HC

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Esundale**

Respondent: **One Money Mail Limited**

Heard at: **London Central Employment Tribunal** **On: 28 April 2020**

Before: **Employment Judge H Clark (sitting alone)**

RECONSIDERATION

The Respondent's application for a reconsideration of its judgment dated 6 April 2020 is refused.

REASONS

1. By an email dated 20 April 2020 the Respondent asked for a reconsideration of the Tribunal's judgment of 6 April 2020. The aspect of the judgment about which the application relates concerns the Tribunal's calculation of the Claimant's entitlement to holiday pay, which was based on his 12 months' engagement. The Respondent asserts in the reconsideration application that the Claimant's award should have been limited to 9 months' accrued holiday pay.

The Law

2. The Tribunal has the power to reconsider its Judgments under rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 where it is "*necessary in the interests of justice to do so."* Examples from case law of circumstances where the interests of justice might require a reconsideration are: where relevant evidence subsequently comes to light which was not available at the time of the hearing, where a material error in the procedure at a hearing leads to an injustice, where a party did not have notice of a hearing or where the parties and Tribunal proceed on the basis of a mistaken understanding of the law. The Rules themselves do not define such circumstances (although used to do so), so the Tribunal has a wide discretion, although the "interests of justice" refers to the interests of both parties, not just the disappointed party.

3. Pursuant to rule 72 of the 2013 Rules, if an Employment Judge considers that there is no reasonable prospect of the original decision being varied or

revoked, there is no need to invite the parties' views as to whether the application can be determined on paper or whether a further hearing is needed.

4. The reconsideration procedure should not be used simply as an opportunity for an unsuccessful litigant to re-argue his or her case. There is a public interest in the finality of litigation, which is not furthered if parties are permitted to make more detailed or different submissions to those which they made at the first hearing, to put their claim on a different basis in light of the Tribunal's findings or to adduce evidence which was reasonably available to them at that hearing. Any power under the 2013 Rules should be exercised in accordance with the overriding objective, which includes ensuring that parties are on an equal footing.

The Application

5. The Respondent's application sets out the following:

"*The Claimant was engaged from the 1st of October 2017 until the 4th of October 2018. Holiday pay was awarded for the complete period. In the absence of a contract of employment, holiday pay from October to December could not have been carried over. Therefore, applying the case of Bear Scotland v Fulton [2015] CMLR 40 holiday pay should only have been awarded for 1st January 2018 until 4th October 2018.*

The case of King v The Sash Window Workshop Ltd CJEU C-214/16 does not apply in this case in that the Claimant was not 'prevented' from taking or claiming his holiday from October 17 until December 31st in that the claimant could have made a claim for worker or employee status at that time.

Accordingly, the Tribunal does not have jurisdiction to make an award in respect of holiday pay from the 4th October 2017 to the 31st December 2017.

In the interest of justice, the award should be recalculated accordingly giving a revised award of £4,218,75 (being ¾ of the amount originally awarded)."

Conclusions

6. The Tribunal notes that the Claimant's claim for holiday pay was not the subject of any written submissions by the Respondent (beyond relating to his lack of status) following the substantive hearing. The above submissions could and should have been made prior to the Tribunal's judgment.

7. The written agreement between the parties made no provision for the payment of holiday pay and did not specify when the holiday year would run. The Claimant's claim for holiday pay arises under the Working Time Regulations 1998. Regulation 13 provides as follows:

Entitlement to annual leave

"13.—(1) Subject to paragraph 5, a worker is entitled to four weeks' annual

leave in each leave year.
(2) ….
(3) A worker's leave year, for the purposes of this regulation, begins—

(a)on such date during the calendar year as may be provided for in a relevant agreement; or

(b)where there are no provisions of a relevant agreement which apply—

(i)if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or

(ii)if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date."

8. As there was no "relevant agreement" in relation to the Claimant's engagement and his engagement commenced after 1 October 1998, his leave year started on the date his engagement began, namely 4 October 2017. It was not necessary for him to "carry over" his leave from October to December 2017, as the Claimant was only engaged for 12 months, that is to say, for one complete leave year starting on 4 October 2017. He was, therefore, entitled to one year's accrued annual leave. As such, the Respondent's application for reconsideration has no reasonable prospects of being varied or revoked and is refused.

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Employment Judge Clark

Dated: 28 April 2020

DECISION SENT TO THE PARTIES ON

30/04/2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS