EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104144/2016

Heard in Glasgow on 4 December 2017

Employment Judge: Lucy Wiseman
Members: Gerry Eckersley
Anne Middleton

Mr Cameron Riddell **Written submissions**

Wilson Gibb Management Services Ltd **Written submissions**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided to dismiss the claimant's application for reconsideration.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 4 August 2016, asserting he had the relevant qualifying period, in terms of the Agency Workers Regulations 2010, to assert the rights set out in Regulation 5. The respondent disputed this on the basis the roles carried out by employees were substantially different to the roles carried out by agency workers.

2. The parties agreed there was no dispute regarding the fact (i) the claimant was an agency worker within the meaning of Regulation 3; (ii) the respondent is a temporary work agency in terms of Regulation 4 and (iii) the claimant had

worked for the requisite qualifying period of 12 continuous calendar weeks with the Hirer.

3. A Preliminary Hearing on 7 February 2017 determined that in order to invoke the rights conferred by Regulation 5 of the Agency Worker Regulations, the claimant did not require to identify a comparator who was an employee of the Hirer, carrying out work which was the same or broadly similar to that performed by the claimant for the Hirer.

4. The claimant's claim was heard by the Employment Tribunal on 20 and 21 September 2017, and the Tribunal, in a Judgment dated 16 October (and sent to the parties on 19 October) decided to dismiss the claim.

5. The claimant, by letter of 29 October, applied for a reconsideration of the decision. The claimant sought reconsideration on the basis the Tribunal had adopted the wrong approach by comparing two jobs and not giving sufficient weight to the similarities between the job he undertook and the roles of employees. The claimant also argued the lack of a comparator appeared to have been perceived as a defence. The claimant referred to the earlier Judgment from the Preliminary Hearing and argued the Tribunal's judgment was at odds with the earlier judgment.

6. The claimant wrote a further letter on 23 October seeking reasons why certain decisions had been made regarding documents, postponement of the Hearing, why no findings in fact were made based on cross examination and why the Judgment overruled an earlier Judgment (from the Preliminary Hearing) which had not been appealed.

7. The claimant was advised by the Tribunal by letter of 8 November that the application had not been refused on initial consideration.

8. The Tribunal wrote further to both parties on 15 November to enquire whether they agreed with the application for reconsideration being dealt with without the need for a Hearing, and if so, to submit written submissions by 28 November.

9. The respondent's representative provided written submissions by email of 28 November.

10. The claimant responded to those submissions in an email sent on 28 November.

Respondents submissions

11. The respondent's primary position was that the Judgment was sound and there was no basis for it being reconsidered. Ms Graydon noted the claimant had not, in his application for reconsideration, explained why it would be necessary or in the interests of justice to reconsider the original decision.

12. Ms Graydon referred to the cases of **Lindsay v Ironsides Ray & Vials 1994 ICR 384** and **Flint v Eastern Electricity Board 1975 IRLR 277** as authority for the proposition that the power to grant review on the grounds that the interests of justice require such a review, was very wide in its terms, and was a power which should be cautiously exercised.

13. The cases of **Council of the City of Newcastle upon Tyne v Marsden 2010 UKEAT 0393/09/2301 and Ministry of Justice v Burton 2016 EWCA Civ. 714** were also referred to as authority for the position that reconsideration is not a chance for the losing party to have a second bite at the cherry, and the fact the discretion to act in the interests of justice was not open-ended.

14. Ms Graydon invited the Tribunal to reject the claimant's mistaken position that the Judgment from the Preliminary Hearing "largely defeated" the respondent's defence. The point to be determined by the Preliminary Hearing was whether a comparator was required in order to raise a claim under Regulation 5. The purpose of the final hearing had been to determine whether the claimant received the same working and employment conditions as he would have been entitled to for doing the same job had he been recruited directly by the hirer.

15. Ms Graydon referred to the fact the claimant had suggested the Hirer's Probationary Driver or Probationary Mate were comparable employees

engaged in the same or broadly similar work. The claimant accepted that he did not undertake the same duties as those employees. It was submitted the Tribunal had been entitled to conclude that the work carried out by the claimant was not the same or broadly similar, and accordingly the claimant would not have been entitled to different working and employment conditions had he been employed directly by the hirer.

16. Ms Graydon referred to the other issues raised by the claimant regarding documents and preliminary matters discussed at the commencement of the Hearing and submitted these issues were not adequate to challenge the finality of the Tribunal's decision.

17. The respondent invited the Tribunal to dismiss the application for reconsideration.

Claimants submissions

18. Mr Riddell, in addition to the two letters referred to above, sent a further email on 28 November in response to Ms Graydon's submissions. He rejected the suggestion he was attempting to have a second bite of the cherry. Mr Riddell referred to the fact Whirlpool directly recruited delivery drivers who were trained and contributed to the installations and responsibility in the house. The claimant submitted the comparison to be made was with the role if recruited other than by using the services of a temporary work agency, and the employee role. He considered they were the same role and the Tribunal had not needed to look at the issue of broadly similar.

19. Mr Riddell referred to the two agency workers who had been taken on by Whirlpool: they had been sent for training and allowed to do installations.

20. Mr Riddell submitted the Tribunal had used the wrong comparison between a starter role exclusively for agency workers and the employee role. The claimant accepted it had never been in dispute that the duties carried out by the claimant were different to those carried out by employees. If the claimant had been trained, there would no issue as to a comparison because the duties would be the same.

Discussion and Decision

21. We had regard firstly to the terms of Rule 70 Employment Tribunals (Constitution and Rules of Procedure) Regulations 201 3 (the Rules) which provides an Employment Tribunal with a general power to reconsider any judgment where it is necessary in the interests of justice to do so.

22. We next had regard to the authorities to which we were referred and we accepted that reconsiderations are best seen as limited exceptions to the general rule that Employment Tribunal decisions should not be reopened and relitigated. In particular, reconsiderations are not a method by which a disappointed party to proceedings can get a second bite of the cherry. The "interests of justice" gives Employment Tribunals a wide discretion, but the interests of justice must be seen from both sides.

23. The basis of the application for review is, essentially, an argument which the claimant pursued at the Hearing. He argued that if, as an agency worker, he had been taken on by Whirlpool as a Probationary Driver or Probationary Mate, he would have been entitled to the basic working and employment conditions which employees received. We, at paragraphs 51 and 52 of our Judgment, set out Regulation 5 and its meaning. We stated at paragraph 52 that:

> *"The above points make clear that an agency worker, who has completed a 12-week qualifying period, must receive the same pay as he would be entitled to for doing the same job, at the time the qualifying period commenced, had he been recruited directly by the hirer. The issue is equal treatment in respect of the pay the claimant would have been entitled to, for doing the same job, that is, driving only duties, had he been recruited directly by Whirlpool."*

24. The key point in Regulation 5 is that an agency worker who has completed a 12 week qualifying period, is entitled to receive the same basic working and

employment conditions, as he would have been entitled to for doing the same job had he been recruited directly by the hirer.

25. The claimant was an agency worker and he had completed a 12 week qualifying period: the material issue, therefore, was either (a) what employees of Whirlpool got paid for doing the same job as the claimant or (b) could he point to a comparable employee.

26. There was no dispute regarding the fact that Whirlpool did not employ employees to do the same job as the claimant. There were no employees employed solely to carry out driving duties and assisting with loading/unloading. The claimant accepted there were differences in the duties carried out by him, and the duties carried out by Drivers and Mates.

27. We acknowledged (paragraph 57) that it was not necessary for the claimant to rely upon a comparator. However, if there was a comparable employee carrying out broadly similar work to the claimant, the claimant could rely on this to seek equal treatment. We set out in paragraphs 59 - 63 why we concluded there were no comparable employees.

28. The claimant argued at the Hearing and in the application for reconsideration that the correct assessment was focused on what would have happened if he had been employed by Whirlpool. We cannot accept that submission: the issue is what, if Whirlpool had employed Drivers to perform only driving and loading duties, would they have been paid? The claimants case could not succeed because (a) he accepted Whirlpool did not employ employees to carry out solely driving and loading duties; (b) there was no evidence of any collective agreements setting pay rates for such positions and (c) there were no employees carrying out broadly similar duties.

29. We decided to refuse the application for reconsideration for these reasons.

30. We did not consider the claimant's letter of 23 October 2017 to be an application for reconsideration given its content. However, for the sake of completeness we shall deal with the issues raised in that letter.

31. The claimant asked for a written explanation of the jurisdictional assessment of the PPE claim. We refer to paragraph 66 of the Judgment where the Tribunal made clear that we did not consider we had jurisdiction to determine the claim, and in any event, the clear evidence before the Tribunal was that the claimant had not requested the items of PPE whilst working with the respondent. The claimant, in the application for reconsideration, referred to the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994. This Order was not referred to by the claimant during the Hearing, and in any event, even if the Tribunal had had jurisdiction to determine the claim, we accepted the evidence of Ms Findlay that the claimant had not requested any items of PPE.

32. The claimant wanted to know why documents numbered 175 - 205 in the respondent's bundle were allowed. The Tribunal ensured, at the commencement of the Hearing, that issues with documents had either been resolved, or that parties were prepared to proceed in the circumstances. The Hearing proceeded on that basis.

33. The claimant wanted an explanation why the guidance for seeking a postponement of the Hearing was not followed. We were unsure to what this relates, and can only state that any issues regarding the determination of an application for postponement should have been raised at the time.

34. The claimant sought an explanation regarding documents produced in relation to the Documents Order dated 14 September 2017. We noted that at the commencement of the Hearing, a variety of preliminary issues were discussed. The claimant indicated he was "willing to co-operate" and informed us, in relation to the Documents Order, that it had not been responded to, but he had not sought the correct document in any event. The claimant indicated he was happy to proceed and would raise any issues in cross examination.

35. The claimant questioned why no findings of fact had been made based on the cross examination. The Judgment makes clear that only material findings of

fact are made, and the findings set out are those the Tribunal considered material to the issues to be determined.

36. The claimant sought an explanation why it would be permissible for the logic of a Judgment to overrule an existing Judgment which was not appealed. The Tribunal did not "overrule" the earlier determination made at the Preliminary Hearing. The claimant did not need to rely upon a comparator in order to bring his claim under Regulation 5. However, he may do if he so chooses.

37. We referred to a comparator because it is one of the ways an agency worker can demonstrate that an employee is doing broadly similar work, and on that basis it can be argued the agency worker should receive the same basic working and employment conditions. This is why we carried out the exercise of considering the roles identified by the claimant as being comparable. This in no way "overruled" the previous decision.

38. We decided to refuse the claimant's application for reconsideration.

Employment Judge: Lucy Wiseman
Date of Judgment: 19 December 2017
Entered in register: 19 December 2017
and copied to parties