



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105618/2016

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Held in Glasgow on the 16th of April 2019
Employment Judge: Laura Doherty

10 **Mr E Cadden**

Claimant
Represented by:
Mr R Turnbull -
Solicitor

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New Forest Communications Ltd

Respondents
Represented by:
Mr A. Walker -
Director

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JUDGMENT OF THE TRIBUNAL

The Order of the Tribunal is that the judgment is confirmed under Rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules).

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Reasons

1. Rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules) states ;

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The 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 judgement 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.

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2. Rule 71 provides that the application must be made within 14 days of the date on which the original decision was sent to the parties. Rule 72 (1) provides

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that the application for a reconsideration may be refused if the Tribunal considers there are no reasonable prospects of the decision being varied or revoked. Rule 72(2) provides that if the application is not refused, the original decision shall be reconsidered at a hearing, unless the Employment Judge considers, having regard to any response from the parties, that a hearing is not necessary in the interests of justice.

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3. Reconsideration is sought by the claimant in this case, in which the claimant succeeded in his claims, including his claim of unfair dismissal. Reconsideration is sought of the part of the tribunal's judgement which deals with Remedy arising from the unfair dismissal element of the claim. In particular reconsideration is sought of the aspect of the judgment dealing with mitigation of loss.

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4. The application was not refused under Rule 72 (1) of the Rules and parties views were sought as to whether the application could be determined without hearing. The claimant's position was that the application could be determined without the hearing. The respondents sought a hearing on the basis that it was said they had uncovered evidence about the claimant's use of their company credit card post termination of his employment, which suggested that he had additional sources of income over and above those which he claimed to have at the final hearing.

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5. It did not appear to the tribunal that the claimant's use of the respondent's company credit card was an issue which was likely to provide additional relevant evidence as to the income available from alternative employment to the claimant post termination of his employment. The tribunal was satisfied that it was not necessary in the interests of justice to fix a reconsideration hearing in order to hear evidence about this. The tribunal was satisfied, taking into account the basis of the application and the opposition to it, that it was consistent with the overriding objective in the Rules, and in the interests of justice, not to fix a hearing and to conduct the hearing by way of written

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representations The parties were given the opportunity of providing additional representations and commenting on each other's representations.

- 5 6. No additional submissions were made by the claimant. The respondents made additional submissions in a letter received by the Tribunal on the 13th of December.
- 10 7. The respondent's submissions in the main relate to why they consider the claimant should not have succeed in his claim, which is not a matter for the Tribunal to consider in determining this application. They do however raise a point about the claimant's income since the termination of his employment, which they say should also reflect his use of the company credit card after his employment came to an end. If, as the respondents say the claimant has misused their company credit card, then such sums as he has accessed using that credit card are not properly to be regarded as income, and therefore
15 would not form part of the Tribunal's consideration of the reconsideration application or opposition to it.
- 20 8. The application for reconsideration was made on the basis that the respondents bear the burden of proving the claimant acted unreasonably in not taking certain action to mitigate his loss. It is said that the distinction between what is reasonable and what is unreasonable, reflects the fact that there is usually more than one reasonable course of action open to the claimant (*Wilding v British Telecommunications Pic* [2002] IRLR 524). The application for reconsideration is made on the basis that this was not
25 something on which the respondents made submissions, nor were submissions invited on this or queried during the claimant's submissions.
- 30 9. The claimant made extensive submissions on the issue of mitigation which are recorded in the Judgment. Specific reference was made to the case of *Wilding*, including the point which is made in the application for reconsideration; this is recorded in paragraph 113 of the Reasons It is not

therefore the case that the Tribunal reached its conclusions without having the claimant's submissions on this point.

- 5 10. The claimant submits in support of his application for reconsideration that there were no submissions on this matter by the respondents.
- 10 11. The respondents were an unrepresented party, and they did not deal in detail in submission with all of the issues which the Tribunal had to consider, or which they had given evidence on, or cross examined the claimed on. The respondents however did not agree the claimant's schedule of loss, beyond agreeing the claimant's pre-dismissal earnings. Further, as recorded in the Tribunal's Reasons, the Tribunal was satisfied that the issue of mitigation was raised with the claimant, and some evidence adduced. It was apparent that the claimant was aware that mitigation this was an issue, as it was addressed at length in his submissions. The mitigation point was therefore one which was ventilated during the final hearing and was not one on which the claimant had no opportunity to make submissions upon at the conclusion of the hearing.
- 15 12. The application for reconsideration is also made on the basis that it was never put specifically to the claimant during cross examination that he ought to have withdrawn income at a particular time or of a particular amount, or why it may have been unreasonable not for him to have done so.
- 20 13. This was not a matter which was put specifically to the claimant in cross examination, however the exercise which the Tribunal conducted in reaching its conclusions is set out at paragraphs 177 to 186 of the Reasons. This exercise inevitably requires a degree of speculation on the part of the Tribunal, (as reflected in paragraphs 185 and 186 of the Reasons), and the Tribunal found itself able to carry out the speculative exercise identified there on the basis of the facts which it found, in the absence of the cross-examination question highlighted in the application for reconsideration
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14. It is said in the application for reconsideration that the Tribunal did not have regard to the claimant's evidence in response to a question from Mr Walker, that he, Mr Walker, did not know what was going on with the claimant's business at the time or what the money was needed for. The Tribunal was
5 unable to reach a meaningful factual conclusion on the basis of this piece of evidence, and the Tribunal does not consider that the claimant's answer to this effect, when asked questions about how much his company billed, added significantly to the evidence before it. On cross examination the claimant gave specific evidence to the effect that he has taken out a £30,000 loan, and
10 wanted to build up equity in his business, and the Tribunal reached factual conclusions to reflect that.
15. It is said in support of the reconsideration application, that the fact the claimant did not expand further on his evidence about his business revenue
15 should not mean that there should be findings that his actions were unreasonable, and it was understandable that he was cautious in giving confidential information about his company in an open forum, which could be used by a potential rival in the market. It is said there was no evidence to suggest that this came from a desire to cover up, or failure to mitigate his loss
20 and any cautiousness was irrelevant to the question of mitigation of loss.
16. The Tribunal however, did not conclude that because the claimant did not expand upon his evidence or that he was cautious in giving evidence, that his actions were unreasonable. The facts which the Tribunal found on the basis
25 of the evidence, are set out in the Reasons. These were; that the claimant set up two companies, Tartan Logic and Charthouse Limited; that he had taken out a loan of £30,000 which he invested in one of his businesses; that he wanted to build up equity in the business. The Tribunal also found (and it does not understand this conclusion to be challenged by the claimant) thereafter in
30 paragraphs 73, 74 and 75, that from October 2017 the claimant's company Charthouse billed £17,00 a month for the provision of IT services via Tartan Logic to a single client, (who had formerly been Pointshift's biggest client in terms of turnover). The Tribunal also found that the claimant has chosen to draw no income in the period from 20 September 2017 to the date of the

hearing other than £3,412.15 for the performance of 'navy work'. It was on the basis of these facts, that the Tribunal reached its conclusions on the issue of mitigation. These included that in choosing to restrict his income to £3,412.15 during a period when his company enjoyed revenue of at least £187,000 (11 months- (October 2017 to September 2018) x £17,000), even allowing for the £30,00 loan, and a wish to build up equity in the business) he had not acted reasonably.

17. The Tribunal considered whether its decision has been reached due to a procedural mishap, however in this case the issue of mitigation had been ventilated at the final hearing. If Tribunal has made an error of law, then this would fall to be corrected on appeal, and not by review.

18. On the basis of the facts which it found and applying the tests which are set out in its Reasons, the Tribunal reached the conclusions which it did on the issue of mitigation. Having reconsidered its judgment on the basis of the claimant's application, the Tribunal was not persuaded that it was necessary to vary or revoke any part of it, and the judgment is confirmed.

Employment Judge: Laura Doherty
Date of Judgment: 17 April 2019
Entered in register: 26 April 2019
and copied to parties