EMPLOYMENT TRIBUNALS

Claimants: **Ms Bishu Sherchan (Claimant in Case No 3202226/2019)**
Ms Paris Van Zanten (Claimant in Case No 3202450/2019)

Respondents: **(1) Andrea Aston**
(2) Geoffrey Sharp
(3) SaveLocal Convenience Stores Limited

RECONSIDERATION JUDGMENT

1. The Claimant's application made on 21 October 2020 for a reconsideration of the judgment dated 6 October 2020 and sent to the parties on 7 October 2020 has no reasonable prospects of success and is dismissed.

REASONS

1. By an e-mail sent at 19:48 on 21 October 2020 the First Respondent seeks a reconsideration of my judgment of 6 October 2020 where I held that both Claimants in these cases were employed by Andrea Aston and, contrary to her case, not by SaveLocal Convenience Store Limited.

2. In her e-mail Sarina Hayes erroneously refers to acting for the Claimant. Nothing turns on that. I have seen the Claimants' objections to the application which were sent by e-mail on 2 November 2020. Unfortunately, the original application was not noticed by the administration until the Claimant's submissions were received. This has caused a short delay for which I apologize. The matter is listed for a final hearing on 18, 19 & 20 November 2020. If the parties have complied with my case management orders then there is no reason why that hearing should not be effective.

The rules

3. The Employment Tribunal Rules of Procedure 2013 as amended set out the rules governing reconsiderations. The pertinent rules are as follows:

"Principles

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

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 decision is necessary.

Process

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 determined without a hearing. The notice may set out the Judge's provisional views on the application.

(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) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

4. The expression 'necessary in the interests of justice' does not give rise to an unfettered discretion to reopen matters. The importance of finality was confirmed by the Court of Appeal in ***Ministry of Justice v Burton and anor*** **[2016] EWCA Civ 714** in July 2016 where Elias LJ said that:

> "the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In

> particular, the courts have emphasized the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Ironsides Ray and Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."

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

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

6. Any preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay. That principle militates against permitting a party to reargue matters that have already been considered or referring to evidence which could or should have been considered at the earlier hearing.

7. In accordance with the Employment Tribunal Rules of Procedure I must reconsider any judgement where it is in the interests of justice to do so. Further, if I considered that there is no reasonable prospect of the original decision being varied or revoked I must refuse the application for reconsideration.

Discussion and Conclusions

8. The Claimants take the point that Andrea Aston's application was made one day later than specified in the rules. I do not accept that the application was made late. It would be if the date that the judgment was sent to the parties (7 October 2020) was included in the 14 day period permitted under rule 71. In contract to Section 111 of the Employment Rights Act 1996 the rule does not use the 'beginning with' formula. If I am wrong about that then I see no prejudice to the Claimants in granting an extension of time and I shall deal with the application on its merits.

9. The first ground upon which it is said that it would be in the interests of justice to reconsider my decision is a suggestion that in deciding that Andrea Aston employed the Claimants I have 'gone behind the corporate veil'. This is founded on a misunderstanding of my judgment.

10. I examined the evidence before me and concluded that the Colchester Shop was operated through SaveLocal Convenience Stores Limited [see paragraph 62 of my judgment]. In her reconsideration application Andrea Aston says that *'The assumption would be that they are contracted to the business unless there is evidence to suggest otherwise*'. No authority is cited for that proposition. However, I would

accept that the fact that a company operates a business does provide evidence from which it might be concluded that a person working in that business is employed by the company. That will not always be the case. The task I undertook at paragraphs 64-72 was to analyse all the evidence including the fact that the company operated the shop. Contrary to what is suggested in the reconsideration application there was evidence that contradicted the suggestion that the Claimants were employed by the company. I found that they were hired on a cash in hand basis 'off the books' by Andrea Aston. I found that there was never any intention for the company to be their employer. There was ample evidence to support that conclusion.

11. Ground 2 of the reconsideration application seeks to correct the date Ms Van Zanten started working in the Colchester Shop. I, and the Claimant's accept that that was an error. By this judgment I correct the date referred to at paragraph 21.2 of my judgment to October 2018. However, the date that the employment started was not a material consideration in my conclusion about the identity of the employer. It provides no basis for asking for a reconsideration of the judgment.

12. I am not sure that I understand Ground 3 but I take it together with Ground 4. I have simply recorded what is shown on the bank statements. The relevance of withdrawals from this account for expenditure other than for the company's purposes is that it shows that Andrea Aston was using the company's money for personal expenditure. As such the suggestion that the Claimants were paid by the company is undermined. It is said that a Director is entitled to draw a percentage of personal drawings from a company. The Companies Act is cited but no specific provisions referred to. There is no suggestion that Andrea Aston was employed by the company. She was not entitled to any wages. She might have been entitled to dividends but only if the Company was making a profit. There was no evidence before me that any dividends were declared. A decision has been taken not to keep or file accounts. I consider that I there was ample evidence before me to conclude that Andre Aston did not distinguish between company money and her own.

13. As to ground 5, at paragraph 37 I have simply set out what the statements provided show. I set out the fact that one payment was made from this account to Ms Sherchan. I have not relied upon any other transactions I mention in reaching the conclusions that I did.

14. Ground 6 is very unclear. It appears to be suggested that the name 'Savelocal' was used more often than was suggested in the evidence provided to me by Andrea Aston. No explanation is given as to why such evidence could not have been deployed. A tribunal should not reconsider a judgment in order to give a party a second opportunity to put evidence, available at the time of the hearing, before the Judge seeking a second opportunity to present and argue its case. The penultimate sentence is a simple restatement of Andrea Aston's case. The final sentence refers me to the fact that the Claimants were paid cash from the till. This is a matter that I weighed up and expressly considered.

15. Ground 7 complains that I was not satisfied that the company name was displayed at the premises. It is suggested that Andrea Aston was not asked about this. In fact, during the evidence the question of what was displayed within the shop was raised and extensively debated. If the company name was displayed Andrea Aston had an ample opportunity to say so. I do not consider that there was any unfairness

caused by my finding. It was no part of Andrea Aston's case before me that the full company name was displayed in the premises.

16. At Ground 8 Andrea Aston criticises my findings at paragraph 47. It was common ground before me that neither Claimant was put onto the accounting payroll. The fact that deductions of national insurance should have been made was correct on the evidence of both parties. In determining employment status, I was not precluded from looking at how often the Claimant's worked and whether tax or national insurance was deducted. It was Andrea Aston's case that no tax or National Insurance was deducted. She said that Bishu Sherchan was self-employed. My findings were relevant and supported by ample evidence.

17. Ground 9 suggests that I have 'misapplied the facts'. I have accepted that Chelsea Van Zanten was employed by the company. I had no evidence that Chelsea Van Zanten told her sister that any work offered to her would be from the company. It was open to Andrea Aston to have called Chelsea Van Aston to give evidence but she did not do so. Other than Paris and Chelsea Van Zanten were sisters there is no basis upon which I could infer that anything was said about who operated the Colchester shop.

18. Having regard to each or Andrea Aston's grounds I conclude that she has no reasonable prospects of persuading me that her application for a reconsideration has any reasonable prospects of success. I therefor dismiss the application without a hearing.

Employment Judge Crosfill
Dated: 13 November 2020