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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107152/2019

Heard on the 11 May 2021 (written submissions)

Employment Judge L Wiseman

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Mr M Picton

[Redacted]

Claimant

No written submissions

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**Mr Michael Gallagher
t/a Signs of the Times**

[Redacted]

Respondent

Represented by:

Mr A Russo

Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided, having reconsidered its Judgment dated 1 February 2021, to confirm the Judgment. The case will now be listed for hearing.

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REASONS

1. The claimant presented a claim to the Employment Tribunal on the 29 May 2019, asserting he had been discriminated against because of disability, and that there had been unauthorised deductions from wages.
- 5 2. The respondent entered a response denying the claims, and asserting the claimant had not been an employee of the respondent.
3. An Employment Judge directed that a preliminary hearing be arranged to determine the employment status of the claimant.
4. A preliminary hearing was arranged for the 18 January 2021 to determine
10 whether the claimant was an employee of the respondent. The claimant was in attendance with his representative. The respondent's representative and the respondent did not appear for the preliminary hearing.
5. The Employment Judge asked the clerk to telephone the respondent's
15 representative and the respondent. This was duly done but there was no reply from either.
6. The Employment Judge was satisfied the respondent and the respondent's
representative were aware of the date of the hearing. The Employment Judge, having had regard to the lengthy procedural history of the case and the fact
20 there had been no contact from the respondent or the representative, decided to proceed with the hearing.
7. The Employment Judge decided the claimant was an employee of the respondent. A Judgment dated 1 February 2021 was sent to the parties.
8. The Employment Judge directed, in light of the fact there was to be a further
25 hearing in this case, that a letter be sent to the respondent's representative asking for an explanation why there had been no attendance at the hearing.

9. The respondent's representative emailed on the 14 February 2021 and referred to a phone call made, and an email sent, on the 18 January 2021 and enquiring whether these had been passed to the Employment Judge. The representative also, by letter of the 14 February 2021, made an application
5 for reconsideration of the Judgment dated 1 February 2021. The basis of the application was that the Employment Judge had erred in law in proceeding in the absence of the respondent's representative. The letter referred to the representative's partner having phoned at or about 1.30pm and to having emailed at 2.15pm to explain the reason for absence, which related to the
io representative's ill health.

10. The respondent's representative was advised, by letter of the 26 February 2021, that the application for reconsideration would be referred to the Employment Judge upon her return to work in the week commencing 8th March 2021.

15 11. The comments of parties were invited regarding whether this application for reconsideration could be dealt with by way of written submissions. Both parties agreed. The Employment Judge directed that written submissions should be received by the 26 April 2021; that they should be copied to the other party and that a further period of 7 days would be allowed for comments
20 on the other's submissions.

12. The written submissions of the respondent's representative were received on the 26 April. No written submissions have been received from the claimant's representative, notwithstanding the earlier confirmation that they opposed the application.

25 **Respondent's submissions**

13. Mr Russo submitted the Employment Judge had erred in law when she proceeded with the hearing in the absence of the respondent's representative. This was an error of discretion which the Judge was not entitled to exercise. A valid reason existed for the absence of both the respondent and his solicitor.
30 Mr Russo made reference to having diligently conducted every previous

hearing and procedural issue from August 2019. This included having been in contact with the tribunal clerk on the 15 January 2021 regarding a procedural issue which he intended to raise at the commencement of the hearing. This, it was submitted, confirmed (or implied) that he intended to appear and be in attendance at the forthcoming hearing.

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14. Mr Russo submitted that in light of the foregoing, and his subsequent non-attendance, the Employment Judge ought to have adjourned the hearing or continued it for enquiry for a reasonable period. Three days had been allocated for the hearing and, it was submitted, there was time to make reasonable enquiries. Mr Russo accepted the tribunal had tried to telephone and had left a message shortly after 10am, but this had not been picked up until 1pm.

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15. Mr Russo submitted no other reasonable tribunal would have exercised discretion to proceed, and it had not been in the interests of justice to do so, particularly as hearings were routinely being postponed because of the pandemic. Mr Russo suggested the Employment Judge ought to have suspected something unexpected may have been wrong.

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16. Mr Russo submitted it had been wrong to comment in the Judgment that there had been no contact from the respondent's representative. There had been a phone call at or about 1pm and an email at 2.15pm explaining Mr Russo had taken ill over the weekend, with a very high temperature and a cough. Mr Russo has a chest condition. His condition deteriorated on Sunday and further deteriorated on Monday morning. Mr Ram (Mr Russo's business partner) went to Mr Russo's home on Monday morning, and returned to the office at approximately 1.30pm, when he received the message from the tribunal office. The respondent apologised for the inconvenience, but matters had been beyond his control.

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17. Mr Russo submitted that his ill health had prevented him from making contact on the morning of the hearing. Mr Ram's contact in the early afternoon had been the first available opportunity to do so.
- 5 18. Mr Russo referred to the phone call and email not being referred to in the Judgment and submitted the failure to do so constituted a failure to take into account highly relevant information. This was an error of law. Mr Russo noted a letter had been sent to him seeking an explanation for his failure to attend the hearing. This suggested a lack of awareness by the Employment Judge of the phone call and email.
- 10 19. Mr Russo submitted the reference by the Employment Judge to lack of documents and failure to provide a witness list was an error because the Judge had taken into account matters which it was not relevant to include.
- 15 20. The issue at the preliminary hearing went to the crux of the entire defence and it had been essential for the respondent to defend itself. The finding that the claimant was a credible witness in circumstances where he had not been challenged had not been fair.

Discussion and Decision

- 20 21. I firstly had regard to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Rule 70 provides that a tribunal may, on its own initiative 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 original decision may be confirmed, varied or revoked. If it is revoked, it may be taken again.
- 25 22. I noted the "interests of justice" gives tribunals a wide discretion, but interests have to be seen from both sides.
23. I further noted there was no dispute in this case regarding the fact the respondent and his representative knew the preliminary hearing was arranged to commence on the 18 January 2021. The respondent and his representative did not attend for the hearing and, at the time when the hearing

took place (that is, when it commenced at 10am) there had been no contact from the respondent or his representative to explain why they were not in attendance.

5 24. The preliminary hearing had been listed for 3 days but in fact concluded prior to lunchtime on the first day (18 January 2021).

25. The Employment Judge, at the time she took the decision to proceed with the hearing, had nothing from the respondent or his representative to explain why they were not present.

10 26. The email sent by Mr Russo's business partner Mr Ram dated 18 January 2021 (sent at or about 2.15pm) explained Mr Russo had been taken ill over the weekend with a very high temperature and a cough. Mr Russo has a chest condition and he deteriorated on Sunday and into Monday. Mr Russo's position, in his submissions, was that the email sent at 2.15pm on the 18 January 2021 was the first opportunity to make contact with the tribunal.

15 27. I noted Mr Russo did not, either at the time, or in connection with submissions for this hearing, provide any medical evidence to support his position. I do not know, for example, whether Mr Russo's condition was such that he had to contact his GP or Pharmacy for advice.

20 28. I had no reason to doubt what I have been told by Mr Russo regarding his ill health. However, I was concerned that contact was not made with the tribunal sooner in circumstances where it was known the hearing was due to commence at 10am. I was unsure what had prevented such contact, and the following issues arise from this:

- 25 • if Mr Russo was too ill to make contact with the tribunal, I might have expected there to be medical evidence to support that position;
- it appeared from Mr Ram's email of the 18 January that there must have been some contact between Mr Russo and him for him to visit Mr Russo's home on the morning of the 18 January: if that is correct, why could Mr Ram not have been told to contact the Tribunal and

- the respondent was not in attendance at the hearing and I assumed from this that there must have been some contact with him to inform him not to attend. If this is so, why could contact not have been made with the Tribunal?

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29. Mr Russo was critical of the Employment Judge for not having taken into account the phone call at 1pm and the email sent at 2.15pm on the 18 January 2021, and for not having made reference to the phone call and email in the Judgment. I could not accept that criticism in circumstances where the hearing had concluded, and the decision had been made, by the time contact was made.

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30. Mr Russo was also critical that it would have been reasonable for the Employment Judge to have understood he intended to appear and to have further understood that something must have happened and to postpone the hearing on that basis. I accept that I considered it odd for neither the respondent nor the representative to have been present, and it was for this reason the clerk was asked to try and make contact with both the respondent and Mr Russo. I considered it was reasonable to have taken those steps to establish if contact could be made. The fact remains that the onus is on the respondent and his representative to contact the tribunal to explain why appearance cannot be made. This was not done timeously in this case.

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31. I asked myself whether it would be in the interests of justice to reconsider the decision that the claimant was an employee of the respondent. I had regard to the following points: on the one hand I acknowledged that if the application for reconsideration is granted and the decision revoked, there will require to be another hearing to determine the issue of employment status. The claimant will be put to the inconvenience and expense of another hearing, but will have the opportunity to present his evidence and submissions afresh.

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32. On the other hand, if the application for reconsideration is refused, the respondent will be denied an opportunity to present its case that the claimant was not an employee. However, the issue of employment status is a preliminary issue, and the merits of the case are still to be determined.
5 Accordingly, the respondent will still be able to defend the claim at a subsequent hearing.

33. I decided, having had regard to the all of the above points, to confirm the Judgment dated 1 February 2021. I reached that decision because notwithstanding the respondent's email of the 18 January and the subsequent
IQ written submissions, I was not satisfied why contact could not have been made with the Tribunal office prior to lunch time on the 18 January.

15 Employment Judge: Lucy Wiseman
Date of Judgment: 18 May 2021
Entered in register: 03 June 2021
and copied to parties

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