EMPLOYMENT TRIBUNALS

Claimant: Ms L Crocombe

Respondent: Equity Release Supermarket Ltd

JUDGMENT

The claimant's application dated 13 May 2024 for reconsideration of the judgment sent to the parties on 29 April 2024 is refused.

REASONS

1. I have undertaken a preliminary consideration of the claimant's application for reconsideration. The application seeks reconsideration of the part of the judgment which concluded that the claimant was not an employee in accordance with the definition in the Employment Rights Act 1996, so the Tribunal does not have jurisdiction to consider her complaints of unfair dismissal and wrongful dismissal/breach of contract. References to paragraph numbers are to paragraph numbers from the reasons promulgated with the judgment.

The Law

2. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70).

3. Rule 72(1) of the 2013 Rules of Procedure empowers me to refuse the application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked.

4. The importance of finality was confirmed by the Court of Appeal in **Ministry of Justice v Burton and anor [2016] EWCA Civ 714** in July 2016 where Elias LJ said that:

> **"the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Ironsides Ray and Vials [1994] ICR 384**

> **Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."**

5. Similarly in **Liddington v 2Gether NHS Foundation Trust EAT/0002/16** the EAT chaired by Simler P said in paragraph 34 that:

> **"a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or by adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered."**

6. In common with all powers under the 2013 Rules, preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay. Achieving finality in litigation is part of a fair and just adjudication.

The Application

7. The application invites me to reconsider my conclusion that the claimant was not an employee in accordance with the definition in the Employment Rights Act 1996 (ERA).

8. I summarise the arguments I understand to be made in this application as to why the claimant says it would be in the interests of justice to reconsider this part of my decision as follows:

8.1. On the basis of facts I found, I did not give the correct weight to relevant factors in reaching the conclusion that the claimant was not an employee in the ERA sense: and/or

8.2. That certain findings of fact were incorrect on the basis of the evidence before me.

9. I will address these arguments in my conclusions.

Conclusions

<u>Not giving correct weight to relevant factors in reaching the conclusion that the claimant was not an employee in the ERA sense</u>

10. Paragraphs 90-94 of my conclusions need to be read in their entirety, together with the relevant findings of fact. Paragraph 94 states:

> "I conclude, having regard to the limited control exercised by the respondent and the limited extent of mutuality of obligation taken together with the other factors pointing against employment status, that the claimant was not an employee of the respondent within the ERA sense."

11. This conclusion is based on all my reasoning, as set out in paragraphs 91-93, which made reference to relevant findings of fact, as to the limited control and limited extent of mutuality, as well as other relevant factors. The claimant, in her application, quotes selectively from my reasoning, in arguing that my conclusion was incorrect. As explained in paragraph 90, the exercise I had to undertake was to consider all relevant factors to determine whether the claimant was an employee. An irreducible minimum to be an employee involves control, mutuality of obligation and personal performance, but other relevant factors also need to be considered.

12. I consider that I gave appropriate weight to relevant factors, including the limited control and limited extent of mutuality of obligation, which were set out in my findings of fact and conclusions.

13. I do not consider that there is any reasonable prospect of my conclusion that the claimant was not an employee in the ERA sense, on the basis of the facts I found, being varied or revoked.

That certain findings of fact were incorrect on the basis of the evidence before me

14. The claimant takes issue with the finding of fact in relation to the insurance excess at paragraph 33. The claimant does not identify the evidence on the basis of which she argues I should have made a different finding. I do not consider there is any reasonable prospect of me varying this finding of fact. Even if I did, I do not consider that a different finding of fact, of the nature suggested by the claimant, would have any reasonable prospect of leading to a variation or revocation of my conclusion that the claimant was not an employee in the ERA sense.

15. The claimant takes issue with paragraph 88 which is a conclusion, based on findings of fact expressed earlier in the judgment (at paragraph 52). Paragraph 88 was part of my reasons for my conclusion that the claimant was a worker, a conclusion not challenged by the claimant. The matters referred to in paragraph 88 were not specifically relied on to support my conclusion that the claimant was not an employee in the ERA sense. Although the claimant invites me to reconsider the finding of fact in paragraph 88 (although the finding of fact is in paragraph 52), she does not identify what, if anything, she says I got wrong in this finding of fact. The claimant does not explain what impact a different finding would have on the conclusion about employment in the ERA sense. I do not consider that there is any reasonable prospect that I would make a different finding of fact which would result in a different conclusion as to whether the claimant was an employee in the ERA sense.

Summary of conclusion

16. For the reasons given above, I do not consider there is any reasonable prospect of my decision that the claimant was not an employee in the ERA sense being varied or revoked. I, therefore, refuse the application for reconsideration.

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Employment Judge Slater

Date: 22 May 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON

Date: 22 May 2024

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