# EMPLOYMENT TRIBUNALS

**Considered at:** London South **On:** 16 May 2024

**By:** Employment Judge Ramsden

**In the matter of (1) Mr D McShaw, (2) Mr R McShaw, (3) Mr E Atwere v Mitie Limited**

**Consideration of judgment reached on 25 April 2024**

# JUDGMENT ON RECONSIDERATION

1. The Respondent's application for reconsideration of the judgment upholding certain of the complaints brought by the Second and Third Claimant given in this matter on **25 April 2024** is refused - there is no reasonable prospect of the original decision being varied or revoked.

# BACKGROUND

2. The First Claimant filed two Claim Forms commencing the proceedings in these cases, the first on 4 March 2021, and the second (which made complaints on his own behalf and on behalf of the Second and Third Claimants) on 22 April 2021.

3. The relevant complaints for the purposes of the application for reconsideration are those made by each of the Second Claimant and the Third Claimant that the Respondent refused to permit them to take all of their holiday entitlement for the holiday years 2020/2021 and 2021/2022 when they say they were entitled to 29 and 28 days' annual leave for those years respectively. The Second Claimant's complaint in this regard was defined as "Complaint 10" in my judgment, and the Third Claimant's equivalent complaint was defined as "Complaint 13".

# APPLICATIONS

4. The Respondent applied, under Rule 71 of the Employment Tribunals Rules of Procedure 2013 (the **ET Rules**), for reconsideration of my decision on 25 April 2024 that Complaints 10 and 13 were well-founded and succeed, and my award of damages to the Second and Third Claimants in respect of those matters. The

Respondent says that the conclusion I reached on those Complaints should be varied by reversing the conclusion on each of them - i.e., so as to conclude that Complaints 10 and 13 were not well-founded and to dismiss those Complaints - in the interests of justice.

5. The Respondent's reasons for applying for reconsideration of that decision are that:

   a) *The evidence that was available to the Tribunal supports the Respondent's position* because:

      (i) The conclusion reached by the Tribunal did not reference the Second and Third Claimants' working patterns, and the fact that they do not work five days a week;

      (ii) The pro-rating advocated by the Respondent would reflect the Working Time Regulations' entitlement of 5.6 weeks annual leave per annum, whereas the conclusion reached by the Tribunal would result in their entitlement exceeding that and amounting to 8 weeks' annual leave per year for an employee working a five-day week;

      (iii) The Tribunal's conclusion would result in an inconsistency between the annual leave entitlements of the Second and Third Claimants who both work an average of 3.5 days per calendar week, on the one hand, with the annual leave entitlement of the First Claimant, who works an average of five days a calendar week, on the other; and

      (iv) While the witness statement of Carol Imrie (on behalf of the Respondent) states that the annual leave entitlement of the Second and Third Respondents was 28 days per year, that was – although it was not stated in her witness statement - subject to pro-rating, there was sufficient evidence before the Tribunal for it to reach that conclusion; and

   b) *The evidence relied upon by the Tribunal is consistent with the Second and Third Claimants having a pro-rata entitlement*. Specifically, the Respondent says that the 25 April 2024 judgment relied upon the terms of the 3 September 2020 grievance outcome letter, which the Respondent says is better-construed as providing that the Second and Third Claimants' holiday entitlement had changed since their transfer, pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (the **TUPE Regulations**), such that the Second and Third Claimants were and are entitled to 19.6 days' annual leave per year, with (by exception) an extra day for the 2020/2021 holiday year.

# RULES

6. The Rules on reconsideration are set out in Rules 70 to 73 of the ET Rules. The pertinent ones for these purposes are Rules 70 and 72:

"***Principles***

*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.*"

*"**Process***

*(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting out a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application…"*

7. It is only if prospects of the reconsideration application succeeding are greater than "no reasonable prospect" that consideration will then be given as to whether the application should be reconsidered at a hearing or otherwise.

# REASONS

8. There was no requirement for the Tribunal to refer to the Second and Third Claimant's shift patterns when determining their contractual entitlement to annual leave.

9. As the Respondent acknowledges, Ms Imrie's witness statement expressly states that the Second and Third Claimants were entitled to 28 days' annual leave, and says nothing about pro-rating. However, this was not a question of Ms Imrie simply omitting to refer to pro-rating: she was taken in her oral evidence to the employee liability information that the Respondent's predecessor provided to the Respondent in respect of the Second Claimant in anticipation of the TUPE-transfer of the Claimants into the Respondent's employment (this appeared in the Claimants' Supplementary Bundle at page 2878), which stated that the Second Claimant was entitled to 28 days' annual leave. Ms Imrie confirmed that the Respondent honoured TUPE-protected terms such as holiday entitlement unless the legislation entitled the individual to more. This point was explored thoroughly

by the Second Claimant when cross-examining her, and Ms Imrie's oral evidence to the Tribunal was that the Second and Third Claimants were each entitled to 28 days' annual leave. Her position in her witness statement was that the Second and Third Claimants had simply not tried to take all of their entitled leave, and there was evidence in the Claimants' Supplementary Bundle which clearly contradicted this (including at page 2550).

10. Whether the fact that the Second and Third Claimants were entitled to 28 days' annual leave means that there is a disparity between their annual leave entitlements and that of the First Claimant was not explored by either party in evidence, and nor was it a matter that the Tribunal regarded as one needing exploration. It was accepted by both parties (and the Tribunal) that there are differences in the terms and conditions of employment of the First Claimant compared with the Second and Third Claimants.

11. The Working Time Regulations 1998 prescribe workers' minimum entitlement to annual leave, so the fact that the Respondent provides more than that (whether that is because of its bargain with its employees or because of a TUPE-protected term) does not affect the term found by the Tribunal to form part of the employment contracts of the Second and Third Claimants.

12. The terms of the grievance outcome letter involved an acceptance by the Respondent that the Second and Third Claimants TUPE-transferred into the Respondent's employment with an entitlement to 28 days' annual leave. The fact that that letter purported to alter that entitlement does not change the Tribunal's conclusion that the annual leave entitlement in the Second and Third Claimants' unwritten employment contracts is for 28 days' per annum, because they transferred into the Respondent's employment with that entitlement and never agreed to a reduction to it. (As the Second and Third Claimants never agreed to it the question of whether any such agreement could, in any event, be effective to reduce their entitlement did not therefore need to be addressed.) The dispute about their annual leave entitlement (among other matters) is ultimately what reached the Tribunal for its consideration in this case.

# DECISION

13. For the reasons set out above, the Respondent's application for reconsideration has no reasonable prospect of causing the original decision to be varied or revoked, and so the Respondent's application for reconsideration is refused.

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Employment Judge Ramsden
Date:16 May 2024