EMPLOYMENT TRIBUNALS

Claimant: Miss K Paczkowska

Respondent: R-Com Consulting Ltd

Heard at: Manchester (by CVP) **On:** 17 May 2024

Before: Employment Judge Eeley

REPRESENTATION:

Claimant: In person
Respondent: Mr J Gilbert, Consultant

JUDGMENT ON RECONSIDERATION

The judgment of the Tribunal is that:

1. The time limit for presentation of the claimant's applications for reconsideration made on 11 January 2022 and 6 June 2022 should be extended pursuant to rule 5 of the Employment Tribunals Rules of Procedure 2013 so that the reconsideration applications can be heard and determined on their merits.

2. The decision of Employment Judge Warren (relating to the date of termination of employment) is confirmed. The claimant's effective date of termination of employment for the purposes of these proceedings was 12 November 2018.

3. The claimant's claims in case number 2414057/2019 are struck out as having no reasonable prospects of success.

REASONS

1. This is the decision and reasons which were given orally by the Tribunal to the parties on 17 May 2024 in relation to the claimant's reconsideration application and in relation to strike out of the second 2019 claim form. The decisions in relation to the claimant's application to amend her claim were reserved decisions and have been notified to the parties in a separate reserved decision document.

2. This decision relates to items 9(a), (b) and (c) on Regional Employment Judge Franey's Case Management Summary from the hearing on 8 March 2024. Firstly, I am asked to decide whether the reconsideration application can be heard given that it was presented more than 14 days after the judgment that it was seeking to reconsider. Secondly, if the application is heard and determined in substance, I am asked to decide whether it is appropriate to vary, confirm or revoke the previous decision of Employment Judge Warren.

Late application

3. I first address the extension of time point. This is clearly an application which is out of time. It seeks to apply to reconsider the decision of Employment Judge Warren on a previous reconsideration application. That decision was sent to the parties in April 2021. The two applications that I am dealing with are those made on 11 January 2022 and 6 June 2022 (pages 487 and 495 in the hearing bundle).

4. Clearly the application is presented out of time but rule 5 of the Employment Tribunal Rules gives me the discretion to extend time where appropriate to do so. This is a judicial discretion and I need to consider the balance of prejudice to the parties in either allowing the application to be heard outside the time limit or preventing it from being heard outside the time limit.

5. In essence, the claimant has explained to me why she could not have made the applications any earlier than she did on 11 January 2022 and, as explained further, in the 6 June 2022 application. Essentially, the application that I am called upon to decide is based upon documents which were provided to the claimant by HMRC on 5 January 2022. The claimant, once she had read the letter from HMRC, provided her application for reconsideration a few days later on 11 January 2022. Some of the attachments to that HMRC letter may well have been provided to the claimant at an earlier date but the actual letter itself could not have been provided to the claimant any earlier than 5 January 2022. To that extent, the claimant has a good explanation for delaying her application and for needing an extension of time. She could not reasonably have been expected to bring this particular application any earlier than she did.

6. I have considered the balance of prejudice between the parties. It seems to me, having heard from both parties this morning, that both sides have been able to make submissions on the substance of the application and have not been prejudiced in doing so by the lateness of the application itself. They have been able to deal with the substance of the application and have not been

unfairly prejudiced in doing so by the delay in making the application. On that basis it would be fair to both parties to extend time and consider the application on its merits. It is better, in my view, to deal with the application on its merits rather than dismiss it on the basis of procedural grounds, such as delay.

7. So, in relation to paragraph (a) in the list of issues, I am prepared to extend time and hear the late reconsideration application.

Reconsideration

8. Paragraph (b) in the list of issues is the substance of the reconsideration application itself. I remind myself that the relevant test to be applied is that which is set out at rule 70 of the Tribunal Rules of Procedure. I must consider whether it is necessary in the interests of justice to reconsider the decision. I take into account all of the supporting case law and the procedural principles set out at rule 72.

9. This is not an appeal; it is a reconsideration. I have to look at whether the parties (or one of them) have not had a fair opportunity to present an argument to the Tribunal on a point of substance. There is no 'exceptionality' test. I have to bear in mind the overriding objective, which is set out at rule 2 of the Tribunal Rules of Procedure. I bear in mind that it is the judicial exercise of a discretion. It is a broad discretion but is to be exercised in a principled way. I have to consider the interests of justice from both parties' points of view and I also have to take into account the public interest in the finality of litigation. That is a weighty public interest. It is the public interest in each decision in litigation being taken with finality. It does not solely relate to the overall outcome of the proceedings at the end of a case. Rather, it is equally relevant to the judicial determination of issues as the case proceeds through the Tribunal.

10. I bear in mind the guidance I receive from the case law such as Phipps v Priory Education Services Ltd [2023] ICR 1043; Newcastle-upon-Tyne City Council v Marsden [2010] ICR 743; Ministry of Justice v Burton [2016] ICR 1128. I am reminded that reconsideration is a power to be exercised cautiously. (See also Ebury Partners UK Limited v Davis [2023] IRLR 486 and some earlier comments in the case of Outasight VB Limited v Brown UKEAT/253/14.)

11. In this case the issue that I am being asked to look at again on reconsideration is the effective date of termination. It is relevant because the claimant currently has two claim forms before the Tribunal which both deal with the issue of dismissal and which both have a 2019 Tribunal Case Number.

12. The decisions that have previously been made on the effective date of termination have been made by Employment Judge Warren. The first decision was made after a hearing where Employment Judge Warren had been directed to the relevant documents and had also heard evidence from the claimant and some evidence from a witness (Miss Singer) on behalf of the respondent. (I appreciate that Miss Singer's evidence may have focussed more on the issue of ACAS Early Conciliation and "without prejudice" discussions.) The decision was given (page 329 in the bundle) and the written reasons were subsequently supplied (page 333 in the bundle). In particular, it is important to note that

factual findings were made after the Judge had heard the evidence and had considered the documents. Relevant findings are made at paragraphs 13-16, paragraph 18 and at paragraph 23. A conclusion was reached (based on the finding of fact at paragraph 23) that the claimant's resignation letter was effective and was not rescinded at any point subsequently.

13. The claimant sought a reconsideration on the basis (it appears) of the difference between the finding based on the evidence which was available to Employment Judge Warren at the hearing, and the date on the P60 document from HMRC.

14. When Employment Judge Warren gave her decision on the reconsideration application (page 440) she referred to the P60 and said that it would not cast doubt on the factual findings she had made (paragraphs 9-11). I note that the P60 gives a later date than that which was found by Employment Judge Warren. Judge Warren decided that termination of employment was in November 2018 whereas the P60 gives a 2019 date.

15. Judge Warren's reconsideration decision was sent to the parties on 13 April and the claimant made applications for a reconsideration of that first reconsideration decision.

16. That is the current position. I am tasked with determining an application to reconsider a decision that was already a reconsideration of the judge's earlier decision. This issue of effective date of termination has been looked at twice by the same Judge. It now comes to me for a third review.

17. The only new item before me in terms of Tribunal documentation is the HMRC letter which accompanies the documentation in the P60 and the P45. The P45 itself is consistent with the 2018 effective date of termination – it is the P60 which is not. The letter from HMRC states that the respondent's information supplied to HMRC does not match the claimant's information, and there is reference to a nil salary being recorded at HMRC up to January 2021 (which is clearly beyond the date that either side is saying is the correct date of termination and must, therefore, be wrong.) The HMRC letter refers to a cessation date of 5 April 2021. Again, this is not one of the dates that has previously been canvassed before the Tribunal. 5 April 2021, of course, would be the most recent tax year-end before the date on the HMRC letter in January 2022.

18. The errors in the HMRC records tell us nothing about the details of who sent in the data to HMRC, whether the person who sent that data to HMRC actually sent correct data (which has been mis-recorded by HMRC) or whether the information supplied by the respondent was, itself, incorrect. There is nothing to indicate whether the difference in dates is deliberate or whether it is an error. The cessation date of 5 April 2021 is clearly wrong, even on the respondent's case.

19. The other pertinent point in the letter is the tax code which apparently relates to a later year (which suggests that it is not consistent with a decision to dismiss in

2018.) The letter from HMRC suggests that the respondent should be asked for an explanation for the discrepancies.

20. That is the information that I have in front of me. What I have to decide is: is it necessary in the interests of justice to reconsider the previous decisions and what does the information in front of me now tell me regarding that question?

21. It is important to note that HMRC records are not determinative of the question of effective date of termination for the purposes of an employment tribunal. The issue of the effective date of termination is based on the evidence (primarily) relating to what the parties said and did in relation to each other during the relevant period of time.

22. This is a case where the claimant has sent in a resignation letter. There is some dispute about whether she was given a chance to rescind the resignation and at what point in time the respondent accepted it as a resignation. However, once an unequivocal resignation has been sent from the claimant to the respondent, although the respondent may decide to offer the opportunity to retract or to rescind that resignation, an acceptance of resignation is not necessarily required.

23. The HMRC records which are before me are effectively the records of a third party (not a party to the employment relationship). Such records should, in the normal course of events, be accurate and reflect or match the other documents in the case. However, that is often not the case. Employment Judge Warren made clear findings based on the evidence before her and the facts that the claimant referred to at the last hearing (and after that hearing.) Judge Warren noted that the claimant had presented her first 2019 Employment Tribunal claim after the effective date of termination in 2018. That says something about the claimant's own thoughts and beliefs in relation to the termination of her employment. HMRC records may be helpful but they are not determinative (just as they are not determinative on issues of worker/employee status which come to be decided by the Tribunal.)

24. Employment Judge Warren heard oral witness evidence and she referred to the relevant documents. The only item that she did not have was the HMRC letter accompanying the P60. I note the point made about the tax code. However, it is notable that the tax code is attached to the subject access response letter of 2019 but still apparently relates to a future year (2021). This would tend to suggest an administrative error in the tax code rather than a deliberate manipulation of the data by the respondent.

25. Is it necessary for the claimant to establish a later date in terms of the rest of the proceedings? No, because the claimant already has a claim before the Tribunal which is based on the earlier effective date of termination in 2018 and which she can pursue to a final hearing. The claimant is therefore not left without a remedy if I refuse to vary the judgment of Employment Judge Warren. The claimant was clearly able to present a claim form once she felt that she had been unfairly dismissed, and she did so in her first claim form of 2019.

26. I am being asked to revisit a decision in 2024 when the original decision under consideration was made in August 2019 and then reconsidered and sent to the parties in 2021. We are therefore approaching the fifth anniversary of the initial decision being made. I would also observe that it is not 'necessary in the interests of justice' to vary the decision on the basis of documents alone when I have not heard the accompanying oral evidence from the relevant witnesses (in the way that Judge Warren did). It is an additional difficulty to expect witnesses to deal with the evidence on this issue for a second time, some several years after the initial decision.

27. Drawing the matter to a conclusion, the P45 matches the rest of the evidence. It is the P60 which is the outlier. Employment Judge Warren has already looked at the P60 and concluded that it did not impact upon her earlier decision which was based on the documents and the oral evidence. There is no evidence of forgery or deliberate manipulation of the record. HMRC records are not determinative of the question that the Tribunal has to decide. Employment Judge Warren clearly considered the issue of rescission of a resignation in her reasons. It is not necessary for me to look at that for a second time.

28. The other matters which the claimant referred to today include the postponements in the Judge Sherratt case. Once again, I do not consider those to be relevant and material to this reconsideration application. Indeed such matters as could (and should) have been referred to at an earlier stage if they were thought to be relevant.

29. There is nothing in the new documents which are now before me to show that the claimant has (contrary to the reasons in Employment Judge Warren's decision) retracted her resignation or continued in her employment past 2018. I bear in mind that it is a case where the claimant has resigned and it is not necessary for the respondent to accept that resignation in order for the termination to take effect.

30. I decline to reconsider and vary the previous decision. The effective date of termination remains 12 November 2018 for the purposes of these Tribunal proceedings.

<u>Strike out</u>

31. In light of my decision on the reconsideration application I asked the parties whether it is now appropriate for me to strike out case number 2414057/2019 on the basis that it has no reasonable prospects of success because it is based on an effective date of termination in July 2019 whereas (for the purposes of the Tribunal) the effective date of termination was in November 2018. (I refer, in particular, to paragraph 38 of Regional Employment Judge Franey's Case Management Summary from March 2024 which neatly sets out the conundrum that faces the Tribunal and the parties.)

32. The claimant said, when asked to accept that strike out was appropriate in those circumstances, that she remains dissatisfied with the Tribunal's decision on the effective date of termination; that she will need to appeal that decision;

and that she will need to undertake further investigations with HMRC in order to correct the record (from her point of view). In light of that, the claimant asked that, rather than dismiss the second claim form, I should stay it pending an appeal and then it can be resurrected at a later date, assuming that the claimant's appeal succeeds.

33. I am afraid I am not prepared to allow the claimant's request. It seems to me that I have to decide the case as it currently stands before this Tribunal. I have to apply the reasonable prospects of success test to the two case numbers as they currently stand, given the current situation and the decisions of the Tribunal to date. It may well be that the claimant appeals the decision. It may be that such an appeal changes the outcome so that a strike out decision made today needs to be undone. However, the general rule of procedure in these Tribunals is that the Tribunal hearings do not pause pending the outcome of an appeal which is yet to be instigated. The first instance proceedings continue to progress even if one of the parties pursues an appeal to a higher Tribunal. I also bear in mind the age of the litigation. The case is already an old one in terms of the events relating to 2018 given that we are now in May 2024. There is a final hearing listed in September 2025. If I stay one aspect of this case pending an appeal that may jeopardise the final hearing or otherwise interfere with the timely resolution of the case.

34. Consequently, I am going to strike out the second claim form (case number 2414057/2019) on the basis of the effective date of termination in 2018 as found by the Tribunal. The 2018 termination date means that the second claim form from 2019 has no reasonable prospects of success as it is based on a 2019 termination of employment.

Employment Judge Eeley

Date: 4 June 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
Date: 17 June 2024

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