EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4108343/2021

Judgment made in Glasgow on 17 August 2023

Employment Judge M Whitcombe

Dr K Connaughton	**Claimant**
Greater Glasgow Health Board	**Respondent**

RECONSIDERATION JUDGMENT

The claimant's application for reconsideration of the judgment on preliminary issues is refused under rule 72(1) of the Rules of Procedure because there is no reasonable prospect that the original decision would be varied or revoked. It would not be in the interests of justice to do so.

REASONS

1. This is my decision and reasons on the claimant's application for a reconsideration of my reserved judgment on a preliminary issue, which was sent to the parties on 17 July 2023. In that judgment I found that the claimant was not the respondent's worker for the purposes of section 230 of the Employment Rights Act 1996, regulation 2 of the Working Time Regulations 1998 or the Working Time Directive. The full reasons were set out over 72 pages.

2. At the preliminary hearing the claimant was represented by Deshpal Panesar KC instructed by Jacqueline McGuigan of TMP Solicitors. However, the claimant's application for reconsideration dated 27 July 2023 was drafted and signed by the claimant himself, apparently without their involvement. In response to the Tribunal's request for clarification of the position the claimant explained on 7 August 2023 that he was now acting in person.

3. The application for reconsideration was received on 28 July 2023, within the 14 day time limit set by rule 71. Under rule 70, a judgment may be reconsidered "where it is necessary in the interests of justice to do so." On reconsideration the original judgment may be confirmed, varied or revoked. The two stage process is governed by rule 72. The first stage is that I must consider whether there is a reasonable prospect of the original decision being varied or revoked. If not, rule 72 mandates that the application "shall be refused".

4. In broad terms, the claimant argues that my decision was tainted with apparent bias and "lack of consideration of facts". I will deal with the points made by the claimant under separate headings.

Deadlines for written submissions

5. Unusually, after the completion of the parties' written and oral submissions I

twice invited them to make additional written submissions. That was necessitated by the appearance of two or more potentially relevant decisions of the EAT while I was preparing the judgment. On both occasions I invited submissions on my own initiative – there was no application by either side.

6. As I understand it, the claimant's complaint concerns the second such occasion. On 4 July 2023 the representatives were invited to agree a deadline for additional written submissions and to notify the Tribunal of it. On 11 July 2023 a member of Tribunal staff noticed that neither side had replied and raised that failure with me. I asked for the parties to be chased for a reply by 2pm on 12 July 2023. In my internal email to administrative staff I said, "*I am happy for them to agree the deadline because they'll no doubt be facing some availability problems of their own at this time of year. However, if they don't want to make any more submissions, I can just get on with things so a reply either way would be helpful. As for the deadline for that reply, it would be helpful if they could reply by 2pm tomorrow*". Unfortunately, the member of Tribunal staff appears to have misunderstood that direction and drafted a letter saying, incorrectly, that "*Employment Judge Whitcombe has instructed that the submissions should be lodged by 2pm on 14 July 2023*". In fact, I had directed only that the parties should be chased for their agreed deadline for submissions, rather than the submissions themselves. I only became aware of the administrative error in that correspondence when dealing with this reconsideration application. I did not see the letter sent by the administration to the parties on 12 July 2023 at the time.

7. It appears that the parties might have replied on 11 July 2023, because the Tribunal's letter of 12 July 2023 refers to correspondence received from both sides on 11 July 2023. That is not on the correspondence file which has been made available to me, but I infer from the context that it was probably correspondence about the deadline for submissions.

8. Further, it appears from a letter sent on behalf of the claimant that the parties had agreed the deadline of 14 July 2023. Jaqueline McGuigan's email of 12

July 2023 said, "*thank you for acknowledging the party's* [sic] *agreement to lodge written submissions on 14 July 2023*". She asked for more time so that the claimant could review the document before submission. I was unable to grant that request because I had by then organised time to complete the lengthy judgment before commencing annual leave. That allocated time would have been wasted and the judgment significantly delayed if I did not receive the parties' written submissions by the date they had agreed between themselves and notified to the Tribunal. There would also be an impact on other work and my availability to hear other cases. When refusing that application I said, "*unfortunately, the extension sought would result in a delay of several weeks to the finalisation of the judgment, as a result of EJ Whitcombe's own imminent absence. Regrettably, he is unable to grant the extension. The claimant is represented by an extremely experienced legal team and his wish to approve their legal submissions is not a compelling consideration in all the circumstances. They have the authority and expertise to act for him without express approval of written submissions on issues of pure law.*" That is still my view, and I think it is a proper basis on which to refuse an extension of a deadline erroneously set by an error in Tribunal correspondence, but with which the parties apparently agreed, at least initially.

9. My decision is that this is not a basis for reconsideration for the following reasons.

   a. The Tribunal's letter of 12 July 2023 did not accurately reflect the direction I had actually given internally and so it cannot give rise to any inference of apparent bias on my part, as the claimant has submitted.
   b. It would not do so anyway. It applied equally to both sides. It would not have been unreasonable to impose a tight deadline on parties represented by experienced and sophisticated representatives when the invitation was simply to make concise additional submissions on one or two recently reported cases.
   c. In fact, the parties agreed the deadline of 14 July 2023 anyway.
   d. Both sides were able to comply with the deadline, giving full and helpful

written submissions on the cases I had drawn to their attention. If they were inconvenienced by the deadline in the Tribunal's erroneous letter then I regret that, but it did not impair the fairness of the process.

e. The submissions were to deal with a short point of pure law. The claimant was represented by a well-known specialist KC and a well-known specialist solicitor. Fairness did not require the claimant's express approval of the legal submissions made on his behalf. The claimant did not give express approval to Mr Panesar KC's oral submissions either.

f. Conspicuously, the claimant has not sought to make any different or additional submissions on ***Plastic Omnium Automotive Limited v Horton*** [2023] EAT 85 as part of this reconsideration application. That illustrates that the error by the Tribunal administration has not caused any unfairness to him at all. If it had, then this application would have been the obvious way in which to make any necessary additional submissions on the point. None have been made.

Hansard Evidence

10. Effectively this ground of challenge is an attempt to revisit certain issues of evidence and to suggest that I should have given more weight to certain parts of the evidence than I did.

11. I indicated that I would pre-read the witness statements, and I did. I did not indicate that I would "read all the disclosures", as suggested in the claimant's application. If by that the claimant means that I indicated that I would read every page of documentary evidence, he is mistaken. Even if I had done so, that does not mean that every single piece of evidence must be referred to in my reasons, even if that were realistically possible. It is necessary to set out only the facts which I found to be important to my conclusions.

12. Mr Panesar KC did not rely on the extracts from Hansard in his submissions. I do not recall them being referred to in cross-examination either. No doubt

Mr Panesar KC would have done so if in his professional judgment they were important to the claimant's case, and if he believed that the tests in ***Pepper v Hart*** [1993] IC 593, HL, for reliance on Hansard were met. The Hansard extracts were not important evidence and they could not affect my decision or the reasons for it, which have been set out at some length.

Public holidays

13. I am not clear that any submission to this effect was made by Mr Panesar KC. Regardless, it does not change my decision.

The BMA as an effective and powerful Trade Union

14. Contrary to the claimant's submission, the power and effectiveness of the BMA was amply demonstrated by the evidence available. It was clear from the evidence of the respondent's witnesses that the BMA was an equal bargaining party. The activities and reputation of the BMA are also a matter of common knowledge and experience.

Ballot Manipulation by the BMA

15. I did not make a finding that the ballot was "manipulated". It was a genuine and democratic exercise.

Implications of leaving the EU

16. I did not reason my judgment on the basis that the claimant had brought the case later than 31 December 2020 and could not therefore rely directly on the WTD. The claimant did not refer to any particular paragraph of my reasons when making this criticism, but I suspect that he mistakes paragraph 183, which is part of the summary of the submissions made on behalf of the respondent by Mr Napier KC, with reasoning of my own. Mr Napier KC's submission in that passage was also limited to the ***Kukudeveci*** principles.

17. My own reasoning was that the claimant could not rely directly on WTD because his situation did not fall within the ambit of the EU conception of worker. See paragraphs 218 to 223, under the heading "Worker status in EU law". That is a very different issue and the EU law element of the case was decided on a very different point. The claimant's criticism is based on a misunderstanding of my reasoning. I did not base my reasoning on ***Kukudeveci***, so it was unnecessary to consider whether Mr Napier KC's submission on that was correct or not.

18. In any event, the claimant's criticism is misconceived for another reason. A claim is commenced when the Tribunal receives it. The claim form (ET1) was received by the Tribunal on 10 March 2021.

Conclusion

19. For those reasons, I am not persuaded that there is a reasonable prospect of a conclusion that my judgment displays apparent bias or relevant misapprehensions of fact, as the claimant has argued. The challenge made to it is based partly on legal misunderstandings and partly on attempts to reopen issues of fact after judgment. I do not accept that I have made any relevant factual errors. I have read the claimant's criticisms carefully but I am satisfied that my factual findings were entirely open to me on the evidence.

20. There is no reasonable prospect that this judgment would be varied or revoked on reconsideration. That would not be in the interests of justice. I therefore refuse the application for reconsideration at the first stage of the approach required by rule 72.

Employment Judge: **M Whitcombe**
Date of Judgment: **17 August 2023**
Entered in register: **22 August 2023**
and copied to parties