Case No. 2406291/2015
2406292/2015

EMPLOYMENT TRIBUNALS

Claimants: Mrs J Frudd
Mr I Frudd

Respondent: The Partington Group Limited

Employment Tribunal Rules of Procedure 2013, rule 72

JUDGMENT

1. In this judgment, "the Judgment" means the judgment sent to the parties on 2 February 2018, the "Reasons" means the written reasons accompanying the reserved judgment and "the reconsideration application" means the claimants' application for reconsideration dated 15 February 2018.

2. The following parts of the Judgment will be reconsidered at a hearing:

   2.1. The dates of the open season contained in the definition section, paragraph (2);

   2.2. Paragraphs 2.1 and 2.2 – the declaration that time work started at 5pm;

   2.3. Paragraphs 2.1 and 2.2 – the declaration that time work ended at 8pm when one or more security guards were working at the Park. In this respect the tribunal will only reconsider the claim period prior to 2014 and will only reconsider the question of whether time work finished at 10pm rather than 8pm.

3. The remainder of the reconsideration application is refused.

NOTICE OF RECONSIDERATION HEARING

1. There will be a reconsideration hearing on **17 April 2018.** At the reconsideration hearing, the Judgment may be varied, but only to the extent indicated in this judgment and reasons.
2. The reconsideration hearing will take place immediately before the resumed final hearing. Once the reconsideration hearing is concluded, the tribunal will determine the question of whether, in the light of the reserved judgment and any variation to it, the claimants were paid the National Minimum Wage and, if not, what the extent of the underpayment was.
3. The overall time allocation for the hearing on 17 April 2018 remains one day.

REASONS

The application

1. The Judgment and Reasons were sent to the parties on 2 February 2018. In essence, the Judgment declared that the claimants were employed on time work for parts of their time on call, but not for others.
2. By e-mail dated 15 February 2018, the claimants applied for reconsideration of many aspects of the judgment. The broad thrust of their application was that all of their time on call should have counted as time work.
3. The application, whilst lengthy, is generally well-structured and there is no need for me to repeat its contents.

Relevant law

4. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides that a tribunal may, on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. Applications for reconsideration must be made in accordance with Rule 71.
5. Rule 72 requires that an employment judge must consider any application under Rule 71. If the judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application must be refused.
6. The old Employment Tribunal Rules of Procedure 2004 required that judgments could "reviewed", but only on one of a prescribed list of grounds. One of those grounds was that "new evidence [had become] available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time."

This proviso reflected the well-known principle in civil litigation deriving from *Ladd v. Marshall* [1954] 3 All ER 745, CA.

7. The current 2013 Employment Tribunal Rules of Procedure replaced the old list of grounds with a single test: a judgment will be reconsidered where it is "necessary in the interests of justice to do so". There is no specific provision for fresh evidence. Nor is there any express prohibition a party relying on evidence about which he knew or ought to have known before the judgment was given. Nevertheless, the "interests of justice" test must, in my view, incorporate a strong public interest in the finality of litigation, even if it is not as inflexible as the proviso in the 2004 Rules. Where a party could reasonably have been expected to rely on the evidence first time around, it would take a particularly good reason to give that party a fresh opportunity to rely on it.

8. Although neither party has drawn the case to my attention, I have taken it upon myself to read the recently-reported decision of the Court of Justice of the European Union in *Ville de Nivelles v. Matzak* C-518/15, CJEU. It is a case decided under the Working Time Directive 2003/88. From that case I derive the following principles:

   8.1 Member States must give "working time" in Article 2 of the Directive an interpretation that is no more restrictive than the CJEU's definition.

   8.2 Article 2 must be interpreted as meaning that stand-by time which a worker spends at home with the duty to respond to calls from his employer within 8 minutes, very significantly restricting the opportunities for other activities, must be regarded as 'working time'.

   8.3 Member States are not obliged to adopt the Article 2 definition of "working time" as a way of determining entitlement to remuneration for time spent on standby.

9. In my view, *Matzak* would not cause me to alter my decision. I am not aware of anything in NMWR, or the domestic case law interpreting it, that says that "working time" for the purposes of the Directive should be regarded as "time work" for the purposes of NMWR. As I see it, the domestic law remains that as stated by the Employment Appeal Tribunal in this case at [2017] ICR 1186. If a party disagrees, their remedy is to appeal.

Conclusions on preliminary consideration

10. I have given the application preliminary consideration under rule 72. For ease of reference I attempt to identify each argument with a subject heading which, I hope, not unfairly, identifies each argument that the claimants raise. The headings merely provide a convenient label and should not be taken to be an oversimplification of that argument.

<u>Paragraphs 1 and 2 – dates of the open season</u>

11. In my view it is reasonably arguable that I overlooked relevant evidence in relation to the dates of the open season. If Mr Frudd's witness statement is taken into account, the open season may in fact have been longer than I found it to be. This point can be reconsidered at the next hearing.

<u>Paragraph 3 – hours of time work</u>

12. I did not find this argument particularly easy to understand. There seem to be a number of distinct arguments being put forward under this heading. I set them out here, together with my reasons for thinking that they would not give rise to any reasonable prospect of the Judgment being varied or revoked.

    12.1 *Given that the claimants were time workers, and given that their contract did not provide a means of calculating pay for work done after 10pm by reference to the time spent working, the whole period after 10pm should be considered as time work.* This argument was not raised either in our initial discussion of the issues or in closing arguments. If I understand it correctly, and it is right, there would be no need for the multi-factorial analysis demanded by the Employment Appeal Tribunal. Indeed, it would be hard to see why the case should have been remitted to the employment tribunal at all: it would have been sufficient for Simler P to say that the claimants were not employed on output work or unmeasured work, and because emergency call-out payments were not calculated by reference to the time actually spent working, the time after 10pm must be time work. In my view, the better analysis is that call-out payments are based on a notional period of a few minutes' working time, based on the assumption that emergency call-outs would not be time-consuming.

    12.2 *The judgment leaves a gap between the end of the claimants' shift (sometimes 4.30pm) and the start of on-call time work of 5pm.* If I have properly understood this point, it is arguable. There is some evidence that the claimants' regular shifts did not always finish at 5pm and it is arguable that I overlooked it. I will reconsider this point at the next hearing.

    12.3 *The possible presence of other staff would make no difference.* I explained (Reasons para 71) why I thought it did make a difference.

<u>Paragraph 4 - Christmas</u>

13. Paragraph 26 of the Reasons dealt with Christmas. It was part of the closed season when, on my findings, there was very little, if anything, to do. The Park was completely closed and residents were not allowed to stay in their caravans. Being on-call over Christmas meant very little more than being at home.

<u>Paragraph 5 – Missing evidence</u>

14. I do not see any reason why I should follow a different approach from *Ladd v. Marshall* in this case.

15. If this were a civil claim, the *Ladd v. Marshall* criteria would not be satisfied. Making allowances for the fact that the claimants were representing themselves, they could reasonably have been expected to draw the document in the bundle to the tribunal's attention at some point during the hearing. Evidence and submissions lasted for 3 days. Even if Mrs Frudd could not lay

her hands on the document during her questioning of Mr Ward on Day 1, she could have pointed it out to me on Days 2 or 3.

16. In any event, the document the claimants refer to would not cause my findings to be altered. The reconsideration application does not attach the document, or signpost where it can be found in the bundle, but from the claimant's description, it would appear to be consistent with my existing findings of fact. The claimants appear to be describing an incident in which Mrs Frudd obtained permission to leave the Park, in circumstances where Mr Frudd would also need to leave the Park in order to collect her. In other words, the missing document would have tended to show that the claimants needed permission if they both wanted to be away from the Park at the same time. I found (Reasons paragraph 46) the claimants were jointly required to ensure that at least one of them was on the Park whilst on call and (Reasons 66.2) that the occasions on which permission was specifically granted to leave the Park did not alter the analysis. The missing document supports that conclusion. There is no reasonable prospect of its existence causing me to vary or revoke the Judgment.

<u>Paragraph 6 - Ramtech</u>

17. I found that the respondent cancelled its subscription to Ramtech in December 2014. It may have been that there was some run-off period after December 2014 during which the alarms were pre-paid. There was a clash of evidence on this point. But the precise date when the respondent stopped using the Ramtech alarms is of little importance. I did not distinguish between the periods before and after December 2014.

<u>Paragraph 7 – Frequency of paid call-outs</u>

18. The claimants have reminded me of paragraphs 12 and 13 of *British Nursing Association v. Inland Revenue* [2002] EWCA Civ 494 ("*BNA*"). They do not cause me to alter my self-direction on the law at Reasons paragraph 60. I do not understand Buxton LJ to have been saying that the frequency or otherwise of disturbance whilst on call is always irrelevant. The existence of slack periods at night was irrelevant in the context that particular case. In *BNA,* home workers were required to be on standby to take telephone calls as part of a 24-hour telephone helpline service. The home workers were providing the same service as the employer was providing at its premises during the daytime. Nighttime calls were relatively infrequent, but it did not alter the purpose of requiring the workers to be at home: they were there to operate the 24-hour facility. In my view this scenario is different in principle from one in which the home workers are only required to do anything once every couple of months.

19. If the claimants disagree with my view of the law, their remedy is to appeal to the Employment Appeal Tribunal.

<u>Paragraph 8(i) – Employer's purpose</u>

20. I took points 8(i)(a) and (c) into account in reaching my decision: see Reasons paras 66.1 and 68.1.

21. It is arguable that I overlooked point 8(i)(b). It may be that, prior to 2014, the claimants kept the mobile phone and pager in the evening when the security guards arrived. If that is right, it might tend to suggest that the claimants were the first line of response despite there being security guards at the Park. It might cause me to find that all open season working time continued up to 10pm prior to 2014. At the next hearing I will hear arguments as to whether or not that part of the Judgment should be varied. There is no reasonable prospect of my finding that working time continued past 10pm.

Paragraph 8(ii) – restriction of activities

22. I made detailed findings about the circumstances in which the claimants were permitted to the leave the Park. The claimants' point (a) is addressed at paragraph 66.2 of the Reasons: the absence of disciplinary proceedings is not informative because in practice the claimants did not both leave the Park together without specific permission. Points (b) and (d) – I do not recall the evidence of what was said in the job interviews, but it is no different in principle from the finding I made at Reasons paragraph 23. Shift-swapping (Point (c)) is dealt with in Reasons paragraph 24.

23. I also made a number of findings that were also relevant to this factor: see, for example, Reasons paragraphs 44, 66.2 and 68.2. Simply re-emphasising points (a) to (d) does not give the claimants any reasonable prospect of my varying or revoking the Judgment.

Paragraph 8(iii) - responsibility

24. I explained (Reasons para 68.3) why I thought that the claimants had a little less responsibility during the night time than during the evening. The extent of responsibility was only one of a number of factors. As for the claimants' point (c), the claimants did not draw my attention to paragraph 1.1 of the Licence Conditions during the hearing.

Paragraph 8(iv) - immediacy

25. I considered the immediacy or otherwise of the claimants' requirement to attend to call-outs. See, in particular, Reasons paragraphs 68.4 and 71.

26. There is no reasonable prospect of my judgment about time work after 10pm being varied or revoked.

Paragraph 9 – regulation 32

27. It is far too late for the claimants to try and rely on regulation 32 of NMWR. At the start of the hearing I specifically explained to Mrs Frudd that there might be two potential ways of establishing time work. One was under regulation 30 – the requirement to be present at the Park itself amounted to work. The other potential route was through being awake for the purposes of working within the meaning of regulation 32. When I explained this, Mrs Frudd was quite clear: she was not seeking to rely on regulation 32. This was the concession that I set out at paragraph 5 of the Reasons. It is also consistent with the fact that the claimants did not try to rely on regulation 32 in their final submissions and their witness statements did not seek to address the question of being awake for the purposes of working. There would be a

significant disadvantage to the respondent if I were to re-open the issue of whether there was any regulation 32 time work. All the witnesses have given evidence. The argument would also face a difficulty on its merits. As the claimants recognise in their reconsideration application, regulation 32 only applies if the worker is not at home. The reconsideration application concedes that the claimants were "at home". This concession is realistic: Mr Frudd in both his witness statement and his oral evidence used the word "home" to describe the caravan in which the claimants lived. The claimants lived in the caravan and did not live anywhere else. As for the argument now raised at paragraph 9(c), regulation 32 does not distinguish between workers who are required to be at home and workers who choose to be there.

Disposal

28. I have identified those parts of the reconsideration application that have a reasonable prospect of resulting in the judgment being varied or revoked. They will be reconsidered at the hearing currently listed for 17 April 2018. As part of their preparation for that hearing, the parties will need to anticipate the possible findings I might make on reconsideration, including variation of the start times of on-call time-work, re-definition of the open season in line with Mr Frudd's witness statement, and variation of the finish times on days prior to 2014, when security guards were present at the site. That way, there should not need to be much time spent in re-calculating the claimants' hourly pay in the light of my reconsideration findings.

Employment Judge Horne

12 March 2018

SENT TO THE PARTIES ON

13 March 2018

FOR THE TRIBUNAL OFFICE