EMPLOYMENT TRIBUNALS

Claimant: **Ms Lyn Cartmell**

Respondent: **Mr Steven Moore**

JUDGMENT

The respondent's communications dated 5 November 2019, 7 March 2020, 20 June 2020 and 18 September 2020 are treated as an application for reconsideration of the judgment dated 21 October 2019 sent to the parties on 12 November 2019. The application for reconsideration is refused.

REASONS

1. I have undertaken preliminary consideration of the respondent's application for reconsideration of the judgment upholding the claimant's claims for payment of wages following a hearing on 21 October 2019.

Hearing and judgment

2. At a hearing on 21 October 2019 the respondent was ordered to pay the claimant the sum of £2,275.04 in respect of a failure to pay the claimant the national minimum wage for the period 16 July 2018 to 5 November 2018 and the sum of £273.20 in respect of the failure to pay the applicable minimum wage for the period 6 November 2018 to 28 December 2018. The written judgment was sent to the parties on 12 November 2020.

3. The judgment was based upon the respondent's concession that the claimant was paid a fixed gross rate for each week worked for an agreed number of hours worked during the relevant periods. The respondent had been candid in accepting that he had not considered the national minimum wage rules when agreement was reached as to the sums being paid to the claimant for the hours she worked. The agreed rate paid for the weeks in question resulted in the rate paid per hour being less than the applicable national minimum wage.

Respondent wishes judgment to be reconsidered

4. The respondent wrote to the Tribunal on 5 November 2019 stating that he wished to appeal the decision as he alleged he had already paid the claimant the sums ordered. He sought written reasons for the decision.

Respondent asked to provide specific basis for reconsideration

5. On 4 January 2020 the respondent was advised that the Tribunal's judgment was issued in writing on 12 November. The respondent was directed to Rules 70 to 72 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 with regard to an application for reconsideration and told to provide specific grounds for any reconsideration application.

6. On 16 January 2020 the respondent wrote to the Tribunal asserting that he had paid the claimant the money ordered.

7. On 17 January 2020 the claimant wrote to the Tribunal saying that the sums the respondent had paid her was the weekly pay that had been agreed by the respondent as due to her. She was paid a fixed weekly amount. The sums paid were arrears in respect of this fixed weekly amount. Those sums had been taken into account in the judgment (see paragraph 15).

Respondent asked to set out where the error in the judgment was

8. On 14 February 2020 the respondent was asked to set out which parts of the judgment are disputed (given the judgment was based on the respondent's agreement as to the applicable sums and hours) and why there was an error in light of the respondent's position.

9. On 7 March 2020 the respondent wrote to the Tribunal stating that he had paid the claimant "backpay and sick pay" between 19 January 2019 to 24 April 2019 which totalled £3003.

10. On 6 April 2020 the claimant's comments were sought on the foregoing and the respondent was asked to state which parts of the judgment were disputed. The respondent was referred to paragraph 15 of the judgment where it was noted that the respondent accepted that the claimant was only ever paid the maximum weekly sum of £178 gross. The respondent sometimes paid less than this but made up the sums by overpaying in subsequent weeks. The respondent accepted at the hearing that he was not aware of the minimum wage rules and had not checked the position. The hours the claimant worked were not in dispute. The sum paid was not in dispute. This resulted in the sums that were agreed to be paid to the claimant (for the hours it was agreed she worked) being less than the minimum wage. The respondent was asked to set out what specifically he disputed in terms of the judgment.

11. On 6 April 2020 the claimant confirmed that the sums referred to by the respondent were the sums that were due to the claimant to pay the agreed weekly amount. She had not been paid sums in excess of that set out in the judgment. In other words the sums referred to by the respondent in his

application were the "top up payments" he made to ensure the agreed weekly rate was paid, even if not paid at the time.

12. On 14 April 2020 the respondent wrote to the Tribunal asking why he was being asked the questions now.

Respondent given further opportunity to set out where the error was

13. On 12 June 2020 the respondent was referred to rule 70 and 72 of the Tribunal Rules. It was noted that to allow the Employment Judge to decide whether or not there are reasonable prospects of the judgment being varied the respondent should consider the terms of the judgment carefully and provide a written response to the following 2 questions:

    a. At paragraph 15 of the judgment it is stated that the respondent accepted what the claimant was paid and for which hours. Is this paragraph correct and if not what is the correct factual position?
    b. Does the respondent argue that there were payments made which were not taken into account? If so please state what these are and for what periods.

14. The respondent was advised that once it was clear as to what precisely the error was, further procedure could be considered.

15. On 12 June 2020 the claimant confirmed that the sums referred to by the respondent were not sums in excess of those referred to in the judgment.

16. On 20 June 2020 the respondent referred to the sums to which previous reference was made.

Respondent given final opportunity to set out where the error was

17. On 10 September 2020 the following communication was issued to the respondent:

    "Employment Judge Hoey has considered the respondent's letter of 20 June 2020 in which he states that he had paid the claimant sums of money after January 2019.

    The claimant in an email of 12 June 2020 stated that the respondent paid the claimant £100 a week from January to April 2019 which was payment in respect of arrears at the agreed rate of £178 per week.

    The respondent accepted at the hearing that he had agreed to pay the claimant £178 gross a week. Paragraphs 11 to 15 set out what was agreed between the parties.

    At paragraph 15 of the judgment it is noted that the claimant accepted that she had been paid less than £178 a week but this was often made up by overpayment in subsequent weeks (which appears to be the sums referred to by the respondent in his letter of 20 June).

    The respondent is given one final opportunity to explain if any of the foregoing is incorrect and if so why, in particular the facts as agreed by the parties set out at paragraphs 9 to 15 of the judgment.

The respondent is given 21 days from the date of this letter to set out the position to allow a final decision to be made in respect of the reconsideration application."

18. On 18 September 2020 the respondent replied repeating essentially what he had said in his letter of 20 June 2020. He said that at the hearing he could not refer to anything that had happened after January 2019. He did not set out what parts of the judgment he maintained was incorrect or what additional sums were paid in excess of those set out in the judgment.

The Law

19. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70).

20. Rule 72(1) of the 2013 Rules of Procedure empowers me to refuse the application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked.

21. The importance of finality was confirmed by the Court of Appeal in **Ministry of Justice v Burton and anor [2016] EWCA Civ 714** in July 2016 where Elias LJ said that:

"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; and in Lindsay v Ironsides Ray and Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."

22. Similarly, in **Liddington v 2Gether NHS Foundation Trust EAT/0002/16** the EAT chaired by Simler P said in paragraph 34 that:

"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 by 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."

23. In common with all powers under the 2013 Rules, preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay. Achieving finality in litigation is part of a fair and just adjudication.

The application

24. The judgment issued by the Tribunal set out what was agreed between the parties. The claimant was paid £178 gross per week. Where there were weeks whereby the sums paid to her were less than this, subsequent payments were made to ensure she received £178 per week. That appears to be the sums to which the respondent refers in his application.

25. It was accepted at the hearing that the claimant worked 16 hours a week in the period 16 July 2017 to 5 November 2018. That was a 16 week period. For each hour she worked during that period she was paid the gross hourly rate of £4.56 which was less than the then applicable national minimum hourly rate of £7.83. The respondent did not suggest (and there is no evidence to suggest) that the claimant received a greater sum for those hours.

26. It was accepted at the hearing that the claimant worked 30 hours a week for the period 6 November 2018 to 28 December 2018. That resulted in the gross hourly rate of £5.93 being paid to the claimant which was less than the then applicable national minimum hourly rate of £7.83. The respondent did not suggest (and there is no evidence to suggest) that the claimant received a greater sum for those hours worked.

27. The foregoing represented what the respondent agreed at the hearing. The respondent was candid in his approach and accepted that he had not checked what the national minimum wage was. The judgment that was issued was based upon the hours the claimant worked and the sums paid for those hours, both of which were confirmed by the respondent during the hearing.

28. The respondent was given a number of opportunities to set out what he believed the errors to be or if there were further sums paid in excess of what is set out in the judgment. The sums to which he refers appear to be the sums paid to the claimant to ensure the agreed £178 was paid to her. That was what was confirmed at the hearing and was the gross sum taken into account, even if the claimant on occasion was paid less than £178 at the time.

29. I have carefully considered the correspondence submitted by the respondent. The respondent has not referred to the areas in the judgment that are alleged to be incorrect. The documents submitted following the judgment appear to support the facts set out in the judgment. The respondent was given a fair opportunity to explain what the error was or if there was additional relevant information that had not been taken into account. He was told that the additional information he was presenting appeared to be confirmation of the back pay to ensure the claimant received the agreed rate (which was the rate taken into account in the judgment). He did not state this was incorrect.

30. The respondent has not therefore presented any new evidence or a compelling reason as to why the original decision should be reconsidered. There is no basis to find that the figures presented at the hearing in respect of the agreed weekly sum and the agreed number of hours worked were incorrect. From that information the claimant was paid an hourly rate

less than the then applicable national minimum wage rate. The respondent has now provided any reason to explain why that conclusion was wrong.

Not in the interests of justice to allow reconsideration

31. The respondent had not provided any evidence that shows the Tribunal has missed something important or that new evidence is being presented that could not reasonably have been put forward at the time. The respondent set out the hours worked and sums paid. Judgment was issued on the basis of the information before it.

32. The Tribunal considered the facts agreed between the parties and reached a conclusion in light of those facts whilst applying the law.

Conclusion

33. Having considered the points made by the respondent I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The points of significance were considered and addressed at the hearing. It is not in the interests of justice to reconsider the decision the Tribunal reached.

34. The application for reconsideration is therefore refused under rule 72(1) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Employment Judge Hoey

Dated: 30 September 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

.28 January 2021

FOR THE TRIBUNAL OFFICE