EMPLOYMENT TRIBUNALS

Claimant: Mr D Wilson

Respondent: Carbon60 Limited

JUDGMENT

1. The Claimant's application that Employment Judge Caiden should be recused from considering the reconsideration application, initially made on 16 August 2023, is refused.

2. The Claimant's application, initially made on 16 August 2023, for reconsideration of the judgment sent to the parties on 14 August 2023 is refused.

REASONS

Background

1. Following a hearing that occurred 5 July 2023, which the Claimant did not attend, the Tribunal (Employment Judge Caiden) upheld the complaint of unauthorised deduction for wages (although no compensation was awarded as the outstanding sums had been determined to have been paid) and dismissed the complaint of breach of contract, namely failure to pay notice pay and loss of wages following the termination of the employment contract. This Judgment was only sent to the parties by the Tribunal service on 14 August 2023 (referred to below as "Judgment").

2. The dismissal of the claims was premised on the Claimant not being an employee and so the Tribunal had no jurisdiction to consider the breach of contract (see Judgment at para 34). The Tribunal however did go on to consider in the alternative that even if he was an employee the claim would have failed as the only loss recoverable is notice pay which had been paid (see Judgment at para 35).

3. Shortly after judgment was sent to the parties, on 16 August 2023, the Claimant emailed various people in effect expressing his dissatisfaction with the judgment and one of whom was the Watford Employment Tribunal. There were other emails also sent but this Tribunal is only concerned with two aspects that stem from this initial email:
   3.1. An application for Employment Judge Caiden to recuse himself from the reconsideration of judgment application;

3.2. An application to reconsider the judgment.

4. The 16 August 2023 email states, as appears relevant:
   4.1. "*This is an application requesting the recusal of Employment Judge Caiden from proceedings*";
   4.2. that "*conspiring with, or on behalf of the Respondent and/or a representative of the Respondent to pervert the course of justice is a criminal offence*" and that "*Judge Caiden's refusal to acknowledge and/or address the existence of P45 documents issued by the Respondent that were placed before the Tribunal, implies fraud*";
   4.3. "*It would be unacceptable for the judge to come under pressure to admit or not admit certain evidence, how to direct the jury, or to pass a particular sentence. Decisions must be made on the basis of the facts of the case and the law alone'. Judge Caiden omits evidence relating to the facts of the case at paragraph 6 of his judgement dated 7 July 2023. The full copy of my email sent to the Tribunal on 5 July 2023 is attached for your convenience*"
   4.4. "*The existence of P45 documents confirms employee status, as does section 230 of the Employment Rights Act 1996.*"
   4.5. "*Commercial links between the Ministry of Justice, Deloitte, and the Impellam Group, are noted.*"

Recusal

5. As set out above at paragraph 4, the Tribunal understands the grounds for recusal to be on the basis of bias, both actual and apparent. The Tribunal reminds itself that in relation to this recusal application that, following *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451:
   5.1. ordinarily, it will be the duty of the judge to consider the objection and exercise judgment on it, and it would be wrong "*to yield to a tenuous or frivolous objection as he would to ignore an objection of substance*" (at para 21);
   5.2. there is some force in the observation that "*just as justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding to readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide in their favour*" (at para 22);
   5.3. relying upon another case the observation that "*As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to* [them]*. Subject to certain limited exceptions, a judge…should not accede to an unfounded disqualification application*" at para 24).

6. In *Medicaments and Related Classes of Goods (No.2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 it was stated that:
   6.1. "*The requirement that the tribunal should be independent and impartial is one that has long been recognised by English common law*" (at para 35);
   6.2. "*Bias is an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve. A judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular*

witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him." (at para 37);

6.3. "*The decided cases draw a distinction between "actual bias" and "apparent bias". The phrase "actual bias" has not been used with great precision and has been applied to the situation (1) where a judge has been influenced by partiality or prejudice in reaching his decision and (2) where it has been demonstrated that a judge is actually prejudiced in favour of or against a party. "Apparent bias" describes the situation where circumstances exist which give rise to a reasonable apprehension that the judge may have been, or may be, biased*" (at para 38).

7. The test for bias is the fair-minded observer test, *Medicaments and Related Classes of Goods (No.2)* at para 85, and *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357 at para 103. In *Porter* at para 103 it was stated as being

> "*The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*"

8. In terms of the Claimant's application, dealing first with actual bias, the Claimant has not set out any 'actual' basis for this. The matter is founded upon the decision of the Tribunal and the failure to include reference to the P45 in the earlier judgment (which is dealt with in greater detail in relation to the recusal application). The mere fact that evidence is not mentioned does not show actual bias, nor does it amount to (or imply) fraud as alleged in the application. The same is true for a decision going against a litigant. In so far as the Tribunal understands the Claimant's application, the Tribunal confirms that :

8.1. the Tribunal did not "*conspire*" with the Respondent, or its representatives, and did not feel under any pressure to not admit or consider any evidence;

8.2. the Tribunal does not have any personal or proprietary interest in Deloitte or the Impellam Group, nor in the Respondent.

9. The Tribunal then moves on to consider 'apparent bias' which it assumes is the main basis for the application. In this regard the Tribunal concludes that a fair minded and informed observer having considered the facts would not conclude that there was a real possibility that the Tribunal was biased owing to the failure to mention the P45 in evidence or find the Claimant was not an employee. This is because of the following:

9.1. a Tribunal will not mention all evidence in a judgment;

9.2. the P45 had been explained by the Respondent as "*payment in lieu of notice. The email (page 46) and the payslip in respect of this payment is at page 47. A P45 in respect of this payment is at pages 48-50".* It was therefore specifically drawn to the Tribunal's attention by the Respondent which goes against a suggestion that it was trying to "*not admit*" evidence;

9.3. an informed observer would understand that the decision on employment status is not limited or answered by a single document, and will, it is suggested, also have sufficient knowledge of the law that a P45, or employment for tax purposes under PAYE, does not mean the individual is an employee of the other party.

10. Accordingly, and stepping back and looking at all matters in the round, the Claimant's application is refused as a "*fair-minded and informed observer, having considered the facts would*" not "*conclude that there was a real possibility*" that the Tribunal was biased.

Reconsideration

11. In Schedule 1 of Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("ET Rules"), rule 70

> *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.*

12. Rule 71 requires an application to be made in writing for reconsideration within 14 days that the written reasons were sent to the parties. This has been complied with by the Claimant in terms of both time limit proscribed and it is apparent that the crux of the application is that the Tribunal failed to have regard to evidence, namely the P45, which would materially have affected its decision.

13. The Tribunal notes that in determining reconsideration applications it must first consider under r.72(1) ET Rules whether there is "*no reasonable prospect of the original decision being varied or revoked*". This initial stage, sometimes referred to as a 'sift stage' is mandatory *H White & Sons Limited v Ms K White UKEAT/0022/21* para 57 and *Shaw v Intellectual Property Office* UKEAT/0186/20 paras 80-81. Ordinarily, at this 'sift stage' there is no input from the responding party (*Shaw* paras 81-85) and in this case no representations have been sought from the Respondent by the Tribunal in reaching its decision under r.72(1) ET Rules.

14. The Tribunal accepts that 'new' evidence (or in this case alleged overlooked evidence) could fall within something making it in the "*interest of justice*" to reconsider a judgment. However, in this case it concludes the application must fail and there is no reasonable prospect of the original decision being varied or revoked as:
    14.1. in law the fact that an individual is paid through "*Pay as you earn*" (PAYE), which means that they would receive a P45, or even that they are deemed an employee for tax purposes, is not conclusive to establishing employment status See for example IDS Employment Law Handbooks, Volume 3 – Contracts of Employment at para 2.86: "*Another relevant financial indicator of employment is the incidence of income tax and national insurance — deductions at source point to employment; gross payments suggest self-employment. However, this factor is not generally regarded as strong evidence and the opinion of HM Revenue and Customs (HMRC) on a worker's employment status for tax purposes will never be conclusive as to his or her status for employment law purposes*". Indeed, it is relatively common in agency type scenarios (which the Tribunal concluded this was) for the company that supplies the worker to a client to be the one paying the worker and doing so by PAYE;
    14.2. in any event, the Tribunal made a finding in the alternative, see Judgment para 35, that even if the Claimant were an employee his claim

would fail as he had been paid notice pay and that was the only recoverable loss. Accordingly, the Claimant's argument on reconsideration has no reasonable prospect of varying the original decision to dismiss the claim.

Employment Judge Caiden
7 September 2023

JUDGMENT AND REASONS
SENT TO PARTIES ON…8 September 2023

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FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.