



EMPLOYMENT TRIBUNALS

Claimant: Mr W. Matthaus

Respondent: MBNA Ltd (R1)
Paymaster (1836) t/a Equiniti Hazell Carr (R2)

HELD AT: Wrexham via CVP **ON:** 31st January 2022

BEFORE: Employment Judge T. Vincent Ryan
Ms. S. Atkinson
Ms C. Peel

REPRESENTATION:

Claimant: Written application, response, and submissions

Respondent: Written application, response, and submissions

JUDGMENT & DECISION on RECONSIDERATION

The parties' having made respective applications for reconsideration of the Reserved Liability Judgment signed on 14th October 2021, and sent to the parties on 15th October 2021, ("the Liability Judgment"):

1. The unanimous DECISION ON THE RESPECTIVE APPLICATIONS for reconsideration is:

1.1. The claimant's application for reconsideration of the Liability Judgment findings in respect of his claim that unauthorised deductions were made from his wages is dismissed upon withdrawal;

1.2. The claimant's application for reconsideration of the Liability Judgment findings in respect of his status, specifically the finding at paragraph 2.2 of the Liability Judgment (that he was not a contract worker) is refused as there is no realistic prospect of it being varied or revoked.

1.3. The respondents' applications for reconsideration of the Liability Judgment in respect of the finding that the claimant was automatically unfairly dismissed

(a claim under s.103A Employment Rights Act 1996 (ERA)), is granted and the unanimous judgment of the Tribunal on reconsideration is set out below.

- 1.4. The respondents' applications for reconsideration of the Liability Judgment in respect of the finding that the claimant was Victimised (s.27 Equality Act 2010, "EqA"), is granted and the unanimous judgment of the Tribunal on that reconsideration is set out below.
2. UPON RECONSIDERATION of the Liability Judgment the unanimous judgment of the Tribunal is:
 - 2.1. The finding that the claimant was automatically unfairly dismissed, the claim under s.103A ERA, is revoked, the Tribunal confirming its finding as to status that the claimant was a worker but not an employee.
 - 2.2. The finding that the claimant was Victimised, contrary to s.27 EqA and s.39 (3) EqA is confirmed.

REASONS

The Issues:

1. Rules 70 - 73 ETs (Constitution & Rules of Procedure) Regs 2013 provide for reconsiderations of judgments. On application for reconsideration of a decision the Tribunal shall consider whether there is a reasonable prospect of the original decision being varied or revoked, and if not, then an application shall be dismissed. Where an application is granted, the Tribunal may confirm, vary, or revoke the original decision.
2. The overriding objective of the Tribunal is to deal with cases fairly and justly; the interests of justice must prevail. In this case the parties have agreed that the overriding objective will best be achieved by way of written submissions and mutual responses before the Tribunal convene in chambers to deal with the matter.
3. Essentially the Tribunal must decide, initially, whether there is a reasonable prospect that parts of its Liability Judgment will be revoked or varied if reconsidered, and then, subject to that, whether the interests of justice require confirmation, variation, or revocation of those parts of the liability judgment that are reconsidered.

The Applications:

4. R1 & R2 have made a joint application for reconsideration of the finding that C was automatically unfairly dismissed (s.103A ERA) on the basis that it is inconsistent with the Tribunal's finding that C was a worker but not an employee.
5. R1 & R2 also apply for reconsideration of the finding that, C being a worker, he was victimised in circumstances where they rely on the parties' agreed list of issues suggesting that this claim required a finding that C was a contract worker; the Tribunal found that he was not a contract worker. R1 challenges the finding

that C was a worker, amongst other matters the subject of a Notice of Appeal; the appeal to the EAT is stayed pending this decision.

6. C initially applied for reconsideration of the finding that he suffered unauthorised deductions from his wages. That claim has been settled anyway. This application was withdrawn by C.
7. C initially applied for reconsideration of the finding that he was not a contract worker. He has clarified that he is content with the finding that he was a worker, which he says entitles him to the judgment of Victimisation in his favour, but if that finding is in jeopardy, he would pursue the application for review of the finding that he was not a contract worker.
8. The parties discussed the matters in hand at a preliminary hearing held on 30th November 2021. In accordance with agreed Orders, they each submitted clarified applications and responses to the other parties' applications, and other comments.

The Tribunal

9. The Tribunal has read and discussed the Liability Judgment, all extant applications and the respective parties' submissions/responses and comments. It has considered the Rules (including the overriding objective as above), the authorities cited by the parties and the principles in the following authorities raised by Employment Judge Ryan (albeit it is noted these relate more to the adding of claims to Lists of Issues than to re-appraising the way preliminary jurisdictional issues are framed):
 - 9.1. Langston v Cranfield University 1998 IRLR 172 EAT – some issues are implicit, raising the obligation to consider them even if additional to agreed issues.
 - 9.2. Remploy Ltd v Abbott & others EAT 0405/2014 – Langston, above, has no “resonance” in complex cases where parties are well-represented, had defined the issues and engaged in case management; this relates to the late raising of wholly new claims.
 - 9.3. Muschett v H M Prison Service 2010 IRLR 451 CA – the Tribunal's function is to hear the case the parties choose to put before them, make findings as to facts and to decide in accordance with the law.
 - 9.4. Mervyn v B W Controls Ltd 2020 ICR 1364 CA – lists of issues may be amended to bring justice where the facts “shout out” that a claim be added.

Decision:

10. C withdrew his application in respect of his claim for wages and for that reason the Tribunal dismissed it. Had it not been withdrawn the Tribunal would have refused it otherwise, as having no reasonable prospect of achieving a variation or revocation of the Liability Judgment.

11. The Tribunal remains satisfied as to its judgment in respect of C's status as a worker but not a contract worker. There being no reasonable prospect of variation or revocation of those aspects of the Liability Judgment, C's application was refused.
12. As previously explained to the parties the Liability Judgment contained a drafting error for which I (Employment Judge Ryan writing for himself) have apologised; I made a mistake and I am sorry, as expressed to the parties at the said preliminary hearing and in writing when I expressed my provisional view on this application. It is inconsistent to find that C was a worker, but not an employee, and that he was automatically unfairly dismissed. The Tribunal found unanimously that the claimant was a worker but not an employee; that decision is confirmed today. The judgment at paragraph 7 of the Liability Judgment (Public Interest Disclosure ("whistleblowing") – dismissal (s.103A ERA)) was an alternative finding included in the initial draft contingent on our judgment on the issue of status. Had the Tribunal found C to have been an employee, it would have confirmed the finding of automatic unfair dismissal. The Rs had suggested we deal with jurisdiction last, and we did, hence alternative findings being set out in the draft. On reaching our conclusion in respect of status I ought to have, but omitted to, delete the finding of unfair dismissal. The Tribunal revokes the Unfair Dismissal judgment without hesitation.
13. C made various claims, dependant on his status at the material time. The parties produced documentary evidence and witness evidence addressing the issues of status and they all made submissions both in writing and orally on the issue of status. A considerable part of the parties' efforts, and the Tribunal's time, were spent considering C's status, notwithstanding the Rs' overall view that the claims would fail on the facts of the allegations of conduct and that the Tribunal may not even need to consider this jurisdictional point. In the light of the Rs' applications and the significance of C's status to the decision to revoke part of the Liability judgment as at paragraph 12 above, the Tribunal considered that there was a reasonable prospect of the Liability Judgment being varied or revoked in respect of the Victimisation findings. The Tribunal allowed this application to proceed, and it reconsidered its judgment in respect of the Victimisation findings.
14. The parties enabled the Tribunal to consider and decide whether the claimant's status was that of employee, worker, or contract worker. That obviously mattered as C had to establish that his status entitled him to the statutory protection he claimed and to the remedies he seeks.
15. The claimant claimed, and needed to establish, status as an employee for his claims of unfair dismissal and breach of contract; he needed to be a worker for his wages and "whistleblowing" detriment claims.
16. Protection from victimisation (s.27 & s.39 EqA) extends to employees, apprentices, and workers (s.83 (2) (a) EqA), and contract workers (S.41 (3) EqA).
17. It follows that C would have been protected from victimisation if he was found to be an employee, worker, or contract worker.

18. The list of issues at paragraph 1.5 of the Reasons with the Liability Judgment poses the question as to whether, for the purposes of his victimisation claim, amongst others not relevant today, C was a contract worker. The Rs say that C based his victimisation claim on his being a contract worker; C says that it was an alternative and not exclusive question, that obviously C would accept for this claim either that his status was that of employee, worker or contract worker and he would have no reason to limit the claim by relying only on the status of contract worker.
19. Guided by the interests of justice the Tribunal found C's submissions more persuasive than the applications, and submissions in support, of the Rs.
20. Having found that C was a worker, that he performed protected acts, that he was subjected to detriments, and that he was so subjected because he performed those protected acts C was entitled to the judgment given; he was victimised.
21. The Tribunal feels obliged to ask itself whether the contentious listed issue is correctly, clearly, and exclusively worded when interpreted as it is by the Rs. We took account of the complexity of the case where the parties were professionally, and well, represented having undergone case management. Our function is to hear the case put, make findings of fact, and decide in accordance with the law. We had to consider the way the case was put, as chosen by the respective parties and how justice requires us to consider C's victimisation claim in terms of the significance of the findings regarding status. Would the Rs suffer a disadvantage or be unfairly treated if the said issue was read as allowing C to expect protection from victimisation if found to be an employee or worker? The Tribunal considered the overriding issue and whether this aspect of the claims rendered any part of the hearing unfair, to whom and how.
22. All parties had every reasonable opportunity to advance evidence and argument as to C's status at the material time. They all took those opportunities. Likewise, they were able to, and did, advance evidence and argument as to whether there was a protected act(s), and detriment and the causation for any detrimental treatment. We are satisfied that there was no unfairness to either party at the hearing or in our deliberations regarding the component elements of a claim of victimisation. We do not think it is then unfair to put those component parts together; that results in the finding as set out in our Liability Judgment. C established that he was entitled to statutory protection and that the Rs transgressed, regardless of the wording of the List of Issues. Our role is to ensure fairness and justice and not adjudicate on the linguistic quality of the parties' list of issues. Statutory entitlement established, it trumps a party's restrictive interpretation of the List of Issues where, as in this case, every aspect of employment status was fully canvassed; it is that (coupled with findings of fact that all parties agree were open to us) that gave C judgment.
23. On reconsideration the judgment in respect of the claimant's victimisation claims is confirmed, paragraph 11 and all other parts of the judgment that led the Tribunal to that conclusion.
24. Revocation of the Unfair Dismissal judgment was because the Tribunal found that C did not have the qualifying status (of employee). It would have been ironic to

then revoke the Victimisation judgment where the Tribunal had found that he enjoyed a qualifying status (that of worker).

25. Both parties in their written submissions have requested or intimated other potential finessing of the judgment and referred to appeals to the EAT. The Tribunal only saw the notice of Appeal after the November 2021 preliminary hearing. The Tribunal did not invite the parties to make submissions beyond the applications being considered here. It would be inappropriate for the Tribunal to delve further into the Liability Judgment at this stage or, of its own motion, to reconsider all or any other parts of it without informing the parties and inviting submissions thus adding to further delay and cost; in fact, the Tribunal sees no need. The Tribunal considers that the overriding interest would be best served by the parties deciding whether to withdraw or pursue their appeals, and, if pursued, then that all else ought to be left to the EAT. If the EAT seeks clarification from the Tribunal or remits all or any of the Liability Judgment to this Tribunal we will of course deal with matters as appropriate. Subject as stated above the Tribunal is content to confirm its Liability Judgment.

Employment Judge T.V. Ryan

Date: 31.01.22

JUDGMENT SENT TO THE PARTIES ON 2 February 2022

FOR THE TRIBUNAL OFFICE Mr N Roche