



EMPLOYMENT TRIBUNALS

Claimant: Miss K John

Respondent: Water Wings Swim School

RECONSIDERATION JUDGEMENT

Upon the Respondent's application made by letter dated 4 May 2022 to reconsider the Judgment dated 3 March 2022 under rule 71 of the Employment Tribunals Rules of Procedure 2013:

the Written Judgment dated 3 March is confirmed.

REASONS

1. An application for reconsideration is an exception to the general principle that (subject to an appeal on a point of law) a decision of the Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (Rule 70).
2. The importance of finality was confirmed by the Court of Appeal in *Ministry of Justice v Burton and anor* [2016] EWCA Civ 714 where it said:

“the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (*Flint v Eastern Electricity Board* [1975] ICR 395 which militates against the discretion being exercised too readily; and in *Lindsay v Ironsides Ray and Vials* [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review.”

3. Similarly, in *Liddington v 2gether NHS Foundation Trust* EAT/0002/16 the Employment Appeal Tribunal said:

“a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or reargue matters in a different way or by adopting points previously omitted. There is an underlying policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the

opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered.”

4. In my letter to the parties dated 13 May 2022, I set out my provisional view that this matter should be reconsidered as having delivered my oral judgment, I made no award for failure to provide a written statement of employment particulars as required by s38 of the Employment Act 2002. That letter states as follows:

“The Claimant was found to be a worker and under s38(3) of the Employment Act 2002, the Tribunal must, subject to subsection (5) increase the minimum award and may, if it considers it just and equitable in all circumstances, increase the award by the higher sum.

The oral judgment did not take into account the amendments made by regulations 1(2) and 17(2) of the Employment Rights (Miscellaneous Amendments) Regulations 2019 which extends the duty to provide a written statement of particulars to workers.

In the written judgment, an award equivalent to two weeks’ amounting to £192 was made. This was a departure from the oral judgment and as such, a reconsideration of the judgment can be considered.”

5. The parties were given until 23 May 2022 to write to the Employment Tribunal to set out their views on reconsideration and whether a reconsideration could be determined by written submissions. The Respondent was also requested to give reasons if they considered any exceptional circumstances which would make an award unjust or inequitable. The Claimant did not provide a response in relation to the reconsideration. The Respondent did not indicate any exceptional circumstances. In response to this letter, the Respondent requested a reconsideration of the Judgment by email dated 23 May 2022. I have considered all relevant documentation by the parties in the matter.
6. In their application dated 23 May 2022, the Respondent raises the following points:
- i) “The absence of a written statement of employment was not pleaded during the hearing, nor at a preliminary hearing heard by Employment Judge Ryan.
 - ii) The amount and date of the unauthorised deductions are incorrect
 - iii) Support by Employment Judge Butcher
 - iv) The Claimant’s witness statement was amended
 - v) The Claimant was cross-examined by Employment Judge Butcher without affirmation or oath

- vi) References made by Employment Judge Ryan during a preliminary hearing regarding the Claimant's status and Employment Judge Butcher "ignoring this evidence".
 - vii) Interruptions made by the Claimant's father and representative making the Hearing unfair."
7. By a further letter dated 1 July 2022 and in accordance with Rule 72(2) of the Employment Tribunal Rules of Procedure 2013, the parties were notified that the application would proceed by way of written submissions in the absence of a hearing and were requested to provide any further written submissions upon which they intended to rely by 15 July 2022. The parties did not request an oral hearing for the reconsideration. No further submissions have been received and I have therefore addressed the matters raised in the Respondent's application for reconsideration.
8. In relation to point (i) of the Respondent's application, the Claimant had provided a Schedule of Loss which was considered at the beginning of the final hearing. The Claimant's representative confirmed a sum for 4 weeks' pay in relation to the Respondent's failure to provide a written statement was being claimed as opposed to 2 weeks due to the emotional stress this matter had caused the Claimant. The Respondent did not question this at the time, nor was the Claimant questioned by the Respondent on this issue. As the Claimant's claim was upheld, in accordance with s38 Employment Act 2002, the tribunal **must**... make an award of the minimum amount.
9. The Respondent did not identify any issues arising in the preliminary hearing heard by Employment Judge Ryan during the Hearing on 3rd March 2022. This has only now come to my attention as part of the Respondent's application for reconsideration.
10. In relation to point (ii), the Respondent does not dispute the award in relation to deduction in respect of holiday pay. I refer to paragraphs 35 and 37 of the Judgment and I find nothing to lead me to consider departing from this.
11. Turning to points (iii) and (vii), the Respondent does not provide any specific detail. It would be a matter of supposition on my part to infer that this suggests I did not conduct the hearing in a fair manner. In the event that this is what the Respondent intends, I have addressed this together with points iv) and vii) raised by the Respondent. At Paragraph 8 of my judgment, I record that both parties confirmed that they had been able to ask all the questions they wished to raise and that I was satisfied that the parties were afforded sufficient time to put their respective positions to the Tribunal. I have in mind at all times Rule 2 of the Tribunal Procedure Rules and my obligation to ensure the parties are on an equal footing and seeking flexibility in the proceedings in order to deal with cases fairly and justly. I have considered these matters carefully and am satisfied that there were no procedural irregularities which would render the Hearing unfair.
12. With regard to points (iv) and (v), at the beginning of the Claimant's evidence, the Claimant's father and representative began asking questions of the Claimant and the Claimant responded. At that point, the Claimant had not affirmed. As soon as this became apparent, I explained this to the

parties and asked the Claimant to provide an affirmation dealing with the evidence she had given and the remainder of her evidence. Mr Francis, on behalf of the Respondent confirmed that he was content to proceed on this basis.

13. I am satisfied that the evidence provided by the Claimant was therefore valid and in accordance Rule 43.
14. In relation to point (vi), this was not raised by the Respondent at the Hearing on 3 March 2022 and I was not involved in the preliminary hearing. A copy of Employment Judge Ryan's Order was not provided to me by either party but I have since seen a copy of the Order. The Preliminary Hearing to which the Respondent refers was for case management only and no evidence was given.
15. The Respondent's application for reconsideration is allowed in accordance with my preliminary view as set out in my letter to the parties dated 13 May 2022. Following my oral Judgment, I reflected on the amendments made by Regulations 1(2) and 17(2) of the Employment Rights (Miscellaneous Amendments) Regulations 2019. As I found the Claimant to be a worker, I considered I was bound to make an award under s38 Employment Act 2002. This was reflected in my written Judgment.
16. In relation to the other matters raised in the Respondent's application, I am satisfied on the basis of what is before me that there is no reasonable prospect of the original Judgment being varied or revoked,

Employment Judge Butcher
DATE – 12 August 2022

JUDGMENT SENT TO THE PARTIES ON 18 August 2022

FOR THE TRIBUNAL OFFICE Mr N Roche