# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms H Romanowska**

**Respondent:** **Tesco Stores Limited**

## JUDGMENT
## ON A RECONSIDERATION

The claimant's application received on 28 October 2019 for reconsideration of the Judgment sent to the parties on 9 September 2019, and which was resent to the claimant on 15 October 2019, is refused.

## REASONS

There is no reasonable prospect of the original decision being varied or revoked, because:

1. I have considered the claimant's application for reconsideration of the Judgment. The application was sent by the claimant and received by the Tribunal on 28 October 2019. It consists of 3 pages of submissions with attachments that the Tribunal has seen before. I have taken the contents of the application into account.

**Rules of Procedure**

2. Rule 72(1) of the 2013 Rules of Procedure empowers me to refuse the application without convening a reconsideration hearing if I consider there is no reasonable prospect of the original decision being varied or revoked.

3. The test is whether it is necessary in the interests of justice to reconsider the Judgment (rule 70). Broadly, it is not in the interests of justice to allow a party to reopen matters heard and decided, unless there are special circumstances, such as a procedural mishap depriving a party of a chance to put their case or where new evidence comes to light that could not reasonably have been brought to the original hearing and which could have a material bearing on the outcome.

**The application**

4. The claimant failed in her claim of unauthorised deductions from wages because the Tribunal decided, at a preliminary hearing on 6 September 2019, that the claim had not been presented to the Tribunal in accordance with the provisions of section 23 of the Employment Rights Act 1996, in circumstances where the Tribunal was satisfied that it was reasonably practicable to present the claim before the end of that period of 3 months. The claimant's application for reconsideration expresses her dismay and disagreement with the conclusion that her claim should be dismissed.

5. Despite the points raised in her application, there is no reasonable prospect of the claimant establishing that the Tribunal made an error of law, or that any of the conclusions on the time point were perverse. Such contentions are in any event better addressed in an appeal than by way of reconsideration.

The preliminary hearing

6. The Tribunal listed a preliminary hearing because the last of the alleged deductions from wages was said to have occurred on 24 August 2018, such that the time limit for presenting a claim expired on 23 November 2018 (plus any further period of time arising from the compliance with early conciliation). The claimant engaged in ACAS early conciliation from 30 January 2019 to 18 February 2019 and presented her claim on 21 February 2019 which was out of time.

7. Section 23(4) of the Employment Rights Act 1996 provides that an extension of time for presentation of a claim of unauthorised deductions from wages can be granted where the Tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of the relevant period of 3 months and where the complaint was presented within such further period as the Tribunal considers reasonable.

8. The relevant factual background in this case is as follows: The claimant worked for the respondent for 12 years and she remains an employee. In late 2017, the claimant had surgery on her knee and was off work, sick, for a lengthy period of time. She returned to work on 1 April 2018. The claimant contends that she was not paid for some overtime worked before her knee surgery in 2017, that she was not paid full sick pay whilst she was off sick and that from May to August 2018 she was underpaid her wages on a number of occasions. The claimant approached her managers about these alleged underpayments but she was not able to resolve matters and so, on 10 September 2018, she raised a grievance. The claimant told the tribunal at the preliminary hearing that her grievance was written for her by a lawyer. The grievance mentions going to ACAS and to the Employment Tribunal. Grievance meetings took place at which

the claimant had a trade union representative with her. The internal grievance procedures were eventually exhausted. Then, on 30 January 2019, the claimant commenced ACAS early conciliation which concluded on 14 February 2019 when an ACAS certificate was issued. On 21 February 2019, the claimant presented her ET1.

9. Applying the relevant law to the facts in the case, the Tribunal's conclusions at the preliminary hearing were as follows:

9.1 The claim is out of time because it was not being presented, through a first approach to ACAS for early conciliation, within the period of 3 months from the last deduction complained of, as prescribed by section 23(4) ERA.

9.2 It was reasonably practicable for the claimant to have presented her claim within the applicable 3 months period for the following reasons:

9.3 The claimant contended that the internal grievance proceedings had prevented her from bringing her claim earlier. At the preliminary hearing, Counsel for the respondent referred the Tribunal to the case of Palmer and Another v Southend-on-Sea Borough Council [1984] 1 All ER 945 in which the Court of Appeal held that the existence of an impending appeal was not of itself sufficient to justify a finding that it was not reasonably practicable to present a claim within a time limit. The Tribunal considered itself bound by the decision in Palmer - it is not a sufficient reason to say that it was not reasonably practicable to present a claim in time because internal proceedings were ongoing, and ignorance of rights or time limits at that stage is not just cause.

9.4 The Tribunal noted that, during the grievance proceedings, the claimant had had the benefit of assistance from her trade union. She had also consulted a lawyer because she told the Tribunal that a lawyer wrote her grievance for her. The grievance letter specifically mentions going to ACAS and to an Employment Tribunal. Therefore, the Tribunal considered that either the lawyer or the trade union representative, or possibly both, were aware, in early September 2018, of the possibility of a claim to the Employment Tribunal and it follows that they would have been aware that time limits would apply. The Tribunal relied upon the case of Dedman v British Building and Engineering Appliances [1974] ICR 53 which held that where a claimant engages a skilled adviser and they make a mistake the remedy is against the adviser.

9.5 The claimant also contended that illness had prevented her from submitting her claim in time. However, the Tribunal noted that the claimant was not off work, sick in September 2018 or in November

2018, when she was at work and attending grievance meetings. In those circumstances the Tribunal concluded that the claimant was either aware of the time limits herself or was being advised by people who were so aware at the relevant time.

9.6 The Claimant told the Tribunal at the preliminary hearing that she had believed that the Respondent would pay her and that she would not need to take legal proceedings or go to Tribunal and so she had waited for them to pay her. That belief has been shown to be incorrect and her delay in the hope of payment is not a reason to extend time.

10. The claimant's application for reconsideration contains a limited number of substantive points. I have considered each point in turn.

10.1 The claimant says that when she returned from sickness absence in April 2018, she did not have access to her payslips because the respondent had changed the payroll system, and that it was only later, when she gained access to the respondent's online system, that she realised that some payments were missing. I note however that, at the material time, the claimant was able to present a grievance in September and obtained assistance from her trade union. At that stage, she was in time to present a claim.

10.2 At the end of June 2018, the claimant suffered a family bereavement and had to travel to Poland for the funeral. She returned on 1 July 2018. Unfortunately, I do not see how this affected the claimant's ability to present a claim some months later in the year.

10.3 The claimant says that the respondent had delayed the grievance process in the hope that she would not do anything until after the grievance process had concluded. There is no evidence that the respondent delayed the grievance process and, in any event, given the Judgment in Palmer, such can have no effect on the requirement for the claimant to present her claim.

10.4 The claimant considers that the 3 months period should be counted from the date of the last grievance meeting and that if it was, her claim would be in time. However, the statutory provisions on time limits are clear and the Tribunal is bound by them.

10.5 The claimant says that ACAS did not tell the claimant that her claim was out of time. However, ACAS is not an advisory body and it remains the fact that the claimant had consulted a lawyer, and also had the benefit of trade union assistance.

11. In all the circumstances, it was reasonably practicable for the claimant to have presented her claim within the applicable 3 months period. The test for an extension of time is not a vehicle for an Employment Judge simply to exercise their discretion to admit the claim. The Tribunal must look at whether there was a just cause or excuse for the delay and the failure. In this case the Tribunal decided that there was no just cause or excuse.

12. Many of the matters to which the claimant refers in her application were considered by the Tribunal at the preliminary hearing and in the course of its deliberations. It is not in the interests of justice to reopen such mattes once decided.

13. I am also satisfied that the Tribunal clarified the issue to be determined at the preliminary hearing on 6 September 2019, the procedure for the preliminary hearing and the purpose of submissions to the claimant and assisted her in that regard by taking her through each aspect of the legal test to be applied and the issues to be determined.

**Conclusion**

14. Having considered all the points made by the claimant I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The application for reconsideration is refused.

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Employment Judge Batten
Date: 12 February 2020

JUDGMENT SENT TO THE PARTIES ON:

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FOR THE TRIBUNAL OFFICE