EMPLOYMENT TRIBUNALS

Claimant: Beverley Cook

Respondents: Zoe Solomon t/a/ Bleadon Café (1)
Alistair House t/a Bleadon Café (2)

JUDGMENT

The claimant's application emailed to the Tribunal on 7 August 2023 for reconsideration of the judgment sent to the parties on 25 July 2023 is refused.

REASONS

BACKGROUND

1. On 18 July 2023 I conducted a preliminary hearing (PH) in these proceedings to determine the issues identified by Employment Judge Lumby in his order sent to the parties on 3 July 2023.

2. At the PH the claimant and the first respondent represented themselves and the second respondent was represented by counsel. The parties had exchanged witness statements and had prepared an agreed bundle of relevant documents all of which were read by me. All the parties gave evidence and were cross-examined. All the parties were given an opportunity to sum up their cases and duly did so. I then gave judgment with oral reasons. The Judgment is as follows:

(1) The Claimant's employment by the Second Respondent was transferred to the employment of the First Respondent on or about 1 July 2015 pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)
(2) There was no relevant transfer of employment under TUPE from the First Respondent to the Second Respondent in or about November 2020 or March 2021
(3) The claim against the Second Respondent is dismissed
(4) The Claimant's employment with the First Respondent was terminated by dismissal on 20 August 2021
(5) It is declared that the Claimant is entitled to a statutory redundancy payment to be calculated in due course.

THE CLAIMS

3. By a claim form presented on 24 October 2021 the Claimant brought the following claims:

(a) Breach of contract (relating to notice) pursuant to the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994, comprising 12 weeks' pay totalling £3,564; and

(b) Unlawful deductions from wages pursuant to Part II of the Act of £594; and

(c) Accrued but unpaid holiday pay pursuant to the Working Time Regulations 1998, amounting to £528; and

(d) Statutory redundancy pay of £5,346.

THE ISSUES AT THE PH

4. The central issue at the PH was the identity of the claimant's employer and, therefore, the correct respondent in the proceedings. The evidence I read and heard was overwhelmingly supportive of the claimant's own case that the first respondent had remained at all material times her employer. Both the oral evidence and the documentary evidence pointed in the direction of the first

respondent being the correct respondent and that she had dismissed the claimant on 20 August 2021 and that the reason for dismissal was redundancy. As a result it was held that the Claimant's employment with the first respondent (as a result of TUPE) commenced on 15 July 2009 and ended by dismissal on the ground of redundancy on 20 August 2021.

5. The judgment and consequent case management orders were sent to the parties on 25 July 2023.

THE APPLICATION

6. By email dated 7 August 2023 the first respondent applied for reconsideration of the judgment on the following grounds:

> 'The written judgement made clear that the basis for the award for the claimant was the premise that the job of work for Respondent 1 was substantially different than that undertaken with Respondent 2, i.e. that for respondent 1 the job was work in a café and for respondent 2 the job was work in a deli only offering takeaway.
>
> I submit the following evidence:
>
> 1 Screenshot of Facebook post from Bleadon Farm Shop posted by Respondent 2 on 12 July 2021, advising customers that the kitchen was fully refurbished and ready to go and customers could *"sit in and eat in style".* At this point the Claimant was employed to work for Respondent 1, but in fact was working as an employee of respondent 2 in the role of chef in the café in the same location.
>
> 2 Email to the Claimant from Respondent 1 asking for confirmation that the Claimant would be returning to work in the new premises in the role for which she was currently being paid furlough. This is dated 13 July 2021.
>
> 3 Text message on 14 July 2021, where there is confirmation that she is now working for Respondent 2.
>
> 4 Screenshot of Facebook post from Bleadon Farm Shop advertising "fully refurbished café" serving breakfasts. This is dated 17 July 2021.
>
> 5 Email from the Claimant to Respondent 1, stating that she would not be accepting work for the Respondent 1 as this was redundancy. I believe at this point in time she had already accepted a role with Respondent 2. This is dated 19 July 2021."

7. Attached to the application were several documents as follows:

a. a screenshot of a Facebook post from Bleadon café on 12 July 2021 advertising a sit-in facility at the premises formerly occupied by the first respondent

b. an email from the first respondent to the claimant dated 13 July 2021 the last substantive paragraph reads: "I will give you 14 days to respond , if I do not hear from you within this time then **I will use that as confirmation that you no longer wish to be in my employment any further furlough will be stopped and your employment with me will end."** This was in the hearing bundle page 88.

c. A text message exchange between the claimant and the first respondent in July 2021 in which the first respondent asks the claimant whether she is "*two weeks behind with pay*." These were in the hearing bundle page 72.

d. a further Facebook post from the Bleadon café suggesting the café is open for sit in food as of 17 July 2021

e. an email from the claimant to the first respondent rejecting the offer of alternative employment claiming, inter alia, that the nature of the job offer made by the first respondent (see above) meant there was a redundancy situation. This was in the hearing bundle page 89.

LEGAL PRINCIPLES

8. Rules 70-72 of the Tribunal Rules provide as follows:

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.

71. Application

Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

72. Process

(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) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

9. There is one ground for reconsideration under Rule 70: '*where it is necessary in the interests of justice.'*

10. 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.

11. In **Ebury Partners UK Ltd v Acton Davis [2023] IRLR 486**, HHJ Shanks stated:

> *'24. The employment tribunal can therefore only reconsider a decision if it is necessary to do so "in the interests of justice." A central aspect of the interests of justice is that there should be finality in litigation. It is therefore unusual for a litigant to be allowed a "second bite of the cherry" and the jurisdiction to reconsider should be exercised with caution. 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, the jurisdiction should not be invoked to correct a supposed error made by the ET after the parties have had a fair opportunity to present their cases on the relevant issue. This is particularly the case where the error alleged is one of law which is more appropriately corrected by the EAT.'*

12. Where an application for reconsideration is made on the basis of there being new evidence available which was not available to the tribunal at the time, the principles set out in **Ladd v Marshall [1954] 3 All ER 745** apply and it is necessary to show:

a. that the evidence could not have been obtained with reasonable

diligence for use at the original hearing;

b. that the evidence is relevant and would probably have had an

important influence on the hearing; and

c. that the evidence is apparently credible.

DECISION

13. The first respondent's application is without merit. In so far as she contends that it is in the interests of justice for the matter to be reconsidered I refer to the relevant principles set out above: there needs to be finality of litigation. While the first respondent clearly does not accept the judgment the evidence heard at the PH was that the claimant's employment with the first respondent continued until terminated by the first respondent on 20 August 2021. The first respondent issued the claimant with a P45 at that time. The email correspondence which the claimant has supplied with her application confirms that as of July 2021 the first respondent considered herself to be the employer of the claimant and the claimant considered herself to be the employee of the first respondent. The emails confirm the claimant was still an employee of the first respondent in July 2021 albeit on furlough and that the first respondent wanted her to continue to be an employee of hers. Any contention that the claimant had ceased to be an employee of hers as a result of a TUPE transfer to the second respondent in about November 2020 or March 2021 was and is hopeless.

14. Furthermore, the email correspondence was included in the hearing bundle and taken into consideration when arriving at the judgment as to the correct respondent.

15. In so far as the Facebook screenshots are concerned both of those documents are suggestive of the Bleadon café being open to serve food for consumption on the premises by the middle of July 2021. However, there is no explanation given as to why the documents were not provided at the hearing. There would have been ample time to have obtained the Facebook posts before the hearing. The evidence could have been produced with reasonable diligence. The contention by the second respondent as to what was going on at the premises was made in the witness statement of the second respondent. He stated that he had opened in June 2021 serving cold food takeaways but then at paragraph 12 say he moved onto selling hot food and then that he engaged the claimant as of 12 July 2021. If the first respondent did not accept that account she could

have sought evidence to demonstrate it was incorrect: Facebook is an obvious port of call.

16. In any event the evidence of the nature of the business would not have assisted the first respondent. The second respondent stated in his amended grounds of response and in his witness statement he had engaged the claimant on 12 July 2021 and he repeated it when he was cross-examined but that was not inconsistent with her remaining an employee of the first respondent albeit on furlough until the termination of her employment by the first respondent in August 2021.

17. In those circumstances there is no reasonable prospect of my varying or revoking my decision nor would it be in the interests of justice to allow the Claimant to re-argue points already considered at the PH or raise new arguments/evidence at this stage, which could have been raised at the PH.

Employment Judge Walters
Date: 15 September 2023

Sent to the parties on
04 October 2023
By Mr J McCormick

For the Tribunal Office