Case No: 2300627/2021
2302103/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Bramall**

Respondent: **Flow Logistics Limited & Ors**

JUDGMENT ON APPLICATION FOR RECOSIDERATION

It is not in the interests of justice to vary the judgment on reconsideration promulgated on 29 November 2022.

REASONS

1. A reserved judgment on a preliminary issue dated 29 September 2022 was sent to the parties on 14 October 2022 (the "Judgment"). In the Judgment, I refused to substitute the respondent ("Nexus") for Flow Logistics Limited ("Flow Logistics") (in claim 2300627/2021).

2. On 28 October 2022 Mr Bramall's representative wrote to the Tribunal indicating that the claimant requested that the Judgment be reconsidered. They submitted that in accordance with rule 70 of the it would be in the interests of justice for the Judgment to be varied to allow the claims against Nexus to proceed.

3. The seventh respondent ("Nexus") was to make submissions on the application by 21 November 2022. I was informed by the Tribunal administration that no submissions had been received and I considered the application and concluded that it had a reasonable prospect of success. My judgment on the application for reconsideration was sent to the Tribunal administration for promulgation on 29 November 2022. Subsequently, two events occurred:

    a. My judgment on the application for reconsideration was promulgated on 23 January 2023. That is a significant delay.

b. Nexus submitted representations in respect of the application for reconsideration on 21 November 2022. These were not sent to me. Indeed before issuing my decision, I specifically asked the Tribunal administration whether any representations had been received and I was told that there were no representations for me to consider. Unfortunately that was incorrect.

4. It is most regrettable that I was not in a position to consider Nexus' representations before issuing the judgment on reconsideration. I would have done so had they been sent to me. On 27 January 2023, Nexus' solicitor wrote to the Tribunal applying for a reconsideration of my judgment on reconsideration. They point out that Nexus' submissions opposing the original application were not considered by me and it would be in the interests of justice pursuant to rule 70 for the judgment on reconsideration to be reconsidered. The outcome sought is for my judgment of 29 September 2022 to be restored. Alternatively, if the judgment of 29th September 2022 is not restored then Nexus makes a further application for reconsideration of the reconsideration judgment in the interests of justice. It states that at paragraph 44 of the Judgment, the Tribunal distinguished the decision in **Galilee v Commissioner of Police of the Metropolis [2018] ICR 634** on the application to amend but did so obiter, as the application to amend had been refused. In the reconsideration judgment it submits that the Tribunal has not determined the issue that even if the amendment is permitted the claims against Nexus are treated as having been brought at the date of the amendment application and are thus out of time. The Tribunal has determined that it was reasonably practicable for Mr Bramall to have brought his claim against Nexus in paragraph 47 of the Judgment of 29 September 2022, and therefore even if the amendment is permitted it is submitted that the Tribunal has no jurisdiction to hear the claim against Nexus and it should be dismissed.

5. I asked the Tribunal administration to notify Mr Bramall's representative of the application to reconsider the judgment on reconsideration and invite their representations to be received by 3 February 2023. Unfortunately this was not done. When I chased the matter, I asked the Tribunal administration to invite a response by 10 February 2023. Mr Bramall's representative has submitted representations in time and opposes the application.

6. I do not propose to repeat the basis upon which the original application was made or to set out my reasons for allowing the application. This is set out at length in my original judgment on reconsideration. In this decision, I use defined terms as per the judgment on reconsideration. Suffice to say, say, I allowed the application for the first respondent in the First Claim (Flow Logistics Limited) to be substituted with Nexus Workforce Ltd t/a Flow Logistics Limited.

7. Rule 70 provides the Tribunal with a general power to reconsider any judgment where it is necessary in the interests of justice to do so. A 'judgment' is defined in rule 1(3)(b) as 'a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines:

a. a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs);

b. any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue); or

c. the imposition of a financial penalty order under the Employment Tribunals Act 1996., section 12A'

It is only a decision which finally determines a claim or any issue in a claim that can constitute a judgment for the purposes of a reconsideration under rule 70. It follows that the judgment on reconsideration is a judgment for present purposes in that it dealt with the issue of substituting one party for another party in the First Claim.

8. The previous Employment Tribunal Rules (2004) provided a number of grounds on which a judgment could be reviewed. The only ground in the 2013 Rules is that a judgment can be reconsidered where it is necessary in the interests of justice to do so. I consider that the guidance given by the Employment Appeal Tribunal in respect of the previous Rules is still relevant guidance in respect of the 2013 Rules. It was confirmed by **Eady J in Outasight VB Ltd v Brown UKEAT/0253/14/LA** that the basic principles still apply.

9. There is a public policy principle that there must be finality in litigation and reviews are a limited exception to that principle. In the case of **Stevenson v Golden Wonder Limited [1977] IRLR 474** makes it clear that a review (now a reconsideration) is not a method by which a disappointed litigant gets a "second bite of the cherry". Lord McDonald said that the review (now reconsideration) provisions were

> *Not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before.*

10. In the case of **Fforde v Black EAT68/80** where it was said that this ground does not mean:

> *That in every case where a litigant is unsuccessful is automatically entitled to have the tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in even more exceptional cases where something has gone radically wrong with the procedure involving the denial of natural justice or something of that order.*

11. In the interest of justice means the interest of justice to both sides. The Employment Appeal Tribunal provided guidance in **Reading v EMI Leisure Limited EAT262/8**1 where it was stated:

> *When you boil down what is said on (the claimant's) behalf it really*

comes down to this: that she did not do herself justice at the hearing, so justice requires that there should be a second hearing so that she may. Now, 'justice' means justice to both parties.

12. Nexus' application to reconsider proceeds on the basis that it would be in the interests of justice for there to be a reconsideration of the judgment on reconsideration. The term "in the interests of justice" is not defined in the rules. In **Outasight VB Ltd v Brown 2015 ICR D11, EAT**, Her Honour Judge Eady QC accepted that the wording 'necessary in the interests of justice' in rule 70 allows employment tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially, 'which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation'. The reconsideration procedure, like its predecessor, the review procedure, can be used to correct errors that occur in the course of proceedings, regardless of whether the error was a major or a minor one. In this case, Nexus' application is clearly in the interests of justice because the judgment on reconsideration does not take account of the respondents' submissions that were sent to the Tribunal on time. Had those submissions been considered, it is possible that the outcome could have been different (i.e. a rejection of the original application for reconsideration) and the Judgment would have stood unchanged.

13. For ease of reading, I have set out the basis of the original application for reconsideration and Nexus' opposition thereto.

14. Mr Bramall's application proceeded on the premise that none of the reasons provided in the Judgment in paragraph 45 (c) are relevant to the issue as to whether he made a genuine mistake. Instead, it is submitted that they relate to whether it was reasonable for him to have made such a mistake. It is further submitted that the reasons provided do not show that he was in fact unreasonable.

15. Mr Bramall submitted that he made a genuine mistake and was unaware that when issuing the First Claim that Flow Logistics was only a trading name. He submitted that he believed it to be the legal name of his employer and was entirely unaware of the legal entity that is named as the respondent.

16. The Judgment, it is submitted, focuses on the reasonableness of Mr Bramall in making the mistake and fails to determine whether he made a genuine mistake.

17. Nexus opposed the application to reconsider the Judgment as follows:

    a. It is simply an impermissible attempt to re-argue the arguments previously advanced before the Tribunal.

b. Paragraphs 8 to 24 of the Judgment clearly set out the arguments being advanced by Mr Bramall.

c. Mr Brammall relied upon the decision in **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650, NIRC,** which the Tribunal specifically referred to the 7 points identified by Lord Donaldson in paragraph 41 of the Judgment. As set out in the 7 points, the Tribunal was exercising discretion to allow the amendment. Point 6 refers to permission only being granted if the Tribunal is satisfied that the mistake sought to be corrected was a genuine mistake. This is an element in the decision whether to exercise the discretion to allow the amendment. The Tribunal is required to consider "all the circumstances of the case". The question of whether or not a genuine mistake has been made is not the sole question.

d. The application sought to isolate one sentence of the Judgment at paragraph 45 (c) thus:

> *I am not satisfied that the claimant made a genuine mistake in citing Flow Logistics Ltd as a respondent in the First Claim*

Read in the context of the Tribunal's full self-direction as to the 7 points identified by Lord Donaldson and the reasoning at sub paragraphs 45 (c) from (i) to (viii) it is clear that the Tribunal was properly considering all the circumstances of the case including at paragraph 45 (d) the hardship occasion to Mr Bramall in refusing the application. It is submitted that equally in one sense it is clear that it was not a mistake to identify Flow Logistics Ltd, there was no mistake as to their name or their registered office, the mistake was the failure to identify that they were not Nexus, a point which is clear from the Tribunal's reasoning. It was not a case of a simple error in the name.

e. Nexus submits that the only criticism that Mr Bramall can make is that the tribunal elided the considerations at Lord Donaldson's point 6 and 7 into a singled short form summation of the test, in the sentence quoted at paragraph 45 (c), making reference to the genuineness of the mistake. However, it is clear that the Tribunal, having properly directed itself first of the law, was considering all the circumstances of the case. The attempt to read the reasoning as being only as to the state of Mr Bramall's mind, and whether he was mistaken, as an opportunistic distortion of the Tribunal's reasoning as a whole.

f. Once that is appreciated, it can be seen that the remainder of the application, with one impermissible addition, simply repetitious of Mr Bramall's submissions before the Tribunal or an attempt to re-argue points or to develop further arguments which he had the opportunity to deploy or to develop at the hearing. In accordance with the important principle of finality, the application should be rejected as an attempt to re-argue points after the Judgment.

g. Nexus submits that the impermissible new argument is set out in

paragraph 17 of the application in that it impermissibly seeks to introduce new evidence, without any evidence in fact being led other than bold assertion and without any explanation as to why could not have been led before the original hearing. This related to Mr Bramall's solicitor's experience of the appearance of other DSPs on the Company Register. It is submitted that Mr Bramall chose to leave no evidence from his solicitors addressing the steps they had taken to establish the identity of the correct respondent and he did not give evidence in relation to his understanding of whom he was contracting with, particularly in relation to the payments he received from Nexus and why he did not question this. In Nexus' submission, there is no suggestion that it would have been impossible to have led that evidence had Mr Bramall wished to do so. Further reference to other DSPs and their position at Companies House was clearly relevant to the position of Nexus.

h. Nexus submits in the alternative that If the Judgment is not restored then they make a further application for reconsideration of the judgment on reconsideration in the interests of justice. They refer to paragraph 44 of the Judgment which distinguished the decision in **Galilee v Commissioner of Police of the Metropolis [2018] ICR 634** on the application to amend but did so obiter, as the application to amend had been refused. In the judgment on reconsideration it is submitted that the Tribunal has not determined the issue that even if the amendment is permitted the claims against Nexus are treated as having been brought at the date of the amendment application and are thus out of time. The Tribunal has determined that it was reasonably practicable for Mr Bramall to have brought his claim against Nexus, and therefore even if the amendment is permitted it is submitted that the Tribunal has no jurisdiction to hear the claim against Nexus and it should be dismissed.

18. Mr Bramall's opposition to the application to reconsider the judgment on reconsideration proceeds as follows:

a. None of the points raised by Nexus impact the findings in the judgment on reconsideration. The argument that Mr Bramall's application is an impermissible attempt to re-argue the case is not supported. References then made to paragraphs 5 to 9 of the judgment on reconsideration where it is stated that I carefully considered the grounds on which the Judgment could permissible be reconsidered covering all the points that were raised by Nexus. Even if I had received the submissions, it would have made no difference to my findings, which were entirely permissible and consistent with the relevant authorities. Consequently, there are no grounds for a further reconsideration.

b. In any event, Nexus wrongly characterised Mr Bramall's application is simply seeking "to have another bite of the cherry". Mr Bramall's grounds were properly set out which were permissible grounds.

c. Nexus' argument that Mr Bramall impermissibly introduced new evidence via his application is not accepted. In any event, it was not

determinative. Reference is then made to paragraph 18 and 19 of the judgment on reconsideration which is then quoted in the letter. It is submitted that when I referred to paragraph 7 & 8 of Mr Bramall's original application, I demonstrated that placed significant importance on being notified of a factual misunderstanding which was pivotal in my decision. Mr Bramall knew Flow Logistics was a trading name for Nexus when bringing the First Claim. In his application, Mr Bramall submitted this was incorrect and this had not been asserted by him or by Nexus. This is precisely the kind of factual error that is appropriate for a reconsideration application to address.

d. Reference is also made to the fact that I referred to paragraph 27 of Mr Bramall's application and the conclusions that I reached in paragraph 19 in the judgment on reconsideration regarding the respective hardship to both parties which demonstrates that it was the application of the correct legal test, with the emphasis on the balance of prejudice, that was also determinative in the decision to grant Mr Bramall's application.

e. Turning to the new application for reconsideration on the basis that I wrongly distinguished the decision in **Galilee** in the Judgment it is submitted that I did not make a finding that was obiter in that I considered the arguments that were presented by Mr Reade KC and did not agree with his line of reasoning as set out in paragraph 44 of the Judgment. It is submitted that this was a material finding of the Tribunal and having made such finding, I determined that the decision in **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650, NIRC**, and the subsequent line of authorities should be applied.

f. It is submitted that in the light of that, the correct deadline for reconsideration of that decision was 14 days from the date of the Judgment and the application for reconsideration of this element of the Judgment is out of time.

g. In any event, Nexus has not properly identified any reason why the finding should be reconsidered, or raised anything that was not raised at the preliminary hearing, and therefore, even if the reconsideration application had been made in time, it should also be rejected for this reason.

h. Finally, Mr Bramall submits that there are no grounds for disturbing the findings in the Judgment at paragraph 44 concerning **Galilee**, which are correct as a matter of law and should stand.

19. Having carefully considered the parties' representations I prefer Mr Bramall's submissions to Nexus' submissions for the reasons given therein. Consequently the judgment on reconsideration stands.

10 February 2023

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Employment Judge **A.M.S Green**