



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND)

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Determination of the Tribunal, Upon Consideration in terms of Rule 72(1) of the Claimant's Application in Case No 4112056/2021 and dated 24th January 2023, for Reconsideration of the Tribunal's Judgment of 18th, Issued to Parties on 20th, January 2023

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Employment Judge J G d'Inverno

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Mr R U Pettigrew

**Claimant
In Person**

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Universal Student Living Ltd

**Respondent
Represented by:
Mr A Glass, Solicitor**

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DETERMINATION OF THE TRIBUNAL

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The Employment Judge, upon consideration in terms of Rule 72(1) of the claimant's Application dated 24th January for reconsideration of the Tribunal's Judgment of 18th/20th January 2023, ("the Judgment"), considering, on the Grounds of Application presented, that there is no reasonable prospect of the original decision being varied or revoked:-

(First) Refuses the Application in terms of Rule 72(1); and,

(Second) Directs that parties be informed of the refusal by the sending to them of a copy of this Determination together with the Note of Reasons attached to it.

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Employment Judge: J d’Inverno
Date of Judgment: 21 February 2023
Entered in register: 23 February 2023
and copied to parties

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I confirm that this is my Determination in the case of Pettigrew v Universal Student Living Ltd and that I have signed the Determination by electronic signature.

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REASONS

1. By email dated the 24th of January 2023 the claimant made Application, in terms of Rule 71 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, for reconsideration of the Judgment of the Tribunal dated 18th and issued to parties on 20th January 2023, following the Open Preliminary Hearing heard in the case on 10th January 2023.
2. The Application, was made timeously in terms of Rule 71 insofar as it relates to the Tribunal’s Judgment of 18th/20th January 23. It attached 8 pages of photographic partial extracts from documents to which reference is made in the Application, and is in the following terms:-

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“From: Roy Urquhart Pettigrew
Sent: 24 January 2023 10:55
To: EDINBURGHET; Graydon, Kirsty;
Andrew.Glass@clydeco.com
Cc: Law Clinic
Subject: Case Number 4112056/2021 R U Pettigrew v Universal Student Living Ltd.

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Attachments: 20230124_093337.jpg; 20230124_093354.jpg;
20230124_093409.jpg; 20230124_093421.jpg;
20230124_093434.jpg; 20230124_093638.jpg;
20230124_093644.jpg; 20230124_093713.jpg

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Dear Sir/Madam.

10 Application for reconsideration of the Judgement of Judge d'Inverno.CVP
Hearing 10/1/2023.

Dear Sir/Madam.

15 I refer to the above request and would ask that this Judgement be
reconsidered.

I have listed the reasons for my request and enclose new evidence which is
in the interests of Justice.

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The respondent's main thread of defence has been that I never was employed
by Homes for Students and my employer was Universal Student living ltd.
This is untrue and I will list the new evidence.

25

1. HMRC form P800(HMRC08/21). Page 2 of this form shows my income
and whom this income has originated from.

This clearly shows that my employer did change and shows both Universal
Student Living ltd and then changed to Homes for Students ltd.

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2. I also attach details of my transfer to Scottish Widows. This clearly shows
that I was transferred to the Homes for Students ltd pension Scheme.

My previous pension provider was NEST whilst employed by Universal
Student Living ltd.

3. I also attach a copy of the final disciplinary hearing letter .I have bracketted the relevant sections which are "during the 30 minutes of discussion that followed, you continued to bring up several matters, many of which relate to your employment under Universal Student living. This bore no relevance to the allegations held against you. Further discussions yielded no clarity on what basis you felt the decision to dismiss you were fit for appeal."

"It is on that basis that I support the decision to terminate your employment with Homes for Students.

The final paragraph states the blacklisting of my email addresses/server and attempts to obtain further evidence via a Subject Access request were denied.

The final attachment is the new Homes for Students phone simcard letter.

The provision of false information/statements throughout this process has seriously affected my mental health and in my opinion has been done with malicious intent.

My reputation has been rubbished and the publication of previous Judgement has caused extreme mental anguish. I considered giving up due to the distress caused by this process and my marriage is now on the brink of collapse as a result of my depressive state .

The provision of false information at my initial hearing by the respondent has resulted in valuable Tribunal time being wasted and the costs associated with providing false information.

In view of this I would be grateful if the Tribunal could take this new information into account .

I have had to take 2 oaths, provide 2 sets of medical records and endure a Tribunal process which has been biased due to the false allegations contained in the Respondents defence and during my disciplinary procedure.

5 It should be noted that a fully completed ET3 has never been provided to myself and had a fully completed ET3 been completed in full and truthfully then this matter could have been resolved at an earlier date. Judge Pirters instruction that a fully completed ET3 be provided to me and the respondent's failure to provide this suggests impropriety.

10 At my initial hearing I requested that for the purposes of the tribunal that both parties be treated as one. I gave my reasons on 3 occasions but was advised by both Judges to seek legal advice on the definition of a legal entity.

15 In view of the new evidence and in the interests of Justice I would request a reconsideration of all previous judgements made.

I thank you for your consideration.

20 Yours sincerely

25 Roy Urquhart Pettigrew

Sent from Outlook for Android

3. As is set out at paragraph 2 of the Note of Reasons attached to the Judgment
30 and reproduced below for ease of reference, the Open Preliminary Hearing was fixed for the consideration of two distinct Preliminary Issues, viz;-

“The Issues

2. The Open Preliminary Hearing was fixed for the consideration and determination of the following two Preliminary Issues:

5 (a) Whether, at the material time for the purposes of his complaints, that is in the period 1st January 2019 to 30th June 2019, the claimant was a person possessing the protected characteristic of Disability for the purposes of section 6 of the Equality Act 2010, by reason of all or some of the physical and mental impairments (medical conditions) of which he gives notice of relying in his
10 pleaded case, and in the “Scott Schedule” at pages 82 to 85 of the Joint Bundle, those being; “Anaphylaxis Shock, Musculoskeletal Issues, Anxiety and Depression”;

15 (b) Whether in, section 8 paragraph 7 of his ET1 at page 31 of the Joint Bundle (“the Bundle”), the claimant gives notice of a relevant and competent complaint of failure to consult in respect of a Regulation 3(1)(a) of the TUPE Regulations 2006 “Relevant Transfer” and, if he does not, whether the “TUPE Complaint” which is given notice of at section 8, page 7 of his
20 ET1 should be struck out as enjoying no reasonable prospect of success which failing should be made the subject of a Deposit Order.”

4. The claimant’s Application for Reconsideration although making reference in
25 its heading to the “*Judgment of Judge d’Inverno.CVP Hearing 10/1/2023*” relates in its terms solely to the second Preliminary Issue, that is the one set out at 2(b) above – read short whether, in section 8 paragraph 7 of his ET1 the claimant gives notice of a relevant and competent complaint of failure to consult in respect of a Regulation 3(1)(a) TUPE Regulations 2006 relevant
30 transfer, and if not, whether that complaint, as given notice of in section 8 page 7 of the ET1, should be struck out as enjoying no reasonable prospect of success.

5. The Application for Reconsideration relates solely to paragraph (Third) of the Tribunal's Judgment which is in the following terms:-

5 “(Third) That the “TUPE Complaint” which is given notice of by the claimant at section 8, page 7 of his ET1, is a complaint which enjoys no reasonable prospect of success and is struck out in terms of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 Rule 37(1)(a).”

10 **Applicable Law, Reconsideration in Overview**

6. The Tribunal's current powers to reconsider its Judgments are set out in Rule 70 which is in the following terms:-

15 **“70 Principles**

A 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 Judgment 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.”

- 20
7. The present Rule 70 evolved out of old Rule 34 of the 2004 Employment Tribunal Rules of Procedure. Some brief consideration of the old Rule is appropriate because the Higher Courts have from time to time confirmed that some of the jurisprudential guidance given in respect of the old Rule 34 continues to apply to the new Rule 70. There have also, from time to time and in the context of the emergence of the “Overriding Objective”, stated that some of the emphasis placed on the previous requirement for exceptional circumstances was less applicable.

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The Position under the old Rules

8. Under old Rule 34 of the 2004 Employment Tribunal Rules, there were 5 grounds upon which a Tribunal could review a Judgment (not including a default Judgment). These were:

- 5 • That the decision was wrongly made as a result of an administrative error - old Rule 34(3)(a)

- That a party did not receive notice of the proceedings leading to the decision – old Rule 34(3)(b)

- 10 • That the decision was made in the absence of a party – old Rule 34(3)(c)

- That new evidence had become available since the conclusion of the Tribunal Hearing to which the decision related, the existence of which could not have been reasonably known of or foreseen at the time – old Rule 34(3)(d) and/or

- 15 • That the interests of justice required a review – old Rule 34(3)(e)

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9. Under the 2013 Rule (Rule 70), only one of these grounds is carried forward namely, that a reconsideration is *necessary in the interests of justice*. That sole ground however falls to be regarded as broad enough to embrace the other 4 specific grounds previously expressed under old Rule 34. In seeking to apply Rule 70 ground – *is reconsideration necessary in the interests of justice* - the Tribunal must consider the interests of both parties and the underlying public policy principle that in all proceedings of a judicial nature there should be finality in litigation.

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10. Reconsiderations are thus best seen as limited exceptions to the general rule that Employment Tribunal decisions should not be reopened and relitigated. It is not to be viewed as a method by which, nor is the Tribunal's power to be

exercised for the purposes of affording to, a disappointed party to proceedings, a second bite of the cherry. In **Stevenson v Golden Wonder Limited** [1977] IRLR 474, EAT, Lord Macdonald said of the old review provisions that they 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.*'

Interests of Justice

11. Under Rule 70 of the 2013 Employment Tribunal Rules, a Judgment will only be reconsidered where it is "*necessary in the interests of justice to do so*". This ground gives an Employment Tribunal a wide discretion but the case law suggests, that it will be carefully applied. 'It does not mean that in every case where a litigant is unsuccessful he or she is automatically entitled to a reconsideration: "*virtually every unsuccessful litigant thinks that the interests of justice require the decided outcome to be reconsidered. The ground only applies where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order*" – **Fforde v Black** EAT 68/80.

Exceptional Circumstances Required?

12. More recent case law suggests that the "interests of justice" ground should not be construed as restrictively as it was prior to the introduction of the 'Overriding Objective' which is now set out in Rule 2 of the 2013 Rules. The same requires an Employment Tribunal to seek to give effect to the Overriding Objective (to deal with cases fairly and justly) whenever it exercises a power conferred by the Rules or is required to interpret its provisions. That however does not result in any rule of law that the interests of justice ground do not have to be construed restrictively. The Overriding Objective to deal with cases justly requires the application of recognised principles. Those principles include finality of litigation which is in the interests of both parties and in the public interest.

The Interests of Justice require to be considered from both sides

13. It is clear that the interests of justice as a ground for reconsideration relate to the interests of justice to both sides. In **Reading v EMI Leisure Limited** EAT 262/81 the claimant appealed against an Employment Tribunal's rejection of her application for a review of its Judgment. She argued that it was in the interests of justice to do so because she had not understood the case against her and had failed to do herself justice when presenting her claim. The EAT observed that: *'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. It is not said, and, as we see it, cannot be said that any conduct of the case by the employers here caused [the claimant] not to do herself justice. It was, we are afraid, her own inexperience in this situation.'* Accordingly, the claimant's appeal failed.

Consideration and Determination

14. As noted above, that part of the Judgment in respect of which the claimant seeks reconsideration is paragraph (Third):-

"(Third) That the "TUPE Complaint" which is given notice of by the claimant at section 8, page 7 of his ET1, is a complaint which enjoys no reasonable prospect of success and is struck out in terms of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 Rule 37(1)(a)."

15. The complaint of failure in a duty to consult upon a "relevant transfer" for the purposes of the TUPE Regulations 2006 is incorporated by the claimant in terms of an amendment.

16. As noted at paragraph 28 of the Findings in Fact the whole specification and notice given of that claim is to be found at paragraph 7 in the section 8 paper

apart to the claimant's proposed amended ET1 which was produced at page 31 of the bundle. The averment is in the following terms:-

5 “7. On 29th July 2021, Universal Student Living was taken over by Homes for Students Ltd. It is believed that this was a transfer under the operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006. The claimant was not informed or consulted about this transfer.”

10 17. No further specification or particularisation of the TUPE claim is given notice of.

15 18. In the course of his submissions the claimant confirmed that the claim was one which he sought to advance in terms of there having occurred a Regulation 3(1)(a) of the 2006 TUPE Regulations, “Relevant Transfer”.

19. The Findings in Fact made by the Tribunal relative to that Determination are set out at paragraphs 27 to 35 of the Judgment; viz

20 20. On 29th July 2021, Homes for Students Ltd acquired Universal Student Living Ltd.

25 21. The acquisition proceeded by way of a share sale. Extracts from the Share Purchase Agreement dated 31st March 2021 are produced at **pages 147-149 of the Bundle.**

30 22. On 28th July 2021, notification of Homes for Students Ltd, as a person with significant control of Universal Student Living Ltd, was issued and filed at Companies House (**pages 150-151 of the Bundle**). The notification confirms that Homes for Students Ltd hold “*directly or indirectly, 75% or more of the shares in Universal Student Living Ltd.*”

23. In the course of the acquisition, a total of 100 shares from Universal Student Living Ltd were transferred to Homes for Students Ltd on the 28th of July 2021 (**confirmation statement produced at pages 152-154 of the Bundle**).

5 24. Following the transfer of shares there was no change in the identity of the claimant's employer.

"Relevant Transfer"

10 25. A "relevant transfer" for the purposes of the TUPE Regulations 2006 is described in Regulation 3(1)(a) as follows:-

"3 A Relevant Transfer

(1) These Regulations apply to:-

15

(a) A transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity".

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26. It is of paragraph (Third) of the Judgment which found the complaint given notice of in those terms to be one which enjoyed no reasonable prospect of success and its consequent strike out upon that ground, that the Application seeks reconsideration. It is in particular Finding in Fact 35: "*35 Following the transfer of shares there was no change in the identity of the claimant's employer.*" that the Application seeks be reconsidered.

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27. The Grounds upon which that reconsideration is sought and is said to be in the interests of justice are set out variously in the Application.

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28. In the second line of the Application – "*I have listed the reasons for my request and enclosed new evidence which is in the interests of justice.*" None of the evidence attached to the application is new in the sense of having

5 become available since the conclusion of the hearing to which the decision relates and the existence of which could not have been reasonably known of or foreseen by the claimant at the time of the hearing. Rather, it is all evidence which was within the claimant's knowledge and possession both at the time of introducing the complaint of failure to consult in the bald and restricted terms in which it is set out at paragraph 7 of the section 8 paper apart and at the time of the Hearing. As evidence which the claimant now asserts he wishes to found upon, it should have been produced and led at the hearing on 10th January 2023. No explanation is advanced in the application for why the claimant did not do so. Separately and in any event, while such evidence would go to the question of whether or not a relevant transfer had occurred, the preliminary issue to be determined and which was determined at the Open Preliminary Hearing was not that but rather, whether the complaint in the bald and unspecific terms in which it was presented enjoyed no reasonable prospect of success.

29. The terms in which the claim was and remains presented includes no specification or notice of the matters on which it is now said the claimant wishes to rely. I consider that there is no reasonable prospect, on this ground, of the original decision that the "TUPE complaint" which is given notice of by the claimant at section 8, page 7 of his ET1, is a complaint which enjoys no reasonable prospect of success and on that ground fell to be struck out in terms of Rule 37(1)(a), being varied or revoked.

25 30. In numbered paragraphs 1 and 2 of the Application, the claimant refers to pages of the post Hearing documentary evidence which he attaches to his Application as evidencing respectively that the account from which his wages were paid changed, post the share sale acquisition from Universal Student Living Ltd to Homes for Students Ltd, and that he was transferred to the Homes for Students Ltd pension scheme. The complaint as given notice of contains no specification of these matters. Separately, however, changes of the sort referred to are not inconsistent with there being no change in the identity of a party's employer following a transfer of shares and are steps commonly occurring following acquisition by share transfer. They are not

matters which of themselves, let it be assumed they are established, prove that the identity of an employer has changed and that a relevant transfer for the purposes of the TUPE Regulations has occurred.

5 31. The documentary evidence now produced is not new in the sense that it was known to and in the possession of the claimant both at the time of his introducing the claim in the terms of which he did and at the time of the Hearing of 10th January. The same is true of the documentary evidence referred to at numbered paragraph 3 of the Application and in the third
10 paragraph from the bottom of page 1 (new Homes for Students phone SIM card letter. The Employment Judge considers that there is no reasonable prospect, on the above Grounds of Application, of the original decision at paragraph (Third) of the Judgment being varied or revoked.

15 32. The penultimate paragraph of the first page of the Application is in the following terms:-

20 *“The provision of false information/statements throughout this process has seriously affected my mental health and in my opinion has been done with malicious intent.”*

33. The implication arising from the statement is that the false information has been provided by the respondent to the Tribunal/the claimant. There is nothing in the application that goes to show that false information/statements
25 have been provided or that the same was done with malicious intent, nor that any of the information (documentary evidence included in the Hearing bundle and relied upon by the respondent) was false.

34. Separately, the first paragraph on the second page of the Application
30 indicates that the false information being referred to was provided at what the claimant refers to as “my initial hearing”. The current Application for Reconsideration which is made in terms of Rule 71 on 24th of January 2023, cannot competently encompass any Judgment other than the Tribunal’s Judgment of 18th/20th January 2023.

35. The Employment Judge considers that there is no reasonable prospect of the original decision being varied or revoked on this ground of application.”

5 36. The third paragraph on the second page of the Application is in the following terms – *“I have had to take 2 oaths, provide 2 sets of medical records and endure a Tribunal process which has been biased due to the false allegations contained in the respondent’s defence and during my disciplinary procedure.”* This sentence does not specify the “false allegations” referred to or in any way go to show how the asserted falseness of such allegations might result in
10 paragraph (Third) of the Tribunal’s Judgment being varied or revoked. The Employment Judge considers that there is no reasonable prospect of paragraph (Third) of the original decision being varied or revoked on this Ground of Application.

15

37. In the ante penultimate paragraph of the Application it is stated:-

*“It should be noted that a fully completed ET3 has never been provided to myself and had a fully completed ET3 been completed in
20 full and truthfully then this matter could have been resolved at an earlier stage. Judge Piters instruction that a fully completed ET3 be provided to me and the respondent’s failure to provide this suggests impropriety.”*

25 38. The statement contained in that ground is not founded in fact. Examination of the case file discloses, that the Form ET3 as initially drawn and tendered had omitted the respondent’s address. The tendered ET3 was rejected on those grounds. On 13th December 2021 the respondent made Application for Extension of Time for the presenting of a response which Application the claimant opposed on 17th December 21. On 21st December the Legal Officer,
30 having considered the Application and Grounds of Objection, in the context of the Overriding Objective, granted the Application and allowed the updated response to be received as at 13th December 2021. By letter dated 21st December 2021 a copy of the accepted response that is to say a copy of the

document which the claimant describes in this Ground of Application has a “fully completed ET3” was sent by the Tribunal to the claimant at his address. No inference of impropriety arises. The Employment Judge considers that there is no reasonable prospect of paragraph (Third) of the original decision (the Judgment) being varied or revoked on this Ground of Application.

39. The penultimate paragraph of the Application is in the following terms:-

“At my initial hearing I requested that for the purposes of the Tribunal that both parties be treated as one. I gave my reasons on 3 occasions but was advised by both Judges to seek legal advice on the definition of a legal entity.”

40. That statement appears to relate to an initial Case Management Hearing which proceeded on the case on the 13th January 2022. The Application under consideration and made by the claimant in terms of Rule 71 on 24th January 2023, cannot competently encompass Orders of the Tribunal made at the 13th January 2022 at Closed Preliminary Hearing which proceeded before Judge Porter. The Employment Judge considers that there is no reasonable prospect of the original decision (paragraph (Third) of the Judgment) being varied or revoked on this Ground of Application.

41. In compliance with an Order of the Tribunal, made for the purposes of putting parties on an equal footing, the respondent’s representative had sent to the claimant, in advance of the OPH a written skeleton of the Arguments to be advanced on behalf of the respondent at the Open Preliminary Hearing including those in respect of the TUPE argument. The claimant had fair notice of the respondent’s case and fair opportunity, at the OPH, to put his case.

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42. Whereas in the course of making his submissions at the OPH the claimant asserted, for the first time that he had signed a second Contract of Employment with the alleged transferee, no reference to such a Contract is

included in the Application nor is it produced or referred to as forming part of the “New Evidence” tendered in support of it.

5 43. Upon consideration of the claimant’s Application, made under Rule 71 and dated 24th January 2023, for reconsideration of paragraph (Third) of the Judgment of the Tribunal dated 18th and sent to parties on 20th January 2023, the Employment Judge considers that there is no reasonable prospect of that part of the original decision being varied or revoked on the Grounds of Application presented. The Application is accordingly refused in terms of 10 Rule 72(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1.

15 **Employment Judge: J d’Inverno**
Date of Judgment: 21 February 2023
Entered in register: 23 February 2023
and copied to parties

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I confirm that this is my Determination in the case of Pettigrew v Universal Student Living Ltd and that I have signed the Determination by electronic signature.