EMPLOYMENT TRIBUNALS

Claimant: **Ms C Crabb**

Respondent: **Dr Ebenezer Timeyin (formerly trading as Thanet Road Surgery)**

Before: **Employment Judge John Crosfill**

RECONSIDERATION JUDGMENT

1. The Claimant's application for a reconsideration of the remedy judgment dated 1 September 2020 has no reasonable prospects of success and is dismissed.

REASONS

2. By an E-mail sent on 12 October 2020 the Claimant has asked for a reconsideration of our remedy judgment dated 1 September 2020 but not sent to the parties until 30 September 2020

3. I shall set the Claimant's application out in full. She says:

   This application is being made solely on the amount of SMP awarded, and believe this may be lawfully unjust on the basis the employer is/was responsible for that statutory amount following both advice and instruction by HMRC, they confirm that if responsibility of payment ultimately lay with the employer, which it does, your judgment confirms this should have been paid in its entirety by your employer.

   Both HMRC & Gov.uk confirm that this would be recoverable from your employer

if they were liable for that SMP as it is a lawful amount the state says any child bearing woman is entitled to, a statutory amount of money and a years entitlement of maternity leave.

I acquired all information and evidence with regard to the legalities of SMP from our UK government website gov.uk and HMRC; who should pay it, the said amount of time and monies paid, what to do if not paid, and finally exceptional circumstances and how the lawful amount is recoverable if it remains unpaid.

I have no dispute to your judgment and am asking for reconsideration simply on the amount of SMP awarded and that the £5662.02 SMP was included in the total amount before deductions were taken, however upon research and sourcing governmental advice and laws regarding maternity pay inform me that the SMP figure would usually be removed from the total amount before deductions and/or increases were applied to the amount awarded by the tribunal. Further exploration confirms the SMP would still need to be paid in full if the employer was responsible, and that I have been unfairly penalised on the amount awarded, but at this late stage and simply the age of my claim for SMP and circumstance means that, the final decision with regard to the sum I would receive can only be made by yourself. I quote by claims handler at HMRC " unfortunately at this stage, due to the age and circumstance of your claim it is evident your employer is responsible for your statutory maternity payment but ultimately the final sum awarded lies with the tribunal judge and/or his accompanying panel members"

When judgment is made, firstly you confirm if the dismissal was fair or unfair. Once decision is made, it is simply answer of right or wrong.

Once conclusion is made you of course need to explore contributing factors, probabilities and percentages on who and how the dismissal happened and percentages of probability. Even though these evidently are of vital importance when awarding claims in court and the remedy aspect of a claim, but in this instance I have incurred deductions to the maternity element of my claim that would reflect the probabilities of the judgment opposed to factual and lawful aspects of the judgment. I have been penalised on a statutory entitlement that my employer is responsible for paying.

Furthermore, any statutory payments made to an employee by their employer are surprisingly 92% reimbursed by HMRC upon application.

£707.75 was the SMP amount the respondent was instructed to pay out of the £5662.02 original SMP entitlement awarded by the court after the deductions were applied to the total amount, as stated 92% of that figure is recoverable for Dr Timeyin, hence, ultimately in the event this judgment is reconsidered, revoked or varied and the full SMP is awarded to myself this is then 92% recoverable, following submission of Evidence of SMP paid to an employee on the following financial year tax return.

I understand the courts and it's staff are in extreme demand and would like to take the opportunity to apologise for asking for reconsideration of our judgment, but this request is not being made due to fairness of the judgment but the legality of my SMP entitlement.

<u>The rules</u>

4. The Employment Tribunal Rules of Procedure 2013 as amended set out the rules governing reconsiderations. The pertinent rules are as follows:

   "Principles

   70. - A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

   Application

   71 - Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

   Process

   72. - (1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

   (2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

   (3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal,

shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

5. The expression 'necessary in the interests of justice' does not give rise to an unfettered discretion to reopen matters. 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."

6. 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."

7. Any 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. That principle militates against permitting a party to reargue matters that have already been considered or referring to evidence which could or should have been considered at the earlier hearing.

8. In accordance with the Employment Tribunal Rules of Procedure I must reconsider any judgement where it is in the interests of justice to do so. Further, if I considered that there is no reasonable prospect of the original decision being varied or revoked I must refuse the application for reconsideration.

Discussion and Conclusions

9. The Claimant has sought a reconsideration of our judgment without asking for full written reasons for our decisions. She is not to be criticised for that as she has represented herself with great courtesy, resilience and skill throughout the proceedings. However, I am unable to refer to reasons in writing and in dismissing this application I need to explain, at least in summary, what those reasons were.

10. As the Claimant has correctly identified we found that her dismissal was unfair. Our liability decision which was given in writing explains our reasons. As a part of our liability decision we went on to ask deal with some of the issues which would inform us what the appropriate compensation ought to be.

11. We made 3 significant findings. We held that if the Respondent had acted fairly and lawfully there was a 75 percent chance that he would have dismissed the Claimant. We found that the relationship had deteriorated to the extent that the employment would have ended by 17 May 2018. We had also found that the errors made by the Claimant meant that it would be just and equitable to reduce both the basic award and the compensatory award by 50%. These are large reductions but were justified on the evidence and could be summed up by saying that we felt that the Claimant had a very small chance of keeping her job on a temporary basis but certainly would not have kept it for long.

12. At the remedy hearing before us the Claimant established to our satisfaction that had she kept her job until 17 May 2018 she would have qualified for statutory maternity pay whether her employment had been terminated on 17 May 2018 or not.

13. ERA 1996 s 123(1) provides that the amount of compensation shall be determined having regard to the loss sustained 'in consequence of the dismissal'. We were not required to take an ‘all or nothing’ approach to the assessment of any loss. The task for the Tribunal was to assess the loss for in consequence of the dismissal. The approach we had taken was to approach this on the basis that the unfair dismissal had caused the Claimant to lose the chance of remaining in her employment. We valued that chance reducing the total loss which included the statutory maternity pay by 75%. There is no logical reason on the facts before us to treat maternity pay any differently than any other form of wages other than for the fact that it can survive a dismissal.

14. We started by assessing what the Claimant would have received had she not been dismissed on 17 December 2017. We agreed with her that we should include the statutory maternity pay she would have been paid by the Respondent. We accepted her point that our finding that she would have been dismissed on 17 May 2018 did not mean that the statutory maternity pay would not have been received after that date.

15. Having calculated that sum then the Tribunal applied 2 reductions. The first was to reflect our finding that there was a 75% chance that she could have been dismissed fairly on 17 December 2017. If she had been dismissed that day she would have had no loss at all.

16. Finally, we needed to ask whether the award we were making needed to be reduced by reason of any culpable or blameworthy behaviour. The test is whether it is just and equitable to do so and we concluded that it was. We found that the Claimant’s conduct justified a reduction of any award by 50%.

17. The Tribunal accepted the Claimant's argument that if she had remained in employment she would have received maternity pay. I have no doubt that HMRC's advice that had she remained in employment the Respondent would have been legally obliged to pay her statutory maternity pay is correct. That is the conclusion we came to.

18. The difficulty is that the Claimant was not employed on that date. We were not assessing loss on the basis that she would have been but on the basis that she might have been employed on that date. The Respondent's unlawful act, the unfair dismissal, did not cause her to lose her maternity pay it caused her to lose the chance of getting that pay. It is that chance which we have assessed and awarded compensation for. It would not be just and equitable to hold the Respondent responsible for the whole of the maternity pay when there was a 75% chance that he would not had to pay it at all.

19. The Claimant did explain her position very clearly during the hearing. Her application for a reconsideration is a repetition of the points that she made. Although her arguments are attractively made she is attempting to reargue points already made.

20. It is a matter of regret that the Claimant has been unable to obtain statutory maternity benefit it appears because the DWP took the view that she could recover those sums in these proceedings. They were wrong about that she was only able to recover a sum reflecting the loss of a chance that she would get maternity pay. It is a matter for the Claimant whether she wishes to take that up with the DWP.

21. The fact that the Respondent might be able to recover maternity may from HMRC does not affect our decision in any way. He was not responsible for most of that loss and should not be expected to have to pay it even if it could be reclaimed.

22. For these reasons I have concluded that the Claimant's application for a reconsideration raises arguments that we have previously considered and rejected. Her application has no reasonable prospects of success and is dismissed on the papers.

Employment Judge John Crosfill

Dated: 21 December 2020

Public access to employment tribunal decisions
All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.