EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103131/2019

Held in Glasgow on 25 October 2019 (Reconsideration Hearing in chambers)

Employment Judge C McManus

Ms Lynne Sloan	**Claimant** **Written Representations** **In person**
Greenleaf Hygiene Solutions (Scotland) Ltd	**Respondent** **Written Representations** **Mr John O'Donnell - Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of this Tribunal dated 27 June 2019, entered in the register and copied to parties on 1 July 2019, is reconsidered in terms of Rules 70 to 72 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, and is confirmed without variation.

REASONS

Introduction

1. On 9 July 2019, the respondent's representative made an application for reconsideration of my Judgment made following the Final Hearing in this case on 7 June 2019. The Judgment which is reconsidered is dated 27 June 2019, entered in the register and copied to parties on 1 July 2019.

2. This reconsideration is made in terms of Rules 70 to 72 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 ('the ET Procedure Rules').

Issue

3. The respondent's representative's reconsideration application contends that reconsideration is necessary in the interest of justice because the Judgment shows an incorrect calculation and the claimant is entitled to the gross sum of £154.64 and not £265.10 as awarded. Reliance is placed on what is set out in the respondent's representative's email of 9 July 2019.

Initial Consideration of Reconsideration Application

4. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('the Procedure Rules') set out at Rule 70 – 73 provisions in respect of reconsideration of Judgments.

5. The respondent is represented by a solicitor, Margaret Gribbon, although the respondent's representative at the hearing on 7 June 2019 was a Director of the respondent, Mr John O'Donnell. Ms Gribbon's email to the Employment Tribunal office of 9 July 2019 made this reconsideration application in reliance of the terms of a forwarded separate email from Mr O'Donnell, also dated 9 July. The respondent's position was set out as being that the reconsideration application can be dealt with without a Hearing

6. On 19 July 2019, email correspondence was sent from the Employment Tribunal office to both parties acknowledging the respondent's solicitor's application for a reconsideration of the Judgment dated 27 June 2019. This email informed that EJ McManus, who heard the case, was on annual leave and was due to return in mid-August.

7. The respondent's solicitor's email of 9 July 2019 was submitted in time, within 14 days of the date that the Judgment was sent to parties on 1 July 2019, and the application set out why reconsideration was considered to be necessary in the interests of justice. The application had been copied to the claimant. The application complied with Rule 71 of the Procedure Rules. I did not refuse the application at Initial Consideration, under Rule 72.

8. On 27 August 2019, correspondence was sent from the Employment Tribunal Office to the parties, informing that the application for reconsideration had not been refused on initial consideration and that any response to the application should be made by 10 September 2019. Parties were advised in this correspondence that the reconsideration application was brought to my attention on my return to office on 26 August 2019 and an apology was given for the delay. The following provisional view on the application was expressed:-

"Parties are reminded that the decision is made on the basis of the findings in fact set out in the Judgment dated 27 June 2019. "

9. On 4 September 2019, the claimant sent an email to the Employment Tribunal Office, copied to the respondent's solicitor, in the following substantive terms:-

"Please note I have no interest in pursuing this any further….

I have found the whole process extremely stressful. I also wish to state that I am unhappy with the decision on the report, mainly the part where it is noted that J O'Donnell and L Dougal were regarded as more credible witnesses than myself."

10. That correspondence was acknowledged by email from the Employment Tribunal office to both parties on 5 September 2019. In that email parties were informed that I considered that in terms of Rule 72(2) a Hearing is not necessary in the interests of justice. That email invited either party's comments on the position that the decision was made on the findings in fact made following the Hearing, to be received in writing by 5pm on 23 September 2019. On 7 October 2019 correspondence was sent from the Employment Tribunal office to both parties, informing that I had decided that the reconsideration of the Judgment dated 27 June 2019 should take place on the basis of parties making written representations, rather than a Hearing taking place. Any further written representations or information which either party wished to be taken into account in this reconsideration were invited by 21 October 2019. The respondent's solicitor confirmed on 8 October that the

respondent had no further written representations to make beyond those contained in the forwarded email from Mr O'Donnell of 9 July 2019. On 23 October 2019 correspondence was sent to the parties from the Employment Tribunal office informing that the reconsideration in chambers would be on 25 October 2019, and not 23 October. Parties were given the opportunity to provide any further written representations of information by 24 October 2019. No further correspondence was received from either party.

11. The Reconsideration Hearing was scheduled to take place in the Glasgow Employment Tribunal offices on 23 October 2019, with that reconsideration being by way of my consideration of parties' representatives' written submissions only. Parties' representatives were not in attendance. The reconsideration was re-scheduled to 25 October due to other requirements of the Employment Tribunal.

12. I was satisfied that it is in line with the overriding objective set out in Rule 2 of the Procedure Rules for this matter to be dealt with without a Hearing.

Relevant Law

13. The reconsideration is dealt with in terms of Rules 70 to 72 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1. In terms of Rule 70, at this Reconsideration Hearing, the Judgment might be confirmed, varied or revoked. The Tribunal's overriding objective, under Rule 2, to deal with the case fairly and justly, applies.

14. The previous Employment Tribunal Rules 2004 provided a number of grounds on which a judgment could be reviewed (now called a reconsideration). The only ground for reconsideration in the Employment Tribunal Rules of Procedure 2013 Rules is set out in Rule 70 and is '*where it is necessary in the interests of justice*" to do so. That means justice to both sides. That phrase is not defined in the Employment Tribunals Rules of Procedure 2013, but it is generally accepted that it encompasses the five separate grounds upon which a Tribunal could "*review"* a Judgment under the former 2004 Rules.

15. Reconsideration of a Judgment is one of the two possible ways that a party can challenge an Employment Tribunal's Judgment. The other way is by appeal to the Employment Appeal Tribunal.

16. Although there are some differences between the current Rules 70 to 73 and the former Rules 33 to 36, it was confirmed by HHJ Eady QC in *Outasight VB Limited v Brown* [2015] ICR D11, that the guidance given by the Employment Appeal Tribunal in respect the 2004 Rules of Procedure is still relevant guidance in respect of the 2013 Rules. HH Judge Eady QC said: -

"In my judgment, the 2013 Rules removed the unnecessary (arguably redundant) specific grounds that had been expressly listed in the earlier Rules. Any consideration of an application under one of the specified grounds would have taken the interests of justice into account. The specified grounds can be seen as having provided examples of circumstances in which the interests of justice might allow a review. The previous listing of such examples in the old Rules - and their absence from new - does not provide any reason for treating the application in this case differently simply because it fell to be considered under the "interests of justice" provision of the 2013 Rules. Even if it did not meet the requirements laid down in Rule 34(3)(d) of the 2004 Rules, the ET could have considered whether it should be allowed as in the interests of justice under Rule 34(3)(e). There is no reason why it should then have adopted a more restrictive approach than it was bound to apply under the 2013 Rules".

17. Her Honour Judge Eady QC, provided further judicial guidance on reconsiderations in *Scranage v Rochdale Metropolitan Borough Council* [2018] UKEAT/0032/17. At paragraph 22, when considering the relevant legal principles, she stated as follows: -

"The test for reconsideration under the ET Rules is thus straightforwardly whether such reconsideration is in the interests of justice (see Outasight VB Ltd v Brown UKEAT/0253/14 (21 November 2014, unreported). The "interests of justice" allow for a broad discretion, albeit one that must be exercised

judicially, which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation."

18. In *Dundee City Council v Malcolm [2016] UKEATS/0019-21/15*, the then EAT President, Mr Justice Langstaff stated, at paragraph 20, that the current Rules effected no change of substance to the previous Rules, and that they do not permit a claimant to have a second bite of the cherry, and the broader interests of justice, in particular an interest in the finality of litigation, remained just as important after the change as it had been before.

19. The Court of Appeal in *Ministry of Justice v Burton & Another* [2016] EWCA Civ.714, also reported at [2016] ICR 1128, referred to HH Judge Eady's comments. At paragraph 25, Lord Justice Elias, refers, without demur, to "*the principles recently affirmed by HH Judge Eady in the EAT in Outasight VB Ltd v Brown UKEAT/0253/14."* Further, at paragraph 21 in *Burton*, Lord Justice Elias stated :-

"An employment tribunal has a power to review a decision "where it is necessary in the interests of justice": see Rule 70 of the Tribunal Rules. This was one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, as Underhill J, as he was, pointed out in Newcastle on Tyne City Council v Marsden [2010] ICR 743, para. 17 the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily…"

20. Mr Justice Underhill commented on the introduction of the overriding objective (now found in Rule 2 of the 2013 Rules) and the necessity to review previous decisions, and on the subject of a review, in providing guidance to Tribunals

in Newcastle upon Tyne City Council – v- Marsden [2010] ICR 743, as follows:-

"But it is important not to throw the baby out with the bath-water. As Rimer LJ observed in Jurkowska v Hlmad Ltd. [2008] ICR 841, at para. 19 of his judgment (p. 849), it is "basic" "… that dealing with cases justly requires that they be dealt with in accordance with recognised principles. Those principles may have to be adapted on a case by case basis to meet what are perceived to be the special or exceptional circumstances of a particular case. But they at least provide the structure on the basis of which a just decision can be made.

The principles that underlie such decisions as Flint and Lindsay remain valid, and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles. In particular, the weight attached in many of the previous cases to the importance of finality in litigation – or, as Phillips J put it in Flint (at a time when the phrase was fresher than it is now), the view that it is unjust to give the losing party a second bite of the cherry – seems to me entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final (subject, of course, to appeal").

21. The approach to be taken to applications for reconsideration was considered by Mrs Justice Simler, then President of the EAT, in *Liddington v 2Gether NHS Foundation Trust [2016] UKEAT/0002/16/DA.* That relates to the stage of initial consideration, but the comments of Mrs Justice Simler at paragraph 34 and 35 of her Judgment are relevant to the present case. These are as follows:

"34.In his Reconsideration Judgment the Judge identified the Rules relating to reconsideration and in particular to the provision in the Rules enabling a Judge who considers that there is no reasonable prospect of the original

decision being varied or revoked refusing the application without a hearing at a preliminary stage. In this case, the Judge addressed each ground in turn. He considered whether there was anything in each of the particular grounds relied on that might lead him to vary or revoke his decision. For the reasons he gave, he concluded that there was nothing in the grounds advanced by the Claimant that could lead him to vary or revoke his decision, and accordingly he refused the application at the preliminary stage. As he made clear, a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered. Tribunals have a wide discretion whether or not to order reconsideration, and the opportunity for appellate intervention in relation to a refusal to order reconsideration is accordingly limited.

35. Where, as here, a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application. It seems to me that the Judge was entitled to conclude that reconsideration would not result in a variation or revocation of the decision in this case and that the Judge did not make any error of law in refusing reconsideration accordingly.'

22. There is a public policy principle that there must be finality in litigation and reviews or reconsiderations are a limited exception to that principle. In *Stephenson v Golden Wonder Limited [1977] IRLR 474* it was made clear that a review (now a reconsideration) is not a method by which a disappointed

litigant gets a *"second bite of the cherry*". Lord Macdonald, the Scottish EAT Judge, said that the review provisions were "*not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence produced which was available before".*

23. In *Fforde v Black EAT68/80*, the EAT set out that this ground does not mean "*that in every case where a litigant is unsuccessful he is automatically entitled to have the Tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in even more exceptional cases where something has gone radically wrong with the procedure involving the denial of natural justice or something of that order."*

24. The interests of justice in reconsideration, means the interests of justice to both sides. The Employment Appeal Tribunal provided further guidance in *Reading v EMI Leisure Limited EAT262/81,* where it was stated "*when you boil down what it said on [the claimant's] behalf it really comes down to this: that she did not do herself justice at the hearing so justice requires that there should be a second hearing so that she may. Now, "justice", means justice to both parties. It is not said, and, as we see it, cannot be said that any conduct of the case by the employers here caused [the claimant] not to do herself justice. It was, we are afraid, her own inexperience in the situation."*

25. Following *Lindsay v Ironsides Ray and Vials 1994 ICR 384, EAT*, the failings of a party's representative, professional or otherwise, will not usually constitute a ground for review. There are exceptions to that norm, e.g. *Newcastle upon Tyne City Council v Marsden.*

26. Following *Neary v Governing Body of St Albans Girls' School and another 2010 ICR 473 CA,* in an application for review, all relevant all relevant facts and circumstances should be taken into account.

27. In *Yorkshire Engineering and Welding Co Ltd v Burnham 1974 ICR 77 NIRC,* it was held that '*the tribunal's errors fell well within the range of error inherent*

in any form of forecasting'. The test for a Tribunal is considering applications for review of remedies decisions in which the compensation awarded includes an element of future loss was set out as follows:-

"That the test for an industrial tribunal to decide whether or not to review a decision was whether the forecasts that were the basis for the decision have been falsified to a sufficiently substantial extent to invalidate the Tribunal's assessment, and whether that falsification occurred so soon after the decision that a review is necessary in the interests of justice; but that in the present case since the facts were not in the event substantially different from what was forecast the tribunal had rightly refused a review of their decision."

Respondent's Application for Reconsideration

28. The respondent's position is that it is in the interests of justice for the Tribunal to reconsider its Judgment dated 27 June 2019, for the reasons set out in the respondent's Director's email of 9 July 2019. I have now considered the full terms of that email and the comments made on the Judgment of 27 June 2019. There are no substantive submissions from the claimant, her only communication in respect of the reconsideration application being the email referred to above.

Decision

29. The Judgment of 27 June 2019 is a Judgment as defined in Rule 1(3) (b) of the Employment Tribunals Rules of Procedure 2013. It finally disposed of the claimant's claim against the respondent, by setting out the remedy following the claimant's claims of unpaid wages. That disposal was on the basis that some, but not all of what was claimed by the claimant to be unpaid wages due to her from the respondent was successful, as set out in that Judgment. I made findings in fact on the evidence before me at the Final Hearing. I applied the relevant law to my findings in fact and made my decision on remedy, all as set out in the 17 page Judgment dated 27 June 2019.

30. In this reconsideration, I have carefully considered the written submissions, and my obligations under Rule 2 of the Procedure Rules in terms of the overriding objective to deal with the case fairly and justly. The full terms of the respondent's representative's email of 9 July 2019 have been considered. A reconsideration application is not and should not be allowed to be an opportunity to repeat submissions already made or raise submissions which could have been made. Findings in fact were made on the evidence before me at the Final Hearing. The respondent should not use the reconsideration process to restate their position or to seek to change the evidence before the Tribunal. It is not in the interests of justice to allow a party to 'have another go' if they do not like the outcome of a hearing. The decision was made on the findings in fact. The findings in fact were made on the bass of the evidence at the Final Hearing.

31. The Judgment of 27 June 2019 sets out Findings In Fact which were made by me on my assessment of the evidence which was brought before me at the Final Hearing on 7 June. Those Findings In Fact are set out in pages 7 – 13 (at paragraphs 19 – 38). The findings in fact includes, at para 25 of the Judgment, a table which, as stated in the findings in fact, accurately sets out the respondent's position in respect of the claimant's attendance at work for the respondent in the period from 3 December 2018 to 4 January 2019, and accurately sets out the payments made to the claimant by the respondent in respect of that period, and the basis on which those payments were made by the respondent.

32. There is nothing in the respondent's submissions that establishes or suggests that something has gone wrong at or in connection with the Judgment dated 28 June 2019, nor that something has happened since the Final Hearing in this case which makes the Judgment of 28 June 2019 unjust. It has not been argued that any significant event has occurred affecting the position set out in the Judgment dated 28 June which was not or could not have been known as at the dates of the Remedy Hearing.

33. In his email of 9 July 2019, Mr O'Donnell seeks to further comment on the position. At the Final Hearing, I heard evidence on the reasons why the respondent chose not to make payments (e.g. in respect of 12 December absence). That evidence is taken into account in the Judgment of 27 June 2019.

34. It is in the interests of justice for the decision on payment of SSP to be taken in line with the statutory provisions set out in the Social Security Contributions and Benefits Act 1992. That has been done, as referenced at para 46 of the Judgment. On that basis, account has been taken in the Judgment (as set out at para 46, lines 7 – 8, that SSP is not payable for the first 3 qualifying days in any period of entitlement. For that reason, the Judgment reflects that 3 days of the claimant's absence in December 2017 (3, 4 & 12 December) did not lead to an entitlement to SSP. It is in the interests of justice to ensure that the Judgment accurately reflects those statutory provisions

35. The respondent's relies in the reconsideration application on the claimant's absences on 3 & 4 December 2018 being a separate period of incapacity from her absences later in December 2018. It was not argued before me at the Final Hearing that that the period of absence starting on 12 December was a new period of incapacity in terms of the Social Security Contributions and Benefits Act 1992. Section 152 of the Social Security Contributions and Benefits Act 1992 defines '*period of incapacity for work*'. This includes the following provisions:-

"…

(3) any two periods of incapacity for work, which are separated by a period of not more than eight weeks shall be treated as a single period of incapacity for work…."

36. On the application of Section 152(2) of the Social Security Contributions and Benefits Act 1992, the claimant's period of incapacity for work began on 3 December 2017.

37. As set out in the findings in fact at paragraph 24. The claimant advised the respondent that she was unfit to attend the meeting on 12 December 2018. In doing so, the claimant self certified as unfit for work. She was then certified by her GP as being unfit for work from 13 December 2018 until 8 January 2019, as set out in the findings in fact at paragraph 24. The claimant was self - certified as unfit for work on 12 December. In terms of the Social Security Contributions and Benefits Act 1992, 12 December 2017 was the third day in a period of incapacity for work, which began on 3 December 2017.

38. The respondent's position in the reconsideration application is that 13 December was a new period of entitlement in terms of the Social Security Contributions and Benefits Act 1992. On the application of section 152(2), the period of entitlement began on 3 December 2017. The claimant is entitled to payment of SSP in respect of absences as set out at paragraph 52 of the decision.

39. In the reconsideration application the respondent seeks to bring new evidence in respect of bank holidays. This evidence was not brought at the Final Hearing and it is not in the interests of justice for the this new evidence to be taken into account.

40. For these reasons, it is not in the interests of justice for any adjustment to be made to figures set out in the judgment issued following the Final Hearing. The respondent seeks the award to be varied from £265.10, with possible deductions for tax and National Insurance, to £154.64 with appropriate deductions. It is not proportionate in terms of the overriding objective in Rule 2 of the Procedure Rules, for further reasoning to be provided. The calculations in the Judgment are accurate based on the findings in fact, and on application of the relevant law, including the Social Security Contributions and Benefits Act 1992.

41. The phrase '*in the interests of justice'* means in the interests of both parties. The respondent is entitled to finality of the litigation in the Judgment (subject

to appeal). The outcome of the reconsideration is confirmation of the Judgment dated 28 June 2019, without variation.

Employment Judge:	C McManus
Date of Judgement:	28 October 2019
Entered in Register, Copied to Parties:	29 October 2019