EMPLOYMENT TRIBUNALS

Claimant: Mr P Wolfenden

Respondent: Cherish UK Ltd

Heard at: Manchester **On:** 25 May 2021

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: In person
Respondent: Miss Watson,HR representative

JUDGMENT ON RECONSIDERATION

The judgment of the Tribunal is that the Judgment made in respect of the claimant on 19 October 2020 is not varied or overturned.

REASONS

Introduction

1. The claimant had brought claims of unlawful deduction of wages contrary to Part II of the Employment Act 1996. The hearing was listed for 19 October 2020 at 10.00am. It was changed to 2.15pm on the morning of 19 October 2020 due to a judicial resources issue.

2. The respondent did not attend the hearing and I made judgment in favour of the claimant in respect of his claims of £3,043.84 and reserved a costs application.

The Law

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

> "(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.

(71) Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing 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 when the written reasons were sent out (if later) and shall set out why reconsideration of the original decision is necessary.

Process

(72) An Employment Judge shall consider any application made under rule 71:

(i) If the Judge considers there is no reasonable prospect of the original decision being varied or revoked the application shall be refused and the Tribunal shall inform the parties of that 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.

(ii) If the application has not been refused under paragraph (i) 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 (i), 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 representations.

(iii) Where practicable the consideration under paragraph (i) 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 (ii) shall be made by the Judge or, as the case may be, the full Tribunal which made the original which made the decision. Where that is not practicable the President, Vice President or Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full Tribunal, either shall direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part."

4. The Rules now provide one ground: the interests of justice. The previous Rules did include one specific ground i.e. that the Judgment was made in the absence of the parties, and so there is some case law relating to this which I will look at below, but in general whilst the discretion of interests of justice is wide it was held in **Flint v Eastern Electricity Board [1975]** not to be boundless and "must be exercised judicially and with regard not just to the interests of the party seeking the review but also to the interests of the other party and to the public interest that there

should, as far as possible, be finality of litigation". The overriding objective should also be taken into account.

Respondent's Submissions

5. The respondent submitted that their failure to attend the hearing on 19 October 2020 was because they were convinced that there had been a settlement in this case and therefore there was no need to attend. The respondent's submissions in relation to the facts are as follows.

6. The respondent began negotiating with the claimant through ACAS on 15 October. There were emails backwards and forwards.

7. At 16:49 on 16 October it was stated to the claimant that the respondent was not going to make an offer beyond £1,700 net. The claimant advised ACAS that the respondent had failed to comply with Case Management Orders and that the hearing had been moved from 10.00am to 2.15pm. The claimant made an offer in this phone call to settle for £1,800 net subject to terms.

8. On 19 October at 9.30am the claimant was informed that the respondent had accepted his offer and were discussing draft wording. Prior to this the respondent, on Sunday 18 October, had requested a draft COT3 from ACAS.

9. On that day the respondent also wrote to the Tribunal at 9:57 stating, "We have agreed to settle this claim today. We therefore do not require a hearing on 19 October. We appreciate the Judges are stretched as it is". This was a strange email as, as referred to above, the respondent had that day requested a draft COT3 and were aware, as was agreed today, that they would not receive it until Monday morning. At that point in time it appears the respondent was unaware that the hearing was going to be moved to 2.15pm as this was only communicated on the morning of 19 October.

10. The respondent says that they sent a COT3 to ACAS at about 11.00am on 19 October. They advised they could provide proof of when this was sent, however they had not provided it prior to the hearing. I gave them the opportunity to provide it this afternoon whilst I was drafting my Judgment. When I received a copy of the draft COT3, however, there was nothing attached to determine what time it was sent. The respondent then did not hear from ACAS and they presumed that the case was settled and the hearing would not go ahead.

11. I should note that at 11.00am £1,800 was agreed in principle, however ACAS advised the claimant that the hearing would not be cancelled unless ACAS said there had been an agreed settlement or the claimant advised them he was withdrawing. At 11.08am the claimant asked if the COT3 could be chased. The claimant contacted the Tribunal and confirmed the hearing was to go ahead. ACAS contacted him at 13:35 and advised him that the respondent had now sent over some draft COT3 wording, which they forwarded to the claimant. The claimant replied within 15 minutes to advise that he would settle for that amount if the respondent paid the amount before the Tribunal started. The hearing then went ahead and the respondent did not attend.

12. The respondent submits they genuinely believed that the matter had settled once they had signed a COT3 and sent it to ACAS, and the fact that heard nothing further they assumed that the matter had indeed settled. Ms Watson from the respondent today stated that she was on maternity leave when she was dealing with this matter, that she had arranged childcare for the morning but not for the afternoon, and that it would have been better had she nevertheless attended the hearing to confirm what was happening.

13. There was a phone call with the claimant and ACAS at 15:44 and ACAS confirmed that they had not informed the respondent of any legally binding agreement as the claimant had not accepted the respondent's terms.

14. The claimant had confirmed at 14:05 that he would accept the respondent's offer if they paid it before 16:15.

15. In addition, the respondent provided some emails in the course of the hearing. The respondent provided an email sent to them by ACAS on the morning of 19 October with a draft COT3 stating that once they had decided on a form of wording, ACAS would pass that wording to the claimant for his consideration and he would have the option to make any changes. Such changes would be submitted to the respondent for review. Once both parties had communicated their acceptance of the same wording to ACAS the agreement become legally binding. ACAS would then draw up a legally binding COT3 for the parties to sign and a formal record of what at that point is already a legally enforceable contract, and "It is only at this point that we would notify the Employment Tribunal of a settlement".

16. The respondent accepted that there was no legally binding settlement.

Claimant's Submission

17. The claimant advised that he had found the respondent untrustworthy and therefore he was not prepared to accept a settlement payable in 14 days as he would then he required to go back to the Tribunal and the County Court if they did not honour it. From his point of view, he had only received a draft COT3 at 1.30pm on the day of the hearing and he had no knowledge as to why, if the respondent had sent it in earlier, it had not been sent to him. He had been chasing up the COT3 all day with ACAS. However, it was not his responsibility to ensure that ACAS acted promptly, and indeed it was not clear yet what time the respondent had sent the draft COT3 to ACAS. He was not acting duplicitously at any point as suggested by the respondent as he was unaware before 13:35 that there was a draft COT3.

18. The claimant submitted that it was unreasonable of the respondent to assume that the matter had settled. It was particularly unreasonable that they had written to the Tribunal on the Sunday in an attempt to cancel the hearing (which was only within the ambit of himself and/or ACAS), and yet no COT3 had been obtained and they knew one could not be obtained until Monday. Accordingly, at that point in time when they wrote the email to the Tribunal, even though it is accepted it probably would not have been read until Monday, the respondent had no idea whether there would be an agreement.

19. The respondent was rash in assuming:

(1) that the claimant would be willing to agree to all the other matters in the COT3; and

(2) that they could cancel the hearing in this rather cavalier fashion.

Conclusion

20. Bearing in mind the strictures in **Flint** regarding finality of proceedings, and consideration of the overriding objective, it is my decision not to vary or overturn the Judgment I made in respect of the claimant on 19 October 2020.

21. My reasons are that whilst Ms Watson appears a genuine and resourceful individual, she had no proper explanation of why she did not attend the hearing. In my view it was not reasonable of Ms Watson to assume that the matter had been settled given she was aware of the procedure and if she was not she should have been, and that merely the drafting of the agreement and signing it would not be sufficient as it was still open at that point for the claimant to make changes – for example he was not happy with the payment period. Whilst it was unfortunate that this was not forwarded to the claimant until much later in the day, there was still a window of opportunity to ensure the matter was settled. If Ms Watson had chased the matter up further with ACAS it is possible the COT3 would have been forwarded more quickly to the claimant and the matter could well have been settled before the 2.15pm hearing.

22. I find that it was not reasonable either for the respondent on the Sunday to assume the matter would be settled. Again it was clear that it was not just the matter of the amount of money which had been agreed in principle but there may be other terms which either the respondent put in and the claimant did not agree or other terms the claimant would put in.

23. Whilst Ms Watson has advised that they would have paid the money more quickly, unfortunately due to negotiations taking place very close to the hearing it appears that ACAS did not pass on to the respondent the claimant's indication around 2.00pm that he would settle if the money was paid before 2.15pm. The respondent could have asked for a short postponement whilst the matter was finalised. The claimant was perfectly entitled to decide to go ahead with the hearing. There was nothing that the claimant did to mislead the respondent into thinking that the matter had been settled when it had not been.

24. Accordingly, the circumstances surrounding the respondent’s assumption that the matter had settled, whilst genuine, was not reasonable and accordingly are insufficient for the original Judgment to be overturned.

_____

Employment Judge Feeney

20 August 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

23 August 2021

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
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.