EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Numbers: 8000280/2023 & 8000302/2023

Reconsideration in Chambers on 24 November 2023

Employment Judge C McManus

Mr G McEvoy **Claimant**

McCallum Food Ltd **Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL AND ORDER

The Judgment of this Tribunal dated 4 October 2023, entered in the register and copied to parties on 9 October 2023, is reconsidered in terms of Rules 70 to 72 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, on the application of the respondent.

The outcome of the reconsideration is that the decisions set out in the judgment are varied only to the extent that the respondent's name and address is changed to reflect the details in the draft ET3s submitted by the respondent's now instructed representative.

The following is deleted:

McCallum Foods Ltd

T/A German Doner Kebab

56 Renfield Street

Glasgow

G2 1NF

And replaced with the following details:

McCallum Food Ltd

20 – 22 Wenlock Road

London

England

N1 7GU

REASONS

Background

1. These claims had proceeded undefended. The ET1 claim form in both claims had been served on the Respondent's address given by the claimant in the ET1 forms (56 Renfield Street, Glasgow). No ET3 response was received, in respect of either claim. The claims were conjoined and proceeded to a Final Hearing on 23 August 2023. The decision in respect of both claims was set out in the Judgment in respect of case numbers 8000280/2023 and 8000302/2023, dated 4 October 2023 and issued to parties on 9 October 2023 ('the judgment').

2. On 18 October 2023, email correspondence was sent to the Employment Tribunal from Anderson Strathern Solicitors. Their position was that they were newly instructed by the respondent, that their client had not received a copy of the judgment but that they had '*heard that a judgment has been issued against them.*' The solicitors requested a copy of any issued judgment *'under case numbers 8000280/2023 or 8000302/2023*' as soon as possible.

3. The judgment, and subsequently the ET1 forms under each claim number were subsequently sent to Anderson Strathern. These were sent without referral to an Employment Judge and without being copied to the claimant.

4. On 23 October 2023, Anderson Strathern emailed the Employment Tribunal office, copied to the claimant, with the respondent's application to reconsider the judgment and separate application to allow ET3s to be received late. The respondent's grounds for seeking reconsideration of the judgment are set out in letter from Anderson Strathern solicitors dated 23 October 2023. In summary, their position is:

- The respondent's registered address is not 56 Renfield Street, Glasgow, although they do operate a fast food business from there.

- The respondent had not received the ET1 claim forms, Notice of Hearing, Judgment or any other correspondence from the Employment Tribunal office in respect of these claims and therefore has not defended the claims or attended any hearings.

- It would be in the interests of justice for the judgment to be revoked, the ET3 be allowed late and the claims proceed defended.

5. Draft ET3s in respect of claims under case numbers 8000280/2023 and 8000302/2023 were also sent to the Tribunal office. The Respondent's representative's correspondence requesting that the ET3s in case numbers 8000280/2023 and 8000302/2023 be received late set out the following:

"The respondent did not receive a copy of the claims and therefore did not receive notification of the date for an ET3 response to be submitted. Had they known about the claims, they would have proceeded to defend the actions against them. The Respondent heard gossip amongst staff (former and current) that an employment tribunal claim had been raised by Mr Gerry McEvoy. The Respondent's, Jeff Reid, called the Glasgow Employment Tribunal to enquire about a claim and was advised that the claims had been rejected as they had no basis. For that reason, they did not lodge a defence. The judgment of 9 October 2023 notes that the Claimant's third claim, case no. 8000281/2023 was rejected as the names of the Respondent did not match the ACAS certificate and that a decision was taken to not accept the claims against German doner kabab and Dale Glendinning in respect of case no. 8000280/2023 which appears to have given rise to the confusion about the status of the claim(s).The Respondent then became aware of an alleged judgment issued against them via gossip. They were also contacted by the press about the judgment on 18 October 2023. That is what prompted my instruction and contact with the tribunal on 18 October 2023 to request a copy of any judgment. Although the judgment was sent to myself on 18 October 2023, the Respondent has never received a copy of the claims. On 19

October, I requested a copy of the claim as I came to be aware that my client did not hold a copy. The Tribunal shared a copy on 20 October to myself by email. Taking into account that Mr Jeff Reid is a lay person it was not unreasonable for him to consider the claim had been rejected given the discussion with the Glasgow Employment Tribunal particularly given the operational restaurant nor their head office had received copies of any correspondence from the Tribunal. It would be in line with the overriding objective of the tribunal to grant an extension of time for the Respondent to submit the ET3. It would also be in the interests of justice to allow the Respondent to defend the claim. We, therefore, enclose a draft of the Respondent's response to the claim."

6. Email correspondence was subsequently sent by the claimant to the Employment Tribunal office. These emails were not copied to the respondent or their representative. In summary, the claimant's position was:

- He didn't believe that the respondent's position;
- The respondent had '*refused'* to speak to ACAS and had '*told lies'*;
- The respondent's position did not make sense;
- An Employment Judge has considered the evidence and made the decision; and
- A *'new trial'* would be '*wasting court time*.'

7. On 30 October 2023, correspondence was sent from the Employment Tribunal office to both parties. This informed both parties that the respondent's representative's email of 23 October 2023 was being taken as an application for reconsideration of the Judgment dated 4 October 2023, on the basis that the respondent's representative was seeking:

(1) that the judgment dated 4 October 2023 be revoked;

(2) that the ET3 be allowed late; and

(3) that the case proceed, defended, to a Final Hearing on the merits.

8. In that correspondence, both parties were informed that the respondent's representative's correspondence was accepted as an application for reconsideration under Rule 71 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('the Tribunal Rules'). Under Rule 72 of the Tribunal Rules, the claimant was given a period of 21 days i.e. until Friday 20 November 2023 to set out in writing his comments on the reconsideration application. Both parties were informed that the parties' written representations on the reconsideration application would then be considered, and a decision made on whether or not to revoke the decision dated 04 October 2023.

9. Both parties were informed "*Employment Judge McManus does not consider it necessary for there to be a hearing on this reconsideration application. If, following her consideration of both parties' written positions, Employment Judge McManus reconsiders the decision and decides to revoke the decision dated 04 October 2023, the ET3 will be allowed late and a Final Hearing will be scheduled."* This was the initial view at the Rule 72(1) stage in the reconsideration process.

10. Further email correspondence was received from the claimant, on 30 October and 1 November. This email correspondence was not copied to the respondent's representative. In summary, the claimant's position was that:

- His case was '*won by the evidence and paperwork';*
- It had been found that the respondent had '*broken the law';*
- No new evidence could change the outcome;
- The respondent had *'told lies*';
- The claimant didn't believe that the respondent had not received correspondence from the Employment Tribunal office;
- '*Stress'* was being caused to the claimant;
- The correspondence from the Employment Tribunal office had been sent to the respondent's '*main address';*

- The claimant had given his evidence *'truthfully and faithfully';*
- The claimant queried why the respondent would have case reference numbers if they had not received any correspondence from the Employment Tribunal office;
- An Employment Judge has considered the evidence and made the decision;
- The respondent 'broke the law and didn't follow procedure';
- The respondent is seeking to cause delay and '*more suffering'* for the claimant; and
- A *'retrial'* would be a waste of court time and would not be in the interests of justice.

11. Correspondence was then sent to both parties from the Employment Tribunal office on 3 November 2023. That referred to emails from the claimant of 25 October & 1 November 2023. Both parties were informed that there would be a Reconsideration Hearing on Friday 24 November. Both parties were informed that parties' written positions on whether the Judgment should be revoked would be considered and that if parties wished to submit any further written representations or any documents they wish to rely on in respect of this reconsideration, they should do so by Monday 20 November, copying their correspondence to the other party.

12. No further correspondence or documents were received from the respondent's representative. On 6 November, the Employment Tribunal office forwarded to the respondent's representative the claimant's emails of 25 October. Both parties were reminded that under Rule 92 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ('The Tribunal Rules') correspondence sent to the Tribunal Office must be copied to the other party.

13. The claimant sent further email correspondence to the Employment Tribunal office on 15 and 17 November, with attachments. His position in these emails

was that (1) he understood that the respondent's business was being sold and that he had not copied his emails to the respondent's solicitor because he didn't want the respondent to know that he knew they were selling the business (2) the respondent had changed name several times. Correspondence was sent from a Legal Officer to the claimant in response stating, "*the matters raised in the correspondence above are not ones to which the tribunal can give advice."*

14. I have dealt with this reconsideration on application of the overriding objective to deal with matters fairly, as set out in Rule 2 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ('the Tribunal Rules').

Decision on Reconsideration Application

15. I have considered the following:

- Correspondence from Anderson Strathern solicitors referred to above;
- Terms of draft ET3s and paper apart submitted by Andeson Strathern solicitors on 24 October 2023;
- Correspondence from the claimant referred to above; and
- The judgment.

16. I consider the following to be significant:

- The judgment set out the evidence which was considered to be significant in coming to the decision, set out particularly in the judgment at paragraph 52.
- Paragraph 55 of the judgment sets out the reasons why it was decided that the claimant's dismissal was an unfair dismissal.
- Both parties were directed to submit any documents in respect of this reconsideration by 20 November 2023 (in letter from the Tribunal office of 3 November 2023).

- No documents have been submitted by the respondent to support the position set out in their paper apart or to rebut the conclusions formed on the basis of the evidence presented by the claimant, as set out in the judgment.

- The position in the respondent's representative's letters to the Employment Tribunal office is that the claimant was accused of very serious misconduct but no documentary evidence has been submitted to support that position. The respondent has not set out what evidence would be relied upon by them in respect of them having reasonable grounds to believe that the claimant had acted in gross misconduct. In particular, no statements from witnesses supporting that position have been submitted. Reference is made to the position in paragraph 53 of the judgment.

- No explanation has been provided by the respondent as to why the decision to dismiss was taken by the manager at the centre of the reasons for the claimant's behaviour.

- The respondent's position in the paper apart to the draft ET3 is that the claimant was informed of the dismissal decision by email and that he did not appeal that decision. No explanation has been provided by the respondent on the significant finding that the claimant was not offered an appeal.

- The respondent's position in their draft paper apart is that their internal procedures were followed. This does not address the conclusions of unfairness in respect of the procedure followed, as set out at paragraphs 52 – 55 of the decision.

- The respondent's representative's position is that any award to the claimant should be reduced to take into account his contribution to the dismissal i.e., that the dismissal was because of the claimant's conduct.

- The issue of contribution was considered (set out at paragraph 57 of the judgment). That paragraph 57 states:

"*In all the circumstances I do not consider it to be just and equitable to reduce any award in respect for contributory conduct. The claimant was shouting because he was seeking payment of holiday pay which he was entitled to. The statements do not support a position that the claimant's conduct contributed to his dismissal to the extent that a reduction should be applied."*

- The respondent has not provided for this reconsideration any statements which they would seek to rely on to support their position on their belief of the extent of the claimant's alleged misconduct.

- The respondent now seeks to rely on *Polkey v AE Dayton Services Limited [1987] ICR 142* to argue that the Claimant would have been dismissed in any event and to seek a reduction in any award for compensation accordingly. The have not addressed what has been found, on the evidence submitted by the claimant, to be substantive unfairness.

- No explanation has been provided to explain why the respondent's representative's first contact to the Employment Tribunal office in respect of this case, on 18 October 2023, referenced case numbers 8000280/2023 & 8000302/2023, despite it being the respondent's position that they had not seen the judgment or any correspondence in respect of this case.

17. No documentary evidence has been provided by the respondent to support a position that on consideration of evidence relied upon by the respondent there is likely to be a conclusion that the claimant's dismissal was a fair dismissal.

18. In the judgment, there was no consideration of any argument following *Polkey v AE Dayton Services Limited [1987] ICR 142* that the claimant's compensation should be reduced to take into account a position that he would have been dismissed fairly had a fair procedure been applied (known as a 'Polkey reduction').

19. Following the House of Lords decision in *Polkey v AE Dayton Services Ltd 1988 ICR 142, HL,* a Tribunal is entitled to consider making a Polkey reduction when assessing the compensatory award payable in respect of the unfair dismissal, to consider whether a reduction should be made on the ground that the lack of a fair procedure made no practical difference to the decision to dismiss.

20. There were a number of reasons for the decision that the claimant's dismissal was an unfair dismissal, as set out at paragraph 55 of the judgment. These were not merely procedural. The claimant's dismissal was found to be substantively and procedurally unfair.

21. In these circumstances, on reconsideration my decision is that it is not in the interests of justice to revoke the decision and for the claims to proceed defended to a full Final Hearing on the merits.

22. I considered whether it was in the interests of justice to allow this case to proceed to a Remedy Hearing only in respect of whether there should be any application of a Polkey reduction. I considered the guidance given by Mr Justice Elias, the then President of the EAT, in *Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT*. In that case, Mr Justice Elias reviewed all the authorities on the application of Polkey and summarised the principles to be extracted from them. These included:

- *in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;*
- *if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future);*

- *there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal;*

- *however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence; and*

- *a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.*

23. The reasons for the amount of the claimant's compensatory award are set out at paragraphs 56 – 59 of the judgment. The respondent has made no submissions on the extent of the period to which the compensatory award relates. Their argument that a Polkey should be applied is made only in the paper apart to their draft ET3 (at paragraph 18). On the findings in the judgment, and where no indication has been given of any further documentary evidence being relied upon by the respondent, no sensible prediction can be made that a Polkey reduction should be applied. In their reconsideration application no evidence has been presented to support a position that the amount of compensation awarded to the claimant was not just and equitable. The claimant's dismissal has been found to be unfair for substantive as well as procedural reasons. For these reasons, I consider that it is not in the interests of justice to now allow this case to proceed to a Remedy Hearing to determine whether a Polkey reduction should be applied.

24. The decision that the claimant's dismissal was an unfair dismissal stands.

25. In respect of the respondent's position on the claim under section 13 of the Employment Rights Act 1996, the respondent has provided no information on their calculation of the amount paid to the claimant in respect of holidays. Paragraph 48 of the judgment sets out the statutory basis of the claimant's claim for unpaid holidays. Paragraph 61 sets out the reasons why that claim was successful, as follows:

"I was satisfied that the claimant is entitled to the sum of £472.12 from the respondent, being the balance due to him in respect of 6 days accrued but unpaid holidays (56 hours x £13 = £723) and taking into account the sum paid to him in respect of these holidays (£723 - £255.88). The respondent may be entitled to make further tax and NI deductions in respect of that holiday payment."

26. Account was taken of the sum paid to the respondent in respect of holidays. In the paper apart to their draft ET3s, the respondent accepts that the claimant was due 6 days holiday. Their position at paragraphs 13 and 21 of the paper apart) is that the claimant was paid the sum of £255.88 in respect of 6 days holidays. No explanation has been provided by the respondent to as to why 6 days holiday entitlement £723, leaving a shortfall of £472.12 when the payment of £255.88 is taken into account. In these circumstances, it is not in the interests of justice to proceed to a defended Final Hearing on that claim.

27. In respect of the respondent's position on the redundancy claim, that claim was dismissed in the judgment. That effectively accepted what is the respondent's position, which is that the claimant was not dismissed by reason of redundancy. It is not in the interests of justice to proceed to a defended Final Hearing on that claim.

28. In respect of the claim for breach of contract / notice, the respondent's defence is based on their position that the claimant was dismissed for gross misconduct. As set out above, no documentary evidence has been provided by the respondent to support a finding that the claimant had acted in gross misconduct. Given that no indication of additional evidence to be relied upon

to support the basis for the respondent's reasonable belief that the claimant had acted in gross misconduct, is not in the interests of justice to proceed to a defended Final Hearing on that claim. Reference is made by the respondent to witness statements. As set out in the judgment, witness statements were relied upon by the claimant and did not support a reasonable belief that the claimant had acted in gross misconduct.

29. In the paper apart to the draft ET3s, the respondent reserves their position on time bar, on the basis that they have no had sight of the ACAS Early Conciliation Certificate ('the ECC'). The ECC is on file and I have considered this. The date of receipt by ACAS of the EC notification is 13 June 2023. The date of issue by ACAS of the ECC is 15 June 2023. The date of dismissal was 10 June 2023. The ET1 claim forms were submitted on 15 June 2023 and 23 June 2023, as set out at paragraphs 1 – 11 of the judgment.

30. In all these circumstances, it is not in the interests of justice to revoke the decision.

31. As set out in paragraphs 1 – 17 of the judgment, there was some confusion on the correct identity and address for the respondent. In his correspondence to the Tribunal the claimant expresses concern that premises formerly operated by the respondent (including at Renfield Street in Glasgow) are no longer owned by the respondent. In their draft ET3s the respondent's representative has provided the respondent's company name (and company number (14428379) and registered address. The Tribunal Rules allow addition, substitution and removal of a party (Rule 34). It is in the interests of justice and in line with the overriding objective in Rule 2 for the respondent to be correctly designated.

Employment Judge: **C McManus**
Date of Judgment: **27 November 2023**
Entered in register: **28 November 2023**
and copied to parties