



EMPLOYMENT TRIBUNALS

Claimant: Miss S Strachan

Respondent: New Focus Healthcare Ltd

Employment Judge Tom Ryan

JUDGMENT ON RECONSIDERATION

The judgment of the Tribunal is that the respondent's application for reconsideration is dismissed. The judgment of the tribunal sent to the parties on 14 December 2018 is confirmed as modified by the tribunal's order of 15 November 2019 substituting the name of the respondent shown in this judgment for that of Claire Fryer.

REASONS

1. The tribunal's powers concerning reconsideration of judgments are contained in rules 70 to 73 of the Employment Tribunals Rules of Procedure 2013. A judgment may be reconsidered where "it is necessary in the interests of justice to do so." Applications are subject to a preliminary consideration. They are to be refused if the judge considers there is no reasonable prospect of the decision being varied or revoked. If not refused, the application may be considered at a hearing or, if the judge considers it in the interests of justice, without a hearing. In that event the parties must have a reasonable opportunity to make further representations. Upon reconsideration the decision may be confirmed, varied or revoked and, if revoked, may be taken again.
2. By a claim presented to the tribunal on 24 October 2018 the claimant alleged that the respondent had withheld the sum of £832 from her pay which she said was the equivalent of a full month's wages.
3. Ms Fryer against whom the claimant been made did not enter a response. Pursuant to rule 21 of the Employment Tribunals Rules of Procedure 2013 judgment was given for £832 in favour of the claimant and sent to the parties on 2 January 2019.
4. By email of 4 February 2019 produced to the tribunal at a later stage in the proceedings the respondent's payroll function wrote to the claimant saying that it would seek to have the judgment overturned.

5. On 3 May 2019 Ms Fryer wrote to the tribunal saying that she was not the employer of the claimant and identified the corporate respondent named above. She asked that the claim be reconsidered on that basis. She did not assert that the money claimed by the claimant was not owed to her.
6. There was then correspondence between the tribunal, the claimant and the respondent which led to a notice being sent to the parties on 12 September 2019 listing the application for reconsideration for a hearing on 15 November 2019.
7. At that hearing Mr Lee Marginson attended for the respondent. He is a director of the company. The claimant did not attend. However by that date the respondent had not presented a draft response to the tribunal setting out its defence to the claim. However I was satisfied having heard Mr Marginson that the claimant had in fact been employed by the corporate respondent as was evidenced by payslips that were provided to me.
8. At that hearing I ordered the respondent to serve a draft response by 29 November 2019 and required them to provide:
 - 8.1. a proper explanation for the failure to serve a response to the claim;
 - 8.2. the facts relied on in support of any defence to the claim, including any facts showing that this order was entitled to make deductions from the claimant's wages; and
 - 8.3. attaching any documents relied upon in support of the defence.
9. On 29 November 2019 Mr Marginson asked an extension of time to comply with that order on the grounds that he was unwell.
10. On 2 December 2019 the respondent presented a response form, copies of correspondence with the claimant, a copy of a letter to her 14 September 2018 inviting her to attend a grievance meeting, a copy of the employee handbook and a copy of the particulars of the terms of employment.
11. I formed the view that the submission of those documents did not comply with the first 2 of the requirements imposed by me set out at 8.1 and 8.2 above. I therefore afforded the respondent until 19 December 2019 the opportunity to rectify those defects. I also invited the parties to make further representations in writing or request a hearing before I determined the reconsideration application. The respondent has not made an application for a further oral hearing.
12. On 17 December 2019 respondent wrote to the tribunal attaching a document purported to comply with those directions.
13. As to the proper explanation to serve the response, the respondent set out in bullet points that Ms Fryer had been absent from duty on maternity leave since October 2018, that her absence had been extended due to ill-health and Mr Marginson had also been absent and unwell, that Mr Marginson was unaware of the matter and that Ms Fryer had resigned as a director.

14. Although I do not doubt that the facts set out in that way may be correct they do not provide a proper explanation why the claim, apparently properly served upon the respondent, was not considered and a response filed within the time allowed by the rules. Those points do not begin to explain why, for example in the absence of Ms Fryer or Mr Marginson other members of the respondent's staff did not take steps to comply with the requirement to serve a response. Even if there was no director available a letter to the tribunal asking for more time would have been a simple and effective step.
15. However, of more significance in my judgment, is the response to the 2nd requirement, namely to set out the facts relied upon in support of the defence to the claim. As to that, the respondent simply refers in bullet points to the claimant's contract of employment, the staff handbook and the invitation to discuss her grievance.
16. I have read those documents carefully. The handbook provides no assistance on the circumstances in which the respondent might be entitled to make deductions from wages. There is simply no mention of that circumstance. The same is true of the invitation to the grievance meeting. There is nothing in that letter which says anything about deductions from wages at all.
17. In the statement of main terms and conditions the following set out under the heading "Pay":
- Your wage will be paid at the rate of £8 per hour by BACS at 4-week intervals in arrears.
- We have the right to deduct from your pay, or otherwise to require prepayment by other means, any sum which you owe to us including, without limitation, any overpayment of pay or expenses, loans made to you by ask, or any other item identified in this Statement and/or the Employee Handbook as being repayable by you to us.
- If you are prevented from attending your place of work and/or performing your job duties as a result of Police bail conditions, or because of an order or direction of the Court all relevant regulatory body, then the duration of such period will be without pay.
- We will ensure compliance with the law on National Minimum Wage/National Living Wage at all times.
- If you have unauthorised absence(s) a deduction will be made at the normal charge rate for the equivalent amount of time taken off.
18. If, which is open to question, the respondent was entitled to make deductions from the claimant's wages it could, construing its own terms of employment, only be in respect of "any sum which you owe to us including... any overpayment of pay or loans".

19. In order to begin to show that it had a defence upon the facts the respondent was required by the tribunal to set out the facts which showed that the withholding of one month's wages satisfied the definition that it had imposed upon its right to withhold wages. The respondent has completely failed to do that.
20. For the avoidance of doubt, even if the respondent had done that in writing I would still have required it to satisfy a judge at a hearing that the terms of the contract were sufficiently drawn so as to afford the respondent the right to make the deduction and to identify on proper evidence the basis on which a month's wages had been withheld from the claimant.
21. Taking those matters into account and, still not being satisfied that the respondent has, despite repeated opportunities over a period of a year, provided a proper opportunity for the failure to present a response, I am not satisfied that it is just and equitable to take any decision other than to refuse the application for revocation and confirm the judgment against the corporate respondent.

Employment Judge Tom Ryan

Date 23 January 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
28 January 2020

FOR THE TRIBUNAL OFFICE

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