



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Number: 4105206/2017

Reconsideration decision made in Glasgow on 28th June 2018

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Employment Judge M Whitcombe

Mr J Hood

Claimant

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Joseph Gallagher Limited

First Respondent

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Costain Limited

Second Respondent

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Vinci Construction Grands Projets UK

Third Respondent

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RECONSIDERATION
Employment Tribunal Rules of Procedure 2013
Rules 70-73

- 5 My decision is that there is no reasonable prospect of the original decision being varied or revoked and the application for a reconsideration is therefore refused.

REASONS

Introduction

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1. A full tribunal panel chaired by me and also including Mr KF Watson and Mr R Taggart unanimously dismissed the Claimant's claims of detriment and unfair dismissal on grounds of having made a protected disclosure. Our full written reasons running to 18 pages have already been provided and should be read
15 in conjunction with this document.

2. On 21st June 2018 the Claimant emailed the Tribunal administration attaching a letter to the President of the same date. The President considered the contents of that letter and decided to treat it as an application for a
20 reconsideration. The President therefore referred the case back to me, as the Employment Judge who chaired the original panel, in accordance with rule 72(3), having taken the view that it was practicable to do so.

3. I have followed the process outlined in rules 70 to 73. The first step is for me
25 to consider on the papers whether there is a reasonable prospect that the imputed decision would be varied or revoked. If not, then the application for a reconsideration fails without seeking a response from all parties or going forward to a hearing (see rule 72).

30 Chronology

4. The final hearing was originally scheduled to take place on 9th, 10th and 11th April 2018. At short notice I was asked to deal with a telephone case

management hearing on 9th April 2018, the scheduled first day of the final hearing. The upshot was that the final hearing commenced (with a full panel) on 10th April 2018. I chaired that panel. We heard evidence on 10th and 11th April 2018. By the end of 11th April 2018 the evidence had been completed.

5 With the consent of all representatives submissions were then dealt with in writing in order to save cost and avoid delay. The Tribunal members met to consider the representatives' written submissions and to reach our decision on 22nd May 2018. We reached a unanimous decision on that day. I finalised the reserved judgment and our written reasons and signed them on 31st May 2018.
10 They were promulgated by the Tribunal administration on 13th June 2018.

5. At the hearing the Claimant was represented by his solicitor, Mr Bathgate. Since the hearing the Claimant has sent correspondence in his own name, without apparently involving Mr Bathgate. Mr Bathgate has not come off the
15 record and this decision will be sent to him too.

6. In summary form, Mr Hood seeks a reconsideration on the following bases (I will quote some parts of his letter).

20 a. Certain criminal allegations apparently made against the Claimant by individuals connected with one or more of the Respondents "resulted in the hearing being unfairly biased towards the other parties" such that it was a "miscarriage of justice", with a judgment which "could have been influenced by the false allegations made against me". The
25 Claimant says that he strongly believes that I should not have played any part in the hearing after being made aware of false criminal allegations and that it might have affected my assessment of his credibility. The Claimant says that a different judge should have been
30 appointed or that I should have stood down since the integrity of the hearing had been compromised.

b. I made assumptions in the judgment which are not based on fact. I have not considered all of the relevant information and have ignored inconsistencies in the Respondent's evidence.

5 7. I will deal with the two groups of criticisms in turn.

The relevance of criminal allegations to our decision

10 8. Although the letter mostly refers to me alone, and only occasionally to the tribunal or to the panel, I begin by emphasising that our judgment and reasons were the product of a process in which all three members of the tribunal played an active and independent part. The judgment and reasons were also unanimous. The non-legal members of the Tribunal played no part in the case management discussion on 9th April 2018.

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9. The representatives had clearly discussed the relevance, if any, of the criminal allegations prior to the telephone case management hearing. At the start of the case management hearing on 9th April 2018 I was informed that the parties had agreed that it would not be necessary for any witness or representative to refer to the criminal allegations made against the Claimant, and that the final hearing could properly begin on the second day originally listed on that basis, without the need for a sist or postponement. The rest of the telephone call was then concerned with case management and definition of the issues. There was no further discussion of the criminal allegations.

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10. As anticipated, the full hearing took place without any reference at all to the criminal allegations (as the Claimant appears to accept in his communication of 30th May 2018). They were not mentioned in evidence or in the parties' written submissions. The members of the tribunal did not discuss them at any point whatsoever during their deliberations. They simply played no part at all in our reasoning, which is why they are not referred to in our written reasons either.

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11. Indeed, the only person who has made repeated reference to the criminal allegations in recent correspondence is the Claimant, writing on his own initiative rather than through his solicitor Mr Bathgate. That did not influence us, and our decision had already been reached and written reasons prepared in draft before the Claimant's communication of 30th May 2018 was referred to me. That is why I asked the Tribunal administration to write back to the Claimant reassuring him that our judgment was completed, subject to proof-reading, prior to receiving his email of 30th May 2018, and that neither the timing nor the content of the judgment had been influenced by correspondence alleging criminal conduct (whether on the part of the Claimant, or on the part of those making allegations against him). As will be clear from our written reasons, our judgment was based on a very different foundation.

12. None of the experienced representatives attending the telephone case management hearing on 9th April 2018 (including Mr Bathgate who represented the Claimant) suggested that it would be inappropriate for me to be a member of the panel hearing the case. None of those representatives made any application or suggestion to that effect during the final hearing, or in their detailed written submissions. The Claimant himself did not raise any concerns whatsoever regarding my involvement in his communication of 30th May 2018 asking for a judgment "sooner rather than later to help alleviate the stress and anxiety I am currently suffering". The first suggestion that my involvement in the process had been inappropriate came after the Claimant received our reserved judgment dismissing his claims.

13. I am afraid that in those circumstances I see no reasonable prospect that our decision would be varied or revoked in the interests of justice. Not only did the criminal allegations play no part at all in our thinking, decision or written reasons, but none of the experienced representatives made any suggestion that there was a difficulty. Tribunals are well used to putting irrelevant material out of their minds when approaching the true issues in the case. The criminal allegations in this case fell firmly into that category. They were irrelevant, I put them out of my mind. The other members of the Tribunal were not even part of

the telephone case management discussion which, in the Claimant's view, gave rise the taint. I see no reasonable prospect on which it could be argued that the history of the case and of my involvement gave rise to a perception of apparent bias. To apply the test outlined in many cases including *Porter v Magill* [2002] 2 AC 357, no fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

Approach to the Evidence

14. We have already set out our full written reasons elsewhere, and I refer to them again here. We considered the evidence at length. It is neither necessary nor appropriate to make findings on every disputed factual issue. On the contrary, our function is to make findings on the matters which are essential to our conclusions.

15. Contrary to the Claimant's current suggestion, we did consider inconsistencies in some parts of the Respondents' evidence and we have given our reasons for preferring the Respondents' case on the points that underpinned our own conclusion (see for example paragraph 48). In so far as there may have been other inconsistencies they were not relevant to our decision.

16. As for the inferences to be drawn from the Claimant's acts and omissions in the context of trade union assistance, our reasoning is set out in paragraphs 51 and 52. All I would add is that those paragraphs are just part of a wide-ranging consideration of credibility.

17. To the extent that the Claimant now asserts that the trade union did not appreciate that he had made protected disclosures, that is an attempt to reopen an issue of fact which we have resolved against him. No evidence was given at the hearing to that effect, no one from the trade union gave evidence at all, and there is no reasonable prospect that the Claimant's current assertion would cause us to reconsider our conclusions on credibility, which were in any event also based on many other factors besides. In essence, our reasoning

was that the reason why the trade union did not refer to protected disclosures in correspondence, or advise the Claimant to do so, was that no such disclosures had been made at all.

5 18. As for the comments made by the Claimant about Gate B being left unattended, and the reasonableness of his belief in a risk to health and safety, we have rejected that argument with full reasons and the Claimant's comments add nothing new. The Claimant did indeed give evidence to the effect now outlined in his letter, and we rejected his argument for the reasons we have already
10 given.

19. There is a brief suggestion in the Claimant's letter that the hearing was rushed. It was not rushed, but it was appropriately managed in accordance with the overriding objective. The evidence was completed in the two remaining days
15 available, which was probably very close to the original expectation. The third day would have been used for oral submissions, but we received them in writing instead (by consent). That is the only reason why a three day case was completed in two. Had any party preferred oral submissions, then the case would have gone part-heard to continue on a third day for that purpose. There
20 was no prejudice whatsoever to the Claimant, whose representative agreed that way of doing things.

20. Once again, I conclude that there is no reasonable prospect that our decision would be varied or revoked.

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21. I therefore refuse the application for a reconsideration.

30 **Employment Judge: M Whitcombe**
Date of Judgment: 28 June 2018
Entered in register: 11 July 2018
and copied to parties