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EMPLOYMENT TRIBUNALS

Claimant: **Mr R Smits**

Respondent: **David Phillips Furniture Ltd**

JUDGMENT

The Claimant's application dated 18th June 2018 for reconsideration of the judgment dated 1st June 2018 is refused.

REASONS

There is no reasonable prospect of the original decision being varied or revoked for the following reasons:

A. Relevant rules and principles

1. Rule 70 of the Employment Tribunal Rules of Procedure 2013 ('the Rules') provides 'a Tribunal may … reconsider any judgment where it is necessary in the interests of justice to do so. …'

2. The Claimant has complied with rule 71 by making his application in time, in writing and copied to the Respondent.

3. Rule 72(1) provides so far as is relevant: '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 … the application shall be refused and the Tribunal shall inform the parties of the refusal.'

B. The Claimant's application for a reconsideration - grounds

1. Basic award - reduction under s122(2) Employment Rights Act 1996

This reduction was made pursuant to a statutory power to reduce compensation where any conduct of the Claimant was such that it would be just and equitable to reduce the basic award. The findings of fact on which this reduction was made are at paras 12-15 of the judgment, setting out what it was the Tribunal found the Claimant did, to justify a deduction and at this level. The Claimant in his reconsideration application again sets out his own version of events as to what happened but the Tribunal has made its own findings as to what happened based on all the evidence before it and has not accepted that the Respondent was kept informed about the Claimant's absence (see para 15). There is no reasonable prospect of these findings being varied or revoked (and

consequently the reduction removed or reduced) simply because the Claimant does not agree with them and wishes to have a second opportunity to re-argue his case.

2. Compensatory award – weekly pay figure used

The figure used to calculate weekly pay is the net figure not the gross figure. This is because this part of the award addresses the Claimant's actual loss ie his net loss. For this reason, there is no reasonable prospect of this method of calculation being changed to use a gross pay figure.

3. Compensatory award – 15% reduction for failure to comply with ACAS Code of Practice

3.1 The ACAS Code of Practice puts responsibilities on both employers and employees to try to resolve matters between them. This does not involve using ACAS but is between the employer and the employee. In a constructive dismissal case as this was, there is an obligation on an employee to raise a grievance with the employer, which the Claimant did not do, which the Tribunal found to be unreasonable. The findings of fact on which this reduction was made are at para 19 of the judgment. The matters the Claimant refers to in his reconsideration application (previous positive statements about him by the Respondent and his request to see if they would re-employ him, prompted by the Respondent's previous assurances that they would do so) are not relevant to whether or not he unreasonably did not raise a grievance with the Respondent when he resigned. Para 19 of the judgment explains why his failure to do so was unreasonable ie because he had contributed to the situation.

3.2 The other matters raised in the reconsideration application are about the ACAS conciliation process. This process, by which an employee must request conciliation from ACAS before bringing an employment tribunal claim, is a separate and independent obligation and is not part of the ACAS Code of Practice under which this reduction was made. The fact that the Claimant says that the Respondent did not participate in that conciliation process is not relevant to his obligation under the ACAS Code of Practice to raise a grievance.

3.3 For these reasons, there is no reasonable prospect that this deduction would not be applied or would be applied at a lower percentage. The maximum percentage which could have been applied is 25%.

4. Compensatory award – reduction under s123(6) Employment Rights Act 1996

This reduction was made pursuant to a statutory power to reduce compensation where the dismissal was caused or contributed to by any action of the Claimant. The findings of fact on which this reduction was made are at paras 12-15 of the judgment, setting out what it was the Tribunal found the Claimant did to merit a deduction. See para B1 above as the same reasons apply.

5. Pay in lieu of notice

The same loss cannot be compensated twice because that results in an employee receiving more money than he has lost. The compensatory award already covered the period of loss which would have been covered by the notice period. See para 33 of the judgment. For this reason, there is no reasonable prospect that the Tribunal would also award an amount for payment in lieu of notice.

6. Interest

The Tribunal does not have a general power to award interest in an unfair dismissal or wrongful dismissal case. It has the power to award interest in a discrimination case under the Equality Act 2010, which this was not. For this reason, there is no reasonable prospect that the Tribunal would also award an amount for interest as it has no such power to do so.

7. Preparation time order

The power to make a preparation time order is in Rule 76. Preparation time orders are not made automatically just because a party has won their case. Rule 76 provides that a Tribunal may make one but it does not have to make one. The test relevant in this case was whether the Respondent had acted vexatiously, abusively, disruptively or otherwise unreasonably in the way the proceedings were conducted. The threshold is a high one. The high threshold was not met because the Claimant did not specifically identify at the hearing what it was the Respondent had done which meant that an order should be made (see para 40 of the judgment). In his reconsideration application the Claimant now refers to the Respondent not having prepared the bundle and sending in witness statements late. The fact that the Claimant ultimately had to prepare the bundle because the Respondent hadn't and the late service of witness statements do not meet that high threshold. The other matter the Claimant refers to in his reconsideration application is orders under s7(4) of the Employment Tribunals Act 1996 but this relates to other matters such as witness attendance and the disclosure of relevant documents which is not what the Claimant is complaining about and is a separate Tribunal power not under Rule 76. For these reasons, there is no reasonable prospect that the Tribunal would make a preparation time order at all.

The Tribunal therefore refuses the application for a reconsideration because there is no reasonable prospect of the Tribunal deciding that it is necessary in the interests of justice for the original decision to be varied or revoked.

The Tribunal apologises for the delay in dealing with the Claimant's application but it was not referred to the Employment Judge until 29th August 2018.

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Employment Judge Reid

Date 6th September 2018
JUDGMENT AND REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE