



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms P Stewart

**Respondent:** Nisbits PLC

## DECISION ON AN APPLICATION FOR RECONSIDERATION

**I reject the claimant's application for reconsideration under Rule 70(1) of the Tribunal's Rules of Procedure 2013: there is no reasonable prospect of the tribunal's original judgment being varied or revoked.**

### Introduction

1. On the 22<sup>nd</sup> and 23<sup>rd</sup> November 2021 I conducted a two-day Preliminary Hearing. I concluded that Ms Stewart did not have sufficient continuity of employment to maintain two of her claims.
2. Ms Stewart was an employee of the respondent. She was dismissed by reason of redundancy. She presented a claim which asserted detriments and dismissal arising from public interest disclosures, discrimination, victimisation, a redundancy payment and unfair dismissal.
3. The respondent denied all of the claims and asserted that Ms Stewart did not have two years continuous service with the respondent because she had been an employee of an agency for part of the relevant period.

### Ms Stewart's arguments

#### **Paragraphs 1 & 3**

4. On 10<sup>th</sup> June 2021 Employment Judge Howden- Evans ordered a preliminary hearing to consider whether the claims for unfair dismissal and a redundancy payment were within the Employment Tribunal's jurisdiction. This direction did not affect the

claimant's allegations that her dismissal was unfair for the purposes of section 103A and 104 of the Employment Rights Act 1996, or any claims of discrimination and victimisation.

5. At that hearing Ms Stewart had argued against the separation of this issue. Her foremost reason was her belief that the candour and reliability of the respondent's evidence on this issue should be seen in the context of the whole case.
6. Ms Stewart did not appeal against the decision of Employment Judge Howden -Evans nor did she apply for a reconsideration.
7. Before me, after both parties had given evidence, and the respondent had made its submissions on the issue of continuity of employment, Ms Stewart's closing submission re-stated her opinion that the issue of continuity of employment should not be determined as a discrete issue. I intervened to be clear whether she was making a somewhat late application for the preliminary hearing not to determine the issue. She did not do so but, nevertheless, I asked her in what specific respect her case before me was prejudiced by the absence of other witnesses apart from Ms Gough.
8. Ms Gough, as she then was, was the respondent's manager involved in the recruitment of Ms Stewart via an agency and her subsequent appointment as an employee of the respondent. Ms Gough is also a person named as responsible for incidents of harassment, victimisation and being a prominent participant in, as the claimant's case asserts, the decision to unfairly dismiss the claimant.
9. The Claimant did not identify any point in Ms Gough's evidence that, under cross examination, would have led to a different answer or might have led me to less confidence in her answers.
10. I considered the cases of E v X, L & Z and others EAT UAEAT/0079/20/RN (V) & UAEAT/0080/20/RN, which were mentioned by Employment Judge Howden-Evans (for quite a separate purpose). In this case, her order has not been challenged, there were no material changes of circumstances which were brought to my attention and I could not identify any specific basis which would, in the interests of justice, warrant a decision that, during closing submissions, I should refuse to determine the issue before me.

**Paragraphs 2.a and 2.b**

11. The essence of Ms Stewart's submission is that I reached the wrong conclusions in my findings of fact.

12. In my judgment I stated that I had concerns about the reliability of both the claimant and the respondent's witness. I concluded that the most reliable source of evidence was within the contemporary correspondence, including emails between Ms Stewart and her recruitment agent. I concluded that, on a number of factual disputes I preferred the documentary evidence to that of Ms Stewart.
13. I had some concerns about Ms Stewart's oral evidence, as an example; following cross examination, I concluded that Ms Stewart had not been promised that her period as an agency employee would lead to a permanent role with the employee. I did so, largely because Ms Stewart conceded what she had described as a "promise" was really an expectation on her part. Her concession was consistent with contemporary email.
14. A significant issue on the claimant's contract of employment with the respondent was whether the claimant had noticed the date recorded as the commencement of her employment. The date did not encompass any of her time as an employee of the recruitment agency; a key concern for the claimant. The respondent cross examined the claimant who had time to review the contract. It argued that, having read that clause of the contract, the claimant's silence was indicative of her agreement; a silence that was inconsistent with a belief she had been employed by the respondent whilst she was working under a contract of employment with the recruitment agency.
15. In her Closing submission, the claimant stated she had noticed the "start date" but had not wanted to raise it in case she was considered a trouble maker; a submission that I did not think credible given she had raised concerns about her salary and the absence of a flexible working arrangement.
16. The majority of the contract did not assist me with determining the date of which the claimant's continuity of employment with the respondent commenced.
17. In summary, Ms Stewart is essentially inviting me to reconsider my contemporary judgment upon her reliability as a witness. Her submission does not accurately reflect the evidence and I cannot conceive that, having taken all of her grounds of complaint into consideration, I would now reach any different conclusion.

**Paragraph 2.c**

18. In my notes prepared for the judgment I had written the word "completed" rather than "passed" the Graduate Law Diploma..
19. I was aware Ms Stewart had retaken her examination in land law but she had, by that time, completed her course. I was aware that contract law is one of the core subject areas studied on her course. I was also aware from her witness statement of

the number of points she raised with respect to her contract and her job description at the time of her direct employment with the respondent. Her statement also described reviewing a commercial contract as part of her role after she had accepted the respondent's offer of employment. I was aware that the claimant was not qualified as a lawyer and did not judge her by that standard. However she was a person whom had some understanding of contract law.

**Paragraph 4**

20. The claimant's oral submission on the respondent's decision not to place the claimant on probation was somewhat different to the point now made. She argued the claimant's decision was evidence that the respondent had treated her period of employment with the recruitment agency as her probationary period as an employee of the respondent. Thereby the respondent acknowledged those prior months of work were evidently part of her period of employment with respondent. I did not find that point persuasive.
21. With regard to the issue of promissory estoppel, I made a finding of fact that the respondent had not made the representations alleged by the claimant. My reason for those decisions was the absence of any contemporary record of such promises, the contemporary records which indicate a hope or expectation on the part of the recruitment agent and the claimant, but not the respondent, the claimant's acceptance in cross examination that she had not received a promise of a permanent role and the respondent's denial.
22. The claimant does not identify any evidence to support her argument that she agreed to the terms of the respondent's contract due to an "Inequality of arms" and I note that the representations to which she then refers are not those of the respondent but of the claimant's recruitment agent which continued to receive commission on the claimant's wages whilst she was an employee of the agency. There was no evidence before me that the recruitment agent had reached any agreement with the respondent that contradicted the respondent's denial.
23. With regard to the new evidence, on the application of the criteria in *Ladd v Marshall* [1954] EWCA Civ 1, I have concluded that a message, which was within the claimant's possession prior to the hearing, could with reasonable effort, have been produced.
24. Further, I share the view of the claimant, as set out in her application; that had the content been available it would not have had any material impact on my decision.
25. By reason of the above, I find that the above grounds of complaint have no reasonable prospect of leading to the revocation or variation of the judgement.

26. For the above reasons, I do not consider that this application for reconsideration has any reasonable prospect of success.

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Employment Judge R F Powell

Dated: 17<sup>th</sup> January 2022

ORDER SENT TO THE PARTIES ON 21 January 2022

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS

Mr N Roche