EMPLOYMENT TRIBUNALS

Claimant: Mr D Silberman

Respondent: Peninsula Business Services Ltd

JUDGMENT ON RECONSIDERATION

1. The 14 day time limit in rule 71 for making an application for reconsideration is extended pursuant to rule 5 so as to enable the application made by the claimant on 31 January 2024 to be considered on its merits.

2. Upon reconsideration, the Judgment of Employment Judge Gianferrari sent to the parties in writing on 20 October 2022 is varied so that paragraph 1 of that judgment is revoked and replaced by the following:

> **The claimant's claim for wrongful dismissal is well-founded and the respondent is ordered to pay the claimant the sum of £1,667.67 in respect of his four week notice period.**

REASONS

Procedure and Extension of Time

1. Following a preliminary hearing in the Employment Appeal Tribunal ("EAT") before His Honour Judge Martyn Barklem, the appeal in this case was stayed to give the claimant (the Appellant before the EAT) the opportunity to submit an application for reconsideration within 21 days of the seal date of the EAT order, which was 15 December 2023.

2. That time period expired on 5 January 2024 but the application was in fact made on 31 January 2024.

3. Ordinarily the time limit for an application for reconsideration is 14 days from the date on which the written Judgment is sent out to the parties (rule 71 of the Employment Tribunals Rules of Procedure 2013), but the Tribunal has a general power to extend time under rule 5.

4. Rule 72(3) provides that an application for reconsideration under rule 71 shall be considered by the Employment Judge who made the original decision, where practicable. In this case it was not practicable for Employment Judge Gianferrari to deal with the matter because he no longer sits as an Employment Judge. Under rule 72(3) I have decided to appoint myself to deal with it.

5. The test I have to apply is set out in rule 70: whether it is necessary in the interests of justice to reconsider the judgment, and if it is revoked I have to take it again.

6. The email of 31 January 2024 enclosing the reconsideration application said:

> **"I sincerely apologise for any delay in the submission of this application, owing to my mental health. I am in the process of getting medical evidence should this be needed to support the delay in the application."**

7. I caused a letter to be sent to the parties on 15 February 2024 confirming that I would deal with the reconsideration myself, and saying that I proposed to extend time for the application to be considered on its merits unless the respondent wished to make submissions to the contrary.

8. The respondent replied on 7 March 2024. It did not oppose an extension of time.

9. I therefore decided to extend time so that the reconsideration application could be considered on its merits.

10. I also invited submissions on whether the application ought to be considered at a hearing, or whether it could be dealt with on the papers alone. The claimant initially requested a hearing by email of 1 March 2024. However, by email of 7 March 2024 he said he was happy for it to be decided on the papers. Given the issue and the amount at stake I decided under rule 72(2) that a hearing was not

necessary in the interests of justice. I was satisfied that both parties had been given a reasonable opportunity to make further written representations.

Background

11. This case was heard by Employment Judge Gianferrari on 24 May 2022, and after deliberating in chambers on 10 June 2022 he issued a written Judgment with Reasons which was sent to the parties on 20 October 2022 ("the Gianferrari Judgment"). The unfair dismissal complaint was dismissed. There are no outstanding issues about that.

12. The complaint of breach of contract in relation to notice pay ("wrongful dismissal") was also dismissed, and the claimant was not awarded any notice pay. However, on appeal it was noted by HHJ Barklem that a finding of fact had been made in paragraph 26.16 of the Gianferrari Judgment to the effect that the claimant had been told when dismissed for gross misconduct on 4 February 2020 that he would be "paid in lieu as accepted by the parties". The wrongful dismissal claim had been dismissed because Employment Judge Gianferrari found that the claimant had been guilty of gross misconduct which entitled the respondent to dismiss him without notice, but the EAT concluded that the Judge had overlooked the fact that, even so, there had been an agreement that the claimant would be "paid in lieu".

13. The issue was as to the period for which that was agreed. The claimant had resigned his employment on 24 January 2020 giving eight weeks' notice of termination meaning that his employment was due to end on 19 March 2020. He contended that the agreement was that he should be paid for the remainder of the notice period expiring on that date.

14. The respondent contended, however, that when it dismissed him and agreed to pay notice it was an agreement only to pay the notice due to him upon termination of his contract by the employer, being four weeks' notice.

Claimant's Application

15. The claimant attached a four page document to his initial email of 31 January 2024. The first six paragraphs repeated comments made by HHJ Barklem in the EAT order, with some minor additional comments and emphasis from the claimant.

16. The claimant then took issue with the findings of fact made in paragraphs 26.4 and 26.5 of the Gianferrari Judgment, and sought to re-open the unfair dismissal complaint. Such matters are outside the scope of the issue under consideration on appeal and I disregarded those paragraphs.

17. There was, therefore, nothing in the initial application which dealt with the point at issue.

Respondent's Submission

18. By a letter of 7 March 2024 the respondent observed that the claimant's application did not address the issue of the length of agreed notice pay. It was

asserted that there was no basis on which the claimant could claim to have been owed eight weeks because there was a contractual right to terminate on four weeks' notice. It said that it had now made a payment to him equivalent to four weeks' gross pay.

Claimant's Response

19. The claimant made further submissions in reply by email of 7 March 2024. He referred to case law relating to the exercise of a clause providing for payment in lieu of notice providing an extract from his contract which contained such a clause in the following terms:

> **"We reserve the contractual right to give pay in lieu of all or any part of the above notice by either party."**

20. His key point was that the respondent had an obligation to make clear what "payment in lieu" it was proposing to make, and the ambiguity should be construed in his favour as meaning the balance of the notice period that he had given, not the four weeks' notice period which the respondent would have been required to have given had there been no gross misconduct.

21. The claimant confirmed that he had received £1,666.67 paid by the respondent but further argued for an uplift of 25% because of an unreasonable failure to follow the ACAS Code of Practice on Discipline and Grievance Procedures, meaning there should be a higher award even if I were to agree that the respondent should only pay four weeks' notice.

22. Finally, the claimant applied for a preparation time order for the whole case, saying that he could provide full details if required.

Discussion and Conclusions

23. It is necessary to consider the contractual mechanics. The claimant resigned his employment on notice on 24 January 2020 and was thereafter serving a notice period during which he was to remain employed until 19 March 2020.

24. However, that resignation was not effective to terminate his contract because it was superseded by the decision to dismiss him communicated verbally on 4 February 2020 and confirmed in writing by letter of 7 February 2020. As Employment Judge Gianferrari found, on 4 February 2020 the claimant was told that he would be "paid in lieu" of notice.

25. It is plain that this agreement to pay notice was overlooked in the Gianferrari Judgment, and therefore the judgment dismissing the claim for breach of contract must be revoked and replaced by judgment that the claim succeeded. The respondent breached the contractual agreement to pay the claimant in lieu of notice.

26. The issue in dispute between the parties is about the award of damages which should result from that breach. Did the agreement oblige the respondent to pay the balance of the notice period initiated by the claimant's resignation, or only

the notice period applicable in the event of dismissal by the employer. That depends upon the interpretation of what the parties verbally agreed on 4 February 2020.

27. The principles of contractual interpretation were summarised by Lord Hoffmann in **Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896** as follows:

> "**(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract….**
>
> **(2) …..**
>
> **(3) ….**
>
> **(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax…. "**

28. Lord Hoffman was dealing with interpretation of a written contract but recognised in paragraph (4) of the extract quoted above that the same principles would apply to "any other utterance", such as a verbal exchange of the sort found by Employment Judge Gianferrari to have occurred on 4 February 2020.

29. The relevant background here included the following facts:

(a) The claimant had resigned, giving notice due to terminate his employment on 19 March 2020;

(b) The respondent had grounds for terminating the contract early without any notice, as he had committed gross misconduct;

(c) The respondent would have been entitled to have taken no disciplinary action, but simply to have allowed his resignation notice period to have expired, possibly putting him on "garden leave" or exercising its contractual right to pay him in lieu of that notice, but

(d) Instead, it chose to take positive action to terminate his contract by dismissing him, meaning that if there had been no gross misconduct he would only have been entitled to four weeks' notice.

30. Both sides had that background knowledge at the time. Applying the principles summarised above, I am satisfied that a reasonable person having knowledge of that background would have taken the agreement to have meant that the claimant would be paid in respect of the notice period applicable where there is a termination by the employer, not that derived from the resignation by the employee. It was clear that the respondent was terminating employment before the expiry of the

claimant's notice period in March. The finding that the claimant was guilty of misconduct gave it the grounds for termination. The dismissal was the mechanism by which the contract was to come to an end, superseding the resignation.

31. A reasonable person in possession of that knowledge would not have found the agreement to "pay in lieu of notice" ambiguous. Its meaning in this context is clear. The claimant's argument about construing ambiguity against the party responsible for it does not assist him.

32. It therefore follows that the amount the claimant is entitled to as compensation for breach of that contract is four weeks' gross pay, in the sum of £1,666.67. This has already been paid.

Further Matters

33. There are two further matters which I can now address with the assistance of the parties.

ACAS Uplift

34. The first is the claimant's claim for an ACAS uplift to the amount I have now awarded. Employment Judge Gianferrari did not consider remedy.

35. The parties should make any further submissions in relation to this within 21 days of this Judgment being issued, and I will then make a determination on whether to uplift the award in respect of wrongful dismissal under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

36. I propose to deal with that on the papers unless either side considers that a further hearing would be required.

Preparation Time Order

37. The second is the claimant's application for a preparation time order.

38. This application is made within time under rule 77, as the last date for making it is 28 days after the date on which the Judgment finally determining the proceedings is sent to the parties.

39. If the claimant wishes to pursue this application he should provide within 21 days of this Judgment being issued full details of the amount of the time spent, and when it was spent, and the basis on which he contends that the respondent has acted unreasonably in defending the claim or its conduct of the proceedings.

40. The respondent will have 21 days from the date it receives the claimant's preparation time application in which to make any objections.

41. I propose to deal with that application on the papers too unless either side requires a further hearing.

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Regional Employment Judge Franey

3 April 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON

19 April 2024

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