Case No: 2300434/2023

EMPLOYMENT TRIBUNALS

Claimant: Mrs M Smith

Respondent: Royal Borough of Greenwich

JUDGMENT

The claimant's application dated **20 December 2023** for reconsideration of the judgment sent to the parties on **8 November 2023** is refused.

REASONS

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

1. The power to reconsider a judgment can be found in rule 70 of the Employment Tribunals Rules of Procedure. A Tribunal may, on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. The applicable law was recently summarised by HHJ Shanks in *Ebury Partners UK Limited v Mr M Acton Davis* [2023] EAT 40 at paragraph [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."

2. I have applied those points when making this decision.

3. There were no procedural errors during the original hearing. The claimant had a full opportunity to make submissions (ground 1). This is because she was given the opportunity at the end of the hearing to send in written submissions by an agreed deadline to ensure that she had time to reflect on what had happened during the hearing and the respondent's oral and written submissions (see paragraph [6] of the judgment sent to the parties on 8 November 2023: 'the Judgment'). Also, the claimant had clearly set out her position in extensive written submission-types of documents in the bundle (see paragraph [7] of the Judgment). The claimant was not put at any disadvantage because her submissions were not made orally. This is because the content, length and detail of the claimant's written submissions throughout these proceedings demonstrates that she is articulate and more than capable of making her submissions in writing.

4. The claimant's first set of written submissions were received by the Tribunal and taken into account (see Judgment at paragraph [6]). It is correct that the claimant's second set of written submissions were submitted to the Tribunal administration but not received the Judge due to an error. However, on the claimant's own admission they were sent after the deadline set at the original hearing. No express application for an extension of time was made at the time. In any event, I consider that the claimant had sufficient time in all of the circumstances to send her written submissions by the original deadline. There was no procedural error or unfairness in these circumstances. Also, having now considered the second set of written submissions, there is nothing raised in these that demonstrate that the original decision was wrong or that a procedural error occurred. It is relevant that the hearing bundle already included the claimant's position as set out in writing at very great length, including at pages A17 – A38, B15 – B25, B43 – B71, and her original letters to the respondent at D88 – D114.

5. I take into account the fact that the first submissions address the question of employment status and so I do not consider that any procedural error could have occurred for that question on the basis that the second set of submissions were not received by the Judge.

6. The second set of submissions begin by addressing the question of disclosure of emails by the respondent. This is dealt with below.

7. It is right to record that the claimant had concerns about paragraph 21 of the respondent's skeleton argument at the original hearing as raised in the second set of written submissions. These were about an alleged end date of employment. However, the claimant's concerns were misplaced given the Tribunal's conclusion about end date at paragraph [56] of the Judgment.

8. In the claimant's second set of written submissions she suggests that the Tribunal should have requested a copy of any self-employed contract the claimant might have had. However, the evidence did not suggest that any such document existed.

9. I find that the timing of the service of the bundle did not cause the claimant any material prejudice, in part because she was given additional time to put her submissions in writing. She also had this additional time to consider any documents in the bundle, such as email exchanges, as required. The claimant's application for reconsideration is ultimately speculative as to whether or not there may have been additional emails that could have been included in the

bundle. This topic was also considered at paragraphs [8] and [9] of the Judgment. On the material available to me it is not clearly established that the respondent was in breach of its duties of disclosure or, in fact, that it had not complied with the claimant's DSAR request. This is because a DSAR request is for disclosure of information as opposed to documents. Also, in the context of the Tribunal's reasoning, the email evidence was not significant. This is, in part, because any label given by the parties to the employment relationship is only one factor that can be taken into account and is not determinative (see paragraph [53] of the Judgment). Also, any missing emails cannot be significant in light of the Tribunal's finding that the claimant was not reliant on the respondent's disclosures to be in a position to commence proceedings in time (see paragraph [66] of the Judgment). There is nothing in the claimant's second set of written submissions that would affect those conclusions. The respondent did not need to expressly contest employment status before proceedings could be sensibly commenced by the claimant.

10. Also, there is nothing in the second set of submissions that would warrant a reconsideration of the hearing. The claimant's points about missing emails and disclosure have been considered above. The claimant's submission that the respondent has not submitted proof of self-employment adds nothing in light of the fact that the Tribunal has not found that the claimant was self-employed. The issue of the timing of the service of the skeleton argument is addressed elsewhere in these reasons. The questions that the claimant has for the respondent, which were not answered by any witness, simply demonstrate the potential for a degree of ambiguity about her employment status. They do not demonstrate that the claimant was an employee.

11. Also, the points raised by the claimant in her second written submissions about employment status refer to historical matters, how she was paid and taxed, her work patterns, her correspondence, her tax returns, receipt of correspondence about HR type matters from the respondent, and an end of year payment received. To the extent that any of these issues were relevant there were adequately dealt with in the Judgment. For example, the claimant's working pattern is considered at paragraph [34], payment and tax terms are considered at paragraph [48], the claimant's own correspondence with the respondent is raised throughout the Judgment, and matters relating to the level of control by the respondent were covered at paragraph [47]. Any receipt of correspondence by the claimant about reorganisation etc. would not change that conclusion. Also, the points relating to access to an Employee Self-Service Account were covered at paragraph [50], the staff card at paragraph [52], and any label used by the parties at paragraph [53].

12. In the reconsideration application the claimant says that the hearing was unfair because she was not able to cross-examine the respondent (ground 2). However, the respondent chose not to call any witnesses. The claimant cannot cross-examine the respondent's barrister because it is not their role to give evidence on behalf of their client. The respondent's barrister would also not be able to give evidence in response any questions from the Judge. This point is also already dealt with at paragraph [9] of the Judgment.

13. There was no prejudice to the claimant from the timing of the service of the Respondent's skeleton argument (ground 3) for the reasons set out in paragraph [4] of the Judgment. A skeleton argument is not the same as late evidence. The respondent was entitled to cross-examine the claimant because she gave oral evidence relying on her written documents in lieu of a formal witness statement (see Judgment at paragraph [7]). There is no evidence to support the claimant's allegation of bias or lack of fairness.

14. The application for reconsideration does not demonstrate that the Judgment was wrong ('ground 4'). This is because the arguments made by the claimant were either made at the time of the original decision, or could have been.

15. The issue of alleged obstruction was dealt with at paragraph [62] of the Judgment. The points made in the reconsideration application add nothing to this and were either raised, or could have been raised, by the claimant before.

16. There is no evidence to demonstrate that the original decision was influenced by inappropriate factors.

17. The Judgment included consideration of the reality of the situation (see paragraph [19] and [29]). Also, the label given by the parties to employment status is not determinative of employment status, whether before or after a dispute has arisen. This area was considered at paragraph [53] of the Judgment. Ultimately, determination of employment status is a question for the Tribunal, applying the law to the findings of fact made. The position of the parties is not determinative of this question.

18. The claimant also seeks to rely on documentary evidence not used at the original hearing. I do not consider that there is a good reason why these documents were not used at the original hearing. In any event, having considered the documents, they do not determine the issues in the claimant's favour. The label given by the parties at various stages is not determinative of employment status, and neither is the manner in which the claimant was paid or her tax arrangements. There is no reasonable prospect that the formal admission of these documents in evidence would lead to the original decision being varied or revoked. The content is, at best, tangential to the issues given the material already in the bundle and the claimant's own evidence.

19. Overall, I am satisfied that both parties had a fair opportunity to present their cases on the relevant issues. Also, none of the points that the claimant sought to make in her second set of written submissions or her reconsideration application would fundamentally change the conclusions in relation to mutuality of obligation or the level of control (in relation to employee status), or the conclusions about the claimant's ability to bring the claims in time.

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Employment Judge Smith

Date_____16 February 2024_____