EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103202/2020

Held in Chambers on 14 November 2024

Employment Judge F Eccles
Members R McPherson and D Frew

Mr C Milroy **Claimant**

Ministry Of Defence **Respondent**

RECONSIDERATION JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The decision of the Tribunal is that, having reconsidered its original decision, the decision dated 5 August 2024 should be confirmed.

REASONS

1. By judgment dated 5 August 2024, the Tribunal found that the respondent had treated the claimant less favourably as a part-time worker when compared to full-time equivalents by denying him access to the Armed Forces Pension Scheme 1975 ("AFPS75") and by using a divisor of 365.25 to calculate his daily rate of pay. The respondent sought reconsideration of the above judgment by application dated 20 August 2024. The application was not refused by the Tribunal on initial consideration. The claimant responded to the application. Parties were in agreement that the application could be

determined without a hearing and the Tribunal considered that a hearing was not necessary in the interests of justice. Parties were given a reasonable opportunity to make further written representations in advance of the Tribunal meeting to determine the application.

2. In terms of Rule 70 of the Employment Tribunal Rules of Procedure 2013, a Tribunal may, either on its own initiative or on the application of the party, reconsider any judgment where it is in the interests of justice to do so. On reconsideration, the decision may be confirmed, varied, or revoked.

3. In terms of the application for reconsideration, the respondent submits that the Tribunal's written reasons should be varied to record the correct position regarding the statement of agreed facts. The Tribunal refers to the statement of agreed facts at paragraph 6 and to the respondent's position if the statement is correct at paragraph 104 of its written reasons. The Tribunal asked the parties on 12 July 2024 to clarify whether paragraph 5 of the statement of agreed facts was accurate, in particular that reservists were entitled to join the AFPS 75 when mobilised and that to get any benefit from joining the AFPS 75 an individual would have to serve a full year. The claimant confirmed on 22 July 2024 that he did not agree with paragraph 5 of the statement. The respondent confirmed on 23 July 2024 that the statement was accurate. The Tribunal informed parties on 23 July 2024 that it proposed to proceed on the basis that the parties did not agree with the terms of paragraph 5 of the statement and parties were asked to inform the Tribunal by 31 July 2024 if they disagreed with this proposal. Neither party had responded to the Tribunal by 31 July 2024. The claimant informed the Tribunal on 5 August 2024 that, having reconsidered the statement, paragraph 5 should remain an agreed fact. The parties were informed on 5 August 2024 that the Tribunal had submitted its judgment for promulgation based on representations received from parties by 31 July 2024.

4. In their application for reconsideration the respondent submits that the statement of agreed facts contains an inaccuracy and that the Tribunal's written reasons should be varied to record the correct factual position. In

response to the application, the claimant submits that the respondent is seeking to resile from the statement of agreed facts.

5. As referred to above, the Tribunal sought clarification from the parties on 12 July 2024 about the accuracy of the agreed statement of facts. This was because of the clear inconsistencies between paragraph 5 of the statement concerning access by reservists while mobilised to the AFPS 75 and uncontested evidence before it. At paragraph 41 of its written reasons for example, the Tribunal refers to the evidence of Kevin Pitt that reservists, when mobilised, did not receive a pension under the AFPS 75 scheme.

6. The Tribunal did not make any findings in fact that the claimant was allowed access to the AFPS 75. At paragraph 31 of its written reasons, the Tribunal did not find that when mobilised the claimant could opt to join the AFPS 75 scheme. At paragraph 32, the Tribunal found that the AFPS 75 scheme was open to regulars only. The Tribunal observes at paragraph 104 of its written reasons that it was unable to conclude from the evidence before it that mobilised reservists were allowed to join the AFPS 75 scheme.

7. If it is now the respondent's position that the statement of agreed facts is inaccurate and that they do not agree that reservists, when mobilised, were entitled to access the AFPS 75 scheme. The Tribunal considers it appropriate to record this, not least for the purposes of further proceedings. It was the claimant's position, when first asked by the Tribunal on 12 July 2024, that the statement was inaccurate. As referred to above, the evidence before the Tribunal was consistent with the respondent's revised position. There was no evidence before the Tribunal that the claimant or reservists generally were entitled to access the AFPS 75 scheme, including when mobilised. That the statement of agreed facts is inaccurate, and the respondent accepts that the claimant was not entitled to access the AFPS 75 scheme, does not however persuade the Tribunal that it is in the interests of justice that it should either vary or revoke its original decision. Being denied access by the respondent to the AFPS 75 scheme was the reason for the claimant making his claim and the Tribunal has found that this amounted to him being treated less favourably on the ground that he was a part time worker.

8. In their application, the respondent submits that the Tribunal's finding at paragraph 25 of its reasons that *"A regular who agrees to work the equivalent of a four-day week is paid 80% of their annual salary"* is misleading. They submit that it fails to take account of evidence from Mr Moyles that regulars, unlike reservists, are legally obligated to attend for duty at all times throughout the year. On the basis that this is an error, the respondent submits that the Tribunal should reconsider the evidence and vary its written reasons at paragraphs 25, 77 (where reference is made to the claimant's submissions) and 81 and record the correct factual position.

9. Having reconsidered the evidence of Mr Moyles in relation to a regular who applies for part time working, the Tribunal was not persuaded that its finding at paragraph 25 should be varied. At paragraph 32 of his witness statement, Mr Moyles states that regulars *"who apply for part-time working can request a 20% or 40% reduction in their normal working pattern, equating to one- or two- days reduction in a five-day week plus a proportionate reduction in any weekend/stand -down duty liability usually equivalent to one or two weekends in five".* In cross examination Mr Moyles confirmed that a regular who wants to have a regular day off, for example a Friday, may be allowed to do so with a 20% cut in their pay. It was not in dispute that a regular can be required to attend for duty on any day of the year. The Tribunal did not find however that reservists have to work 365 days a year or, when account is taken of weekends and annual leave, do in fact work 365 days a year. Some reservists work part time. When they do, the Tribunal found that their pay is reduced by applying the equivalent of a five day working week to calculate the reduction in their pay. In all the circumstances and having reconsidered the evidence before the it, the Tribunal was not persuaded that it is in the interests of justice to vary paragraphs 25, 77 and 81 of its reasons or that on reconsideration, its original decision of less favourable treatment of the claimant by the use of a divisor of 365.25 to calculate his pay should be varied or revoked.

10. The respondent also submits that paragraph 80 of the Tribunal's written reasons does not accurately reflect the arguments advanced by their witnesses. Mr Moyles is of the firm belief that he did not specifically advance

the argument referred to by the Tribunal at paragraph 80 of its written reasons that as a reservist is paid the daily rate for working at least 8 hours in any 24-hour period that in annual terms they were therefore only required to work a third of the year to earn the equivalent of a regular's salary. The Tribunal reconsidered the evidence before it and in particular the evidence of Mr Moyles at paragraph 18 of his witness statement at which he states - *"Part-time Volunteer Reservists earn a daily rate of pay for each 24-hour period during continuous periods of service, or for at least 8 hours for single day periods of service".* In their closing submission the respondent referred to the above evidence and submitted that this means that in annual terms a reservist need only work 365.35/3 = 122.6 days in a year (i.e. 17.5 days) to earn a full salary. This is the argument that the Tribunal refers to at paragraph 80 of its written reasons. In all the circumstances, the Tribunal considers it appropriate to record that the argument referred to at paragraph 80 was not advanced by Mr Moyles in his evidence but rather by the respondent in their closing submissions and the Tribunal's written reasons are revised accordingly. Having reconsidered its decision in light of the above revision however, the Tribunal was not persuaded that it is on the interests of justice to vary or revoke its original decision that the respondent's use of a divisor of 365.25 to calculate his daily rate of pay amounted to less favourable treatment of the claimant as a part- time worker.

11. As referred to above, in terms of Rule 70 of the Employment Tribunal Rules of Procedure 2013, a Tribunal may, on its own initiative reconsider its judgment where it is in the interests of justice to do so.

12. The judgment of ***Augustine v Data Cars Ltd 2024 EAT 117*** was handed down by the Employment Appeal Tribunal on 15 July 2024. The Tribunal did not have the opportunity to consider the judgment before issuing its decision. In ***Augustine***, the Employment Appeal Tribunal considered the correct test for determining whether the reason for less favourable treatment is "*on the ground*" that the claimant was a part time worker and whether it was bound by the decision in ***McMenemy v Capita Business Services Ltd 20027 CSIH 25 2007 IRLR 400***. In the present case it was the claimant's position that the

interpretation of Regulation 5 of the PTWR by the Inner House in ***McMenemy*** is wrong and the Tribunal should therefore apply the broader meaning to be found in judgments of the EAT. In the above circumstances, the Tribunal decided to have regard to the decision in ***Augustine*** when reconsidering its judgment. Parties were given a reasonable opportunity to make further written representations in advance of the Tribunal meeting to determine the application.

13. Having considered the decision in ***Augustine***, the Tribunal remained of the opinion that it is bound by the decision of the Inner House in ***McMenemy***. The test applied by the Tribunal when determining the issue of causation for less favourable treatment of the claimant was therefore whether the claimant's part time status was the sole reason, as opposed to the effective cause. In ***McMenemy***, there was a finding that the claimant was denied the benefit of statutory holidays which fell on a Monday because he had agreed to work a shift that did not include Monday as a working day. The same arrangement applied to full time comparators who did not work on Mondays – the respondent operated a 7 day working week. In ***Augustine***, the Tribunal found that the respondent's drivers (whether part-time or full-time) worked a wide range of hours, and that the less favourable treatment identified by the claimant arose from the failure to apply a circuit fee that took account of hours worked and was not solely because the claimant worked part-time.

14. In this case, the Tribunal did not find a reason other than his part-time status for denying the claimant access to the AFPS 75 or for using 365.25 as the divisor to calculate his daily rate of pay. The respondent sought to rely on administrative cost to justify its decision to deny the claimant access to the AFPS 75. The Tribunal was not persuaded that the decision in either ***McMenemy*** or ***Augustine*** required it to treat cost, in this case an inevitable consequence of allowing the claimant access to the AFPS 75, as a causative factor and to find that part time status was not the sole reason for less favourable treatment. Having considered the decision in ***Augustine***, the Tribunal remained of the opinion that it was bound by the decision in ***McMenemy*** and that it was not in the interests of justice to vary or revoke its

decision that the sole reason for the claimant's less favourable treatment was his part time worker status.

15. In all the circumstances, having reconsidered its original decision the Tribunal has decided that the decision dated 5 August 2024 should be confirmed.

F Eccles

Employment Judge

20 November 2024

Date

Date sent to parties **20 November 2024**