



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: S/4108678/15 & Others

Held at Aberdeen on 9 November 2018 & 7 January 2019

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Mr K Innes

Claimant
In Person:

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William Grant & Sons Distillers Ltd

Respondents
Represented by:
Mr S Neilson –
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The unanimous decision of the Tribunal is as follows;

1. Claimant's Application for Reconsideration is refused.

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2. The respondent's Application for expenses is reserved meantime until conclusion of the appeals to the Employment Appeal Tribunal.

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REASONS

1. The Employment Tribunal issued a Judgment on 25 May 2018, copied to
5 parties of even date, dealing with a number of claims brought by the claimant
against his employers. Following the issue of the Judgment the claimant
wrote on 28 May 2018 seeking a Reconsideration.

2. The Reconsideration was in the following terms:

10 “1) *The Claimant wishes to exercise his right under Rule 71 of The
Employment Tribunals Rules of Procedure to make an application for a
Reconsideration of the decision in **Case Numbers 4108678/15, 4104091/16
& 4102068/17** – The claims that he has been denied his minimum statutory
paid annual leave entitlement under the Working Time Directive/Regulations.*

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*2) The Judgment does not resolve the issue of the Claimant’s entitlement
provided by Article 7 of the Directive.*

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*3) That provision properly implemented into the Regulations by Regulation
13(1) provides the Claimant with a “basic” entitlement of four weeks to mean
a period of 28 days.*

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*4) The claimant has cited case law of the highest court that confirms this.
See Merino Gomez [2004] as present in the Judgment of the Claimant’s case.*

*5) Regulation 13A provides the Claimant with “additional” entitlement of 1.6
weeks.*

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*6) The Claimant is entitled to payment on account of periods of annual leave
at the rate of a weeks pay for each week of leave in accordance with the
Employment Rights Act 1996.*

7) *The Judgment in the Claimant's case considers that he is a salaried worker. The Respondent holds that the Claimant's entitlement under Regulations 13(1) and 13A provides him with annual leave of 28 days to mean a period of four weeks. This is what is provided to the Claimant in his shift roster in any particular year.*

8) *The Claimant is provided with a further six days of contractual leave. The full annual leave provided to the Claimant is 34 days. That is a period of 4.8 weeks as regards the Claimant's paid annual leave.*

9) *The Claimant is a salaried worker. Remuneration of 34 days annual leave under the Employment Rights Act 1996 provides the Claimant with 4.8 weeks pay. That does not provide the Claimant his minimum paid statutory entitlement which is 5.6 weeks.*

10) *The Claimant would like to remind the Tribunal that the European Commission has stated that the Directive is a health & safety law, and that the burden to ensure its compliance lies with the employer.*

11) *As a salaried worker, the Claimant receives his pay for work and holidays proportionately throughout the year in twelve equal instalments. That is 1/12th of his working shifts and 1/12th of his holiday shifts received on a monthly basis. It follows that the holiday pay claims are within time.*

12) *The Respondent has long held the position that the Claimant receives significantly more annual leave than the minimum entitlement provided by the Regulations, whereas the Claimant has held the position that he does not receive the minimum entitlement.*

13) *This particular problem has been a large issue in the Claimant's case since his initial claim of 2014, and the Claimant finds it remarkable, having went through SEVERAL hearings at the Employment Tribunal and FOUR at the Appeal Tribunal, that it remains live and that the Judiciary is so unwilling*

to resolve the matter. The Claimant understands that it is precisely the business of the Judiciary, where there is a conflict with the legislation and law and in the event of a dispute such as the one before us that concerns a faulty implementation of a Directive into the domestic Regulations that is so obvious, to exercise its power in finding a resolution that is satisfactory, and in this case the legislation corrected accordingly.

14) The Claimant does not consider competent a Judgment that has found the Claimant's statutory paid annual leave entitlement to be satisfied but cannot conclude what exactly the entitlement is. The first question that ought to be addressed is the faulty implementation of a directive and in this case the entitlement provided by Article 7 adopted into the domestic Regulations under Regulation 13(1).

15) Article 267 TFEU provides that, on questions of EU law, any 'court or tribunal may if it considers that a decision on the question is necessary to enable it to give judgement, require the Court of Justice to give a ruling thereon'.

16) The Employment Tribunal has the jurisdiction and power to make a reference for a preliminary ruling to the ECJ and the Claimant would request that the Tribunal does so.

17) The Claimant would remind the Tribunal that his right to paid annual leave of 28 days under Article 7 of Directive is guaranteed by community law. He is continually denied this right. The Employment Tribunal has a duty to ensure that he is provided with an "effective remedy".

18) The principle of "state liability" can be considered in the Claimant's case, which provides that national courts must protect the rights conferred by EU law on individuals, including enforcement of these rights where the state is responsible.

19) *Lastly, until such a time as there is an “adequate” facility in place to enable the Claimant to exercise his right to minimum paid leave in full, there can be no time bar restrictions preventing his claim in respect of the proportion of paid leave outstanding of his entitlement guaranteed by community law. The Claimant is entitled to claim for paid leave covering his full employment.*

20) *The Claimant requests that the decision will be reconsidered and a resolution found that provides the Claimant with an outcome that his case deserves and that is at least satisfactory.”*

3. The Reconsideration application was acknowledged and the respondent’s position sought.

4. The respondents wrote to the Tribunal on 7 June 2018 setting out their opposition to the application. They opposed it principally on the grounds that the application did not, in their view, set out any valid grounds for the Tribunal to reconsider the Judgment. Reference was made by them to the case of **Outsight v. Brown UKEAT/0253/14** and to the terms of Rule 70. The respondents also opposed the suggestion at paragraph 16 of the application that the Tribunal should make a referral to the European Court of Justice as no such request had been made during the course of the original hearing, such a referral was in any event unnecessary and had doubtful competency.

5. On 7 June 2018 the claimant wrote once more to the Tribunal reiterating that he wanted to exercise his right to a Reconsideration. This application suggested that no reasonable Tribunal would have reached the findings of fact that it had in relation to his claim for detriment. The application also dealt with issues of time bar indicating that the Tribunal could not impose time bar restrictions on his detriment claim as the claimant was unaware at the time of the events that he had a right to make such a claim. This arose from his alleged exclusion from a consultation meeting in 2 December 2014. His position was that he had been aware of employment tribunal time limits only

in relation to making claims for statutory paid leave (paragraph 28) but he was not aware of the time limits that applied for claims of detriment and further he was unaware of his rights to make such a claim for detriment. These arguments centred around the 'detriment' claim.

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Application for Expenses

6. On 21 June the respondents made an application for expenses under Rules 76 and 77 in respect of claims 4102180/17 and 41044854/17. They copied the Tribunal a letter of 21 June to the claimant giving him an expenses warning. The two claims related to the "shift/handover pay claim" and the "detriment PID claim" respectively.

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7. At the hearing on the 9 November the Tribunal queried whether it was appropriate to hear these applications given that there was an appeal to the Employment Appeal Tribunal which still had to be determined. The respondents took the position that the application should and could competently proceed.

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Additional Claims

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8. Prior to the hearing on 9 November the claimant wrote to the Tribunal on 11 October. This was prompted by the claimant becoming aware of a Practice Direction of the Tribunal President dated 27 March 2015 in relation to claims for unpaid holiday pay and the process for amending existing claims to add additional claims. This direction came against the background of multiple claims being lodged with the Tribunal which had to be 'updated' periodically to take account of further claims becoming due and the time limit of three months on making such claims. The letter indicated that the claimant wanted to add further claims for holiday pay under Regulation 16 of the Working Time Regulations to his existing claims. He also indicated that he wanted to call two witnesses at the reconsideration hearing to give evidence.

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9. On 12 October the respondents wrote to the claimant copying the letter to the Tribunal opposing the application to amend suggesting that it was not competent to amend such an application after the disposal of the original holiday pay claim and that calling fresh witnesses would in effect be adding further grounds for reconsideration. In any event they suggested such an application was out of time.
10. Prior to the hearing the claimant lodged witness statements from a Brian Nicoll and at a later point from Mr Watson, both employees of the respondents

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Hearing 9 November

11. The Tribunal heard submissions from parties. These followed closely the previous positions set out by them in writing prior to the hearing which have been set out above. The claimant renewed his applications to amend and to call further witnesses. These applications were opposed and the respondents renewed their application for expenses.
12. In preparing the present Judgment the Tribunal noted that the claimant's letter dated 7 June was not opposed on the basis that it was a second reconsideration application and was out of time but further particulars relating the request for reconsideration. In the circumstances the Tribunal treated it as such.
13. The claimant helpfully provided the Tribunal with three written submissions at the hearing headed "Preliminary Issues" (dealing with the request to lead evidence from Mr Watson and Mr Nicoll and the application to amend. He also lodged two further documents of submissions firstly in relation to his detriment claim and secondly in relation to his case of paid annual leave entitlement. The Tribunal had access to the original Joint Bundles that had been lodged for the merits hearing and these included witness statements. There was a slight delay at the outset to allow Mr Neilson to read the

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documents lodged by the claimant that morning but thereafter both parties confirmed that they were ready to proceed.

14. As the claimant was unrepresented we referred the claimant to the Employment Tribunal Rules dealing with the Reconsideration and the test that had to be met for Reconsideration namely that granting it had to be in the interests of justice. The Tribunal explained to the claimant what this generally entailed and made reference to the terms of the earlier Tribunal Rules.
15. In the course of submissions Mr Neilson provided the Tribunal with copies of the case of **Outasight Ltd v. Brown** which the claimant was given an opportunity to consider.
16. At the close of the hearing the Employment Judge advised the claimant that if the Tribunal decided to make an award of expenses then the Tribunal could take into account his ability to pay any award (Rule 84). The Tribunal considered it fair to allow the claimant a little time to carefully consider the matter and whether he wanted the Tribunal to take his financial position into account, if it chose to make such an Order. He was asked to write, if he chose to do so, to the Tribunal within 7 days setting it out his financial position. In the event the claimant chose not to do so.
17. After the hearing the claimant wrote to the Tribunal on 10 November with further submissions in relation to the detriment claim, claim no. 4108678/15 and in relations to the proposed amendment of the holiday pay claim.
18. The respondents asked the Tribunal not to consider these additional submissions the hearing had been concluded. They also indicated that in their view the application of expenses should not await the EAT Judgment as the Employment Judge had suggested and that expenses application related to the Reconsideration Hearing and effectively was a discrete matter.

19. The Tribunal did not take account of the further submissions as in its view the hearing had concluded and parties had been given ample opportunity to set out their positions.

5 **Issues**

20. There were four broad issues that the Tribunal had to consider: the claimant's application to amend in relation to adding up-to-date holiday pay claims; the merits of the Reconsideration itself; the claimant's application to lead
10 additional evidence and the application for expenses.

Application to Introduce Additional Evidence in relation to the Detriment Claim

21. At the start of the hearing the claimant indicated that he wanted to lead
15 evidence from two employees of the respondents as they had been present at the meeting on the 2 December 2014 namely, Mr Brian Nicoll and Mr Ian Watson. The claimant explained that he felt that he did not get a chance to have these witnesses give evidence at the earlier hearing. Their evidence was, in his view, relevant. They could speak to the circumstances surrounding
20 his exclusion from the meeting on 2 December 2014 which formed his detriment claim. Documents setting out their likely evidence was available. He explained that they did not give evidence at the hearing because when he arrived for the first hearing in February none of his witnesses were present and that at that point he had not identified Mr Nicoll as a potential witness.
25 His position was that he not believe he was in a good position to argue that Mr Watson could give evidence at the continued hearing in March because of these circumstances. He was reluctant to challenge the decision made, as he saw it, by the Tribunal that it was, in his view, proportionate to allow him to lead evidence from Mr Sapiem and Mr McWilliam. Both of the new
30 witnesses could, he said, also speak about the holiday pay arrangements.

22. When asked why Mr Nicoll, who was not named as being one of the possible witnesses for the hearing in February the claimant explained that he worked

with Mr Nicoll and at that time he wasn't aware of Mr Nicoll's likely evidence. His position was that he had a conversation with Mr Nicoll at some point after the February hearing but did not discuss 'everything' with him. It was sometime later, he suggested, possibly in July of this year before he realised he could give relevant evidence.

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23. The claimant was asked by the Tribunal Judge why he had not insisted that Mr Watson attend as a witness in February or cite him as a witness. The claimant reiterated that he didn't feel that he had been in a strong position to complain at the time about the two witnesses that were agreed as being appropriate to give evidence at the continued hearing.

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24. In discussions the claimant disputed that this evidence would have readily been available to him (both from Mr Nicoll and Mr Watson) at the time of the earlier hearings. The claimant's position was that he only became aware that Mr Nicoll had witnessed the situation following an "off the cuff" conversation on the 2 November of this year. Mr Nicol, he explained, did not work on the same team as he did and they did not see each other regularly.

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25. At the invitation of the Tribunal Mr Innes then gave details of the witnesses likely evidence which included their unsatisfactory dealings with the HR Department. Mr Nicoll had alleged that he was not kept updated in relation to the progress of the shift review and that he had not agreed to the new terms and conditions that had been issued to him. Mr Nicoll also observed that in his view the respondents had acted particularly badly towards Mr Innes and that it was "common knowledge" and that this was due to the Tribunal case against them.

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26. In response Mr Neilson objected strongly to the leading of additional evidence making two main points. In his view allowing new evidence would effectively mean that the case would have to start afresh. The respondent's witnesses would have to give evidence to deal with the new allegations. He also took the position that the application to adduce new evidence was not in the

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application for Reconsideration and accordingly was out of time. His secondary submission was that the evidence both of Mr Watson and Mr Nicoll was reasonably available to the claimant by February and in March. The claimant had accepted that his witnesses should be Mr Saipem and Mr McWilliam. He should have known who had witnessed the incident and could have asked around and identified Mr Nicoll at a much earlier point. The new evidence, in any event, would not assist the claimant as the Tribunal had concluded that the claim arising out of this incident was time-barred.

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10 27. In response Mr Innes argued that all the authorities supported his position and that he had only been aware that Mr Nicoll could give evidence after the Reconsideration had been lodged. He argued that the Tribunal should not have found the incident time-barred. He was knowledgeable about things that he had researched such as holiday pay but he did not know that he could
15 make a claim for detriment. The legal basis for making such a claim was not common and he had only stumbled across it by chance. This had prompted him to make the claim when he did.

20 28. After some discussion the claimant indicated that the witnesses might not need to be heard by the Tribunal and that he wanted to go through the written submissions that he had presented. The Tribunal told the claimant that he had made an application and unless he was withdrawing it would have to be dealt with. He reiterated that the evidence of Mr Nicoll was only available during the 'last quarter'. He was asked by the Tribunal exactly how he had
25 come to understand that Mr Nicoll could give this evidence. The claimant responded that he had approached Mr Nicoll when they were working together and found out after speaking to him that he could give helpful evidence. The Tribunal advised him that it would consider the matter and issue reasons in writing.

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The Application to Amend

29. The claimant advised the Tribunal that during the course of his research he had come across the Employment Tribunal President's Direction in relation

to holiday pay claims. It was, he said, clearly competent to add in additional pay claims to existing claims. This was no doubt to save time and at one point when fees were in operation the payment of a lodging fee there was nothing in his view that suggested this was not an appropriate mechanism that he could use.

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30. In response Mr Neilson opposed the application. He indicated that in his view the claim was concluded. The claimant either was successful at the EAT and the matter was dealt with there or remitted back. At present it was not appropriate for the Tribunal to amend the claim. If this was allowed at this stage matters would become confused. The claims for 2017/2018 were in any event time-barred. At the very latest the payment of holiday pay should be made within a month of the end of the holiday year which was at the end of March. The time-bar began to operate at that point. In his view the application was also incompetent. This was he suggested not a valid application to be dealt with at a reconsideration. He continued that the application itself had insufficient in detail. The claimant had made no attempt to value the additional claim being made. Mr Neilson reminded the Tribunal that the Regulation 13 claim had been dealt with (entitlement to annual leave) It was only the Regulation 16 claim (payment in respect of leave) that the present Tribunal had been considering.

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31. In response the claimant said that it was not possible for him to provide dates or further details given the way the leave was rostered and scheduled as to when he should have been given leave and paid for it.

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32. At this point the Tribunal adjourned briefly to consider matters. It checked its notes in relation to the witnesses that had given evidence for the claimant in March and the circumstances around who was to be called. The recollection of the Judge and members was that the claimant had agreed to restrict the witnesses he called to Mr Saipem and Mr Williams as being the most appropriate witnesses who could speak to events. He had also expressed concern that if he had asked them to attend he would be putting them in a

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difficult position vis-a-vis their employers, the respondents. Reconvening this was put to the claimant who did not disagree that this was the position arguing, however, that he felt he was in a weak position as a party litigant to insist on these witnesses giving evidence at the time so had not done so.

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Reconsideration

33. The Tribunal then heard the claimant in relation to the merits of the Reconsideration more generally and in relation to the detriment claim and his case for paid annual leave. The claimant made reference to his written submissions. In his view there had been a malicious attempt by the respondents to pervert the course of justice. Their witnesses had not given truthful evidence. He once more indicated that there were good reasons why time-bar should not be considered by the Tribunal at this stage. In particular, he suggested that it was wrong for the Tribunal to say that he was quick to assert his rights. He had been unaware that he could make any claim for detriment under the Employment Rights Act 1996 at the time of the events themselves. In his view the respondents had acted badly and had tried to cover up the discrimination that had taken place. He wanted to seek an award of damages in respect of injury to feeling and damages in respect of his financial loss. In relation to the case for unpaid annual leave his position was that he had cited case law from the highest courts that supported his case.

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34. The claimant asserted that the Judgement was wrong when it held that he was a salaried worker. European law had not been properly implemented in the UK domestic law. The Tribunal had gone beyond its powers. In particular, his position was that it had not paid sufficient attention to the Judgment in the case of **Connolly King v. The Sash Window Workshop Ltd.** He asked that the case be referred to the European Court of Justice given that it involved a principle of European law. He argued that when he went on holiday he was not paid any additional sum to take account of the shift element of his normal pay and this was in breach of the principle found to exist in the case of

Robinson v. Steel [2006]. This sum or “ASR” rate should have been paid for 28 days leave or for the 20 days leave as suggested by the respondents.

- 5 35. Mr Neilson adopted the submissions made in correspondence. He responded that the witness statements were an attack on the respondent’s HR managers and considerably widened the issues from the straightforward detriment issue that was pled. The claimant’s actions were in effect an attempt to re-argue the entire case. If the Tribunal had made a mistake in relation to the law that matter required to be dealt with by the EAT. In his view the case of **Outsight** 10 confirmed the principles to be applied in respect of a Reconsideration. Reconsideration was appropriate to get a case back ‘on the rails’ if there had been some mishap. The old rules gave examples of the sort of matters that could amount to being in the interests of justice. There was no procedural mishap here. The entire Reconsideration he argued was an attempt to re- 15 argue the case before the Employment Tribunal. In litigation there has to be some finality and it was not open to the claimant to seek to reopen these matters at this stage.

Expenses Application

- 20 36. The respondent’s solicitor then turned to his application for expenses. This was set out in his firm’s letter to the claimant. He also advised the Tribunal that he had written to the claimant on 12 October prior to the current hearing inviting him to withdraw his Employment Tribunal claim (4104854/17 – the 25 detriment claim) as being time-barred. He argued that the number of claims that were lodged showed that the claimant was using the Tribunal process in a vexatious way. The Tribunal should look at “the whole picture” and the whole context of the claimant’s behaviour. The claim for expenses he had made related to the shift handover claim which issue was dealt with by the 30 Employment Tribunal in the Judgment. Shift handover had taken place happily for many many years and it was wholly unreasonable for the claimant to raise this as a claim. There was no grievance lodged by him until 11 July 2017 (page 345). The claim itself was lodged on 25 July 2017). It was done

purely to put pressure on the respondents. The Tribunal had held that there was no basis for such a claim and in any event, any such claim for handover pay would be time-barred.

5 37. Mr Neilson estimated that the costs dealing with this particular matter would be in excess of £1500 but he would restrict the expenses claim to that figure as being a reasonable sum. The claimant opposed this arguing that this matter was part of appeal and the respondents should not be seeking expenses at this stage. He was salaried to work certain hours and he was
10 not paid to work the additional shift allowance time. In response to that particular matter Mr Neilson argued that the claimant lost nothing by the practice as he was allowed to leave early. He was also on a salary. If the respondents wanted to insist that he worked this time for his current salary then they could do so. The handover arrangement had been part of custom
15 and practice for many years and was reflected in the Shift Agreement.

38. Turning to the detriment claim in Mr Neilson's view it was unreasonable to seek Reconsideration of this matter. There had been no procedural mishap. The detriment claim was not well-founded and in any event time-barred.
20 There was nothing the claimant had said would allow this claim to proceed. The claim was made some three years after the event in question. It was clear that the claimant did not believe that the incident in December was a "big issue" at the time because he had told the respondents that he was happy with the consultation process. This claim was, he observed, being pursued
25 once more to make things difficult for the respondents. He pointed to the numerous claims raised against his clients and the timing of the two claims.

39. The claimant disputed that the claims were ill-founded or that they had been used as some of tactic against his employers. He had only raised the
30 detriment claim when he had become aware that he could make such a claim. His holiday pay claims stretched back to the beginning of his employment and he had only become aware of his rights when he had researched into these matters. Mr Neilson at this point expressed some scepticism about the

claimant's suggestion that he was unaware of his rights. The claimant was, he said, a bright and resourceful person who had acquired considerable knowledge in a complex area of the law. His ignorance even if accepted was not in any way reasonable.

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40. The claimant protested that he was a party litigant and not a professional lawyer or specialist employment lawyer.

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41. In summary, the respondents position was that the legal expenses were likely to be around £1500 but Mr Neilson reiterated that he would restrict his application for expenses to the sum of £750. The claimant's behaviour had been unreasonable. The conduct of the reconsideration was unreasonable. The application to amend was out of time and to add additional witnesses at this late stage was unreasonable conduct. The claim for detriment was misconceived.

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42. At this stage the Employment Judge raised with Mr Neilson whether or not it was appropriate for the Tribunal to deal with the matter of expenses pending the Appeal. Whether or not the Appeal should be dealt with and the dust "allowed to settle". Mr Neilson indicated that he would consider the matter and would like an opportunity to make further submissions on the point. It was agreed that both parties could do this. In addition, the Tribunal indicated to the claimant that he would have seven days to write to the Tribunal in relation to his financial circumstances so that the Tribunal could take account of his financial circumstances if it came to decide that any expenses order was to be made.

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Discussion and Decision

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43. The parties did not agree the ambit of the Tribunal's powers of reconsideration with Mr Neilson taking a narrower view of the power. The starting point is to consider the terms of the Rules that are engaged in the reconsideration process namely Rule 70,71 and 72:

“Principles

5 ***70. 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.***

Application

10 ***71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original***
15 ***decision is necessary.***

Process

20 ***72.—(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 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***
25 ***determined without a hearing. The notice may set out the Judge’s provisional views on the application.***

30 ***(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a***

hearing the parties shall be given a reasonable opportunity to make further written representations.

(3)...

5 44. Rule 70 provides that a Reconsideration should be granted if it is necessary
interests of justice to do so. This is the sole test. The Judgment can be
confirmed, varied or revoked. Under Rule 34 of the Tribunal Rules 2004, the
previous rule that applied, there were five stated grounds which a Tribunal
could review/reconsider a Judgment. The named examples were situations
10 where some mishap had occurred such a decision being made in the absence
of a party. The rule was altered in the current 2013 Tribunal Rules which
provided that the test was only the interests of justice (Rule 70).

15 45. It was recognised under the previous rules that an Employment Tribunal has
a wide discretion to correct errors (**Trimble v. Supertravel Ltd [1982] ICR
451**). This case is authority for the proposition that whether the alleged error
made by the Tribunal is major or minor the focus should be on whether or not
a decision had been reached which is erroneous in law after the procedural
mishap.

20 46. The Tribunal considered the case of **Outasight** referred to by Mr. Neilson. It
concluded that the case did not go as far as he suggested that as a principle
an error of law could not be rectified using this process. In the event that point
was not material to our decision. Where the case was in point was in relation
25 to the approach the Tribunal should take to additional witness evidence being
allowed at this stage. It was authority for the proposition that the case of **Ladd
v Marshall** encapsulates the meaning of the 'interests of justice' when it set
out the circumstances when new evidence could be adduced. We will return
to that case later when considering the claimant's application for fresh
30 evidence.

47. It is clear therefore that the Tribunal has a wide discretion to correct errors that have occurred in the course of the proceedings whether major or minor. There appears nothing that would prevent an error of law being rectified in appropriate circumstances but a line has to be drawn between the sort of situation, perhaps where a Tribunal has been misdirected as to the appropriate statutory provision or in error used the wrong statutory provision, to one where the merits of a case are being reargued. In the reconsideration process the Tribunal has to have regard to the overriding objective and there must be limitations to the power to reconsider a Judgment. It does not follow that an unsuccessful party can effectively relitigate a case using this process where they have been unsuccessful. They have to point to some problem in the earlier hearing that makes it in the interests of justice to rectify. It should also be kept in mind that cost of resolving an error through the process might be considerably less costly than an appeal.
48. The Tribunal first of all considered the arguments set out by the claimant in his letter dated 28 May. He argued that the claim under Article 7 for holiday pay had not been addressed correctly. He disputed the finding that he was a salaried worker. We did not detect any new arguments that we considered that were left unaddressed by the Judgment and in our view the issues the claimant puts forward with such tenacity are now properly matters for appeal.
49. We also considered the letter dated 7 June which relates to the detriment claim. The claimant makes the point that there were various meetings that he felt excluded from. The evidence focussed on the meeting in December but we acknowledge that there is reference to the wider consultation process and we did not accept that the claimant was not allowed input into the process. Indeed, we held that he was kept abreast of matters. There was some confusion with the respondents' witnesses as to exactly what stages some of the claims the claimant had leading to exchanges about these matters to try and avoid confusion but at no time was it denied that excluding the claimant from consultation and for this meeting in particular might amount to a detriment given his protected status.

50. After considering the original Judgment and the submissions made the Tribunal concluded that the respondent's solicitor's submission, that there was no proper basis for the Reconsideration and that it was an attempt to reargue the case, was well founded. No procedural issue or mishap had been identified not any clear basis to demonstrate that the Tribunal had patently erred in law. We will deal separately with the request to lead new evidence.

Application to lead new evidence

51. The Tribunal approached this matter bearing in mind that the claimant is a party litigant and examined its notes in relation to the earlier events. When the case began in February it had already been postponed from an earlier date in November. The notices seeking availability of both parties and witnesses begin the listing process. The claimant returned the stencil with no reference to likely witnesses. The notices intimating the hearing on the 7 February contain a standard paragraph (3) warning a party that they are responsible for ensuring that a witness can attend. Mr Innes did not dispute that he had taken no steps to alert the respondents to his wish to call witnesses who would likely to have had to been released from work. He had in fairness intimated Witness Statements to the respondents who included them in a list of documents. The use of Witness Statement had been provided for in a case management order in September 2017. It may be that the claimant was under some misapprehension that the actual giver of the statement had to attend to speak to its contents and be cross examined although this position has not been put by him to us in these terms.

52. The problem faced by the Tribunal on the 7 February was that the claimant had not arranged for his witnesses to be present nor had the hearing been set down for sufficient length to hear these witnesses. In retrospect it is unfortunate that the Tribunal had not been alerted to his wish to call witnesses earlier as this would have allowed a case management discussion to take place prior to the hearing to consider what witnesses should be called.

53. As it was the Tribunal tried to find a fair way forward bearing in mind that anything that prolonged the duration of the hearing would be both costly and time consuming. It noted that the witnesses seemed to speak principally to the December incident that we have referred to and that this incident formed only one of the many claims brought by the claimant. That claim was on the face of it time barred. The Tribunal had to have regard to the Overriding Objective There was a discussion in which the claimant participated as to whether he could say which of his witnesses were the ones that directly witnessed the incident and on whom he wanted to rely. He seemed to accept that two of the witnesses were the most crucial from his point of view.

54. We would add that part of the background seemed to be the claimant's perhaps understandable reluctance to inconvenience as he saw it his colleagues by insisting they attended to give evidence and his stated acceptance that calling such a number of witnesses who were also distillery operatives (five in total including himself) would be disruptive to the respondent's operations. The issue of the proportionality of calling such a number of witnesses in these circumstances had to be considered. After looking at the documents the claimant appeared to agree that Mr Stepian and McWilliam were his most relevant/important witnesses. He certainly did not disagree. Neither at this point or later did he ask the Tribunal whether he could call further witnesses including Mr Watson. The claimant in the interim has clearly reconsidered his position and expressed the desire to call Mr Wilson and a previously unknown witness Mr Nicoll.

55. Even taking full account of the fact that the claimant is a party litigant we would have expected him to insist either at the time or a short time later, after he had reflected or at least by the continued hearing, that Mr Watson should be heard. He did not do so.

56. We were also concerned that Mr Watson in his two documents goes much further that just referring to the incident in December and if his evidence were to be allowed the respondent's witnesses from the HR team would have to be recalled to allow these allegations to be put to them.

5 57. The claimant also wanted to call Mr Nicoll to give evidence explaining that he did not know the full extent of that person's knowledge at the time he was preparing for the hearing. We regret that we did not have much sympathy with the claimant's position. He has had since 2014 to think about this incident and in preparing for the hearing could have ascertained who had attended from
10 colleagues or from the respondents records even if his own memory was lacking. The potential evidence of Mr Nicoll could have been identified in the lead up to the hearings being arranged. If this new evidence was allowed then once more the respondents would have to consider recalling their witnesses and at the very least investigating Mr Nicoll's allegations. In the Tribunals
15 estimation looking at the matter in the round it is not convinced that it could be in the interests of justice to allow that and the application is refused.

Application to amend

58. The claimant sought to amend his claim for holiday pay. We can appreciate
20 why he seeks to do so. He has been diligent in his researches and wants to protect his position in relation to accruing claims. In our view the appeal process should be concluded first before any attempt is made to amend. We take this view for practical purposes. There are, as Mr Neilson, pointed out difficulties with the form of the amendment. Rather than addressing these at
25 this stage and incurring further delay and expense we consider that it would be appropriate for the Tribunal to note that there is an application to amend before it and to reserve this matter until the merits of the appeal are dealt with. If the claimant is unsuccessful then the issue will fall by the wayside. If the case is remitted back to this Tribunal then the claimant will not have been
30 prejudiced in the interim and the amendment can then be addressed.

Application to the European Court of Justice

59. The claimant has asked us to remit the case to the European Court of Justice. This was not an issue before us at the original merits hearing. With all due respect to the claimant we are not sure if he had fully thought through this matter as he has a pending appeal to the Employment Appeal Tribunal. In our view that would be the appropriate place for such a matter to be canvassed. When an issue concerning the interpretation of European Law arises then the Employment Appeal Tribunal can, if it desires, request a ruling. There is no requirement for the court to do so and the case might proceed to the next level of appeal.

Expenses Application

60. We now turn to the application for expenses.

61. The Rule governing such applications is Rule 76:-

“When a costs order or a preparation time order may or shall be made

76(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that -

(a) a party (or that party’s representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success.”

62. Although there have been changes to what could be described as the expenses regime over the years an award is still the exception rather than the rule. The terms of Rule 14(1) of the earlier 2001 Rules used the same

formulation as later versions of the rules namely that the trigger test was acting 'vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by a party has been misconceived'.

- 5 63. In most cases the unsuccessful party will not be ordered to pay the successful party's costs; see **McPherson v BNP Paribas (London Branch) [2004] IRLR 558** per LJ Mummery at paragraphs 2 and 25:-

10 *"Although Employment Tribunals are under a duty to consider making an order for costs in the circumstances specified in Rule 14(1), in practice they do not normally make orders for costs against unsuccessful applicants. Their power to make costs orders is more restricted than the power of the ordinary courts under the Civil Procedure Rules; it has also for long been generally accepted that the costs regime in ordinary litigation does not fit the particular function and special procedures of Employment Tribunals. It is, therefore, not surprising that the Employment Tribunal Rules of Procedure do not replicate the general rule laid down in CPR Part 38.6(1) that a claimant who discontinues proceedings is liable for the costs which a defendant has incurred before notice of discontinuance was served on him. By discontinuing the claimant is treated by the CPR as conceding defeat or likely defeat. The Tribunal rules of procedure make provision for withdrawal of claims in Rule 15(2)(a), but the costs consequences are governed by the general power in Rule 14."*

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64. The then President of the EAT, Mr Justice Burton in **Salinas v Bear Sterns International Holdings Inc UK/EAT/0596/04DM** noted at paragraph 22.3 that "*something special or exceptional is required*" before a costs order would be made and, even if the necessary requirements of Rule 14 are established,
- 30 there would still remain a discretion of the Tribunal to decide whether to award expenses/costs. The matter is one for the Tribunal's discretion (**Benyon & Others v Scadden [1999] IRLR 700**).

65. The case of **Monaghan v Close Thornton Solicitors 2002 EAT/3/01** which
- 35 was a claim for disability discrimination held that it was unreasonable for a

claimant to persist with a case when a reasonable offer to settle was made contained helpful observations by the then President Justice Lindsay distinguishing the Tribunal costs regime to that of the High Court and County court in which the use of 'Calderbank' letters is established.

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66. The case law on expenses demonstrate that decisions turn very much on their own facts. The award of expenses in a Tribunal case is still the exception rather than the rule. It is a matter of judicial discretion what sum, if any, is awarded.

10 67. The Tribunal spent some time considering the applications that had been made. It eventually came to the view that consideration of the applications should be reserved meantime until the merits of the claimant's appeals have been determined. We came to this view because those appeals are still extant and the merits of the cases intertwine with the reconsideration applications.
15 The respondents will not be prejudiced as the applications have been made timeously and when the appeals are resolved the Tribunal can address the matter again with a clearer overall picture before it.

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30 **Employment Judge: James Hendry**
Date of Judgment: 17 January 2019
Entered in the Register: 18 January 2019
And Copied to parties