EMPLOYMENT TRIBUNALS

Claimant: Mr J White

Respondent: Mrs A Cook

REASONS

Pursuant to a request made by the Claimant on 30 January 2019 in respect of the Judgment made on 10 December 2018 and promulgated on 19 December 2018

The Judgment

1. The full hearing of this case was heard by Employment Judge Kolanko on 25 May 2018. The Respondent did not attend that hearing and was not represented at the hearing. After hearing oral evidence from the Claimant and considering the documents submitted to him Employment Judge Kolanko found that the correct name of the Respondent and employer of the Claimant was Mrs Anne Cook. He also found that the Respondent had made an unauthorised deduction from the Claimant's wages for which the Respondent was ordered to pay the Claimant £590.25 gross. Employment Judge Kolanko dismissed the Claimant's claim for holiday pay because this had not been claimed by the Claimant in his claim form. The Judgment made at the hearing was sent to the parties on 14 June 2018.

The Application and Hearing

2. The Claimant's application for reconsideration of the Judgment was referred to Employment Judge Craft because of Employment Judge Kolanko's retirement.

3. At the reconsideration hearing Employment Judge Craft was able to review the history of the proceedings, discuss the matters that had arisen during the proceedings to date with the Respondent, and the Claimant's representative, and to consider oral representations made to him by the parties. The Claimant had prepared a Bundle of Documents. This comprised 26 documents and 86 pages. The Respondent had brought some documents with her which Employment Judge Craft was able to refer to as required. The Respondent raised no objection to any of the documents contained in the Claimant's Bundle.

The matters considered

4. The Claimant worked at the Vectis Tavern, Cowes, Isle of Wight from 15 February to 11 June 2017. He resigned because of arrears of wages then owed to him and claimed that during his period of employment he had been appointed as Assistant Manager of the premises to work with the Respondent's daughter, Mrs Emma Bristow. The Claimant stated that he had worked a total of 56 hours between 30 May and 11 June 2017 for which he had not been paid. He also claimed that he had been underpaid by £1 per hour between 9 May and 30 May 2017 when he had worked for 114.2 hours. He had detailed the relevant dates and hours of work in a Facebook Messenger message which he had sent to the Respondent on 1 July 2017 and subsequently in other correspondence to the Respondent. The Claimant also asked the Respondent to send him his payslips because he had not received any payslips during his employment and his P45. He received no substantive response to this correspondence and issued these proceedings on 6 September 2017.

5. The Respondent's Response stated that the dates of employment given by the Claimant were incorrect and disputed his alleged status as Assistant Manager. The Response also stated that the Claimant had not been employed by the Respondent but by Sunny Island Leisure Ltd ("Sunny Island"). It also provided a schedule of the hours which the Respondent stated the Claimant had worked in June 2017. It conceded that the Claimant had not been paid for 34.5 of the hours which he had worked in June. However the Respondent submitted that the Claimant had taken paid holiday in excess of his holiday entitlement and that payment of any outstanding wages due to him was conditional on him returning company property to the Respondent.

6. The Claimant's position is that he had been employed by the Respondent to work at The Vectis Tavern. It was common ground between the parties that he had not received a written contract of employment or statement of terms and conditions of employment during his employment. The Claimant maintains that he received no payslips or any other PAYE documentation during his employment.

7. A Notice of Hearing was issued on 22 November 2017 which confirmed that the case would be heard on 9 February 2018. The case was listed before Employment Judge Maxwell. The Claimant attended this hearing but the Respondent did not. Employment Judge Maxwell adjourned the proceedings and prepared a Summary of the circumstances which had resulted in the adjournment, clarified the nature of the Claimant's claim and made further Orders for the conduct of the proceedings.

8. Employment Judges Maxwell's Summary explains that by an email of 7 February 2018 Mrs Cook on behalf of Sunny Island stated that "due to medical reasons" she was not "in a position to proceed on Friday". The Tribunal, in an email in reply on 8 February 2018 had indicated the hearing would go ahead because "no medical evidence has been provided to indicate that the respondent's representative / witness is unfit to attend".

9. In an email sent on Mrs Cook's behalf by Mrs E Bristow, her daughter, at 23.42 on 8 February she wrote as follows:

"**Mrs A Cook is currently at St Mary's Hospital for a further suspected blood clot and will as advised not be able to attend tomorrow.**

She is due to be scanned when the department reopens in the morning and is under the care of A&E Team."

10. Employment Judge Maxwell's Summary then notes that on the morning of the hearing emails had been received attaching photographs of a hospital admission record for Mrs Cook showing her attendance at the Emergency Department of St Mary's Hospital which indicated a date and time of arrival of 9 February 2018 at 0958 and a manuscript note, dated **9/2/18** stating as follows:

"To whom it may concern

Mrs Cook arrived ED IOW this morning to have fully investigated her emergency condition as a day case".

EJ Maxwell then observes as follows:

"I observe the hospital record does not show Mrs Cook having been at hospital on 8 February 2018, as stated in the email received repeating the respondent's request for an adjournment, and nor is there any explanation of how Mrs Cook knew on 7 February 2018 that she would be required to attend the Hospital's Emergency Department this morning."

11. After concluding that the hearing should be postponed Employment Judge Maxwell then states as follows:

"In light, however, of the apparent discrepancies between the original request, the email in the name of Mrs Bristow of 8 February 2018, and the admission record, the Respondent will be required to provide to the claimant and the employment tribunal:

7.1 An explanation of when and how Mrs Cook came to know on 7 February 2018, that she would be required to attend St Mary's Hospital on 9 February 2018, together with written confirmation from any medical practitioner whose advice she relied upon;

7.2 A written explanation of when and how she came to attend St Mary's hospital on 8 February 2018, together with written confirmation from St Mary's hospital of that attendance.

7.3 A written explanation of when and how she came to attend at St Mary's hospital on 9 February 2018 together with any relevant medical evidence which would include a discharge summary. "

12. Employment Judge Maxwell also advised as follows:

    "Furthermore, if there is any prospect that Mrs Cook may be unable to attend the adjourned hearing in this matter, then the respondent should make alternative arrangements for its representation, either by way of sending another employee to speak on its behalf, or instructing a legal representative. In terms of witness evidence, on the Claimant's case it would be his line manager, Emma Bristow, who would be best placed to speak (for the respondent) to his hours and / or the agreed rates of pay."

13. Employment Judge Maxwell made an Order as to the written explanations required from the Respondent in accordance with what is set out in the Summary which is set out in paragraph 11 above, which was sent to the parties on 10 February 2018.

14. On 28 February 2018 the Tribunal sent a strike out warning to the Respondent because the Respondent had not complied with the Order of the Tribunal dated 10 February 2018. This letter stated, inter alia, that if the Respondent wished to object to this proposal reasons should be given in writing or request a hearing at which those reasons could be set out and that any such objection should be notified to the Tribunal by 7 March 2018. On 7 March the Respondent requested a hearing to oppose the proposal to strike out the Response.

15. On 29 March the Tribunal sent out a Notice of Hearing for 25 May 2018 to the parties. On 23 May the Tribunal contacted the parties by email to check that they were ready to proceed with the hearing on 25 May. The Claimant confirmed by email that he was in a position to proceed. The Respondent did not reply to this enquiry. As already stated the Judgment made at that hearing was sent out to the parties on 14 June.

16. The Respondent informed the Tribunal that various illnesses had prevented her from properly preparing for the hearing and attending the hearing on 25 May. However, when she was asked by the Tribunal why she had not applied for an adjournment informing the Tribunal of these circumstances she said that she was aware of the hearing on 25 May and had intended to attend the hearing but had been prevented from doing so by an incident that occurred on the night before the hearing although she could not recall what that medical difficulty had been. The Respondent also informed the Tribunal that her daughter had emailed the Tribunal on the day of the hearing to inform the Tribunal of her problems. The Employment Judge confirmed that no such email had been received by the Tribunal. The Respondent could not provide a copy of that email to the Tribunal.

17. On 29 June the Respondent applied for reconsideration of the Judgment. This application was made out of time and on 21 July the Tribunal requested the Respondent to respond to the following questions:

    - Why was she unable to attend the hearing on 25 May 2018?
    - When she first became aware that she would be unable to attend the

hearing on 25 May 2018?

- Why she did not contact the Tribunal subsequent to the hearing until 29 June 2018?

In asking these questions of the Respondent the Tribunal noted there was nothing on the Tribunal file between 29 March and 25 May 2018 to suggest that the Respondent was unable to attend the hearing on 25 May.

18. The Respondent's response by email on 1 August states that she has been in constant contact with the Court by telephone and email throughout and states, inter alia, as follows:

"I have been extremely unwell and suffered a series of strokes, heart attack and clots on the lung. The latest stroke being on 19 July 2018.

I was unable to attend in Due to ill health and being placed in a Cancer Pathway requiring surgery which left me with a leak of spinal fluid post-surgery, confined to bed and suffering from severe headaches being monitored by the hospital."

The Tribunal's file showed no contact had been made with the Tribunal by the Respondent between 29 March and 29 June 2018.

19. Instructions were given to insolvency practitioners on 11 June 2018 and Sunny Island, stated to be trading as The Vectis Tavern, was placed into a creditors' voluntary liquidation on 3 July 2018. The Respondent signed the statement of affairs which is dated 3 July 2018. This statement confirmed that the company had ceased to trade on 23 November 2017 and that unsecured non-preferential creditors showed a deficiency of £120,226.39. It listed no employees or ex-employees as creditors.

20. In her email to the Tribunal of 1 August the Respondent attached copies of correspondence with the High Court Enforcement Officer together with a copy of a payslip dated 30 June 2017 from Sunny Island for the Claimant and a P60 for the Claimant for tax year to 5 April 2017. There was also a copy of an email from The Stroke Association to the Respondent dated 31 August which confirmed the Respondent had been referred to the Early Supported Discharge Team (NHS) in June 2017 because she had been diagnosed as suffering from a stroke. She also produced a list of medication prescribed to her for her medical difficulties and illnesses.

21. The Claimant produced a letter in his Bundle from the High Court Enforcement Group to him dated 13 September 2018. This described peaceful entry to The Vectis Tavern and states, inter alia, as follows: **"Contact was made with Mrs Cook via the telephone number we hold on file who stated that she no longer has an association with the public house and is merely a silent partner in the company Anne Cook t/a The Vectis Tavern Limited. On conducting a Companies House check, this shows the company to be active with the Debtor listed as a director".**

22. The Respondent confirmed that the information given to the Claimant in this

letter was correct. The Vectis Tavern had continued to trade, following a change of ownership, with the new company under the direction of the Respondent's son and daughter.

23. The Respondent had not provided the information as ordered by the Tribunal on 10 February 2018. The Respondent told the Tribunal that she knew she could not attend the Tribunal hearing on 9 February because she had attended the A&E Department on 7 and 8 February and was going to return to the hospital on 9 February.

24. The Respondent told the Tribunal that her failure to attend the previous hearings was due to ill health with various illnesses. She had suffered a stroke in May 2017, a pulmonary embolism in July 2017, a heart attack in December 2017 and then a further stroke in July 2018. These illnesses had resulted in stays in hospital, and taken her away from the business during which time bar staff had run the business under the management of her daughter. However, Mrs Bristow had gone sick from the end of April 2017 until just before Christmas of that year and had then been ill again at the end of April 2018. The Director's Report to the creditors gave a different medical history stating that the Respondent had suffered a heart attack in December 2016, a stroke in May 2017 and a further pulmonary embolism in November 2017.

25. The Respondent told the Tribunal that operation of the payroll for the business had been contracted to LessTax2Pay but accepted that the Claimant had not received any payslips during his employment at the Vectis Tavern as he maintains was the case. However later in the hearing the Respondent stated that payslips had been produced throughout his employment and referred to correspondence from LessTax2Pay which confirmed that he had been an employee. There was also an email from the Liquidator's office which confirmed that the Respondent had informed the Liquidator that the Claimant was a creditor of Sunny Island. However this email gave no details as to the amount which the Respondent had confirmed to the Liquidators was owed to the Claimant by the company. This indicates that information was provided to the Liquidators after the preparation of the Statement of Affairs.

Conclusions

26. Rule 70 of the Employment Tribunals Rules of Procedure 2013 (as amended) provides an employment tribunal with a general power to reconsider any judgment where it is necessary in the interests of justice to do so. Under old Rule 34 of the Tribunal Rules 2004 there were five grounds upon which a tribunal could review a judgment. These were: the decision was wrongly made as a result of an administrative error; that the party did not receive notice of the proceedings leading to the decision; the decision was made in the absence of the parties; that new evidence had become available since the conclusion of the tribunal hearing to which the decision related, the existence of which could not have been reasonably known of or foreseen at that time; and / or that the interests of justice required a review. It is generally agreed that the requirement that a successful application for reconsideration must be in the interests of justice is broad enough to embrace the other four

specific grounds upon which a review could previously be based.

27. There is an underlying public policy principle in all proceedings of a judicial nature that there should be finality in litigation. Reconsiderations are thus best seen as limited exceptions to the general rule but employment tribunal decisions should not be reopened and re-litigated. It is not a method by which a disappointed party to proceedings can get a second bite of the cherry. The employment tribunal is given a wide discretion which must be carefully applied taking account of the overriding objective which is to deal with cases fairly and justly. The interest of justice ground does not have to be construed restrictively and does not require exceptional circumstances for a successful application for reconsideration to be made. However it does require the application of recognised principles and these include finality of litigation, which is in the interests of both parties, and, furthermore, the interests of justice as a ground for reconsideration must be related and take into account the interests of justice of both parties in the proceedings.

28. This is not a case where there has been administrative error or no notice of hearing has been given to the parties or one of them. It is a case where Judgment was made in the absence of the Respondent. However this does not mean that a party can simply decline to attend a hearing and then apply for review if the Employment Tribunal's decision is unfavourable. To succeed on this ground the party has to have a good reason for his or her absence from the hearing and if a party to the proceedings makes a conscious choice not to appear at that hearing, when they have full knowledge of it, then they must face the consequences of doing so. In these circumstances a tribunal will require the applying party to provide a good reason for his or her absence along with any supporting evidence and the tribunal will then form a judgement about whether that reason is genuine. Furthermore the party will also have to satisfy the tribunal that, owing to the reason for the original absence, it is necessary in the interests of justice for the tribunal's judgment to be reconsidered. It is therefore possible that a tribunal may find that a party had a genuine good reason for failing to attend the hearing yet conclude that it is not in the interests of justice to reconsider the decision made in the absence of that party.

29. The Respondent's failure to attend the hearing on 9 February 2018 raised concerns as to the reason for the Respondent's absence. This was because of obvious contradictions between the emails from the Respondent, and her daughter on her behalf, and the documentation received from the hospital. The Respondent has never answered the questions put to her by the Tribunal in its Order of 9 February 2018. The Response could have been struck out for that reason on 25 May. The Tribunal chose to hear the case and adjudicate on it in the Respondent's absence.

30. Those questions remained unanswered and the Respondent's explanation to the Tribunal in this hearing provide further contradictions as to what was stated to be an emergency admission on 9 February, in circumstances when her daughter's email had stated that she was already in hospital on 8 February. Furthermore there had been no written explanations provided to the Tribunal as it ordered on 9 February and medical evidence has been limited to a list of medication. The Respondent has also failed to address with

due particularity the specific questions asked of her by the Tribunal in its email of 29 July 2018.

31. The Respondent had given no indication to the Tribunal of any difficulties, in respect of preparation, or attendance, in the weeks leading up to 25 May, following her representations on the proposal to strike out the Response. The Tribunal was also concerned that the Respondent could not recall the medical problem that prevented her attendance, and noted that no contact was made with the Tribunal until 29 June. This is in circumstances in which Employment Judge Maxwell had made it clear that the Respondent should make arrangements to be represented by others if she could not attend a hearing, and had given constructive advice as to how she could do so, and when correspondence confirms her daughter who was involved in the business was available to do so.

32. The evidence provided by the Respondent as to the Claimant's disputed employment status is limited to one payslip and a P60 submitted to the Tribunal on 1 August 2018. However, taking into account the payroll arrangements for the business described to the Tribunal such information should have been readily available both to send to the Claimant when he had requested that information in 2017 and then to the Tribunal. It also remains substantially incomplete and without a P45. The status of the ownership and operation of the business of the Vectis Tavern also remains unclear with the Respondent and her family apparently continuing to operate the business through a new company after Sunny Island ceased to trade in November 2017. This is a further example of the Respondent's continuing active engagement in business matters during the period under consideration notwithstanding her medical difficulties.

33. The Respondent's position is in contrast to the Claimant's position. He has pursued his claim with clarity from the outset corroborated by the requests for information he made to the Respondent, and the evidence given to the Tribunal at the substantive hearing, where one claim pursued by the Claimant was upheld, but another was dismissed.

34. The Tribunal has every sympathy with the Respondent for her medical difficulties. However, for the reasons set out above, it has found the explanations she has given to it as to her absence from hearings held by the Tribunal in February and May 2018 very unsatisfactory. The Tribunal finds that the Respondent has failed to provide it with a good reason for her failure to attend the hearing on 25 May. Furthermore, even if the Respondent could not attend a Tribunal on that day, the Tribunal is satisfied that she had every opportunity to ensure that she was represented at that hearing. The Tribunal also finds that the Respondent had ample opportunity to provide the information and documentation which she considered relevant to the issues before the Tribunal particularly a full record of the Claimant's earnings and relevant PAYE documentation well in advance of the hearing on 25 May. The Tribunal has also found that there has been a conscious decision by the Respondent not to comply with orders and requests made by the Tribunal which has damaged the credibility of the explanations which the Respondent has offered to the Tribunal to explain her absence from the hearing of 25 May and the absence of any effective representation for her at that hearing.

35. Therefore, taking into account those matters summarised above in the context of the overriding objective, the need for finality of litigation and the interest of justice to both parties in these proceedings the Tribunal concludes that it is not in the interests of justice to allow this application for reconsideration. The application is refused and the Tribunal confirms the Judgment made on 25 May 2018 and promulgated on 14 June 2018.

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Employment Judge Craft

Dated:…….24 April 2019…….....

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