THE EMPLOYMENT TRIBUNALS

Claimant: **Mr M Brown**

Respondent: **M Bryan Groundworks Ltd**

UPON APPLICATION of the Claimant to reconsider the judgment of 9 February 2021, which had been varied by a reconsideration judgment dated 28 April 2021, under Rule 73 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 (and without a hearing) such judgment is varied at paragraph 3 and adding paragraph 4 herein:

JUDGMENT ON RECONSIDERATION

3. The Claimant's claim under s.13 Employment rights act for unlawful deduction from wages is well founded. The Respondent is ordered to pay to the Claimant the net sum of **£120.57** this comprising:

   3.1 £8.34 for furlough pay;
   3.2 £31.31 in respect of Employer's pension contributions; and,
   3.3 £80.92 in respect of Employee's pension contributions.

   This is a net award and the Respondent shall be liable to the Inland Revenue for any payments of tax and national insurance thereon.

4. The Respondent is ordered to pay to the Claimant an award under section 38 of the Employment Act 2002. The Claimant's earnings exceeded the statutory maximum and the award is therefore for 4 weeks at the statutory maximum of £538 per week which is **£2,152**.

REASONS ON RECONSIDERATION

1. The Claimant made claims for unfair dismissal, wrongful dismissal, and unlawful deduction from wages relating to his furlough pay. On 9 February 2021, I gave an oral

Judgment that the unfair dismissal and wrongful dismissal claims were brought out of time, and whilst the unlawful deductions claim was in time, no sums were due to the Claimant and as such that claim was dismissed. The Judgment was sent to the parties on 26 February 2021. On 3 March 2021 the Claimant requested written reasons.

2. In drafting those written reasons, under Rule 70 on my own motion I reconsidered that judgment and varied it. In my judgment dated 28 April 2021 I found that an award was due to the Claimant in relation to the claim for unlawful deduction from wages relating to his furlough payments ('the 28 April judgment'). This was sent to the parties on 4 May 2021.

3. On 17 May 2021 the Claimant made a written request for a reconsideration of the judgment on 3 issues;

   3.1 Requesting an award under Section 38 of the Employment Act 2002 ('Section 38'). In my oral judgment I confirmed that as the Claimant had not succeeded in any of his claims, I could not make an award under Section 38. In the 28 April judgment I made an award under section 13 for unlawful deduction from wages however I had not readdressed section 38;

   3.2 The Claimant requests a reconsideration of his wrongful dismissal claim (his claim for his notice pay). The Claimant states that it was not reasonably practicable for him to bring a claim for his unpaid notice until he obtained copies of his payslips from his employer;

   3.3 The Claimant submits that the sum awarded to him relating to his claim for unlawful deduction from wages relating to his furlough pay is incorrect.

4 On 25 June 2021, the Respondent replied to the Claimant's representations and confirmed it would accept the reconsideration being carried out on paper. I have carried out the reconsideration on paper as it is in the best interests of justice to do so, because it is proportionate to the value and the complexity of the issues involved.

Relevant Law

5 Reconsideration of judgments is contained in rule 70 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. It states:

> "*70. A Tribunal may, either on its own initiative or on the replication of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration the decision may be confirmed, varied or revoked. If it is revoked it may be taken again*."

6 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.

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

8 In deciding whether or not to reconsider the judgment, the authorities indicate that I have a broad discretion, which "must be exercised judicially … 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" (Outasight v Brown [2015] ICR D11). The Court of Appeal in Ministry of Justice v Burton [2016] ICR 1128 also emphasised the importance of the finality of litigation and that a case should not be reopened just for the purpose of further argument or exploration of the evidence (ibid, para 25).

9 That said, if an obvious error has been made which may lead to a judgment or part of it being corrected on appeal, it will generally be appropriate for it to be dealt with by way of reconsideration: Williams v Ferrosan Ltd [2004] IRLR 607 at para 17 per Hooper J (an approach approved by Underhill J, as he then was, in Newcastle upon Tyne City Council v Marsden [2010] ICR 743 at para 16).

10 Ministry of Justice v Burton (ibid) at para 24 confirmed that a mere failure by a party (in particular, but not only, a represented party) or the Tribunal to raise a particular point is not normally grounds for review.

11 In Stephenson -v- Golden Wonder Limited 1977 IRLR 474 EAT Lord McDonald said that the review provisions were "*not intended to provide the parties with an opportunity of a re-hearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before*."

12 Section 38 Employment Act 2002 confirms that where a tribunal finds in favour of an employee in a complaint of unlawful deductions from wages, and the tribunal finds that the employer has failed to provide the employee with a written statement of employment particulars, the tribunal must award the employee an additional two weeks' pay, unless there are exceptional circumstances which would make that unjust or inequitable, and may, if it considers it just and equitable in all the circumstances, order the employer to pay an additional four weeks' pay.

13 I have not repeated the law applying to the original decision in general as this is set out in the previous judgment.

Conclusions

14 The Claimant's request for reconsideration has been made in time.

15 Having considered whether it is necessary in the interests of justice to review my judgment and whether there is a reasonable prospect of my judgment being varied or revoked in the light of the Claimant's application I have allowed the Claimant's request for reconsideration as there is an error in the calculation of the award and the section 38 claim must be addressed.

16 Dealing with each of the Claimant's points in turn.

Section 38

17 In the 9 February 2021 judgment I found that no sum was due to the Claimant in relation to his claim for unlawful deduction from wages and his claim was dismissed. I confirmed in my oral judgment that accordingly I would not make an award under Section 38, as

this claim requires that I find in favour of the Claimant in one of the claims listed in schedule 5 of the Act (which includes a claim for unlawful deduction from wages).

18 Subsequently in the 28 April judgment I found in favour of the Claimant on his unlawful deduction from wages claim. However, I did not reconsider the section 38 claim in the 28 April judgment. The Claimant therefore asks that I address the section 38 claim.

19 The Respondent objected to a reconsideration on this issue and asserted that the Claimant did not pursue a claim under section 38 and that an outcome relating to the same was not recorded in a judgment.

20 The Respondent was on notice that the Claimant wished to pursue a claim under Section 38. The Claimant had included a calculation relating to a claim under Section 38 in both schedule of losses he submitted in the proceedings, and the Respondent witness, Mr Bryan, addressed the section 38 claim in his witness statement at paragraph 27 in which he accepted that the Respondent had failed to provide the Claimant with a written statement of particulars of employment. The question was also put to Mr Bryan in cross examination at the hearing in which he again conceded that the Respondent had not provided a written statement of particulars and provided no explanation regarding this failure. I am satisfied the Respondent was on notice of a section 38 claim and had adequate opportunity to make representations at the hearing regarding the issue.

21 The Respondent further submitted that had the Claimant pursued a section 38 claim this would have been done at the same time as he submitted his claims for unfair dismissal and wrongful dismissal which were found to be out of time. As a result, the Respondent submitted that a claim under section 38 cannot succeed and is out of time and the Tribunal consequently has no jurisdiction to hear it.

22 A section 38 claim arises when a Claimant brings a claim under Schedule 5. Thereafter, where a Tribunal finds the Respondent was in breach of its duty under section 1 of the Employment Rights Act 1996 ('ERA') at the date the proceedings began it is obligated to make an award. There is no specified time limit relating to the section 38 claim itself, it is essentially a parasitic claim that arises by virtue of a qualifying claim under Schedule 5. It follows that where a qualifying claim is successful and the Tribunal finds the Respondent was in breach of its obligations under Section 1 ERA, then the Section 38 claim will be successful.

23 The Claimant brought three claims under Schedule 5, and one of those claims was successful on reconsideration. The Respondent was on notice of the Section 38 claim, and the Respondent conceded in evidence that it was in breach of section 1 ERA.

24 I find that the Respondent was in breach of its obligations under section 1 of the ERA. Accordingly, the wording of section 38 confirms I must award 2 weeks' pay unless I decide it is just and equitable to increase the award to 4 weeks' pay or there are exceptional circumstances such that it is unjust and inequitable for an award to be made at all.

25 The Claimant asserted in his Schedule of Loss that he should receive the higher award of four weeks, however he did not provide any reasons for this submission. The Respondent freely conceded that it had not provided a written contract to the Claimant

and did not provide evidence of exceptional circumstances which would warrant there being no award.

26 Having considered the position carefully, I do not find there to be any exceptional circumstances which would warrant no award being made.

27 I consider that it would be just and equitable to make an award of 4 weeks' pay. In taking that decision I have taken into account the fact that the Claimant was employed for over 4 years. This was a relatively lengthy period of employment during which time the Respondent had neglected to comply with the provisions of Section 1(3) and (4) ERA. Whilst I also took into account the fact that the Respondent is a small company with no dedicated HR department, the length of employment meant that there was more than enough time for the Respondent to overcome any impediment it did have to rectifying this omission.

28 As the Claimant's earnings exceed the statutory maximum the award is therefore for 4 weeks at the statutory maximum of £538 per week which is £2,152.

Notice pay

29 The Claimant seeks a reconsideration of the judgment that his claim for wrongful dismissal (his notice pay) was out of time. The Claimant seeks to argue that it was not reasonably practicable for him to have brought his wrongful dismissal claim until he had received his P45 as he argues he did not know he would not be receiving his notice pay until receipt of his P45.

30 In my 9 February 2021 judgment I found that it was not reasonably practicable for the Claimant to have brought his unlawful deduction from wages claim in time and set out my reasoning for this at paragraphs 85 to 95 in the written reasons. The Claimant essentially seeks to apply the same argument to his wrongful dismissal claim.

31 The Claimant raised this argument at the hearing and I did not accept his position for the reasons set out in paragraphs 77 – 84 in the written reasons.

32 It is important to note that the time limits the Claimant had to present his claims for wrongful dismissal and unlawful deduction from wages are not the same. The Claimant had until 2 August 2020 to submit his claim for wrongful dismissal to the Tribunal. The time limit for his unlawful deduction from wages claim however was over a month later on 2 September 2020. The Claimant submitted his claims on 16 September 2020.

33 As detailed in my written reasons at paragraphs 82 and 83 therefore, even if I had found it was not reasonably practicable for the Claimant to have presented his claim for wrongful dismissal in time, I would then have needed to consider if his claim was provided within such further period as was reasonable.

34 The Claimant believed he had been dismissed on 3 May 2020 and at this date he knew or ought reasonably to have known he was entitled to 4 weeks' notice having worked for his employer for 4 years. Accordingly, he ought reasonably to have been aware that the sum of £587 he received into his bank on 3 June 2020 was not high enough to amount to 4 weeks' notice. The Claimant received his final payslip and P45 on 29 August 2020.

35 At this date it was then wholly clear to the Claimant that the Respondent had not and did not intend to make a payment to him in respect of his notice pay. The time limit for submitting his wrongful dismissal claim had already expired on 2 August 2020. By 29 August 2020, there was no further impediment to the Claimant from presenting his claim for wrongful dismissal to the Tribunal, however he failed to bring this claim for a further 19 days despite this being 6 weeks after the expiration of his time limit within which to bring his wrongful dismissal claim and despite my findings at paragraphs 81 of the written reasons regarding the Claimant's access to and ability to review information regarding the time limits within which he had to present his claims.

36 This is distinguished from his unlawful deduction from wages claim where the time limit to bring his claim was later, this being on 2 September 2020, and, as detailed at paragraph 91 of the written reasons, even after having received his final payslip and P45 on 29 August 2020, because of the complexity of the furlough scheme I accepted that he would have needed further time to review the same. As such I accepted that presenting his claim for unlawful deduction from wages on 16 September 2020, this being only 14 days from the expiration of his deadline as opposed to 6 weeks, was such further period as I considered to be reasonable.

37 The Claimant's application for reconsideration on this issue does not expand upon points made, or which could have been made at the hearing on 9 February 2021. The Claimant has not set out any further reasons or provided any new evidence as to why the decision relating to his wrongful dismissal should be altered.

38 Accordingly, having reconsidered the judgment, I find that there are insufficient grounds for me to vary or revoke the original decision relating to the Claimant's wrongful dismissal claim. As such, the judgment of 9 February 2021 relating to the Claimant's wrongful dismissal claim is confirmed.

<u>Unlawful Deduction from wages Calculation</u>

39 The Claimant asks that I reconsider the calculation made in the 28 April judgment relating to his award for unlawful deduction from wages relating to furlough pay for the following reasons:

39.1 The award was calculated using figures from amended payslips rather than from original payslips;

39.2 The sum did not include any element of underpayment relating to employee pension contributions;

39.3 The part of the award relating to the Employer pension contributions was calculated using the figures from the column in the spreadsheet that related to Employee pension contributions.

40 The Respondent submitted that the calculations in the 28 April judgment are based on findings of fact and the Claimant's bank statements showing the actual payments received by the Claimant. As the Claimant has provided no new evidence since the conclusion of the hearing, the Respondent submits it is not in the interests of justice that I exercise my discretion to reconsider the 28 April judgment.

41 The Respondent submits the amended payslips are the correct basis for the calculation rather than the original payslips.

42 The Respondent agrees that the calculation in the 28 April judgment incorrectly utilised the figures from the accountant's spreadsheet relating to Employee pension contributions rather than the figure relating to Employer pensions contributions.

Reviewing the calculation

43 In reviewing the calculation in the 28 April judgment, I believe I made a miscalculation of the sum properly due to the Claimant. For that reason, I have decided that the judgment should be reconsidered in the interests of justice pursuant to rule 70 of the Employment Tribunals Rules of Procedure 2013.

44 My calculations were based on the information contained in the accountant's spreadsheet at page 46 of the hearing bundle. However, I had misunderstood and had believed that this spreadsheet was based on the original payslips, which were the payslips the Respondent's accountant had used to calculate the Claimant's P45 and P60 and were submitted to HMRC in RTI submissions. I can now see that the spreadsheet is instead based upon the amended payslips which the Respondent's accountant confirmed he had created to review the payment of furlough made to the Claimant further to the amendment of his payroll system.

45 The calculations should however be based upon the original payslips which were submitted to HMRC and formed the basis of the Claimant's P45 and P60.

46 I further agree with the parties that the calculation in the 28 April judgment relating to the award for Employer's pension contribution took the figures from the accountant's spreadsheet relating to the Employee's contribution rather than the Employer's pensions contribution.

47 I accept that in making my calculation in the 28 April judgment I did not take into account the difference between the sums the Claimant ought to have paid in employee pension contributions and the sums the Respondent did pay in respect of the Claimant's employee pension contribution sums. This must be added to the award to reflect his true loss.

48 I have further noted that the reconsideration calculation ought to be amended to take into account the fact that the weeks in dispute span over two tax periods. I have therefore amended the calculations to reflect the correct tax year for each week of furlough pay.

49 In line with the above I have amended the award to the Claimant and set out below a table demonstrating the calculations which make up the new award.

1. Period	**2.** Gross furlough based on Claimant's claim (80% of £658)	**3.** Actual Net furlough paid	**4.** Net furlough based on Claimant's claim	**5.** 3%Original payslips Employer pension	**6.** 3% Employer's pension contribution on Claimant's claim	**7.** 5%Original payslips Employee pension	**8.** 5% Employee's pension contribution on Claimant's claim
Tax week 4- 01/05/20	526.40	391.00	406.93	8	15.79	10.67	26.32
Tax week 3-24/04/20	526.40	391.00	406.93	8	15.79	10.67	26.32
Tax week 2-17/04/20	526.40	391.00	406.93	8	15.79	10.67	26.32
Tax week 1- 10/04/20	526.40	391.00	406.93	8	15.79	10.67	26.32
Tax week 52- 03/04/20	526.40	391.00	404.93	8.06	15.79	10.75	26.32
Tax week 51- 24 & 25 March 20	210.56	156.40	161.97	4.6686	6.32	7.781	10.528
TOTAL	**2,842.56**	**2,111.40**	**2,194.62**	**44.7286**	**85.28**	**61.211**	**142.13**

50 Accordingly, the following sums are due to the Claimant in relation to his claim for unlawful deduction from wages for his furlough pay;

Furlough

51 Column 3 shows the Claimant was owed furlough in the total sum of £2,194.62. Column 2 shows the Claimant actually received £2,111.40. The Claimant was therefore underpaid furlough in the total sum of £83.22. The Respondent has already made a payment to the Claimant of £74.88 in relation to this sum. The total due to the Claimant for furlough is therefore £8.34.

Employer's pension contributions

52 Column 6 shows that the employer's pension contributions should have been made in the total sum of £85.28. Column 5 shows employer's pension contributions were made in the total sum of £44.73. The Respondent has made a further payment of £9.24 to the Claimant in respect of Employer's pension contributions. The total sum due to the Claimant for underpaid Employer pension contributions relating to the furlough period is therefore £31.31.

Employee pension contributions

53 Column 8 shows that the employee's pension contributions should have been made in the total sum of £142.13. Column 7 shows employer's pension contributions were made in the total sum of £61.21. The total sum due to the Claimant for underpaid Employee pension contributions relating to the furlough period is therefore £80.92.

Summary

1. The award to the Claimant for unlawful deduction from wages is varied and the and the Respondent is ordered to pay to the Claimant:

    1.1. Pay in respect of underpaid furlough wages in the sum of **£8.34**. This is a net award and the Respondent shall be liable to the Inland Revenue for any payments of tax and national insurance thereon;
    1.2. Pay in respect of Employer's pension contributions in the sum of **£31.31**; and,
    1.3. Pay in respect of Employee's pension contributions in the sum of **£80.92**.

2. The Respondent is ordered to pay the Claimant **£2,152** this 4 week's gross pay, capped at the statutory maximum, pursuant to Section 38 of the Employment Act 2002.

EMPLOYMENT JUDGE NEWBURN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 4 August 2021