EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100548/2017 Held at Glasgow on 21 September 2017

Employment Judge Shona MacLean

Mr F Lubamba — Claimant
In Person

Brightwork Limited — Respondent
Represented by:
Mr B Caldow
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the application for reconsideration is refused and the original decision dated 25 July 2017 and sent to the parties on 27 July 2017 is confirmed.

REASONS

Introduction

1. A preliminary hearing took place on 7 July 2017 to determine (the July PH):

   a. Whether the claimant made a "protected disclosure" in terms of section 43A of the Employment Rights Act 1996 (the ERA)?

   b. Whether the claimant was an employee of the respondent?

2. The claimant appeared in person. Ms Ramburrum interpreted the proceedings for him. Mr Caldow represented the respondent. Ms Bellshaw, HR advisor instructed him. The Tribunal reserved its judgment.

3. The Tribunal's judgment was sent to the parties on 27 July 2017 (the Original Decision). It stated:

"The judgment of the Employment Tribunal is that (a) the claimant did not make a protected disclosure in terms of section 43A of the Employment Rights Act 1996 and (b) the claimant was not an employee of the respondent"

4. On 27 July 2017, the claimant applied to the Tribunal for the Original Decision to be reconsidered under rule 71 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Tribunal Rules).

5. On 8 August 2017, the parties were advised the application for reconsideration had not been refused on initial consideration. Both parties were invited to express a view by 16 August 2017 on whether the application could be determined without hearing. If the reconsideration were to take place without a hearing the parties would be advised and given an opportunity to provide written representations.

6. On 16 August 2017 Mr Caldow sent an email to the Tribunal office and copied the claimant. The respondent was content for the matter to be dealt with without the need for a hearing. The claimant did not respond.

7. On 28 August 2017, the claimant was advised that the Employment Judge considered that the application could be dealt with by written submissions and if he agreed he should ensure that any submissions he wished the Tribunal to consider were received by 8 September 2017. A copy of the letter was sent to Mr Caldow.

8. The claimant advised by email sent on 29 August 2017 that he agreed to proceed by written submissions.

9. No further submissions were received from Mr Caldow. The claimant sent an email to the Tribunal office and copied to Mr Caldow on 8 September 2017 which included the following:

"Please note that this is a whistleblowing case. After the review. Anew claim might be brought against Brightwork Limited, Engie Ltd and perhaps Student Loans, Ms Rebeca Graham and Ms/Mrs kirn Hill altogether.

The aim of this case is to not allowed Businesses to punish their workers or not even employees when they made whistleblowing claim or raise their concern about wrongdoing in their workplace"

Reconsideration

10. The Tribunal read the claimant's email sent on 8 September 2017. At the July PH the Tribunal was aware nature of the complaint: the parties had attended a case management preliminary hearing on 1 June 2017 (the June PH). The Employment Judge's note of the June PH (the Note) stated that the claimant was making a complaint of unfair dismissal for making a protected disclosure (section 103A of the Employment Rights Act 1996 (the ERA)) and a claim of being subject to a detriment for making a protected disclosure (section 47B of the ERA). The Note also ordered a preliminary hearing on 7 July 2017 and set out the specific issues to be determined as narrated in paragraph 1 above.

11. The Tribunal then referred to the claimant's letter dated 31 July 2017. The letter sets out on page 1 and at the top of page 2 the reasons why the claimant reserves the right to appeal to the Employment Appeal Tribunal.

On page two the claimant then sets out *"the ground of my request to the Employment Tribunal to reconsider the judgment"*

12. The Tribunal does not have power to consider an appeal of the Original Decision it was unclear why the claimant was referring to his grounds of appeal in his letter to the Tribunal office.

13. In the Tribunal's view the hearing on 7 July 2017 was a preliminary hearing to address the two issues that had been identified at the June PH. Before starting the July PH the Tribunal was satisfied that the claimant was aware of the issues to be determined and that these would be the only issues that would be determined at that hearing. The claimant had been sent by email soft copies of documents and case authorities that had been produced. As the claimant did not have a printer and therefore had not brought hard copies of the documents and case authorities he was provided a set. The claimant was content to proceed and was assisted by an interpreter throughout the July PH

14. The Tribunal heard evidence from the claimant and two witnesses for the respondent. The findings of fact set out in the Original Decision were the findings that the Tribunal considered were essential and relevant to the preliminary issues that it had to determine.

15. The Tribunal then moved onto considering the claimant's grounds for making the reconsideration application and in so doing the Tribunal also considered the respondent's comments set out in Mr Caldow's email sent to the Tribunal office 16 August 2017.

Ground 1 - Paragraphs 46-47 of the Original Decision

16. The claimant said that the disclosure that he made on 6 January 2017 was not an allegation but important/vital information. He had requested the CCTV footage in his claim form and agenda for the June PH. The Tribunal ignored the request without giving reasons. The CCTV footage

demonstrated what happened on 14 November 2016. The Tribunal could not determine the issue as it did not view the CCTV footage.

17. The respondent said that the claimant did not ask the Tribunal to view the footage. In any event whether the event occurred was irrelevant to the issues to be determined.

18. The Tribunal agreed with the respondent's submission. To attract protection, it did not matter whether what the claimant said was true or not or whether he was correct in his assessment of risk. The issue at the July PH in relation to the disclosure was whether what the claimant said in the email sent on 6 January 2017 fell in the legal definition.

Ground 2 - paragraph 48 of the Original Decision

19. The claimant said that the Tribunal failed to investigate (by questioning Mrs Leen or Joe) that the red bucket used on 14 November 2016 was the only used to clean the toilets.

20. The respondent said that that was incorrect. The claimant misunderstood the process that the Tribunal should follow, the steps that the claimant can or should take in presenting his own case and the issues to be determined by the Tribunal. The claimant had already been afforded the courtesy of a clear and concise explanation at the June PH as to his role in presenting his case as set out on page 3, paragraph 8 of the Note.

21. The Tribunal agreed with the respondent's submission. It was not for the Tribunal to obtain the CCTV footage and interview the claimant's colleague and Mrs Leen. In any event that evidence, even if provided by the claimant was not needed for the Tribunal to determine the preliminary issues that were identified.

Ground 3 -paragraph 52 of the Original Decision

22. The claimant said that the Tribunal and the respondent did not prove that the respondent had no control over the site or Mrs Leen. The Tribunal did not ask to see the email sent by Ms Graham on 9 January 2017 or the reply to it.

23. The respondent said that the Tribunal did not need to see an email issued after the alleged disclosure to judge whether the claimant made a disclosure that pre-dated it.

24. The Tribunal considered that its role was not to provide evidence but consider the evidence that was provided to it. The Tribunal heard the evidence of the respondent's witnesses who were credible and reliable. At the July PH the evidence that they presented about the respondent's control over the clients' sites and clients' employees was unchallenged by the claimant. The Tribunal did not consider that it was necessary to see the email sent by Ms Graham on 9 January 2017 to determine the issues before it.

Ground 4 - paragraph 53 of the Original Decision

25. The claimant said that the Tribunal did not give reasons why it was not convinced that at 6 January 2017 his belief was not reasonably held. He criticised the Tribunal's failure to view CCTV footage or interview witnesses. He criticised the respondent's failure to call "Joe" as a witness.

26. The respondent said that the claimant was attempting reargue his case or say that it was wrongly decided. The Tribunal reached its factual conclusion and was entitled to do so. The Tribunal was under no obligation to launch such an investigation, nor to view the CCTV footage. The claimants comments regarding questioning of witnesses or "interview" were misplaced as to the process to be followed. Mr Caldow did not promise to bring ''Joe" as a witness to the July PH and the Note refers to Joe as potentially

relevant *after* the July PH. The claimant seemed to consider that the Tribunal was wrong to conclude that the claimant's belief was not reasonably held as at 6 January 2017 by suggesting that the Tribunal had doubted that wrongdoing occurred; that appeared to be a misunderstanding by the claimant as to the essence of the judgment handed down.

27. The Tribunal was satisfied that the Original Decision set out the reasoning for the conclusions that were reached. The Note was sent to the claimant on 5 June 2017. The Employment Judge conducting the June PH said that it was for the claimant to "*provide evidence to the Tribunal whether that was documents or witnesses.*" The Note also set out what was explained in relation to the procedure at the July PH. In relation to "Joe" the Note stated:

"13. Mr Labamba indicted he wished a co-worker to give evidence. He knows him as Joe but does not know his full name and he still works for the respondent. Mr Labamba wishes him to give evidence to show he is still working for the respondent This appears to be relevant evidence for a hearing that would take place after the hearing on 7 July. Mr Caldow agreed to investigate the position. If the respondent is not prepared to make that employee available to give evidence on a voluntary basis, consideration will be given to issuing a witness order for his attendance."

28. The Tribunal understood from Mr Caldow's comments at the July PH that he had investigated the matter. The claimant had not sought a witness order for "Joe" before the preliminary hearing. He was content to proceed on 7 July 2017 knowing that he was giving evidence and could ask questions of the respondent's witnesses whose written witness statements he had received in advance.

Ground 5 -the Law

29. The claimant referred to the law from which it appeared that he did not accept the Tribunal's assessment of it or the evidence.

30. The respondent said that the claimant was given every opportunity to put forward his case and the hearing on 7 July 2017 was conducted in an entirely fair manner. The application for reconsideration amounted to a challenge to the Tribunal's central conclusions and was an attempt at a "second bite at the cherry", which should not be permitted.

31. The Tribunal referred to Rule 70 of the Tribunal Rules and noted that upon reconsideration of a judgment the Tribunal may confirm, vary or revoke the original decision and, if revoked, the decision may be taken again.

32. Under Rule 70 the judgment will only be reconsidered where it is *"necessary in the interests of justice to do so".* This gave the Tribunal wide discretion. However, it did not mean that in every case where a litigant is unsuccessful they are automatically entitled to reconsideration of the original decision. The ground only applies where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order.

33. The Tribunal noted that the interests of justice as a ground for reconsideration relates to the interests of justice to both sides. It also noted that the interests of justice must be exercised consistently with the right to a fair trial.

34. The claimant did not agree with the conclusions, which were reached in the Original Decision. It is the nature of tribunal proceedings that a party often finds itself in that position. However, having considered all the points made by the claimant the Tribunal remained of the view that its Original Decision should be confirmed.

Employment Judge: S MacLean
Date of Judgment: 21 September 2017
Entered in register: 27 September 2017
and copied to parties