EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms A Uzuegbu		Hestia Housing and Support Limited

JUDGMENT
ON RESPONDENT'S APPLICATION FOR RECONSIDERATION

1. By letter dated 17 August 2021 the Respondent applied for reconsideration of the Judgment on Remedy in this matter sent to the parties on 13 August 2021. In that letter it seeks reconsideration of the judgment on the following grounds:-

    a. The name of the respondent;
    b. Contributory conduct;
    c. Basic award;
    d. Compensatory award;
    e. ACAS uplift.

2. By notice sent to the parties on 20 September 2021 I set out my Preliminary Views and Observations on the application and invited the parties observation on points a., c., d. and e. of the application as set out above. Point b. (contributory conduct) I indicated I intended to refuse on the papers and neither party was invited to provide comments on that.

3. Both parties agreed I could determine the application without a hearing. I have therefore done so, taking into account the parties' comments in finalising this judgment and re-issuing the Remedy Judgment in this matter.

<u>The law</u>

4. Rules 70-73 of the Tribunal Rules provides as follows:-

> **70. Principles**
> 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.
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> **71. Application**
> 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.
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> **72. Process**
> (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.
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> (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.
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> (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.
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> **73. Reconsideration by the Tribunal on its own initiative**
> Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being

reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).

5. 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 (ibid, para 20).

6. 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).

7. It may also be appropriate for a judgment to be reconsidered if a party for some reason has not had a fair opportunity to address the Tribunal on a particular point (*Trimble v Supertravel Ltd*, *Newcastle-upon-Tyne City Council v Marsden* ibid).

8. However, a mere failure by a party (in particular a represented party) or the Tribunal to raise a particular point is not normally grounds for reconsideration (*Ministry of Justice v Burton* (ibid) at para 24) – an application for reconsideration is not an opportunity to re-argue the merits.

This case

9. The Tribunal thus has discretion to reconsider a judgment if it considers it in the interests of justice to do so. Under Rule 72(1), I must dismiss the application if I consider that there is no reasonable prospect of the original decision being varied or revoked. Otherwise, I must (under Rule 72(2)) consider whether a hearing is necessary in the interests of justice to enable the application to be determined. If, however, I decide that it is in the interests of justice to determine the application without a hearing under Rule 72(2), then I must give the parties a reasonable opportunity to make further written representations and I may in that notice set out my provisional views on the application.

10. This is that notice and what follows are my provisional views on which the parties' written observations are invited in accordance with the orders set out above:-

a. Name of the Respondent

11. The Respondent raised this point in its previous application for reconsideration of the Liability Judgment, but did not there explain that Hestia Housing and Support is indeed its registered name and that it is a company which is a charity which benefits from an exception in section 60 of the Companies Act 2006 of which I was not previously aware. It is plainly in the interests of justice for the name of the Respondent on both the liability and remedy judgments to be amended accordingly. Subject to the parties' submissions, this point could be dealt with without a hearing.

b. Contributory conduct

12. In the Judgment on Remedy I identified at paragraph 9 the matters that counsel for the Respondent raised at that hearing as being the matters that it relied on in contending that the Claimant had contributed to her dismissal in such a way that should lead to a reduction in her compensation and I reached a judgment on each of those matters. The Respondent now seeks to raise two further arguments which it did not raise at the hearing. It is immaterial that it put them in its previous application of 8 February 2021. What I indicated in my order in response to that application was that the issue of contributory conduct would be dealt with at the Remedy hearing. It was a matter for the Respondent what arguments it chose to run at that hearing. The Respondent was represented by counsel but did not run the arguments that it now includes in this reconsideration application at the hearing although it had every opportunity to do so. The strong public interest in the finality of litigation means that it is not in the interests of justice to permit it to do so now. The authority of the Court of Appeal in *Ministry of Justice v Burton* makes that clear. On this point, therefore, the application for reconsideration stands no prospect of success and I refuse it on the papers under Rule 72(1).

c. Basic Award

13. I agree with the Respondent that I have miscalculated/mis-typed the Basic Award. The Claimant's gross weekly wage was £472.98[1] and the Basic Award should therefore have been 1.5 x £472.98 x 11 = £7,804.17, which is higher than my previous calculation. The Respondent is commended for pointing out this error even though it goes against its interests. The Claimant in her comments asserts that her basic award should be calculated on the basis of 12 years' service, but the evidence is that her employment commenced on 10 January 2008 and terminated on 5 December 2019. She therefore had 11 years' complete service at the date of dismissal and the Basic Award has been properly calculated on that basis.

[1] In my Provisional Views I adopted the Respondent's figure here of £471.98, but in fact it should have been £47**2**.98 as per paragraph 33 of the Remedy Judgment.

d. Compensatory Award

14. The Respondent invites me to reconsider the basis of part of my compensatory award relating to the period of 13 weeks during which the Claimant was recovering from an operation and unable to work. I allowed the Claimant's claim for this period on the basis of her evidence that she had received 'full pay' the last time she was off sick, but the Respondent now points out that her contractual sick pay entitlement was to 30 days' full pay and 30 days' half pay and thereafter statutory sick pay. Although it could be argued that the Respondent had the opportunity at the hearing to make this point, I acknowledge that this came up only in oral evidence and that the Respondent was to an extent 'taken by surprise' on this point. I consider that the Respondent did not have a fair opportunity to raise this point at the hearing such that it is appropriate for this point to be raised on reconsideration. Further, the Claimant's contractual entitlement does not in any event conflict with her oral evidence since I do not have a note of the Claimant saying that her previous period(s) of ill health were of any particular length. Although this point is much more finely balanced than the others, and since no objection to this point has been raised by the Claimant, I consider it to be in the interests of justice to reduce the compensatory award by £1,760.77 to reflect the Claimant's contractual entitlement.

e. ACAS uplift

15. The Respondent points out that under s 124A of the ERA 1996 the adjustment pursuant to s 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 should be only to the compensatory award and not the basic award. I note that this section is inconsistent with the terms of s 207A of the 1992 Act itself which refers to 'any award', but on normal principles of statutory interpretation, the later Act of Parliament should prevail over the former and I note from the legal materials provided by the Respondent that appears to be the accepted approach. This is therefore an amendment that I make as it is a point that otherwise the EAT will have to correct on appeal and it is undesirable that the parties should have to incur the cost and time required for that.

Conclusion

16. In the light of all the amendments identified above, the total basic award is now £7,804.17, and the total award for loss of earnings is £7,918.27 (i.e. £9,679.04 - £1,760.77). Including £400 compensation for loss of earnings and applying 15% ACAS uplift gives £9,566.01 compensatory award. The total award is therefore **£17,370.18**.

Employment Judge Stout

5 November 2021

SENT TO THE PARTIES ON

08/11/2021..

FOR THE TRIBUNAL OFFICE