

# THE INDUSTRIAL TRIBUNALS

CASE REF: 7691/19

**CLAIMANT:** Diarmuid Lonergan

**RESPONDENT:** Scully Supplies Limited

## DECISION ON RECONSIDERATION

The decision of the tribunal is that the claimant's application for a Reconsideration is not upheld and the tribunal confirms the Decision as promulgated, in its entirety.

**Employment Judge (Sitting Alone):** Employment Judge Leonard

### Appearances:

**There were no appearances before the tribunal at oral hearing and no oral hearing was conducted and the tribunal determined the matter upon the basis of any written representations.**

### REASONS

#### The Background to the matter and the Tribunal's Decision

1. The decision of the tribunal ("the Decision") was promulgated by the tribunal on 17 January 2020.
2. By emailed document dated 23 January 2020, the claimant requested a Reconsideration of the Decision on the ground stated, that evidence was available that was not considered during the tribunal hearing. In that communication, the claimant set forth the written basis upon which he contended that the Decision ought properly to be Reconsidered. By further communications sent by email dated 4 and 6 March 2020, the claimant sought to reiterate the contentions made in the earlier communication and, further, he confirmed that the Reconsideration matter might be determined by the tribunal without a hearing. By communication dated 10 March 2020, Mr Scully on behalf of the respondent indicated that he intended to resist any application for Reconsideration, but that he required further time in order to present submissions and he requested that time be extended by the tribunal until 18 March 2020 to enable that to be done. However, no further communication was

received by or in behalf of the respondent subsequent to this communication of 10 March 2020, notwithstanding the stated intention that there was to be a further communication. Accordingly, the claimant had expressly indicated that he was content for the Reconsideration matter to be dealt with by the tribunal, without a hearing. Further to that, there has been no express request made, for and on behalf of the respondent, that there shall be a hearing of the Reconsideration request. However, as mentioned, nothing further from the respondent has been forthcoming notwithstanding the indication made in the 10 March 2020 communication that there were to be further submissions made, for the respondent. Accordingly, it is necessary for the tribunal to determine if the Reconsideration may now proceed, without a hearing.

3. The claimant's claim in these proceedings was in respect of breach of contract (notice pay) and the statutory right to receive written particulars of contract. In a response, the respondent denied that there had been any breach of contract and contended that the claimant had not been dismissed by the respondent. At the conclusion of the case, Mr Scully on behalf of the respondent made an application for a preparation time order, contending that the claimant in bringing and in conducting the proceedings had acted vexatiously and unreasonably. The tribunal's Decision in the matter, as promulgated, was in accordance with the oral and documentary evidence received and taking account of any oral submissions, reasons having been provided by the tribunal at the conclusion of the oral hearing in respect of these matters.
4. The Decision of the tribunal was as follows:-
  - (a) The claimant's claim in respect of breach of contract (notice pay) was not upheld and that claim was dismissed by the tribunal.
  - (b) The claimant's claim concerning the statutory right to receive written particulars of contract was upheld by the tribunal and the tribunal made a declaration to that effect on foot of Article 44 (3) of the Employment Rights (Northern Ireland) Order 1996.
  - (c) The respondent's application for a preparation time order was refused.

## **THE APPLICABLE LAW**

5. The applicable law in connection with reconsideration of a judgment is contained within Part 12, Rule 64 and following, of the tribunal's Rules of Procedure ("the Rules") which Rules are set forth in Schedule One to the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020. Rule 64 of the Rules provides that a tribunal may, either upon its own initiative or on application of a party, reconsider any judgment ("the original decision") where it is necessary in the interests of justice to do so. Under Rule 66 of the Rules there is a 14 day period for such an application to be presented in writing (and that requirement is deemed satisfied in this case). Rule 67 provides that the application under Rule 66 to have a judgment reconsidered is first considered by the Employment Judge and if that person considers that there is no reasonable prospect of the original decision being varied or revoked, the application shall be refused and the parties shall be informed of the refusal. In this matter, the Employment Judge deemed it appropriate that the application ought not to be

refused under Rule 67(1). Rule 67 (2) provides that if the application is not refused, a notice shall be sent to the parties (a) setting a time limit for any response to the application by the other parties; (b) seeking the views of the parties on whether the application can be determined without a hearing; and (c) where the Employment Judge considers it appropriate, setting out the Employment Judge's provisional views on the application. Rule 68 provides that if the application has not been refused under Rule 67(1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice under Rule 67(2), that a hearing is not necessary in the interests of justice and Rule 68 (2) provides that if the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations. Finally, Rule 70 provides that following reconsideration under Rule 68, the original decision may be confirmed, varied or revoked. If it is revoked it may be taken again.

6. In relation to the “interests of justice” ground for reconsideration, much of the case law precedes the current Rules, but the principles emerging nonetheless remain valid. The judicial interpretation of that specific ground by the Courts and Tribunals has, to a degree, been refined and altered over recent years. That is especially so since the introduction of the statutory overriding objective; that latter is a fundamental requirement of justice and is, as a consequence, enshrined and accorded prominence within the Rules. Accordingly, to take one example, there is no longer any “exceptionality hurdle” (as it was known) required to be traversed by any applicant for review (now Reconsideration) on the “interests of justice” ground (which ground is now the sole ground available under the Reconsideration regime under the current Rules). Before that, it had been the commonly accepted view that there was required to be some manner, for example, of “procedural mishap” occurring, or something akin to that, which constituted a denial to a party of a fair and proper opportunity to present a case (see *Trimble v Supertravel Ltd [1982] ICR 440*). The judgment of Mr Justice Underhill in the Employment Appeals Tribunal case of *Council of the City of Newcastle upon Tyne v Marsden [2010] UKEAT 0393\_09\_2301* provides a very useful, detailed and thorough analysis of the contemporary position. It is that position which is properly to be followed by this tribunal. From the judgment in *Marsden* and with the assistance of other leading cases (see for example *Williams v Ferrosan Ltd [2004] IRLR 607*, *Sodexo v Gibbons [2005] IRLR 836* and *Jurkowska v HLMAD Ltd [2008] IRLR 430*, providing an authoritative interpretation of the earlier cases of *Flint v Eastern Electricity Board [1975] IRLR 277* and *Lindsay v Ironsides Ray & Vials [1994] ICR 384*), the following principles may be distilled and are to be appropriately applied:-
  - 6.1 In the exercise of the discretion vested in the tribunal in conducting a Reconsideration based upon the interests of justice ground, a significant factor to be borne in mind is one of finality in regard to any proceedings. Mere dissatisfaction with the outcome of any matter, where a party perhaps seeks to revisit issues arising from such dissatisfaction, of itself, can never be a proper reason to review a decision, in the interests of justice.
  - 6.2 The ground of the interests of justice is intended to confer a wide discretion on the tribunals.

- 6.3 Justice requires that an equal regard shall be had to the interests and to the legitimate expectations of both parties. The successful party should, in general, be entitled to regard a tribunal's determination upon substantive issues as being final, subject to any right of appeal afforded.
- 6.4 The principles that emerge from the cases of *Flint v Eastern Electricity Board* and *Lindsay v Ironsides Ray & Vials* do remain valid and subsisting. Although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, such cases are nonetheless valuable for drawing attention to those underlying principles requiring to be considered and applied justly and appropriately.
- 6.5 It is unjust to give a losing party a "second bite of the cherry", as it has often been referred to. Justice requires accordingly that there shall be had an equal regard to the interests and to the legitimate expectations of both parties.
- 6.6 The statutory overriding objective must be borne in mind and applied.

### **The Tribunal's Determination of the Matter**

7. The claimant's grounds for the Reconsideration request are set forth in the emailed communication requesting Reconsideration sent to the Office of Tribunals and dated 23 January 2020, as reiterated in two subsequent emails, which also confirmed that the claimant was content for the Reconsideration to proceed without a hearing. Whilst Mr Scully for the respondent had indicated that the Reconsideration application is opposed, nonetheless it had been indicated by Mr Scully that a further communication was to be dispatched on or before 18 March 2020. That has not been done. The requirements of the tribunal, in pursuance of Rule 67(2), were clearly stated by Notice dated 25 February 2020 sent to both parties, which Notice has evidently been received by both (for they have both responded to that). The Notice provided a period of 14 days to communicate with the tribunal. Whilst Mr Scully for the respondent by communication dated 10 March 2020 requested an extension of time until 18 March 2020, nothing further has been received. Considering everything, the tribunal determines that a reasonable and proper opportunity has been afforded to both parties to the case to respond to the Notice of 25 February 2020 and to address the tribunal by correspondence or written submissions regarding the matter of this Reconsideration request. In making this determination, the tribunal has given particular consideration to the disruption significantly and materially affecting business in Northern Ireland and more widely, and society more generally, arising from the Covid-19 pandemic, especially so as this might affect the normal course of business dealings and business administration. However, the tribunal further determines that it is reasonable and proper for the tribunal to take the view that a relatively lengthy time has passed since dispatch of the Notice of 25 February 2020 and these March 2020 communications. Thus, there has been afforded to both parties a very generous period of time, indeed a number of months, to engage in further communications with the Office of the Tribunal. If either party had wished further to communicate with the tribunal, they would have done so long since. The tribunal bears in mind the terms of the overriding objective, as set forth in Rule 2 of the Rules. For these reasons, the tribunal determines that it is unnecessary for the tribunal to further

communicate with either party before proceeding to reach a determination of the claimant's Reconsideration request.

8. The tribunal further determines, firstly, in the light of the claimant's expressly-stated request that the matter shall be determined without a hearing and, secondly, in the light of there being no express request on the part of the respondent for a hearing of this Reconsideration request, that the proper course is for the tribunal now to determine the Reconsideration request without a hearing and upon the basis of any written representations or submissions currently available to the tribunal. For the forgoing reasons, the tribunal shall now proceed with the determination of the Reconsideration request.
9. Examining, firstly, the statutory basis of the application, whilst the claimant has expressly stated that the application arises from a contention that there is new evidence which is available and which was not considered during the tribunal hearing, the tribunal, in the context of the current statutory regime, shall address this as being a request that a Reconsideration determination shall be made upon the sole available statutory ground, which is the "interests of justice" ground. In his communication of 23 January 2020, the claimant has sought to put forward a number of contentions, as mentioned above. The tribunal has carefully considered the content of these contentions, especially so in the light of the fact that the claimant does not require a hearing and that he is content for the matter to be considered upon the basis of these representations alone, as reiterated in the claimant's subsequent communications.
10. Having carefully examined and considered the content of the claimant's submissions in the foregoing respect, the tribunal notes that at the hearing of the case the claimant was afforded every opportunity by the tribunal to put forward any evidence and any submissions which he chose to do so. The hearing of the matter, at first instance, was listed in a manner so as to provide plenty of advance notice and a fair and reasonable opportunity to the claimant, notwithstanding that he was a lay person and not legally represented, to prepare for the oral hearing the case. There is no argument made that the hearing was in any way procedurally unfair or that the claimant was deprived, in any manner, of a fair and proper opportunity to put forward his case. Rather, the claimant's Reconsideration application rests upon what he states in the following terms: "evidence is available that was not considered during the tribunal".
11. To the extent that any of the matters now sought to be raised by the claimant in his communication of 23 January 2020 were not placed before the tribunal at hearing, the claimant has not dealt with the issue of why any such matters could not fairly and properly have been addressed before the tribunal in the course of that hearing. This presents a considerable difficulty for the claimant. The reason for this difficulty is that the tribunal's view is that there is a considerable body of authority to the effect that the former regime of statutory review, and the current regime of statutory Reconsideration, both do not afford to any party what is sometimes referred to as a "second bite of the cherry". This is so whether or not a party seeks to be legally represented or self-represented. In what has been stated above, the tribunal has set forth a summary of the relevant legal authorities and salient principles. The tribunal takes the view that these authorities are largely still relevant and require to be properly taken into account, notwithstanding the current statutory regime of Reconsideration under the current Rules.

12. The tribunal sees nothing in any of the points put forward by the claimant other than to support the proposition that this application for a Reconsideration constitutes the claimant seeking to revisit matters of evidence and submissions which either were placed or, alternatively, which ought to have been placed, before the tribunal in the course of the hearing at first instance. Examining the former and current statutory regimes, the purpose of a Reconsideration is manifestly not to provide an entirely different and indeed much enhanced regime to any party, in comparison to that which existed under the former statutory regime that was in force prior to the implementation of the current Rules. Whilst the tribunal has an obligation to act at all times in the interests of justice, taking account of such matters as the overriding objective enshrined within the Rules and the express provisions of such Rules, the statutory regime very evidently continues to provide proper and just constraints upon the revisiting of the tribunal's decision-making, in accordance with the above-stated principles.
13. The tribunal's determination is that there is no proper and substantive basis underlying the claimant's request for a Reconsideration, as expressed in the communication of 23 January 2020 and as reiterated by the claimant in the subsequent communications, other than the claimant seeking to revisit the hearing process and the substantive determination and seeking to persuade the tribunal to arrive at a decision more favourable to the claimant. Accordingly, there is nothing in the Reconsideration application permitting this application by the claimant to succeed.
14. The tribunal, in general terms, is obliged to determine each case upon its own merits and upon the basis of the evidence adduced and by the proper and proportionate application of the law. In this case, the tribunal can observe no basis upon which the Decision might properly be set aside or upon which the Decision might otherwise be in any way altered or amended, upon the interests of justice. Accordingly, the application for a Reconsideration made on behalf of the claimant must fail and the tribunal upholds and affirms the Decision in its entirety, as promulgated.

**Employment Judge:**

**Date and place of determination: Belfast, 2 November 2020**

**Date decision recorded in register and issued to parties:**