# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr M Davies**

**Respondent:** **Melin Homes Ltd**

# RECONSIDERATION DECISION

The claimant's application dated 20 December 2022 and 16 September 2022 for reconsideration of one part of my Judgment of 6 December 2022 is refused as there is no reasonable prospect of the original decision being varied or revoked.

# REASONS

## The reconsideration applications

1. I have undertaken a preliminary consideration of the claimant's application for reconsideration of that part of my Judgment of 6 December 2022 that struck out the claimant's complaint under section 86 Employment Rights Act 1996.

## The law

2. An application for reconsideration is an exception to the general principle that (subject to an appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70).

3. Under Rule 71 an application for reconsideration has to be made within 14 days of the date on which the written reasons were sent. Rules 71 and 72 do not give an express power to extend time, however, Rule 5 provides a general power to extend any time limit in the Rules.

4. Under Rule 72(1) I may refuse an application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked.

5. The importance of finality was confirmed by the Court of Appeal in Ministry of Justice v Burton and anor [2016] EWCA Civ 714 where it was said:

> *"the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Ironsides Ray and Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."*

6. Similarly in Liddington v 2Gether NHS Foundation Trust EAT/0002/16 the Employment Appeal Tribunal said:

> *"a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or reargue matters in a different way or by adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered."*

## Decision

7. The reasons for my decision are as follows.

8. The claimant applies for a reconsideration of my decision to strike out his complaint for breach of contract brought under section 86 of ERA, as set out in paragraphs 14.2 to 14.5 of my Judgment dated 6 December 2022. I held the complaint had no reasonable prospect of success.

9. The claimant submits that the respondent was not lawfully entitled to dismiss him without notice and that under section 86 the respondent would be required to provide a lawful reason for summary dismissal. The claimant says the respondent has accepted that they dismissed him without notice and accepted that he had not waived his right to notice. The claimant submits that his dismissal falls into the category of (4), taken from Delaney v Staples [1992] ICR 483 which states:

*"Without the agreement of the employee, the employer summarily dismisses the employee and tenders a payment in lieu of proper notice. This is by far the most common type of payment in lieu and the present case falls into this category. The employer is in breach of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended no further services are to be rendered by the employee under the contract. It follows that the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work done under the contract of employment. The nature of payment in lieu falling within the fourth category has been analysed as a payment by the employer on account of the employee's claim for damages for breach of contract. In Gothard v Mirror Group Newspapers Ltd [1998] ICR 729, 733, Lord Donaldson of Lymington MR stated the position to be as follows:*

*"If a man is dismissed without notice, but with money in lieu, what he receives is, as a matter of law, payment which falls to be set against, and will usually be designed by the employer to extinguish any claim for damages for breach of contract, i.e. wrongful dismissal. During the period to which the money in lieu relates he is not employed by his employer."*

*In my view that statement is the only possible legal analysis of a payment in lieu of the fourth category. But it is not, and was not meant to be, an analysis of a payment in lieu of the first three categories, in none of which is the dismissal or breach of contract by the employer. In the first three categories, the employee is entitled to the payment in lieu not as damages for breach of contract but under a contractual obligation on the employer to make the payment."*

10. The claimant argues that his dismissal falls in that category because he says the contract had no expressed right to summary dismissal and the payment was not in fact a payment in lieu of notice. The inherent difficulty with that argument is that the claimant's contract contained a clause saying "At the absolute discretion of the Association, payment in lieu of working notice may be made." It would therefore fall within category (2) in Delaney v Staples:

*"The contract of employment provides expressly that that employment may be terminated either by notice or, on payment of a sum in lieu of notice, summarily. In such a case if the employer summarily dismisses the employee he is not in breach of contract provided that he makes the payment in lieu…"*

11. The claimant says that this clause was not advanced in the ET3 or at the preliminary hearing. However, the ET3 says "*There is no breach of the*

*Claimant's contract arising from his entitlement to notice. The First Respondent reserves a right to make a payment in lieu of notice under the Claimant's contract and exercised that right in respect of the termination of the Claimant's employment."* The claimant seeks to draw a distinction because of the use of the words "reserves a right." But it is clear to me from the ET3 and from what was said at the preliminary hearing that this is the clause the respondent was referring to. Moreover, contractual claims are ultimately concerned with pure contractual principles i.e. whether or not a contractual right existed or not. If it did (provided it is pleaded) there is nothing stopping, for example, a party relying on a contractual principle they did not know about or did not have in mind at the time of the events in question. It is not in dispute that the claimant's contract contained this clause, and I therefore consider his arguments to be legally unsustainable.

12. The claimant refers to the Braganza type restrictions that may operate on the exercise of such a contract discretion and argues that the payment made may not be adequate compensation for statutory notice or summary termination. What that fails to appreciate however is that section 86 has a very limited purpose i.e. to imply where needed into employee's contracts a limited right to minimal period of notice. For example, sometimes there are vulnerable employees who have no written contract of employment/statement of particulars at all. It is not about incorporating rights to manage exits fairly without damage to reputation. Furthermore, I did not strike out (but subjected to a deposit order) the claimant's separate breach of contract notice pay breach of contract claim at paragraphs 14.6 to 14.9 (mistakenly numbered 18.9) of my Judgment. The claimant has paid the deposit so is able in any event to pursue his arguments about the exercise of that contractual discretion. I fear the claimant gives far more attention to clause 86 ERA than that clause was ever intended to bear and that he also, in effect, seeks to continue to find ways to advance the principle of an ordinary unfair dismissal claim, where he did not accrue that right. Given he has paid the deposit orders, I would continue to encourage him to seek some professional advice.

13. I therefore do not believe there is a reasonable prospect of my varying or revoking my previous judgment that the section 86 ERA complaint has no reasonable prospect of success. The application for reconsideration is therefore refused. The claimant has paid the deposit orders and the remainder of the claim (direct age discrimination, harassment related to age, trade union detriment, breach of contract (notice pay)) will be listed for further case management.

_____

Employment Judge Harfield
Dated: 12 January 2023

JUDGMENT SENT TO THE PARTIES ON 13 January 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche