EMPLOYMENT TRIBUNALS

Claimant: Ms P Onu

Respondent: Mr O Akwiwu
Mrs E Akwiwu

HELD AT: Watford **ON:** 31 August 2018

BEFORE: Employment Judge Tom Ryan
Mrs I Sood
Ms L Atkinson

Appearances:
Claimant: Written representations
Respondent: Written representations

JUDGMENT ON RECONSIDERATION

The judgment of the Tribunal is that:

1. Time is extended to permit the claimant to make the application for reconsideration contained in her letter of 15 February 2018.

2. The application for a reconsideration of the judgment on remedy sent to the parties on 26 September 2011 is granted.

3. Upon reconsideration the judgment is varied so as to add as paragraph 6 to the judgment of 26 September 2011 the following:

> "For the further avoidance of doubt it is declared that the sums awarded to the claimant in respect of unpaid wages and unpaid holiday in paragraph 2 above are not contingent upon the findings of race discrimination or harassment in paragraphs 2 and 4 of the judgment sent to the parties on 16 September 2011. They are awards made in respect of free-standing complaints and the respondents are liable to the claimant in respect of those sums."

REASONS

Introduction

1. By a letter dated 15 February 2018 the claimant applied for a correction of the remedy judgment of 26 September 2011 pursuant to rule 69 of the Employment Tribunal Rules of Procedure 2013 or alternatively a reconsideration of that judgment pursuant to rule 70.

2. Because of the length of time that had passed since the original judgment the tribunal was hampered in processing the application since the original file had long been destroyed in accordance with normal administrative protocols.

3. The matter was not referred to me until 29 March 2018 and due to absence from employment tribunal it was not until early May 2018 that I was in a position to consider the application. On 4 May 2018 the tribunal wrote to the parties. For the reasons stated in that letter I declined to grant an application under rule 69. I concluded that it could not be said there was no reasonable prospect of judgment being varied upon reconsideration despite the matters advanced in the respondents' objection to the application which had been made by letter dated 28 February 2018.

4. Pursuant to rule 72(1) I set out provisional views upon the application and enquired of the parties whether they agreed that the application can be determined without hearing. Subsequently the parties agreed to that course of action and were afforded an opportunity to make further representations.

5. The claimant provided further written representations on 7 June 2018. The respondents did not do so and on 16 July 2018 the claimant wrote to the tribunal asking that the application be now determined.

6. Because the original decision was taken by me sitting with lay members it was necessary for the application to be determined by a tribunal constituted in the same way. The Regional Employment Judge appointed one alternative member to consider this application, Ms L Atkinson, since one of the original members, Mr D Walsh, had retired some time ago.

Framework

7. The relevant legal and procedural framework is as follows.

8. The Tribunal's powers concerning reconsideration of judgments are contained in rules 70 to 73 of the Employment Tribunals Rules of Procedure 2013.

9. Rule 71 provides that except when application is made for reconsideration during the course of a hearing it shall be made within 14 days of the date on which the original decision is sent to the parties. Rule 5 permits the tribunal to extend any time limit specified in the rules whether or not time has expired.

10. Rule 70 provides that a judgment may be reconsidered where "it is necessary in the interests of justice to do so." If a reconsideration is granted the decision may be confirmed, varied or revoked and, if revoked, may be taken again.

11. The tribunal is required to give effect to the overriding objectives set out in rule 2 in exercising any power given to it under the rules. The purpose of the overriding objective is to enable Tribunal's to deal with cases fairly and justly.

Chronology

12. Before proceeding further, a brief summary of the history of these proceedings is necessary.

13. Claims were presented to the tribunal by the claimant in September 2010 and January 2011. She made complaints of unfair dismissal deduction from wages, direct and indirect race discrimination, harassment and victimisation, failure to give paid annual leave and failure to pay wages in accordance with the National Minimum Wage Act 1998.

14. The claimant alleged that she had been brought by the respondents from Nigeria to work for them in Hendon as a migrant domestic worker and that she had suffered ill-treatment at their hands.

15. By a judgment sent to the parties on 16 September 2011 the complaints save those of indirect discrimination and victimisation were upheld.

16. The remedy hearing took place on 22 September 2011. The tribunal awarded £25,000 compensation for injury to feelings and £5000 aggravated damages for race discrimination and harassment. We awarded also £43,541.06 for unpaid wages and £1,266.72 for unpaid holiday pay. Those latter two sums were included in the calculation of compensation for race discrimination and together with interest comprised the total award of race discrimination for £78,517.22. It is that expression of the calculation of compensation in respect of which this application for reconsideration is made. Separately the tribunal awarded £11,166.16 for unfair dismissal.

17. The basis upon which the claim for and the tribunal's finding of race discrimination was made was the decision in the Employment Appeal Tribunal in Mehmet v Aduma UKEAT/0573/06.

18. The respondent appealed against the award for wages and contested the discrimination claim in principle. The claimant cross appealed against the dismissal of the claims of victimisation.

19. On 1 May 2013 the Employment Appeal Tribunal [2013] ICR 1039 dismissed the respondent's appeal in respect of the payments for wages and annual leave but it allowed the appeal in respect of the complaints of direct race discrimination and harassment. It allowed the claimant's appeal in respect of victimisation.

20. Both parties appealed and cross-appealed to the Court of Appeal in respect of the discrimination and victimisation claims. On 13 March 2014 the Court of Appeal (Maurice Kay, Ryder and Underhill LJJ) dismissed those appeals: [2014] ICR 571. Paragraph 9 of the judgment makes it clear that no appeal was pursued in respect of the National Minimum Wage element of the case.

21. The claimant applied to the Supreme Court for permission to appeal the rejection of the discrimination claims. Permission was granted but the appeal was dismissed by a judgment dated 22 June 2016: [2016] ICR 756. The appeal to the Supreme Court was not concerned with any aspect of wages or holiday pay.

Application for reconsideration

22. We set out a summary of the application, the material parts of the claimant's written representations and the respondents' objections.

23. In the application the claimant summarised the procedural background and findings as we have done above. The claimant has not received any payment from the respondent and asserts that she continues to suffer financially. During the appeal process and up to the point of the application the claimant had believed that enforcement action would have little likelihood of success. The respondents appeared to have left the United Kingdom and there was no available information about their assets within the jurisdiction.

24. As to the timing of the application the claimant made the following submissions. Counsel for the claimant had acted pro bono since July 2012. The respondents had not responded to requests to satisfy the judgment. The claimant's solicitors, a charitable organisation, were informed by the respondent's representatives that the respondents had left the United Kingdom and had given no instructions save in respect of the appeals concerning race discrimination.

25. The claimant had no means to obtain an asset investigation so only basic enquiries were made by her solicitors who believed that enforcement was not possible. The respondents have more recently instructed solicitors in relation to the judgment sums. Enforcement specialists have agreed to assist the claimant on a pro bono basis.

26. The application was made because the claimant's solicitors believed that "there may be some room for misunderstanding or confusion in relation to paragraph 2 on page 1 of the remedies judgment" (paragraph 16(b) of the application).

27. The claimant pointed out that the claims in respect of the National Minimum Wage and unpaid holiday pay were freestanding and separate heads of claim.

28. They invited the tribunal to clarify by way of this reconsideration that the compensation set out on page 9 of the remedy judgment for claims (ii), (iii) and (iv) were due. In passing we note that it is not completely clear to what these numbered sub-paragraphs refer. They were not so numbered in the original remedy judgment, either on page 9 or in any other place. They appear to be a reference to the unpaid wages, unpaid holiday and interest which are so numbered after paragraph 17(g) of the application itself.

29. At this stage we make it clear that the award of interest made in the remedy judgment was an award made under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Since the claims for race

discrimination and harassment were dismissed by the appeal process the award for compensation as compensation for discrimination and the interest on that award made under 1996 regulations cannot be sustained.

30. However, interest under the Employment Tribunals (Interest) Order 1990 at the rate of 8% per annum will be payable on the awards for unfair dismissal, unpaid wages and unpaid holiday from the day after the day upon which the tribunal made its remedy decision.

31. The claimant in her written representations address the matters raised in paragraphs 15 – 25 of the respondents' objection to the application made in their solicitor's letter of 28 February 2018.

32. In summary, the objection was that the application was considerably out of time and that even if allowance were made for the appeal process the application was still one year and nine months out of time.

33. The respondents submitted that it was not in the interest of justice for the tribunal to reconsider the remedies judgment. They relied upon the cases of **Flint v Eastern Electricity Board** [1975] ICR 395 at 404 and **Ministry of Justice v Burton** [2016] ICR 1128.

34. In **Flint** Phillips J stated that the tribunal's discretion should be exercised judicially and with regard not just to the interests of the party seeking the review (as reconsiderations were then called) but that there should, as far as possible, be finality of litigation. In **Burton** Elias LJ said that the discretion to act in the interests of justice was not open-ended and emphasise the importance of finality, which militated against the discretion being exercised to readily.

35. In written representations the claimant pointed out that the case of **Flint** the claimant sought a review in order to introduce new evidence which had been available at the time of the original decision. The application in the more recent case of **Burton** concerned an argument which the applicant's representative it failed to draw to the attention and which have allowed would have necessitated the introduction of further evidence.

36. The claimant submitted that these cases were not relevant save to state that regard must be had to the interest of finality in considering applications reconsideration and the discretion must be exercised in a principled way. We agree with that submission.

37. The respondents' final submission was that the claimant was seeking a declaration that payments were due and that the defendant was in breach of the judgment if it was not satisfied forthwith and that the claimant's request was a matter of enforcement and was not "something which requires the tribunal to reconsider its decision on the remedies to be awarded". We consider that is not a fair representation of what the claimant is here seeking. We do not consider we are being asked to make a declaration that the defendant is in breach of the judgment albeit we note that no part of the judgment has been satisfied and that is a matter

of considerable significance in deciding what to do as regards what is just and equitable.

38. In written representations, the claimant agreed with the provisional view expressed by the tribunal in the letter of 4 May 2018. In addition it was submitted that the reconsideration was necessary in the interests of justice. Rule 70 invokes a wide discretion and that the discretion is properly exercised where something has gone wrong with the procedure, perhaps involving a denial of justice. A case is then cited **Fforde v Black** UKEAT68/80 which we have been unable to find.

39. It was suggested that cases on such applications decided before the adoption of the overriding objective which suggested it was only appropriate to exercise the discretion to reconsider in exceptional circumstances must be read in the light of the overriding objective requirement to deal with cases fairly and justly. It was submitted there was no test of exceptionality but that, even if there were, the circumstances of this case are exceptional. We think that the circumstances can fairly be described as exceptional if it is necessary for us so to do.

Discussion and conclusions

40. We set out the relevant parts of the provisional views expressed in the tribunal's letter of 4 May 2018.

    1. *The complaints of unauthorised deductions from wages by failing to pay in accordance with the National Minimum Wage and failing to permit the claimant to take paid annual leave were the subject of separate declarations in the judgment on liability sent to the parties on 16 September 2011.*

    2. *Those were freestanding complaints which the claimant could have pursued even if she had not brought a claim of discrimination.*

    3. *... the reason for including the awards in respect of those complaints, effectively under the heading of race discrimination, was in order to permit the claimant properly to recover interest in the event of the finding of discrimination being sustained.*

    4. *The application for reconsideration, whilst not truly a correction of a clerical error or a mistake, is in reality an application for clarification of the tribunal's remedy judgment to make clear the points set out in paragraphs 1 and 2 above and to circumvent an artificial argument that those sums are not recoverable simply by the reason of the way in which the remedies judgment was expressed.*

    5. *Albeit the application for reconsideration is significantly out of time and the tribunal will have to be persuaded to exercise its discretion to extend time there are a number of factors which appear to appoint strongly in favour of granting such an extension.*

    6. *The claimant has not received compensation to which she is entitled by reason of the judgment. That assertion is not challenged by the respondents ...*

    7. *The total award of compensation made by the tribunal was in excess of £89,000. Without the award for discrimination the revised award would still be in excess of £55,000. That does not include any award in respect of victimisation because the*

claimant's appeal to the Employment Appeal Tribunal was successful in that regard. Of that residual sum, almost £45,000 represents unpaid wages and unpaid holiday pay.

8. *If the respondents are now in a position whereby any of the awards can be enforced there does not appear to be any principled objection why the claimant should not seek to do so insofar as those awards are unaffected by the subsequent appeals.*

9. *It is not clear to the Judge why it is not in the interests of justice for the Tribunal to reconsider the judgment in the limited way sought by the claimant, having regard to the overriding objective and the underlying fact that finality of this litigation, at least in this respect, could have been achieved had the respondents paid the sums awarded to the claimant save for the awards for injury to feelings, aggravated damages and interest.*

41. We note that the respondents have made no further submissions having been sent these provisional views. We might infer from that fact alone that they have no substantial argument to advance against those provisional conclusions

42. However, we do not base our determination upon such a consideration. We address the two substantive issues raised by the respondents: delay in making the application and the need for finality in litigation as a factor to take into account in deciding whether to grant the application.

43. Having considered all the submissions we think there is nothing in the second of these points. The tribunal adopts and restates the provisional views as set out above. Whatever the position in relation to race discrimination and harassment and any awards made in respect of those complaints, the sums that the tribunal awarded in respect of unpaid wages, unpaid holiday and for unfair dismissal were either never raised or are unaffected by the appeal process. In respect of those matters it is not the actions of the claimant that have failed to bring finality to the litigation but the inaction of the respondents in paying any sum legitimately due to the claimant. To suggest otherwise is specious.

44. That leads us to draw the conclusion that had this application for reconsideration been made within time it would have been granted without hesitation. It is, in reality, a hybrid application, being an application for reconsideration leading to clarification rather than any substantive variation in the judgment, hence the reason that it was made in the alternative as an application for correction under rule 69. It is an application for clarification of the expression of sums properly due to avoid the risk that the respondents might argue at the enforcement stage that the sums were not properly recoverable because of the way the remedy judgment had been expressed.

45. That conclusion is amply supported by the respondents' solicitors' complete failure to address that point.

46. Those conclusions inevitably lead to the question: should the application now be refused because of delay.

47. We note the length of the delay and the reasons for it advanced by the claimant which we accept. Again, the respondents did not seek to argue against them after they had received the claimant's written representations.

48. There can be no conceivable doubt that even after this extent of time the award for unfair dismissal can be attempted to be enforced. We ask whether it is right that the claimant should potentially be deprived of the opportunity properly to enforce the other awards simply because of the length of the litigation process. We think that such a conclusion would be unjust where the respondents had the opportunity, and at least in respect of the National Minimum Wage element took that opportunity, to challenge the awards and having failed in that attempt continued not to pay the sums awarded.

49. In reaching that conclusion we are not descending into matters of enforcement but recognising the reality of the way in which the award was expressed, the fact that the claimant has not received any part of any award and the attempt by the respondents to put a yet further obstacle in her way of possibly recovering sums due to her.

50. For those reasons we extend time to permit the application for reconsideration to be made. We grant the application and vary the original remedy judgment in the manner set out above.

_____
Employment Judge 31 August 2018

JUDGMENT AND REASONS SENT TO THE

PARTIES ON

5 September 2018…….

…….

FOR THE TRIBUNAL OFFICE