EMPLOYMENT TRIBUNALS

Claimant: **Miss S Harvey**

Respondent: **Millers Hair & Beauty Ltd**

Heard at: **Bristol (decision on papers in Chambers)**

On: **12 May 2021**

Before: **Employment Judge Midgley**

JUDGMENT ON APPLICATION FOR RECONSIDERATION

1. The respondent's application for reconsideration was made out of time but the Tribunal exercises its discretion to accept the application as it is in the interests of justice.

2. The application is granted in relation to the calculation of the award of unpaid annual leave. The sum ordered to be paid by the Respondent for unpaid annual leave is varied to £67.47.

3. The application is dismissed in respect of all other grounds.

REASONS

1. The claimant has applied for a reconsideration of the Judgment dated 1 May 2020 which was sent to the parties on 6 May 2020. On 11 May 2020 the claimant requested written reasons. It appears that after the request was referred to the Judge and acknowledged at his direction, the file was mistakenly marked as dormant and in consequence it was not until November 2020 that the file was again referred to the Judge to prepare the written reasons.

2. Written reasons for the Judgment were prepared on 15 December 2020 and were sent to the parties on 11 January 2021 ("the Reasons"). On 16 February 2021, the respondent emailed a letter dated 10 February 2021 which contained its application for reconsideration.

3. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of

Procedure 2013 ("the Rules"). Under Rule 71 an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The application was therefore received outside the relevant time limit. The respondent explains the delay on the grounds that the relevant paperwork had been provided to Peninsular, a consultancy providing employment related services, and had apparently shredded the paperwork given the delay in receipt of the written reasons.

4. In the circumstances, particularly given the considerable delay in the receipt of the written reasons, I exercise my discretion to extend time to permit the application to be considered as it is in the interests of justice to permit the claim to be admitted out of time.

5. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.

6. The grounds relied upon by the respondent are identified in the letter of 10 February 2021 as follows:

    a. There are errors in relation to the calculation of the payment for annual leave.

    b. There are errors in the calculation of the claimant's hourly rate of pay.

    c. The Judge failed to have regard to the statements and documents sent to the Tribunal on behalf of the respondent in reaching its judgment.

7. I deal with the last two of these grounds, as they may be simply addressed. The respondent had entered a response but did not attend or call any witnesses to give evidence at the hearing. As its witnesses were not present to have their evidence tested by cross-examination, I could give their evidence very little weight. In consequence, where their evidence was in conflict with the claimant (whose evidence I heard), I preferred the claimant's, and more generally accepted her evidence for the reasons given in the written reasons. Such evidence included the issue of the claimant's hourly rate of pay. I accepted her evidence as to the applicable rate of pay, in the absence of any challenge to it, because it was supported by the contract. Even now, the respondent has provided no evidence to support the assertion as to the applicable hourly rate in its application.

8. In addition, in so far as the application entreats me to reconsider and review my decision generally, the Employment Appeal Tribunal ("the EAT") in Trimble v Supertravel Ltd [1982] ICR 440 decided that if a matter has been ventilated and argued then any error of law falls to be corrected on appeal and not by review. In addition, in Fforde v Black EAT 68/60 the EAT decided that the interests of justice ground of review 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 the even more exceptional case where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order". This is not the case here. In addition, it is in the public interest that there should be finality in litigation, and the interests of justice apply to both sides.

9. There is therefore no reasonable prospect of the respondent demonstrating that it would be in the interests of justice for the Judgment to be varied or revoked on the last two grounds.

10. However, the respondent challenges the calculation of the judgment in respect of annual leave. Whilst, for the same reasons as given above, the respondent's application for reconsideration of that figure would have no reasonable prospect of demonstrating that it would be in the interests of justice to vary or revoke the Judgment based upon a document said to detail annual leave taken and owed, on reviewing the judgment I note that it makes no reference to the effect of Regulation 14 of the Working Time Regulations 1998, which provides as follows:-

14.— Compensation related to entitlement to leave

(1) Paragraphs (1) to (4) of this regulation apply where–

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be–

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula–

$(A \times B) - C$

where–

A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

11. Thus, here, as recorded in paragraph 42 of the written reasons, the claimant was entitled to 2 days' annual leave in respect of the leave year 2018/2019 and 22.4 days in respect of the leave year 2019/2020. However, in accordance with Regulation 14, the claimant's entitled to *compensation* in respect of that leave has to be calculated as provided:

    A = 22.4; B = 1/52 (given that only 1 week of the annual leave year had elapsed) and C =O.

12. The calculation of compensation is thus (22.4 x 1/52) – 0 = 0.4 days. To that the two days due in 2018/2019 must be added, making a total of 2.4 days unpaid annual leave. The claimant's gross weekly pay was £196.80. Thus, the calculation of compensation for the loss of 2.4 days is therefore 196.80 x 2.4/7 = £67.47.

13. Paragraph 4.2 of the Judgment dated 1 May 2020 is therefore varied to record **£67.47** gross. The claimant must account to HMRC for any tax and National Insurance contributions due in respect of the award.

Employment Judge Midgley
Date: 12 May 2021

Judgment and Reasons sent to the Parties: 18 May 2021

FOR THE TRIBUNAL OFFICE