EMPLOYMENT TRIBUNALS

Claimant: Mr J Oxley

Respondent: Terry Group Limited

JUDGMENT

The claimant's reconsideration application is refused.

REASONS

The claim

1. At a final hearing on 11 February 2022, at which the claimant represented himself, I had to determine whether or not the respondent had made various unauthorised deductions from the claimant's wages.
2. The wages in question included sick pay, holiday pay and furlough pay. The sick pay element of the claim included sick pay allegedly payable for a period of sick leave in September 2020.
3. At the start of the hearing I sought to clarify the issues in dispute. When I asked the claimant about the alleged deduction from his September sick pay, the claimant told me that he was not pursuing it.
4. I decided that the respondent had made a series of unauthorised deductions from the claimant's furlough pay. I declined to order the respondent to make any payment to the claimant. This was because the respondent had already made a payment in respect of all the unlawfully-deducted wages.
5. I dismissed the remainder of the claimant's claim, including the allegation of unlawful deductions from his September sick pay. This was on my understanding that the claim in respect of that deduction had been withdrawn.
6. Those decisions were recorded in a written judgment sent to the parties on 15 February 2022.

The reconsideration application

7. The claimant has applied for reconsideration of that judgment. His application was attached to an e-mail sent on 27 February 2022.

8. The claimant does not challenge the two decisions mentioned above. He does, however, seek an order for payment of the £1,168.00 September sick pay. He asks for the judgment to be varied so as to include an order for payment of that sum. He is not seeking to revive any argument that there was any *deduction* from sick pay properly payable to him. Rather, he now seeks an order for payment of £1,168.00 as compensation for the financial losses caused by the unlawful deduction from his furlough pay. His case, as set out in his reconsideration application, is that the deductions made him ill and his ill health prevented him from working, causing him to lose £1,168.00 of earnings as a result.

Relevant law

9. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides the tribunal with a general power to reconsider any judgment "where it is necessary in the interests of justice to do so".

10. Rule 71 sets out the procedure for reconsideration applications.

11. By rule 72(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… the application shall be refused…"

12. The overriding objective of the 2013 Rules is to enable the tribunal to deal with cases fairly and justly. By rule 2, dealing with cases fairly and justly includes putting the parties on an equal footing, avoiding delay, saving expense, and dealing with cases in ways that are proportionate to the complexity and importance of the issues.

13. The old Employment Tribunal Rules of Procedure 2004 required that judgments could be "reviewed", but only on one of a prescribed list of grounds. One of those grounds was that "new evidence [had become] available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time." This proviso reflected the well-known principle applicable to civil appeals derived from *Ladd v. Marshall* [1954] 3 All ER 745, CA.

14. The current 2013 Employment Tribunal Rules of Procedure replaced the old list of grounds with a single test: a judgment will be reconsidered where it is "necessary in the interests of justice to do so". There is no specific provision for fresh evidence. Nor is there any express prohibition a party relying on evidence about which he knew or ought to have known before the judgment was given. Nevertheless, the "interests of justice" test must, in my view, incorporate a strong public interest in the finality of litigation, even if it is not as inflexible as the proviso in the 2004 Rules. Where a party could reasonably have been expected to rely on the evidence first time around, it would take a particularly good reason to give that party a fresh opportunity to rely on it.

15. Rule 51 provides that, where a claimant informs the tribunal, in the course of a hearing, that a part of a claim is withdrawn, that part of the claim comes to an end. (The claim is preserved for various types of applications, but they are not relevant to this claim.)

16. Once a claim, or part of it, has been withdrawn, it cannot be revived in the same proceedings: *Khan v. Heywood & Middleton PCT* [2006] EWCA Civ 1087.

17. The withdrawal of the claim must be clear, unequivocal and unambiguous. Before treating the claim as withdrawn, the employment judge should check that the claimant understands the consequences of what he is saying: *Segor v. Goodrich Actuation Systems* UKEAT 0145/11.

18. Section 24 of the Employment Rights Act 1996 prescribes the remedies available to the tribunal where a complaint of unlawful deduction of wages is well founded. By subsection (2), the tribunal may order payment of "such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of."

19. I have considered whether or not the phrase "financial loss …attributable to the matter complained of" is wide enough to encompass loss of earnings attributable to illness caused by the unlawful deduction. I am not aware of any authority directly on the point. In my view, however, I do not think subsection 24(2) is wide enough to allow the tribunal to award such a head of compensation. What the subsection is aimed at, in my view, is direct financial loss, such as interest payments and penalty charges. This interpretation is consistent with the Explanatory Notes to section 7 of the Employment Act 2008, which inserted section 24(2) into the Employment Rights Act 1996.

Discussion

20. In order for the judgment to be reconsidered, the claimant would need to establish a reasonable prospect of successfully arguing, both:

    20.1. That his claim for September sick pay was not withdrawn; and

    20.2. That if pursued, it would result in the judgment being varied.

21. The claimant does, in my view, have a reasonable prospect of arguing that he did not withdraw his claim for September sick pay. This is despite the fact that he told me that he was not pursuing it. I do not think that I needed to check that he understood the consequences of not pursuing an allegation. He knew that this was the final hearing of his claim and, if he did not pursue an allegation at that hearing, he would not realistically have any other opportunity to do so. However, it is arguable that there was insufficient clarity as to precisely *what* was being withdrawn. He could have been withdrawing his allegation that the September sick pay was properly payable, leaving open the argument that an equivalent amount should be paid to him as compensation for unlawful deduction from his furlough pay.

22. I nevertheless refuse the claimant's reconsideration application. This is because it will inevitably fail at the second hurdle. There is no reasonable prospect of the judgment being varied so as to include the proposed award under section 24(2). There are two fundamental problems with such an award. First, for the reasons I have given, I do not think that section 24(2) is wide enough to enable me to do what the claimant wants me to do. Second, even if I had the power under section 24(2), I could not find that the loss of earnings was "attributable" to the unlawful deduction without first finding that the deduction had caused his medical inability to work. For me to make such a finding, there would need to be medical evidence. I do not necessarily go as far as to say that there would need to be an expert

opinion. But, in the absence of expert evidence, there would need to be contemporaneous medical evidence that was sufficiently clear as to enable a person without medical expertise (as I am) to conclude that the unlawful deduction caused the claimant to be too ill to work. There is no such evidence. It would be disproportionate to list a hearing even for contemporaneous medical records to be made available. The delay and expense would be still worse if I were to permit a party to rely on an expert's report. In any event, had the claimant wished to claim compensation for loss of earnings, he could reasonably have been expected to bring medical evidence to the final hearing. The *Ladd v. Marshall* criteria are not satisfied.

Conclusion

23. For the above reasons, my view is that there is no reasonable prospect of the judgment being varied or revoked. The reconsideration application is therefore refused.

Employment Judge Horne
14 March 2022

SENT TO THE PARTIES ON
4 April 2022

FOR THE TRIBUNAL OFFICE