EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102077/2022

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Held via written submissions

Employment Judge L Doherty

Ms Johanna Johnston	**Claimant** **Represented by:** **Mr T McGrade - Solicitor**
The Scottish Ministers	**Respondent** **Represented by:** **Mr B Napier - Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the judgment issued on 28 February 2023 is
20 confirmed under Rule 70 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules).

REASONS

1. This was the respondent's application for reconsideration under rule 70 of the Rules of the Tribunal's judgement issued on 20 February 2023 .The Tribunal's
25 judgment has also been appealed.

2. Rule 70 of the Rules:

   "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
30 *reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.*

   Rule 72:

(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

3. The application for reconsideration was not refused under Rule 72 (1).

4. Both parties agreed that the reconsideration could take place on the basis of the respondents written representations of 13 March 2023 and the claimants written response to them of 31 March 2023, without the necessity of them attending a hearing to provide oral submissions. Having regard to the parties' position, the Tribunal was satisfied that it was it was in the interests of justice to consider the application without a hearing.

5. The parties were given the opportunity to make further written submissions by 7 July. The respondents did so on 22 June and the claimant did so on 23 and 30 June.

6. The application was considered on the basis of the parties' written representations.

7. The judgment, which is the subject of the application, was issued following a PH at which the Tribunal found that the claimant as a Temporary Judge was a part time worker for the purposes of Regulation 2 (2) of the Part-Time Workers (Prevention of less Favourable Treatment) Regulations 2000 (the Regulations).

8. At the conclusion of the PH the parties indicated that a case which dealt with similar issues to that raised in this claim was currently before the EAT in England(*Ministry of Justice & Anor v R Dodds & Ors [2023] EAT 31*) but that the EAT judgment had not yet been issued. It was agreed that this Tribunal would issue its judgment notwithstanding the possibility of a judgement relevant to the issue in this claim being issued at EAT level. It was agreed that if either party considered that upon receipt of the EAT judgement it was appropriate to apply for reconsideration of the Tribunal's decision, then they could do so.

The respondents' application

9. The grounds for this application are that the Tribunal's decision determining the status of the claimant as a part-time worker was not correct in light of the analysis delivered by the EAT in relation to the similar situation that arose in *Ministry of Justice & Anor v R Dodds & Ors [2023] EAT 31*.

10. The respondents submitted that the Tribunal should have accepted their submission that the claimant is properly seen as seen as a full-time worker in terms of Regulation 2(1) because of the nature of her duties as a full-time sheriff.

11. It was submitted that Tribunal should not have accepted the claimant's position that the "*reality of the situation*" was that the claimant was a part-time worker in her role as a Temporary Judge. The reference to *"reality*" was central to the claimant's submission that the Tribunal should focus on her role as a Temporary Judge. This was the central error identified by the EAT in *Dodds* in its analysis of the ET's decision on part-time worker status.

12. The respondents submitted that the Tribunal should have looked at the overall work that was done by the claimant as sheriff and Temporary Judge to see if she was "identifiable" as a full-time worker when she was acting as a Temporary Judge. If she was so identifiable, she was not a part-time worker for the purposes of Reg 2(2).

13. The respondents submitted that by concluding that the fact that in each position occupied by the claimant (i.e. sheriff and Temporary Judge) the claimant was working less than full-time hours, and that these were factors *"clearly not indicative of full-time status in either post",* the Tribunal was engaged in a process of circular reasoning, as identified by the EAT at para. 118. 4 of *Dodds.*

14. The Tribunal should not have concluded that the 'reality' of the situation outweighed the arguments against a variation and extension of shrieval duties. Reference was made to the observations of the EAT in *Dodds* (at paras. 130-131*): "There are many situations where workers are required to perform tasks which are ancillary to their main duties but are a part of their contractual role, including (but not limited to) temporarily performing some work that is routinely carried out by a higher paid employee….the EJ's approach confuses sitting in different jurisdictions with undertaking different jobs.. the sheer fact that a salaried judge is undertaking work in another jurisdiction does not mean that they are a part-time worker in relation to both this and their salaried role.".*

15. The respondents submitted that the Tribunal found that the claimant was a part-time worker in both roles (i.e. sheriff and Temporary Judge) having regard to "custom and practice", a concept restricted to considering the number of days worked as Temporary Judge and comparing that with the number of days worked as a sheriff. The Tribunal's Reasons referred to the respondent's submission that "custom and practice" should be considered with regard to all the circumstances – including the basis on which the individual was first employed – being relevant, but referred only to the "custom and practice" of the number of days worked by Senators, and concluded that *"having regard to that custom and practice, the claimant worked less than a*

full-time comparator in both jurisdictions and on that analysis was a part-time worker in both roles." It was submitted that there was no mention of the sheriff role profile. Further, the Tribunal was wrong to say that the possibility existed to depart from that custom and practice "*but only if there is good reason to do so".* That indicates the Tribunal considered the comparison of days worked to be conclusive of the outcome of part-time status as both Temporary Judge and sheriff, in the absence of some special reason to the contrary. The unchallenged evidence of Paul McKinlay was that there was a "well established convention" that salaried Judicial Office holders were not paid extra for any judicial work they did. Mr McKinlay also referred to the practice of non-payment observed with regard to other tasks undertaken by sheriffs and senators.

16. These were important relevant circumstances that should have been taken into account under "custom and practice" in deciding whether the claimant was identifiable as a full-time worker when carrying out her duties as a Temporary Judge. (*Dodds* (para. 139 (iii)). They were not considered by the ET because of an unduly narrow focus on what was relevant for the purposes of "custom and practice". It was the "custom and practice" of the respondent that the days spent sitting as a Temporary Judge were viewed as part of the claimant's shrieval duties, but the judgment does not give proper recognition of this.

17. At para. 95 of its judgment, the Tribunal sought to distinguish the respondent's two examples of practical problems that could arise should the claimant's arguments to be accepted. The Tribunal distinguished these examples on the basis that in them there were no relevant comparators working longer hours. That is a difference that is irrelevant to the point at issue, which is whether the (potential) claimant in the examples given has the status of a part-time worker for the purposes of the Regulations. The existence of a valid full-time comparator is a separate matter, and it was wrong to make the issue of part-time status under Reg. 2 turn on the presence (or absence) of a valid comparator. No other explanation is given to show why the respondent's examples of likely matters of difficulty were not of substance.

18. It was submitted that the Tribunal was wrong to reject without proper consideration the possible consequences the claimant's arguments held for the reach of the Regulations out with the holding of judicial office

19. By placing reliance on the "reality" of the claimant performing "two different jobs as a sheriff and as a Temporary Judge", the ET did not give proper weight, as it should have done, to the respondent's argument that when performing duties as a Temporary Judge the claimant was acting in pursuance of her shrieval duties, as these had been varied by agreement. The observation that the claimant was not obliged to take up the post of Temporary Judge when it was offered to her does not identify a reason for maintaining her duties were not enlarged by a process of offer and acceptance. In the comparable contractual setting, the recipient of an offer is not bound to accept it.

20. The Tribunal having found that there was 'agreement' to vary the claimant's full-time shrieval appointment (albeit not for a reason proposed by the respondent), it failed to pursue the consequences of that finding. It was submitted that if the terms of the original appointment were varied by the conduct of the parties in respectively allocating and accepting different work, then in carrying out these duties as a Temporary Judge the claimant was acting in pursuance of her (varied) duties as a full-time sheriff. In these circumstances she cannot be identifiable as a part-time worker when carrying out these duties as a Temporary Judge, nor as a part-time worker as a sheriff. *"A part-time worker is defined by reference to what they are not; they are a worker who is not a full-time worker."* (*Dodds,* para. 27).

Claimant's response to the application

21. The claimant opposed the respondent's application for reconsideration

22. The claimant accepted that the judgment in *Dodds* provided very useful guidance on the approach to be taken by a Tribunal, when deciding whether someone is to be regarded as a full-time worker or part-time worker, as required by regulation 2 of the Regulations, and is particularly helpful, as it deals with the situation in which someone holds judicial office.

23. However, it was submitted that two very important points must be borne in mind. Firstly, the central error identified by the EAT in *Dodds* was that the tribunal took as its starting *point "the time when he does that job, and to answer the questions posed by regulation 2 (1)- (2) with specific reference to that time and that job" (para 50*). This was not the approach taken by this Tribunal, and therefore it did not fall into the error identified by the EAT in *Dodds*.

24. Secondly, *Dodds* relates to appeals against the judgment by the tribunal in relation to circuit judges who are authorised to act up in the High Court and district judges who undertake work as recorders. The statutory schemes in operation differ in a number of very important respects from the present case, which have a very significant bearing on the decision reached by the EAT in *Dodds.* The statutory provisions providing for the appointment of the claimants to judicial offices in *Dodds* specifically provided for them to *"carry out such other judicial functions as may be conferred on them under this or any other enactment"* (*Dodds* para 40-42) There was therefore an express provision entitling them to carry out other judicial functions, at the point of appointment. At paragraph 129, it is stated that *"**When a worker carries out duties that are contemplated by their terms and conditions,** (emphasis added) it does not follow, simply because those duties are infrequent or peripheral or in some respects distinct to their central responsibilities, that they are no longer acting in that role and are instead working in a separate part-time role'.* The reference to duties that are contemplated by their terms and conditions follows on from a reference to *"carrying out such other judicial functions as may be conferred on them under this or any other enactment."*

25. It was submitted that unlike the decision by the Tribunal in *Dodds*, this Tribunal properly took as its starting point the findings in fact, that had been agreed or were proved, and then went on to consider:- *"whether there was anything to distinguish the claimant's position as a Temporary Judge from her position as a Sheriff, and to go on to consider the effect of its conclusions in the context of what might be described as the claimant's employment relationship."*

26. It was submitted that the factors that the Tribunal identified at paragraphs 62 of the Reasons onwards were all legitimate and appropriate factors to take into account when considering whether the claimant should be viewed as a part-time or worker full-time worker, and that having undertaken a detailed consideration of arrangements that operated while the claimant carried out the role of a Temporary Judge and a sheriff, the Tribunal was entitled to conclude that the reality of the situation was that the claimant was a part-time worker, while she performed the role of a temporary judge.

27. It is submitted that there is nothing intrinsically objectionable in examining the reality of the situation. This was what was urged upon the employment tribunal by the respondent in *Dodds* (cf para 48).

28. It was not accepted that the Tribunal engaged in a process of circular reasoning of the type criticised by the EAT in *Dodds* (para 3 119). The Tribunal did not take as its starting point an examination of the role of Temporary Judge, which it is accepted would have justified the criticisms made in *Dodds.*

29. The respondent submits that the Tribunal should not have concluded that the reality of the situation outweighed the arguments against a variation and extension of duties. The passage from the EAT in Dodds (paras 130) relied upon by the respondent refers to the performance of tasks *"which are ancillary to their main duties but are a part of their contractual role, including (but not limited to) temporarily performing some work that is routinely carried out by a higher paid employee."* However, this ignores the fact that the Tribunal found that these were *"two different jobs,"* a finding that it was open to it to make, based on the analysis that it had carried out.

30. With regard to the respondent's criticism of the Tribunal's approach to custom and practice and failure to have regard to the Sheriff role profile, the Tribunal specifically referred to the Role Profile which states *"They may be asked to act as temporary judges in the High Court,"* at paragraph 108 of its judgement. This was therefore something to which the tribunal had regard. It also set out very clear reasons why it did not attach significant weight to this sentence.

31. Secondly, the respondent disagrees with the analysis by the Tribunal that *"the possibility exists to depart from that custom and practice, but only if there is good reason to do so."* It is not accepted that this passage indicates that the Tribunal regarded the comparison of days to be conclusive to part-time status. It simply sets out that on this particular point, i.e. comparison of days worked, it saw no reason to depart from its view that the claimant was a part-time worker. The Tribunal clearly had regard to the other issues raised by the respondent in the course of its judgment. It is accepted that the unchallenged evidence of Paul McKinlay was that judicial office holders were not paid extra for any judicial work they did. The Tribunal specifically referred to the position taken by Mr McKinlay at paragraph 31 and 93. It was for the tribunal to determine what weight, if any, to attach to this.

32. With regard to the respondent criticism of the Tribunal for the position taken by it in relation to those who do not work to a standard five day working week all year round, it was submitted that it was unclear to what extent this had any bearing on the decision taken by the Tribunal. The respondent also criticises the Tribunal for failing to engage with its analysis of the possible consequences of a finding of part-time status on those who act up. However, the Tribunal was entitled to take the view that it was not appropriate to deal with this issue in any detail, as it required a detailed analysis of a factual matrix which the Tribunal was unable to carry out.

33. The respondent has argued that the Tribunal did not give proper weight to the their argument that the claimant was acting in pursuance of her shrieval opportunities, which had been varied by agreement. It goes on to criticise the observation at paragraph 70 of the judgement that the claimant was not obliged to take up the post of Temporary Judge when it was offered to her. As a statement of fact, this is completely unobjectionable. As is clear from the other findings made by the tribunal, the claimant did not apply for the post of Temporary Judge and in any event, would have been perfectly entitled to reject the offer, irrespective of whether she had applied or been approached. The tribunal correctly contrasted this situation with the situation which existed in relation to the duties she performed as a sheriff, where she was required to

carry out those duties. In addition, the fact that there was an offer and acceptance of the role of Temporary Judge does not answer the question as to whether the new role which she performed was an extension of an existing role, which was argued for by the respondent, or an entirely separate and distinct role, which was argued by the claimant.

34. It is argued that the Tribunal failed to pursue the consequences of the finding in paragraph 82 that there was an agreement to vary the claimant's full-time shrieval appointment by virtue of the fact that she was allocated work elsewhere during the full-time working hours of her original shrieval appointment. This was not accepted. It is accepted that there was a variation of the claimant's original full-time appointment, which involved the claimant no longer working as a full-time sheriff. It does not therefore follow that any work carried out during the time that she was no longer a full-time sheriff was carried out in pursuance of her duties as a full-time sheriff. The Tribunal carried out a detailed analysis of those factors which it considered pointed towards a finding of full-time worker status and those factors which favoured the existence of two separate part-time appointments and concluded that a finding of part-time worker status was appropriate.

35. The claimant submitted that the application should be rejected.

Consideration

36. The Tribunal began by reminding itself of the basis for a reconsideration of its judgment in the interests of justice under rule 70 of the Rules.

37. A central aspect of the interests of justice is that there should be finality in litigation. In general, while it may be appropriate to reconsider a decision where there has been some procedural mishap such that a party had been denied a fair and proper opportunity to present his case, or that new evidence which was not previously available has come to light, a reconsideration should not be invoked to correct a supposed error made by the Tribunal. If the matter has been ventilated and properly argued any error of law should be corrected on appeal and not by reconsideration.

38. In this case it was contemplated that the EAT decision in *Dodds* may have caused one or other of the parties to apply for a reconsideration of the Tribunal's judgment. That however is not a matter which could properly cause the Tribunal to attempt to correct any error of law in its decision, such errors being a matter for the EAT on appeal.

39. Central to the respondent's application is the submission that the Tribunal fell into the error identified in *Dodds*, and that it should not have focussed on the work done by the claimant as a Temporary judge, but instead looked at the overall work done as a sheriff and a temporary judge.

40. The Tribunal's judgment states at paragraph 60 that its starting point was to consider from the facts that it had found whether there was anything to distinguish the claimant's the position as a Temporary Judge from her position as a Sheriff, and that it went on:

"…to consider the effect of its conclusions on that in the context of what might be described as the claimant's employment relationship."

41. Having conducted that exercise of considering whether there was anything to distinguish the claimant's position as Temporary Judge from her position as a Sheriff at paragraphs 61 to 76, the Tribunal then outlined at paragraph 77 that:

"That is not the end of the matter however, and the Tribunal went on to consider the overall nature of the claimant's employment relationship and the impact of its conclusions as to the distinct nature of the two positions held by her in the context of that relationship. It conducted this exercise with reference to Mr Napier's comprehensive submissions as to how Regulation 2 should be applied in light of claimant's employment relationship."

42. The Tribunal then conducted that exercise over paragraphs 78 to 112 with reference to the specific matters relied by the respondents at the PH.

43. If in adopting this approach the Tribunal has fallen into the error identified in *Dodds,* then that is an error of law, which falls to be corrected at appeal.

44. With regard to the respondent's submission as to the Tribunal's conclusions as to the reality of the situation, and the observations of the EAT at paragraphs 130-133 of *Dodds*, as submitted by the claimant the statutory regimes with which the two cases are concerned are different, (paragraph 129 *Dodds*).

5 45. It did not appear to the Tribunal that this case and *Dodds* are not on all fours as a matter of fact. Indeed, it was the scope for different factual considerations between this case and *Dodds*, which underpinned the parties agreement to this Tribunal issuing its judgment notwithstanding that *Dodds* was outstanding at the EAT.

10 46. If the Tribunal has fallen into error in its consideration about how the statutory regime under which the claimant was appointed to the post of Temporary Judge impacted its conclusions about her part time status under the Regulations, then that again is an error of law which is a matter for appeal.

47. The respondents submit that there is no mention of the Sheriff Role profile, 15 and that there was unchallenged evidence from Mr McKinlay about a well-established convention that salaried judicial office holders are not paid extra for any judicial work they did.

48. Mr McKinlay's evidence and the Sheriff Role profile are referred to within the Tribunal's judgment (paragraph 31, 93 and 108). If the Tribunal has fallen into 20 error in the weight it attached to the evidence about these matters, or in its consideration of the legal implications of custom and practice, then those would not be correctable reconsideration. It is not for the Tribunal on reconsideration to attribute different weight to evidence it has heard and assessed, on the basis that one of the parties disagrees with that assessment. 25 A failure to properly consider the legal implications of custom and practice on the part of the Tribunal would be an error in law.

49. For the sake of completeness the Tribunal in its judgment dealt with the respondents submissions about examples of workers working outside standard hours (term time teachers or a store worker who finished one hour 30 earlier than contractual duties because the store always closes one hour early.) The reference to no full time comparators in paragraph 95 of the

judgment is to identify that in the examples given by the respondents at the PH it was not suggested that any worker was working anything but the nonstandard hours of the workers identified in the examples. There was nothing in the respondent's application for reconsideration on this point which rendered it necessary for the Tribunal to reconsider its decision on the grounds that this was required in the interests of justice.

50. Nor is there anything in the respondent's application with regard to the potential repercussions of a finding of part time status, which in the instant case was made in the context of two separate statutory appointments as opposed to the industrial *acting up* capacity referred to by the respondents (paragraph 104), which would cause the Tribunal to consider that it required to reconsider its judgment in the interests of justice.

51. If the Tribunal has fallen into error in that it did not give proper weight to the respondent's argument that as a Temporary judge the claimant was acting in pursuance of her shrieval duties or failed to pursue the consequences of its conclusion that there was an agreement to vary the claimant's full time Shrieval appointment, then again those are error of law, nor correctable on reconsideration.

52. The effect of the Tribunal's conclusions is that the judgment is confirmed under Rule 70 of the Rules.

53. The case will now be sisted pending the outcome of the appeal.

Employment Judge: **L Doherty**
Date of Judgment: **11th July 2023**
Entered in register: **13th July 2023**
and copied to parties