



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Kieron Dominic Scully

v

Northamptonshire County Council

UPON THE CLAIMANT'S APPLICATION dated 29 August 2023, for reconsideration of the Judgment dated 28 February 2022 (sent to the parties on 13 March 2022) under Rule 71 of the Employment Tribunal Rules of Procedure 2013.

JUDGMENT on RECONSIDERATION APPLICATION

1. The Tribunal considers that there is no reasonable prospect of the original decision being varied or revoked.
2. The Claimant's reconsideration application is refused.

REASONS

There is no reasonable prospect of the original decision being varied or revoked for the following reasons:

1. The Tribunal gave a Judgment on 28 February 2022 striking out the Claimant's complaints against the Respondent on the grounds that they had no reasonable prospect of success ("the Judgment"). Written reasons for the Judgment were provided to the parties on 19 May 2022 in response to a request being made by the Claimant.
2. On 23 November 2022, the Claimant applied for reconsideration of the Judgment. He submitted an amended application on 5 December 2022 and further supplemented it on 25 January 2023. The application was refused for the reasons given in a Judgment sent to the parties on 9 February 2023 ("the First Reconsideration Judgment").
3. On 29 August 2023 the Claimant submitted a second application for reconsideration of the Judgment "based on fresh evidence". He did so following enquiries of the Office of the Public Guardian ("OPG"). Unfortunately, the application was only referred to me on 2 February 2024 and, even then, the documents submitted by the Claimant in support of his

application were only forwarded to me 22 February 2023. The fresh evidence upon which the Claimant purports to rely is said by him to relate to claims by the Respondent that his mother, Vera Scully acted as S's 'representative' for the purposes of direct payments under s.57 of the Health and Social Care Act 2001, and was an 'authorised person' for the purposes of s.32 of the Care Act 2014.

4. Regulation 5 of the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 provides that for the purposes of s.57 of the 2001 Act, a person is prescribed as a 'representative' in relation to another person if they are—

- (a) a deputy appointed for that other person by the Court of Protection under section 16(2)(b) of the Mental Capacity Act 2005(1); or

- (b) a donee of a lasting power of attorney within the meaning of section 9 of the Mental Capacity Act 2005 created by that other person.

5. The Claimant's enquiries of the OPG were with a view to securing confirmation from it that Mrs Scully was neither a court appointed deputy for any matters concerning S at any time nor a donee of a lasting power of attorney from him, meaning that she could not have been S's 'representative' as so defined. I pause to observe that the Claimant and Mrs Scully might simply have included this information in their witness statements for the hearing on 28 February 2022 if they felt I should be aware that this was the case.

6. Although there are seemingly four references in the Respondent's Grounds of Resistance to Mrs Scully being S's 'representative', the Respondent did not refer to the 2001 Act in resisting the Claimant's claim. Instead, the Respondent identified the relevant legislative context for direct payments as being the Care Act 2014, s.117(2C) of the Mental Health Act 1983, and the Care and Support (Direct Payments) Regulations 2014. S.32 of the Care Act 2014 uses the term 'authorised person' to describe those who handle direct payments on behalf of individuals who lack capacity. Mrs Scully is referred to as S's 'authorised person' in paragraphs 23 and 30 of the Grounds of Resistance.

7. Having confirmed that Mrs Scully was not S's 'representative' within the meaning of the 2001 Act and associated Regulations, the Claimant goes on to say:

"This also necessarily means a lack of an authorised person under s.32(4)(a) of the Care Act 2014. This is in clear contradiction to claims made in the Respondents ET3 and statements made in the written testimony of Mr Christopher Hodgson."

As I shall come back to, neither the Respondent nor Mr Hodgson claimed or stated that Mrs Scully's status as an 'authorised person' derived specifically under s.32(4)(a).

8. The Claimant asserts that his delay in pursuing his second reconsideration application is attributable to fraud, concealment or mistake. Indeed, at paragraph 32 of his application he suggests that the Respondent's conduct of the proceedings has:

"... raised a risk of contempt and perjury on the part of Mr Hodgson and others involved with the respondents, which are likely to include other officers of the respondents within the respondents' adult social services departments.

9. I consider the Claimant's submissions in this regard to be misconceived. Firstly, during the hearing on 28 February 2022 neither party referred me to the provisions of s.57 of the 2001 Act or to the 2009 Regulations. At no point during the hearing did Mr Hodgson or the Respondent suggest that Mrs Scully was S's court appointed deputy or the donee of a lasting power of attorney. Had I been referred to the provisions of s.57 of the 2001 Act, I can understand why I might have inferred from the various references to Mrs Scully being S's 'representative', that she was either a court appointed deputy or that she held a lasting power of attorney. However, having not been alerted to the Act or the 2009 Regulations, I was not misled as to her status, whether consciously or otherwise. Secondly, Mr Hodgson did not state or infer, as the Claimant seems to assert, that Mrs Scully's status as an 'authorised person' derived under s.32(4)(a) of the Care Act 2014. An 'authorised person' for the purposes of s.32(4) of the Act is not limited to a person who is authorised under the Mental Capacity Act 2005 to make decisions about an adult's needs for care and support. Instead, an 'authorised person' extends to a wider group of individuals, including someone who the Local Authority considers to be a suitable person to whom to make direct payments (see s.32(4)(c) of the Act). Once again, I was not misled in the matter.
10. My findings on 28 February 2022 that, with effect from 2013, Mrs Scully had taken responsibility for identifying potential carers for S and that she had retained control over any decisions as to who should be engaged in his care, including identifying agency staff to provide respite or holiday cover, as well as my reference to the Claimant having agreed furlough arrangements directly with Mrs Scully were not founded on Mrs Scully being S's court appointed deputy or holding a lasting power of attorney for him; they were not something I considered. There is no question of me having been misled by the Respondent in reaching these findings, whether deliberately, by omission or otherwise.
11. Furthermore, and in any event, my reference to the Care Act 2014 in the First Reconsideration Judgment was solely in the context that the Claimant had asserted in his first reconsideration application that Mr Hodgson had stated or inferred in his evidence to the Tribunal, on 28 February 2022, that S had capacity. For the reasons set out in paragraph 6 of the

Reasons section of the First Reconsideration Judgment, I was satisfied that Mr Hodgson had not done so. On the contrary, he evidently understood S to have been assessed by the Respondent as lacking capacity. His understanding in that regard was reinforced by his reference to the Care Act 2014, and his evident clarity of understanding that s.32 deals with direct payments in the case of adults without capacity.

12. For completeness, I should add that if the Claimant believes the Respondent's references to Mrs Scully as S's 'representative' had the potential to mislead, it is something he might have questioned Mr Hodgson about on 28 February 2022. As I noted in the Judgment and subsequently in the First Reconsideration Judgment, the Claimant did not challenge Mr Hodgson's evidence in any material respects. If he believed Mr Hodgson to be saying that Mrs Scully was a 'representative' within the meaning in s.57 of the 2001 Act, and that I was potentially being misled in this regard, he might have explored the issue further with Mr Hodgson. As I observed in the First Reconsideration Judgment, and observe again now, if the Claimant feels that he did not do himself justice in the matter on 28 February 2022, there is no reasonable prospect of him establishing any conduct on the part of the Respondent that may have caused or contributed to that. As I have noted already, if he or Mrs Scully thought it important to draw to the Tribunal's attention that she was neither a court appointed deputy or the donee of a lasting power of attorney, they might simply have said so in their witness statements or, indeed, even sought the Respondent's agreement on the point. They were aware once the Respondent filed its Grounds of Resistance early in 2021 that Mrs Scully was being referred to as S's 'representative' and 'authorised person', and accordingly had every reasonable opportunity to address any potential misunderstanding that might result from the Respondent's use of those terms. Be that as it may, for the reasons set out above, I was not misled in the matter. I did not proceed on 28 February 2022 on the basis or understanding that Mrs Scully was a court appointed deputy or that she held a lasting power of attorney in respect of S.
13. Finally, the Claimant's submissions at paragraph 37 of his second reconsideration application plainly amount to an attempt by him to have a second bite of the cherry by advancing arguments that he previously had every opportunity to put forward. It is not in the interests of justice that he should be afforded a further opportunity to argue the issues again. There is, as the Employment Appeal Tribunal observed in Outsight VB Limited v Brown UKEAT0253/14, the Respondent's interests to consider in the matter as well as the public interest that there should, as far as possible, be finality of litigation.
14. In all the circumstances the Claimant's application dated 29 August 2023 for reconsideration of the Judgment is refused.

Employment Judge Tynan

Date: 5 March 2024

Sent to the parties on: 6 March 2024

For the Tribunal Office.

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