Case No. 1406710/2020
1400369/2021
1400395/2021
1400538/2021

EMPLOYMENT TRIBUNALS

Claimants: (1) Miss S Spicer
(2) Miss B Johnson
(3) Miss T Holt
(4) Miss E Hillman

Respondent: R & S Hotel Management Limited

JUDGMENT ON APPLICATION FOR RECONSIDERATION

1. The Respondent's application for reconsideration is granted in part and the Judgment of 29 October 2021 is varied as follows;
   (i) Paragraph 3 (ii) is varied such that the Second Claimant is now awarded the sum of £3,990.27;
   (ii) Paragraph 3 (iv) is varied such that the Fourth Claimant is now awarded the sum of £5,999.33.

2. The balance of the Respondent's application is dismissed as it stands no reasonable prospects of success.

REASONS

1. The Respondent applied for a reconsideration of the Judgment dated 29 October 2021 which was sent to the parties on 26 November 2021 with Reasons following on 14 December 2021. The grounds were set out in its application of 11 November 2021.

Principles

2. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). 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. The application was therefore received inside the relevant time limit.

3. 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. The earlier case law suggested that the 'interests of justice' ground should be construed restrictively. The Employment Appeal Tribunal in *Trimble-v-Supertravel Ltd* [1982] ICR 440 decided that, if a matter had been ventilated and argued at the hearing, any error of law fell to be corrected on appeal and not by review. In addition, in *Fforde-v-Black* EAT 68/80 (where the applicant was seeking a review in the interests of justice under the former Rules which is analogous to a reconsideration under the current Rules) the EAT decided that the interests of justice ground of review does not mean "*that in every case where a litigant is unsuccessful he is automatically entitled to have the tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in the even more exceptional case where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order*". More recent case law has suggested that the test should not be construed as restrictively as it was prior to the introduction of the overriding objective (which is now set out in rule 2) in order to ensure that cases are dealt with fairly and justly. As confirmed in *Williams-v-Ferrosan Ltd* [2004] IRLR 607 EAT, it is no longer the case that the 'interests of justice' ground was only appropriate in exceptional circumstances. However, in *Newcastle Upon Tyne City Council-v-Marsden* [2010] IRLR 743, the EAT stated that the requirement to deal with cases justly included the need for there to be finality in litigation, which was in the interest of both parties.

Fourth Claimant

4. The Respondent asserted that the calculations of loss in respect of the Fourth Claimant had failed to account for the fact that furlough payments under the JRS reduced in July, tapering to a conclusion on 30 September 2021.

5. The Fourth Claimant was asked what comments she had about the Respondent's point and whether she was content for the application to have been determined in writing (the Tribunal's letter of 14 December). On 14 December, she expressed the view that the calculation had been correct in her case and, on 10 January, she asked for the matter to be determined in writing.

6. The reduction from 80% to 70% in July 2021 was not reflected in the calculations within paragraph 5.6 of the Reasons. The Respondent's point was a good one and the calculation of loss in the Fourth Claimant's case needed to be varied to reflect it. The reduction covered a short period (1 month) because furlough ought to have ended in August when the Hotel re-opened. The calculation was therefore as follows;

    38 (weeks until the Hotel re-opening), comprising;

    - 34 weeks x 16 x £8.72 – 20% = £3,794.94; and
    - 4 weeks x 16 x £8.72 – 30% = £390.66; and

13 (weeks since re-opening) x 16 £8.72 = £1,813.76
A total of £5,999.33.

Second Claimant

7. A point upon which the Respondent did not comment, but which had occurred to the Judge when he had re-visited the Judgment for the purposes of considering the point above, was that which was made in respect of the Second Claimant's claim in the letter of 14 December 2021; that the calculation of loss in her case ought to have been based upon the contractual term which was found to have existed (an express term for her to have worked for 26 hrs/wk) rather an average hours approach on the basis that she worked under a zero hours contract.

8. The findings of relevance were those within paragraphs 3.14 and 3.15 of the Reasons in which it was determined that she had the benefit of express term for 26 hrs of work/week. The fact that she worked (and was paid) in excess of those hours on occasions before furlough did not alter the express term contended for and found and the calculations ought not therefore to have been conducted on the basis of average hours, assuming that she had been on a zero hours contract like her co-Claimants.

9. The Second Claimant merely wrote to state her belief that the initial Judgment was correct but did not set up arguments as to how or why the Judge's preliminary views in the letter of 14 December ought not to have been applied.

10. The calculation in paragraph 5.3 of the Reasons therefore ought to have been varied as follows;
    26 x 22 weeks x £8.72 – 20% = £3,990.27

Other arguments in respect of all Claimants

11. The Respondent's reconsideration application was otherwise short and pithy (see the last paragraph on page 1 and the first two lines on page 2). It contended that it was, in effect, an intermediary between the Government and the Claimants under the JRS and, since there was no work at the Hotel from November 2020, no wages were 'properly payable' under the Act.

12. Those points, and the additional comment made about the contracts, were addressed in the Reasons (paragraphs 4.1-4.6). The Respondent's arguments did not provide a reason why the original Judgment ought to have been varied or revoked. There were no reasonable prospect that those arguments would succeed. To that extent, the application was otherwise dismissed.

Employment Judge Livesey
Date: 14 January 2022

Judgment sent to parties: 20 January 2022

FOR THE TRIBUNAL OFFICE