THE EMPLOYMENT TRIBUNALS

Claimant: **Mr N MacNab-Grieve**

Respondent: **RFT Repairs Limited & RFT Repairs & Maintenance Limited**

Before: **Employment Judge M Warren**

DECISION ON AN APPLICATION FOR RECONSIDERATION

The Claimant's application for reconsideration is refused on the grounds that there is no reasonable prospect of the original Judgment being varied or revoked.

REASONS

Background

1. By a Judgment dated 16 August 2019, sent to the parties on 3 September 2019, I dismissed the Claimant's claim for unpaid wages. He had been represented at the hearing on 16 August by his father, who has submitted an application for a reconsideration.

The Law

2. So far as is relevant for current purposes, rules 70 to 72 of the Employment Tribunal's Rules of Procedure 2013 make provision for the reconsideration of Tribunal Judgments as follows:

> *"**Principles***
> ***70***
> *A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.*

Application
71
Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

Process
72
(1) 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 (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal...
…
(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it…

3. In Outasight VB Ltd v Brown UKEAT/0253/14 the EAT held the Rule 70 ground for reconsidering Judgments, (the interests of justice) did not represent a broadening of discretion from the provisions of Rule 34 contained in the replaced 2004 rules, (at paragraphs 46 to 48). HHJ Eady QC explained that the previous specified categories under the old rules were but examples of where it would be in the interests of justice to reconsider. The 2014 rules remove the unnecessary specified grounds, leaving only what was in truth always the fundamental consideration, the interests of justice. This means that decisions under the old rules remain pertinent under the new rules.

4. The, "interests of justice" means that there must be something about the case that makes it necessary to go back and reconsider, for example a new piece of evidence that could not have been produced at the original hearing, a mistake as to the law, a decision made in a parties absence. It is not the purpose of the reconsideration provisions to give an unsuccessful party an opportunity to reargue his or her case. If there has been a hearing at which both parties have been in attendance, where all material evidence had been available for consideration, where both parties have had their opportunity to present their evidence and their arguments before a decision was reached and at which no error of law was made, then the interests of justice are that there should be finality in litigation. An unsuccessful litigant in such circumstances, without something more, is not permitted to simply reargue his or her case, to have, "a second bite at the cherry", (per Phillips J in Flint v Eastern Electricity board [1975] IRLR 277).

The application

5. The Claimant was subject to two disciplinary warnings and as a consequence, in accordance with express provision in his contract of employment, did not receive the benefit of an annual pay rise in April 2018.

6. On 25 January 2019 at a meeting of a body referred to as the Joint Consultative and Negotiating Committee, (JCNC) consisting of representatives of the Respondent and its employees, it was agreed that the Respondent would cease its policy of not giving annual pay rises to employees who were subject to disciplinary warnings. As of 25 January 2019, the Claimant received a 2% pay rise commensurate with that received by his colleagues in April 2018. However, his case was that the pay rise should have been backdated to April 2018 and he should have received a back dated payment.

7. I found that there had been no unlawful deduction of wages; the Respondent was entitled not to give the Claimant a pay rise and it was under no legal obligation to back date payment when it decided to change its policy.

8. The Claimant's father, Mr G Macnab-Grieve by an email dated 17 August 2019, (in time) asks me to reconsider that decision. In breach of rule 71, there is no indication that the application has been copied to the Respondent. However, as it is clear to me that the application is without merit I will deal with it anyway.

9. Mr Macnab-Grieve states that although he could not show that the decision reached at the JCNC meeting was a legally binding agreement, it is never the less an emolument that he ought to have been paid. He wrote:

"As the above claim was for unlawful deduction of wages, it is not restricted to contractual entitlement, but under ERA 1996 sect. 27.1, to any emolument referrable [sic] to his employment, contractual or otherwise.

The agreement signifies an entitlement, either discretionary or contractual to an emolument referable [sic] to his employment.

As the implication of the JCNC Agreement signifies the acknowledgement by the respondent that actually the wages were accepted by them as "properly payable, contractually or otherwise".it wasn,'t [sic] therefore necessary for me to prove the JCNC Agreement was a legal committment, [sic] only that the wages previously withheld were acknowledged as properly payable from the date of the sanction and restitution to nullify the effect would follow"

Conclusions

10. The application is an attempt to reargue the case, to have a second bite at the cherry. It is in the interests of justice that there be finality in litigation.

Mr Macnab-Grieve had his opportunity to put his case. On the other hand, I recognise that he is a lay person and in the circumstances consider it in accordance with the overriding objective to allow him to put his point and respond to it. Afterall, if I had made a mistake as to the law, it would have been in the interests of justice to correct it.

11. Section 27(1) (a) of the Employment Rights Act 1996 reads as follows:

> *(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—*
>
> *(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,*

12. Although the emolument does not have to be payable under the employment contract to amount to, "wages" it does have to be payable pursuant to a legal obligation, see New Century Cleaning Co Ltd v Church [2000] IRLR 27. This is why during his closing submissions, I asked Mr Macnab-Grieve if he was able to point to anything which indicated that what was agreed at the JCNC meeting amounted to a legal obligation. He acknowledged that he was unable to do so.

13. The first and fundamental flaw in Mr Macnab's application is that what was resolved at the JCNC did not create a legal obligation. That alone is sufficient for me to find that the application has no reasonable prospects of success.

14. The second difficulty is that in any event, I found that what was agreed in the JCNC meeting was that from that date, the Respondent would cease to exercise its contractual right not to give pay rises to those on disciplinary warnings and as at that date, would give a pay rise to those who had not previously received a pay rise because they had been subject to a disciplinary warning. There was no agreement that the pay rise would be backdated to when others received them and a backdated payment made accordingly. For this reason also, the application has no prospects of success.

Dated:

_31/10/2019_____

Employment Judge M Warren

JUDGMENT SENT TO THE PARTIES ON

....31/10/2019.....

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FOR THE TRIBUNAL OFFICE