



EMPLOYMENT TRIBUNALS

Claimant: Mr Watts

Respondent: Evelyn 190 Community Trust t/a Evelyn 190 Centre

Heard at: London South via CVP **on:** 15 July 2021

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: in person

For the respondent: Mr Brown, Solicitor

RECONSIDERATION UNDER RULE 70

The judgment dated 26 November 2020 sent to the parties on 2 December 2020 is revoked/varied as follows:

The Judgment in relation to redundancy pay and notice pay is revoked.

The Judgment dated 26 November 2020 sent to the parties on 2 December 2020 is confirmed as follows:

The Judgment in relation to unauthorised deductions and holiday pay is confirmed.

Reasons

1. This was an application for reconsideration of the judgment of EJ Sage dated 26 November 2020 sent to the parties on 2 December 2020.
2. The application is under Rule 70 of the Employment Tribunals Regulations 2013, Schedule 1 but also under Rule 20 in respect of an application for an extension of time to submit a response.
3. The Tribunal was provided with 2 small bundles from both parties. The claimant was in person and the respondent was represented by Mr Brown, Solicitor.

Submissions were heard from both parties and the Tribunal also heard submissions directly from Ms Hepburn in relation to clarification of some issues.

Relevant Findings of Fact

4. Only relevant findings of fact relevant to the application today, and those necessary for the Tribunal to determine, have been referred to in this decision. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute today.
5. The respondent is a charitable trust.
6. It is unincorporated. The correct entity is Evelyn 190 Community Trust trading as Evelyn 190 Centre.
7. It has five trustees Ms Yvonne Hepburn, Ms Maureen Vitler, Mr Jim Kanter, Mr Kingsley Pereira, Ms Jennifer Morgan and Ms Louise Coderington-Marshall.
8. The claimant was employed by the respondent from November 2003 until his resignation on 15 or 16 January 2020. The respondent asserts the date was 16 January 2020. The claimant did not specify the date. He wrote a letter dated 15 January 2020 which stated “you have made me redundant” and sought monies outstanding.
9. The reason for the resignation was because the claimant had been informed that he would not be paid salary for January 2020 because of financial difficulties of the respondent. A letter dated 17 January 2020 was sent to the claimant acknowledging the financial difficulties and said it would be able to confirm more details next week.
10. In any event, the claimant started employment elsewhere on 3 February 2020.
11. A claim was presented by the claimant on 9 April 2020. The claimant sought notice pay, holiday pay, unauthorised deductions (for January 2020) and a redundancy payment.
12. The respondent says the notice of claim was not received by the respondent until 9 August 2020 because the respondent operated within a Church which closed as a result of Covid in March 2020. All employees were working from home and the Tribunal papers were forwarded on by the Vicar to Ms Hepburn, Chair of the Management Committee. This was accepted by the Tribunal.
13. Ms Hepburn was suffering with Covid symptoms in April 2020. There was no testing facility at that time, but she explained today she had diarrhoea, high temperature and a cough. She was bed bound for at least 8 days and experienced lingering tiredness until August 2020. This was accepted by the Tribunal.

14. In August, September and November 2020 Ms Hepburn had orthopaedic appointments. The evidence for that was in the bundle.
15. In her statement in support of this application, Ms Hepburn had said in paragraph 3 that she had to take hip replacement surgery during the same period: August to September 2020. There was no evidence of the surgery in the bundle or in relation to recovery time. In Submissions today, when asked about this by the Tribunal, she said the surgery was actually in February 2019 but she remained affected by it (hence the orthopaedic appointments). There was no explanation offered why it had been said in her witness statement, that she had hip replacement surgery in the same period.
16. Ms Hepburn also confirmed today that she continued to work in this period 2 hours daily in a secondary school.
17. The Judgment was sent to the parties on 2 December 2020 which was not forwarded to Ms Hepburn by the Vicar until 15 January 2021. This was accepted.
18. There was however no explanation why it took approximately 6 weeks for an application to be made for reconsideration/an out of time response. The only explanation was that Ms Hepburn was taking advice.
19. An application for reconsideration was submitted on 26 February 2021 by Peninsula with a draft response. The claims for holiday pay and unauthorised deductions in principle were accepted by the respondent. That was confirmed today including the amounts. The claim for notice pay and redundancy pay are resisted on the basis that the claimant was not dismissed by the respondent and/or was not dismissed by reason of redundancy.
20. EJ Sage granted an extension of time for the Reconsideration application on 21 May 2021 and also indicated, provisionally, that the Judgment should be reconsidered for reasons given in the written application.
21. Subsequently, the claimant commenced enforcement action. In a statement dated 4 May 2021, Ms Hepburn applied to prevent enforcement action.

The Law

22. Rule 70 provides a Judgment may be reconsidered where it is necessary in the interests of Justice. On a Reconsideration a Judgment may be confirmed, varied or revoked.
23. Rule 20 enables a party to apply for an extension of time to submit a response. Rule 20 (1) requires the applicant to set out the reason why an extension is sought and shall be accompanied with a draft response (where the time limit has expired).

Conclusions and analysis

24. The respondent's application for a reconsideration has not been made in a timely manner. There was a significant delay from when Ms Hepburn was on notice of the proceedings from 9 August 2020.
25. The Tribunal acknowledges that Ms Hepburn had experienced symptoms of Covid which initially were debilitating in April 2020 but from which she recovered enough in August 2020.
26. Her health thereafter did not prevent her from working on any day for the period September to mid-December where she works 2 hours a day in a secondary school.
27. Whilst Ms Hepburn did have orthopaedic appointments following on from a hip replacement surgery some 18 months earlier, the Tribunal was not satisfied this was to such an effect that Ms Hepburn could not have taken some action in relation to the claim sooner. The Tribunal was concerned by the unexplained change in assertions about the date of the hip replacement surgery. There is, similarly, no proper explanation why it took 6 weeks to get an application for reconsideration/an out of time response submitted. It should have happened sooner.
28. Against the foregoing analysis however, the Tribunal has to balance the significant windfall that the claimant may receive of a redundancy payment over £12,000 which the respondent says is not due. There is an arguable defence that at the time the claimant resigned, there was not a prevailing redundancy situation within the meaning of S.139 Employment Rights Act 1996. There is a dispute which would need to be resolved evidentially. The Tribunal also notes that the respondent is a charity. The defence in relation to notice pay appears to have more challenging merits if the claimant establishes he resigned in response to the respondent saying he would not be paid salary for January 2020.
29. Ultimately, the Tribunal concluded, carefully weighing up the balance of injustice, that it would be comparatively higher prejudice to permit Judgment on the disputed sums to stand in circumstances where this may provide a significant windfall to the claimant, in particular in relation to the redundancy payment.
30. The Judgment is thus varied or revoked in relation to the redundancy payment and notice pay.
31. The Judgment is confirmed in relation to holiday pay and unauthorised deductions.
32. Time is also extended for presentation of the ET3 under Rule 20.
33. Evelyn 190 Community Trust t/a as Evelyn 190 Centre is substituted under Rule 34 as the respondent.

34. The claim for redundancy pay and notice pay will be determined at a final hearing before an Employment Judge sitting alone at the Employment Tribunals, London South, Montague Court, 101 London Road, West Croydon, CR0 2RF, on **29 April 2022** starting at 10 am or as soon as possible afterwards.

35. A Telephone Case Management Hearing will also be listed.

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Employment Judge Khalil

22 July 2021