**Case Number: 2300134/2018**

# EMPLOYMENT TRIBUNALS

**BETWEEN**

**Speed Car Wash Specialists Ltd**
**Appellant**

AND

**Commissioners for HM Revenue & Customs**
**Respondent**

## JUDGMENT

The appellant's application dated 9 April 2020 for a reconsideration of the Judgment of Employment Judge Hyde sent to the parties on 10 February 2020 is refused.

## REASONS

1. In the long term absence of Judge Hyde, I have been appointed by Regional Employment Judge Freer to consider the appellant's application for a reconsideration of the Judgment sent to the parties on 10 February 2020 ('the Judgment') which upheld the respondent's notice of underpayment pursuant to the National Minimum Wage Act 1998.

2. I have received the following documents:

    2.1 the Judgment;

    2.2 the appellant's application dated 9 April 2020 and further submissions dated 12 October 2020; and

    2.3 the respondent's responses dated 22 May 2020 and 4 December 2020;

    and have also been referred to the case of Walton v Independent Living Authority Ltd [2003] EWCA Civ 199, which I have read.

3. The power to reconsider

4. The power to reconsider is contained in rule 70 of the Employment Tribunal Rules 2013 which states:

> 'A Tribunal may, either on its own initiative … 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.'

5. This power is not open-ended. It is limited not least by the need for finality in litigation and that is why the inadequacy of submissions by a party is not in itself sufficient reason for a reconsideration. Also, should a Tribunal have made an error of law, the remedy will usually be an appeal to the Employment Appeal Tribunal (EAT). If fresh evidence has come to light that will only usually warrant a reconsideration if the evidence could not have been obtained with reasonable diligence for use at the original hearing, is relevant, apparently credible and would probably have had an important influence on the hearing.

6. <u>The Judgment</u>

7. Both parties were represented by Counsel at the Hearing in September 2019. The Judgment set out the relevant statutory framework, summarised the submissions of both Counsel, identified the issues as disputed working hours and amount of pay received (the parties having agreed that the workers carried out 'unmeasured work') and identified in detail the relevant factual matrix.

8. Judge Hyde dismissed the appeal concluding that on the balance of possibilities the assumptions reached by the respondent's compliance officer were consistent with the evidence and information she obtained. Further that the appellant had failed to provide a credible explanation as to how the hours and pay documented in the records provided would allow the business to operate. In addition, she expressly recorded that she took into account discrepancies in relation to the information provided by the appellant to the respondent and also his failure to provide CCTV information.

9. <u>Submissions</u>

10. In his application dated 9 April 2020 the appellant stated that:

> 'The injustice and request for reconsideration is based on the case of Walton v Living Organisation Ltd (2003) EWCA - The principle of how much time approximately it takes to carry out the task per day to conclude whether the Minimum Wage Requirements have been satisfied.'

and then set out a purported calculation to show that the actual amount due to the employees per day was £36 as opposed to the £54 calculated by the respondent.

11. In their response dated 22 May 2020 the respondent submitted that the main principle to be derived from the Walton decision is that whether a worker is undertaking "time work" or "unmeasured work" is a question of fact to be decided by the Tribunal. I agree with that submission. The respondent also submitted that Judge Hyde had directed herself properly as to the application of the relevant legal principles and considered comprehensively the evidence before her. Again I agree.

12. They confirmed that at the Hearing the only matters in dispute were the working hours and the pay received and that in light of the evidence before the Tribunal and the submissions of the parties, Judge Hyde was entitled to reach the same conclusion that the compliance officer had reached (and on the same methodology), to find that there was no basis to interfere with the relevant notice of underpayment, and accordingly that the appeal should be dismissed.

13. As far as the Walton case is concerned, they said that the appellant had failed to explain its relevance in light of the appeal having been based on 'unmeasured work'. Further, that the revised calculation suggested by the appellant was unclear with no evidence, fresh or otherwise, to support his assertions.

14. In response the appellant disputed the method of calculation used to calculate hours worked, citing two alternative approaches relying in part on his interpretation of Walton which he said suggested using a daily average agreement and referring to evidence provided at the Hearing.

15. To that the respondent submitted that the appellant had misunderstood the meaning of daily average agreement in the context of Walton (it being a term of a worker's contract) and that it had no relevance to this appeal on the facts. Accordingly, it continued to rely on its earlier submissions.

16. Conclusion

17. I find that there is no reasonable prospect of the original decision being varied or revoked on the basis submitted by the respondent. The appellant had a full opportunity to make his case at the Hearing. He has not referred to any new evidence that could not have been brought to that Hearing and his argument on Walton is misconceived. There are no grounds to allow his application for a reconsidering to proceed. If he considers that Judge Hyde erred in law then the proper route for such a challenge is by way of appeal to the EAT.

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Employment Judge Andrews
31 December 2021