).

(3) The relevant statutory scheme specified in paragraph (4)(b) (including that sub-paragraph as applied by paragraph 5 of Schedule 1) shall apply in the case of a relevant employee irrespective of the fact that the qualifying requirement that the employee's employment has been terminated is not met and for those purposes the date of the transfer shall be treated as the date of the termination and the transferor shall be treated as the employer.

(4) In this regulation the 'relevant statutory schemes' are –

(a) Chapter VI of Part XI of the 1996 Act;

(b) Part XII of the 1996 Act.

(5) Regulation 4 shall not operate to transfer liability for the sums payable to the relevant employee under the relevant statutory schemes.

(6) In this regulation 'relevant insolvency proceedings' means insolvency proceedings which have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner.

(7) Regulations 4 and 7 do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner."

21. I have reminded myself that the EAT in **Services for Education (SE4 Ltd) v White and another** [2015] All ER (D) 123 (Aug) (**SE4 Ltd**) held that an employee's continuity of employment was preserved by section 212(2) of the ERA 1996, despite a transfer of the undertaking in which the employee was employed, between a transferor employer and the transferee.

22. I have further reminded myself that the EAT in **Ward Brothers (Malton) Ltd and others v Middleton and others, and Slater v the Secretary of State** UKEAT/0249/13/RN (**Ward)** considering present wording of TUPE Reg 8, followed the approach set out in **Slater v Secretary of State for Industry** [2007] IRLR 928 (**Slater**) and **Key2Law v De Antiquis** [2012] IRLR 212 (**Key2law**). **Slater** and **Key2Law** are to the effect that an appointment (formal or informal) was necessary before there could be said to be supervision by an insolvency practitioner. The EAT in **Ward** noted with approval the position set out by set out by Elias J in Slater at para 30-32

"30. During the course of the hearing the court raised the question whether at the time of the sale, the proceedings were under the supervision of the insolvency practitioner, a requirement for both Regulations 8(6) and 8(7) to

apply. It appears to have been assumed before the Employment Tribunal that Mr Ramsbottom of Deloittes was, from the moment when he was initially asked to assist the company, an insolvency practitioner within the meaning of the Regulations

31. I heard written submissions on that point and both parties accepted that this assumption was wrong. The definition of insolvency practitioner, set out above, makes it plain that it was not until he was appointed liquidator that he could be so described. He was of course qualified to act as an insolvency practitioner, but he was not acting in that capacity with respect to the transferor.

32. Accordingly, the transferee accepts that on this ground alone, his principal contention must fail. Assuming that the transfer was effected on the 27 July, as the tribunal found, this was on any view before the proceedings were under the supervision of the insolvency practitioner."

23. In summary **Ward** sets out out that a transfer must *be "under the supervision of an insolvency practitioner*" for Regulation 8(7) to apply.

24. Rule 45 of the 2013 Rules provides in relation to Timetabling that

"A Tribunal may impose limits on the time that a party may take in presenting evidence, questioning witnesses or making submissions, and may prevent the party from proceeding beyond any time so allotted.".

Discussion and Decision

25. Under rule **71** of the 2013 Rules 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.

26. The respondent has not provided an explanation why its letter dated 22 November 2019 was not received by the Tribunal until 6 January 2020. However, I consider that it is the interests of justice to; extend the time limit in terms of **Rule 5** of the 2013 Rules and in all the circumstance to permit reconsideration of the original judgment dated 14 August 2019 issued to the

parties 21 November 2019, in terms of **Rule 70** of the 2013 Rules, without appointing a hearing.

27. As set out above the Tribunal's powers concerning reconsideration of judgments are contained in rules **70** to **72** of the 2013 Rules. 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.

28. Having considered the respondents application for reconsideration, and having sought parties views it is considered in the interests of justice that the application be considered without a hearing. Parties have been afforded a reasonable opportunity to make further written representations.

29. The respondent set out in their letter dated 22 November 2019 "*we have no contract of TUPE with Iona Pubs, we have no record of Mr Kerrs employment before 2017"*, and further in their e-mailed letter of 30 January 2020, "*My argument is that we do not have a tupe with Iona, so Colins employment does not go all the way back to 2001 but simply starts at 2017".*

30. The respondent in their e-mailed letter of 30 January 2020, in providing its explanation for nonattendance, does not suggest that it was unaware of the hearing, rather the respondent *"did not appear for the hearing on 13th August 2019 as I was waiting to hear back from ACAS…".*

31. Section 218(2) of ERA 1996, provides that if an undertaking is transferred from one person to another, the period of employment of an employee in the undertaking at the time of the transfer counts as a period of employment with the transferee and the transfer does not break the continuity of the employment of the employee.

32. The judgment of the Tribunal was issued reflecting the unchallenged evidence adduced at the Final Hearing. The Tribunal at paragraph 18 of the judgment sets out in a finding in fact that the claimant's continuous employment with the respondent commenced on 1 September 2001 and that the claimant was engaged at the licenced public bar operating since that date without a break in his continuous employment. It does not however set out that there was a relevant transfer in 2017. It cannot be said that the matter of whether there was a relevant transfer in 2017 has been fully ventilated.

33. The awards in respect of breach of contract and monetary award for unfair dismissal, as set out in the judgment dated 14 August 2019 and sent to the parties including calculations which reflect date of commencement of employment of the claimant. In particular the calculations of Notice Pay at s211 of ERA 1996 and Basic Award in terms of s119 of ERA reflect the date of commencement of employment of the claimant.

34. The respondent elected not to attend at the Final Hearing. It was however open to it to do so, in order to argue that there was no relevant transfer, adduce evidence on its behalf and/or otherwise challenge the claimant's position.

35. The claimant argues, broadly, that the respondent's reconsideration is seeking to re re-litigate matters which were already before the Tribunal.

36. Having considered the respective representations, including the terms of the respondent's emailed letter of 30 January 2020 and its letter dated 22 November 2019 together with the statutory provisions and case law identified above, I am however satisfied that it is in the interests of justice that reconsideration be granted to the limited extent that parties may adduce such evidence as they consider appropriate to address the issue of whether their was a relevant transfer in January 2017. In particular I am satisfied that the interests of justice include the assessment of both notice pay and basic award, each of which assessment directly impact on the monetary awards.

37. For all those reasons I grant the respondent's application for reconsideration, limited to the issue of whether there was a relevant transfer in January 2017.

Employment Judge: **R McPherson**
Date of Judgment: **16 March 2020**
Entered in register: **19 March 2020**
and copied to parties

I confirm that this is my judgment in the case of ***Mr C Kerr v GM Pub Limited 4120664/2018*** *and that I have signed the order by electronic signature.*