EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Tonge**

Respondent: **Total Care Matters Limited**

Heard at: In chambers

On: 11 August 2021

Before: Employment Judge Smith (sitting alone)

Representation
Claimant: No attendance
Respondent: No attendance

JUDGMENT ON RECONSIDERATION

Upon reconsideration, the original decision is confirmed

REASONS

Background

1. The Claimant applies for a reconsideration of the Tribunal's judgment and reasons of 22 January 2021, which were sent to the parties on 28 January 2021. The application concerns what the Claimant now says was one of the claims of unauthorised deductions from wages, specifically in relation to what the Claimant was paid whilst she was suspended from work between 9 September and 7 October 2019.

2. On 9 March 2021 the Claimant wrote to the Tribunal in in the following material terms:

"My query is one part of my claim which the judgement stated I succeeded and was awarded to be paid for the 5 sleeps scheduled on the September rota.

September rota also included 185 working hours so not sure why this was not included in my award. As I would not have been able to do the 5 sleeps without working the185 hours.

Could I ask for this matter to be brought to the judge's attention for clarification on whether this has been overlooked or a misunderstanding of how working hours are shared out within a residential setting or just an human error"

3. From this passage it appeared to me that the Claimant was applying for a reconsideration of my judgment, pursuant to **rule 70** of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, sch.1** ("the **Rules of Procedure**"). Upon my request for clarification, the Claimant confirmed that this was so.

4. It appeared to me that the Claimant was suggesting that I had failed to appreciate that her claim in respect of her period of suspension was not limited to the "sleep-in" enhancements she was due during that period, but to the full extent of her wages due for that period, namely 185 hours' pay.

5. Both parties confirmed to the Tribunal that they were content for me to determine this matter on the papers, without a hearing. I therefore proceeded on that basis.

The law

6. The rules germane to reconsideration applications are set out in **rr.70** and **71** of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, sch.1** ("the **ET Rules**") and are reproduced thus:

Principles

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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

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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.

7. Whilst it is not essential that there be exceptionality in order to rely upon the "interests of justice" criterion under **r.70**, the threshold that must be crossed before a judgment should be reconsidered is nonetheless high. In this regard, of particular importance is the public interest in the finality of judgments. This has been emphasised in the following cases:

   (1) **Flint v Eastern Electricity Board [1975] ICR 395** (High Court, Queen's Bench Division) at **404**:

   "But over and above all that (the interests of the parties)*, the interests of the general public have to be considered too. It seems to me that it is very much in the interests of the general public that proceedings of this kind should be as final as possible; that is should only be in unusual cases that the employee, the applicant before the tribunal, is able to have a second bite at the cherry."*

   (2) **Lindsay v Ironsides Ray & Vials [1994] IRLR 318** (EAT) at **321**:

   "The power to grant a review on the grounds 'that the interests of justice require such a review' is in very wide terms. It is, however, a power which should be cautiously exercised… There are also the interests of the general public in finality of proceedings of this kind."

   (3) **Newcastle City Council v Marsden [2010] ICR 743** (EAT) at [17]:

   "In particular, the weight attached in many of the previous cases to the importance of finality in litigation—or, as Phillips J put it in **Flint** *(at a time when the phrase was fresher than it is now), the view that it is unjust to give the losing party a second bite of the cherry—seems to me entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final (subject, of course, to appeal)."*

   (4) **Ministry of Justice v Burton [2016] ICR 1128** (Court of Appeal) at [21]:

   *"… 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…"*

8. Under the preceding **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004** there were, in addition to the residual "interests of justice" category, four further specified instances under which a reconsideration

(then called a "review") might be appropriate. These were (a) where a decision was wrongly made as a result of an administrative error; (b) where a party did not receive notice of the proceedings leading to the decision; (c) where the decision was made in the absence of a party; and (d) where new evidence had become available since the conclusion of the hearing which could not have been reasonably known of or foreseen at that time. In **Outasight VB Ltd v Brown UKEAT/0253/14** (21 November 2014, unreported) HHJ Eady QC emphasised that the former specific grounds for review could be seen as particular instances when the interests of justice would generally have required such a review, but that the threshold for the applicant party to cross remained high.

9. In relation to the contents of claim forms in Employment Tribunal proceedings the following authorities are instructive:

   (1) A Tribunal ultimately *"only has jurisdiction to consider and rule upon the act or acts of which complaint is made to it"* (**Qureshi v Victoria University of Manchester [2001] ICR 863** (EAT) at **873**, cited with approval by Sedley LJ in **Anya v University of Oxford [2001] IRLR 377** (Court of Appeal) at [9]).

   (2) *"The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made — meaning, under the* [**ET Rules**] *the claim as set out in the ET1"* (**Chandhok v Tirkey [2015] IRLR 195** (EAT), at [16]).

This reconsideration application

Time limits

10. Pursuant to **r.71**, the Claimant had until 11 February 2021 to apply for reconsideration. Whilst it was not apparent from her email of 9 March 2021 that she was applying for reconsideration, she later confirmed that she was indeed applying for reconsideration in that email. I have therefore treated 9 March 2021 as the date upon which the Claimant applied for reconsideration. That application was made 26 days after the time limit expired.

11. I asked the Claimant to explain why the 14-day time limit set by **r.70** was not complied with. She explained that *"The reason for the delay was not being able to speak with anyone from the Nottinghman tribunal office. I rang on many occasions for advice on what I would need to do but due to Covid I don't know whether they were closed or were just not taking calls. Eventually I got through and spoke to someone who advised me that I would need to send an email to the Judge and third party which I then did"*.

12. Whilst not entirely satisfactory as an explanation, I considered on the balance of probabilities that there was a realistic possibility of the Claimant experiencing

difficulties in contacting the Tribunal during the period between 28 January and 9 March 2021, which was during the most recent national lockdown relating to the Covid-19 pandemic.

13. The sole ground upon which the Respondent objected to the Claimant's reconsideration application was on limitation grounds. In its email of objection, dated 30 March 2021, the Respondent stated that the Tribunal had no jurisdiction to entertain the Claimant's application as it had been made out of time.

14. In my judgment, the Respondent's submission is wrong. The time limit set by **r.71** is procedural rather than jurisdictional. Whilst it does not give the Tribunal *carte blanche* to dispense with time limits set by the **ET Rules** (of which the **r.71** is one such example) **r.5** confers a power upon the Tribunal to extend time limits set by the **ET Rules** and, by extension, envisages that there may be situations where this is the just thing to do on a principled basis.

15. In my judgment, the fair and just course for the Tribunal to take is to exercise its discretionary power under **r.5** and extend time. The Claimant has always represented herself and is unlikely to have appreciated the implications of the **ET Rules** pertaining to the reconsideration of judgments, never mind the deadline set by **r.71**. The fact that I had to ask whether she was in fact making a reconsideration application at all is supportive of this. Equally, I have borne in mind the fact that during the period 28 January to 9 March 2021 the country as a whole was experiencing difficulties and Employment Tribunal offices have not been unaffected by the pandemic or the restrictions imposed by HM Government from time to time. In these circumstances I consider that the Claimant should be given the benefit of the doubt in relation to her efforts to contact the Tribunal in that period, and that it is in the interests of justice to extend time.

16. For these reasons I have therefore extended time to 9 March 2021 and the Claimant's application for reconsideration is treated as having been made in time.

The application itself

17. Turning to the application for reconsideration, I note that the Respondent has made no representations beyond the limitation point. It has said nothing about the merits of the application at all. I proceed to deal with it in those circumstances.

18. I reviewed the ET1 claim form the Claimant presented to the Tribunal on 6 January 2020. I considered the factual narrative the Claimant had included within that claim form, particularly in boxes 8.2 (*"Please set out the background and details of your claim in the space below"*), 9.2 (*"What compensation or remedy are you seeking?"*) and 15 (*"Additional information"*). The 185 hours point being advanced by the Claimant in her reconsideration application did not appear in any part of the claim form. There was no reference to her being owed 185 hours' pay or that she was claiming such a sum in these proceedings. No subsequent application was made by the Claimant to amend her claim form to include such a claim.

19. Any claim for 185 hours' pay was simply not included in the claim presented to the Tribunal for determination. As **Qureshi**, **Anya** and **Chandhok** have all made clear,

it was essential for the Claimant to take this step if she wished for the Tribunal to determine such a claim. She did not do so.

20. As I mentioned in my Reasons (paragraph 1), the Claimant's wages claims were substantially clarified as part of a single list of issues compiled by Employment Judge Broughton at a Preliminary Hearing (PH) on 5 May 2020. At paragraph 14.2 of the PH summary the basis of the Claimant's claim in respect of what she was paid during her suspension from work was recorded. Whilst it was said that the Claimant contended that she was not paid her "full salary" in that time, there was no mention of 185 hours being unpaid. The clear thrust of that paragraph was that this was referring to the "sleep-in" enhancements the Claimant contended she was entitled to during her period of suspension and not to any other form of remuneration, less still a claim for 185 hours' pay.

21. In advance of the full hearing the Claimant prepared a Schedule of Loss setting out her contended-for losses. Within the body of that Schedule, and under the heading *"Unlawful deductions of wages"*, the Claimant stated *"On the original September 2019 Rota my hours of work was 185 hours 1518.85 plus 5 sleeps £313.20 = £1832.05"*. The Schedule of Loss was undated but must have been created prior to 14 July 2020 because the Respondent filed a Counter-Schedule of Loss on that date.

22. I have reviewed the Claimant's witness statement for the full hearing. It contained the following text:

> *"I was informed on the 09th on September 2019 that I was suspended on full pay until further notice. My original time sheet for the month of September 2019 shows I was down to work 185 hours and 5 sleeps for that month which was an additional payment of £62.64 for every sleep done.*
>
> *When I received my final wage slip on the 31/10/19 I was expecting my wage slip to reflect my hours that I should have worked in September 2019 as well as 19 hours outstanding for the previous month as well as 3 days annual leave which I had left to take that was still owed to me"*

23. As **Chandhok** has made particularly clear, there is a very great difference between making an allegation or a putative claim in documents such as witness statements and Schedules of Loss on the one hand, and making a formal claim in a claim form on the other. The Respondent was only required to answer the case as put in the Claimant's ET1 claim form. Those matters were clarified without the need to formally amend when the matter came before Employment Judge Broughton on 5 May 2020.

24. As I also mentioned in my Reasons (paragraph 2), at the outset of the full hearing the parties jointly confirmed to me that the issues recorded in Employment Judge Broughton's case management summary remained the issues the Tribunal had to decide. The Claimant did not contend that one of her claims was in fact for 185 hours' pay, deducted without authorisation. That the Claimant may have mentioned this allegation in her witness statement and Schedule of Loss did not mean it was a claim the Respondent had to answer, nor did it thence become an issue the Tribunal had to determine in the hearing. In my judgment, such an allegation (whilst

not amounting to a head of claim in any event) was impliedly abandoned by the Claimant in her confirming to me the accuracy of the list of issues recorded by Employment Judge Broughton.

25. I also note that the contention that the Claimant had not been paid for 185 hours' work in September 2019 was not put to any of the Respondent's witnesses during cross-examination. This is supportive of my conclusion, which is that it had by implication been abandoned.

26. Ultimately I decided the Claimant's claim in respect of "sleep-in" payments during the period of suspension in her favour (see paragraphs 34, 61, 64 and 66 of the Reasons) and I awarded her compensation accordingly.

27. In determining this application I must of course also consider the authorities of **Flint**, **Lindsay**, **Marsden** and **Burton**. The consistent thread running through those cases is that the principle of the finality of judgments is a factor which weighs heavily against the Tribunal reconsidering and revoking or varying its decisions. As I found (at paragraphs 32 and 33 of my Reasons), the Claimant was paid during her period of suspension. Set against those factual findings there could be no realistic prospect of her succeeding in a claim for 185 hours' pay for the month of September 2019, as she now seeks to raise. In addition, she was only suspended on 9 September and had worked up until that point; she was not suspended throughout the whole of that month.

28. At its absolute highest, the Claimant could potentially have contended that there was a difference between 185 hours' pay and that which she actually was paid, but that would be a very different claim and not the one which is (or ever has been) contended for. In financial terms, its value would likely be relatively trivial, and she may have an alternative form of redress outside of the Tribunal in order to seek recovery of whatever it is she may be owed. In my judgment, the principle of the finality of judgments greatly outweighs whatever potential injustice there may have been to a Claimant who had simply not made such a claim at any stage in these proceedings.

Conclusion

29. For these reasons, having reconsidered the matter I confirm the judgment and reasons of 22 January 2021, sent to the parties on 28 January 2021.

Employment Judge Smith

Date: 11 August 2021

JUDGMENT SENT TO THE PARTIES ON

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