EMPLOYMENT TRIBUNALS

Claimant: **Mr L Mirek**

Respondent: **Grayson Automotive Services**

JUDGMENT

The claimant's application dated **17 August 2021** for reconsideration of the judgment sent to the parties on **3 August 2021** is refused.

REASONS

1. The application for consideration refers to a number of matters which it is said the decision of the tribunal panel should be reconsidered. That application is refused under rule 72(1) on the ground that there is no reasonable prospect of the original decision being varied or revoked.

2. In support of the application it is said that that oral representations were not considered or rejected without, it is said, a reason being given. That is not the case. The submissions made were considered and dealt with although the tribunal found some difficulty in following all the claimant's solicitor's submissions, for example he appeared to seek to argue at one stage that the application to adjourn should be granted because, in Mr Kozik's view, UK legislation about isolating after foreign travel is not supported by scientific evidence. In the circumstances the panel did its best to consider the submissions which appeared to have any substance and to be relevant to the matters in hand from a somewhat scatter gun approach.

3. As the written reasons provided make clear, this case, originally lodged in 2016, had been listed for a 10 day in-person hearing. The hearing was attended by the tribunal panel and the respondent's counsel, solicitor and witness. The case could not proceed with that in-person hearing because, and only because, the claimant and his solicitor did not attend. The claimant was unable to attend because he had returned to the UK from Europe in the period immediately prior to the final hearing and was required to self-isolate at home in accordance with regulations in place to manage the spread of coronavirus and covid infection. However, no reasonable explanation for the

non-attendance of the solicitor was provided other than he was instructed not to attend by his client pending the outcome of an application to adjourn the hearing which was outstanding.

4. The application for reconsideration relies in part on the technical difficulties experienced at the hearing because the panel were forced to try and deal with the claimant's solicitor by telephone, but that only arose because the solicitor had chosen or been instructed not to attend the tribunal. It is not uncommon for counsel or solicitors to attend a hearing without those who instruct them, the fact that the claimant was forced to isolate at home was no reason for the solicitor to attend before us. The solicitor was allowed the opportunity to make representations by telephone to seek to ensure the panel had heard as fully as possible from the claimant. However, the alternative would not have been that the adjournment would have been granted or the hearing postponed because the claimant and his representative had not attended the hearing to consider the application, the alternative would have been to consider the application after hearing oral submissions only from the respondent, a point which was made to Mr Kozik at the time. In essence Mr Kozik seeks to criticise the tribunal for the direct consequences of his client's decision to instruct him not to attend the hearing and the tribunal's attempts to mitigate any disadvantage that created.

5. The application asserts that the claimant did not believe that it was a foregone conclusion that the adjournment would be granted but, with respect, the following assertion contradicts that. It states that the claimant *"specifically instructed Mr Kozik not to make preparations, not to instruct counsel and not to make any substantive case representations on his behalf at the telephone hearing on 28 June 2019, on the basis that he did not want the hearing proceeding as a remote hearing. This placed the Claimant in the position of being entirely unprepared and unrepresented"*. The claimant was aware that the 10 day in-person hearing was due to start unless his application to adjourn was granted. It appears that he and his solicitor recognised the obvious solution to self-isolation would have been for the hearing to proceed remotely but the claimant sought to tie the tribunal's hands in relation to that by deliberately failing to prepare for the hearing. If the claimant had thought his application was not a foregone conclusion, he should have taken reasonable steps to ensure he and his representative were prepared for the hearing in case his application was unsuccessful. The offer to delay the start of the hearing slightly if the application was unsuccessful was a pragmatic answer from the panel to address Mr Kozik's own lack of preparation. However, a party cannot reasonably expect a tribunal to adjourn a hearing because they have chosen not to prepare for a hearing they have known about for many months. The fact that Mr Kozik felt there was too much to do in the time that the tribunal felt it could reasonably him allow within the timetable, was a matter between him and his client. The claimant seeks to rely on his own unreasonable conduct as a reason for the orders made by the tribunal to be set aside, that is a submission which has no reasonable prospect of success.

6. The written reasons make clear that the basis for the decision to refuse the adjournment application was that the claimant had acted unreasonably in relation to the application to adjourn. He had not waited for a tribunal decision on his application to adjourn before leaving the country and indeed it

appeared he may have already left the UK when the application was made. He had done so knowing that he would be required to isolate at home on his return based on the rules in force at the time of his departure and therefore would be unable to attend the in-person hearing which had been listed for some time. He did not take any steps to seek to change his plans when it became clear that the respondent objected to his application and the application had not been considered by the tribunal, or at least none that were referred to, to the tribunal.

7. The panel acknowledged that the claimant had made the decision to prioritise his new job for personal reasons related to his new job but without, the tribunal concluded, taking any steps to seek to secure his ability to attend the listed hearing. He decided that because his new employer required him to leave the country for work the tribunal case should be adjourned without him taking any attempts to reach an accommodation with his new employer, despite the obvious prejudice to the respondent which would be caused and the respondent's subsequent objections. It is difficult to see what relevance the claimant's allegations about the respondent's conduct towards his partner (without any supporting evidence) have to that. No basis for his concerns about his new employer were offered to us. The tribunal panel concluded that the reasons for the claimant deciding not to take the obvious and straightforward step of explaining to new employer why it was so important to him to be able to attend the hearing in person were a matter for him but no relevant to our decision on the adjournment. In terms of holiday that too was something for the claimant to manage and the relevance of these matters or why the tribunal should have made its own enquiries of how much holiday the claimant had left to take when the claimant himself had not referred to in his adjournment application (has apparently suggested in paragraph 5(d)) is unclear. It is not for tribunals to manage the arrangements an individual makes to enable them to attend a tribunal hearing. The claimant had known about this hearing for a very significant time.

8. The tribunal made clear that its primary consideration in relation to the adjournment application was whether, on its merits and in light of the respondent's objections, that it was in the interests of justice and the overriding objective to grant that application. If it had been in accordance with the overriding objective to grant the application to adjourn it would have been granted. In terms of the interests of justice and whether there had been a denial of justice, this case must be contrasted with a case where, for example, a claimant or key witness is unexpectedly unable to attend at short notice, for example due to illness (and as was the case in the *Mukoro -v- Independent Workers' Union of Great Britain* case referred to in the application where the claimant required emergency dental treatment on the day of the hearing). The claimant here took a deliberate and considered decision to place himself in the situation where he could not attend the listed hearing in the hope or expectation that his application would be granted.

9. In those circumstances the tribunal had to balance the prejudice to the respondent of granting the adjournment and to the claimant of refusing it, in particular in circumstances where there appeared to be ways that the claimant's self isolation could be worked around to allow the case to proceed. The decision was taken in accordance with the overriding objective and bearing in mind the need to avoid delay and saving expensive.

10. Steps were taken to explore a remote hearing in the hope that, notwithstanding the circumstances the claimant had created through his choices which meant he could not attend the hearing in person, the hearing could still go ahead. The tribunal panel acknowledged that this claimant objected to a remote hearing. The basis for his objections referred to in paragraph 5 (a) of the application that witnesses "*cannot be subject to outside interference in the witness box*" is misplaced and in any event somewhat curious. It was not clear on basis that assertion was made. Tribunals are well used to taking all reasonable steps to ensure that witnesses give evidence remotely without outside interference. If that was not the case cases could not be heard on a remote basis, but in any event the discussions about holding this hearing in part through remote means was necessitated by the claimant's availability. The respondent had attended the tribunal in person and if the hearing had proceeded it could have done so on a hybrid basis with all but the claimant (and possibly his solicitor) attending in person. Some of the respondent's witnesses may have wished to give evidence remotely too but no permission for that had been granted. It is possible that the only witness "who could have allowed themselves to be subject to outside interference" by attending remotely would have been the claimant himself. The tribunal sought to offer reassurances about the claimant's concerns about a remote hearing as a way of finding a way forward because Mr Kozik appeared to be offering the possibility of difficulties, which the tribunal's experience shows can often be overcome, as a basis for not even attempting to see if the hearing could proceed. The panel considered that attitude, given the circumstances faced had been created by the claimant, to be unhelpful. This was a situation wholly different to say the respondent making an application to convert an in-person hearing to a remote one and the tribunal considering the claimant's objections.

11. In terms of the reasons for not granting the application to adjourn the risk of significant delay was an important consideration. In the reconsideration application the claimant's solicitor appears to suggest that adjourning the case would only lead to a short delay if the case had been adjourned (paragraph 12). It is not clear on what basis he asserts that. The respondent's objections were based in part on the anticipated delay and, as was observed to the claimant's solicitor at the time, if the case had been adjourned it was likely to be for a significant period, possibly as long as a year or even longer based on current listings in Birmingham Employment Tribunal and the difficulty of listing long cases. Such a delay would an obvious and significant risk to the quality of witness evidence. The fact that there has already been a long delay in this case reaching a tribunal is no reason not to be considered to avoid a further long delay.

12. In the circumstances the decision to refuse the adjournment application and dismiss the claim because the claimant did not attend the hearing in accordance with Rule 47 was a reasonable one and nothing raised in the reconsideration application suggests that it is in the interests of justice that the original decision be varied or revoked and there is no prospect of the application succeeding.

Case No: 1302701/2016

Employment Judge Cookson

26 August 2021