



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112305/2021

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Employment Judge Neilson

**Mr Salvatore Sgarlata**

**Claimant**

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**Regency Ayrshire Ltd**

**First Respondent**

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**Jamie McGinn**

**Second Respondent**

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**Keith Glass**

**Third Respondent**

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### RECONSIDERATION JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Tribunal has considered the respondents e mail of 31 March 2023. It is not clear on the face of it whether the e mail of 31 March 2023 is intended to be a new application under Rule 71 or whether it is an amendment of the original application made by e mail on the 21 March 2023. The original application made on 21 March 2023 under Rule 71 was dealt with by the Tribunal in accordance with Rule 72 and the decision was notified to the parties on 30 March 2023. That decision was to refuse the application on the basis that the Tribunal did not consider that there was any reasonable prospect of the original decision being varied or revoked. The reasons for

coming to that decision were set out in the letter of 30 March 2023. Accordingly, that decision having been made in accordance with Rule 72 it is not competent for the Tribunal to reconsider the application made on 21 March 2023. The e mail of 31 March 2023 must therefore be treated as a new application under Rule 71.

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2. The respondents' representative correctly identifies that the application of 31 March 2023 has been lodged more than 14 days after the date on which the original decision was sent to the parties. It is accordingly out of time. However, the respondents' representative relies upon Rule 6(a) and submits that the Tribunal should waive or vary the 14 day time limit requirement.

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3. In circumstances where an application for reconsideration under rule 71 is presented out of time the correct course for the respondents to take would be to apply for an extension of time under Rule 5 rather than to rely upon Rule 6. The respondents' representative has not made an application under Rule 5. However, the Tribunal does have a discretion, on its own initiative to extend any time limit. Considering that (a) the application of 31 March 2023 is essentially a repeat of the earlier application of 21 March 2023 with some additional information; that (b) that the issue of the new evidence that the respondents wish the Tribunal to consider is now the subject of an appeal to the Employment Appeal Tribunal and that (c) taken in the round there is a substantive point to be determined in relation to the alleged new evidence, the Tribunal considers, on the grounds that it is in the interests of justice to do so and having regard to the overriding objective, that it is appropriate to extend time under Rule 5 to allow this second application to be received so that the Tribunal may consider the issue.

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4. The application of 31 March 2023 is substantially the same application (the application of 21 March 2023) that has already been made and refused. In accordance with Rule 72 there would need to be special reasons why it should not now be refused.

5. The respondents' application of 31 March 2023 (if you take all the information supplied within the e mails of 21, 29 and 31 March 2023) is essentially that there is new evidence that was not available at an earlier stage and which is material to the outcome of the case as it will establish that the claimant did not disclose work he did for other parties both whilst employed by the first respondent and following the termination of his employment. In particular the respondents' representative has submitted that there is evidence that he alleges substantiates that the claimant worked for longer than one day with Strada Environmental after his employment with the first respondent ceased (allegedly about 2 weeks); that he worked for two days with Mills Milk after his employment with the first respondent ceased and that he occasionally worked with a business called the Ayrshire Garden Guys both at a time when he was employed by the first respondent and since that employment ceased. The respondents' representative maintains that this evidence only came to light following the respondents' instructing a private investigator after the judgement was issued. It is alleged that the respondents were prompted to do this having had sight of an entry for the claimant on social media site "Linked In" which referenced work for Mills Milk, Ayrshire Garden Guys and Strada Environmental. The respondents' representative refers to the private detective only making enquiries "following social media posts being updated following the judgment" – the respondents' position being, as we understand it, that the evidence about work for these businesses could not have been known until the claimant updated his "Linked In" site following the Judgment being issued.
6. Given that the application of 31 March 2023 is directing the Tribunal to evidence that the respondents allege was not available prior to the hearing (whereas the application of 21 March 2023 was primarily related to evidence concerning Strada Environmental – which would have been available prior to the hearing) there is a difference between the two applications.
7. At the Employment Tribunal hearing the claimant did not disclose that he did any work for Ayrshire Garden Guys or Mills Milk (although he was not

expressly asked about this) but he did disclose that he worked for Strada Environmental – but only for one day.

8. The Tribunal does not consider that any occasional work the claimant did for Ayrshire Garden Guys whilst he was employed by the first respondent is relevant. The claimant was free to work for more than one employer and carrying out occasional work for another employer during his time with the first respondent was not an issue in the case.
9. The work for Strada Environmental was something the first respondent was aware of prior to the hearing. The claimant was cross examined on it. The respondents could have investigated the position prior to the hearing. The evidence regarding Strada Environmental is not evidence that could not have been available at an earlier stage.
10. That leaves the alleged evidence regarding two day's work with Mills Milk in December 2022 and occasional work for the Ayrshire Garden Guys following the termination of his employment.
11. In relation to the Ayrshire Garden Guys the respondent has produced what bears to be a transcript of a discussion between the respondents' private investigator and an individual who may work for the Ayrshire Garden Guys. The transcript might suggest that the claimant may have worked on an occasional basis (there is a reference to six or seven times in the last year) for the Ayrshire Garden Guys between the period from July 2020 and November/December 2022. It is not clear whether the claimant worked for them during the period over which loss was assessed in the judgment. If the evidence was accepted then it is not clear that this would have any impact upon the award of compensation made in any event. If the claimant did occasional work for the Ayrshire Garden Guys whilst employed by the first respondent there is no reason why that might not continue and not then be taken into consideration in assessing loss.
12. That leaves the two days work with Mills Milk. The respondents have again provided what bears to be a transcript of a conversation between their private

investigator and a Mr Adam Mills in terms of which Mr Mills would appear to confirm that the claimant worked for his business for two days on a trial basis in December 2022 and was paid for those days.

13. Whilst the Tribunal accepts that the evidence about the Ayrshire Garden Guys and Mills Milk is potentially not evidence that could have been known about by the respondents prior to the hearing the Tribunal has to consider whether it is necessary to reconsider the judgment in the interests of justice. In doing so the Tribunal has had regard to the important principle that there should be finality in the judicial process and to the interests of both the claimant and the respondents. The Tribunal must consider whether the new evidence, if established, is likely to have an important bearing on the result of the case and also consider the overriding objective (particularly in regard to cost, time and proportionality). The Tribunal is not satisfied that the new evidence regarding the Ayrshire Garden Guys and Mills Milk, if established, would have any material bearing on issues of credibility of other evidence in the case. With regard to quantification of loss the only evidence which it would appear might have a direct impact on the quantification of loss is that relating to Mills Milk. However even if that evidence is established it equates to two days pay only. A further hearing to establish the evidence in respect of Mills Milk and/or the Ayrshire Garden Guys will incur not insubstantial cost and time. Taking into consideration all of these factors the Tribunal does not consider that it would be necessary in the interests of justice to reconsider the judgment and accordingly refuses the respondents application of 31 March 2023 under Rule 72 on the basis that there is no reasonable prospect of the original decision being varied or revoked.

**Employment Judge: S Neilson**  
**Date of Judgment: 11 July 2023**  
**Entered in register: 11 July 2023**  
**and copied to parties**