



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4113698/2019 Reconsideration per Written Submissions: Members' Meeting on 9 September 2022**

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**Employment Judge: M A Macleod  
Tribunal Member: S Gray  
Tribunal Member: C Russell**

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**Patricia Rodger**

**Claimant  
Represented by  
Mr G Bathgate  
Solicitor**

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**AdvoCard Ltd**

**Respondent  
Represented by  
Mr A McCormack  
Solicitor**

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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**The unanimous Judgment of the Employment Tribunal is that the claimant's application for reconsideration of the Judgment of 10 June 2022 is granted, and that the claimant is awarded Three Thousand Three Hundred Pounds (£3,300) in respect of past wage loss; and that the Judgment of 10 June 2022 is otherwise unaffected and remains in place.**

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### REASONS

1. The Employment Tribunal issued a Judgment in this case, following a lengthy hearing, in which the claimant's complaints were upheld, in part,

and making an award of compensation to the claimant. The Judgment was issued to the parties on 10 June 2022.

2. The claimant submitted an application for reconsideration of that Judgment, to a limited extent, by email dated 24 June 2022. Further  
5 correspondence from both parties followed, and the Tribunal met on 9 September 2022 by CVP in order to determine the application.
3. It is appropriate, then, to set out the parties' respective submissions, followed by the Tribunal's decision on this matter.

### **Claimant's Application and Submission**

- 10 4. For the claimant, Mr Bathgate confirmed in his initial email of 24 June 2022 (the application therefore being presented within the statutory time limit) that he was seeking reconsideration of the Judgment "restricted to the matter of past wage loss".
- 15 5. He referred to paragraph 253 of the Judgment which stated that the claimant was paid until March 2022 and accordingly there was no claim for past wage loss made by her. He said that this is not supported by the evidence nor by the terms of the Schedule of Loss lodged and found at page 925 of the Joint Bundle of Productions.
- 20 6. He went on to point to the terms of paragraph 150 of the Judgment which stated that the claimant was paid until the end of March 2020 and then on half pay until the end of November 2020, and asserted that these dates were wrong. She was not absent from work until November 2020 and was paid in full until May 2021 when she went on half pay. Her entitlement to any employer sick pay expired in November 2021.
- 25 7. The past wage loss, he said, was set out in the Schedule of Loss as £3,300, a figure not disputed by the respondent. He therefore requested reconsideration of the Judgment, to this extent, under Rule 70 of the Employment Tribunals Rules of Procedure 2013.

8. Further, Mr Bathgate presented more detailed submissions to the Tribunal by email dated 9 August 2022, having been invited by the Tribunal to do so.
9. He said that the index incident occurred in February 2018 (paragraphs 34 to 60 of the Judgment), and the contemporaneous medical evidence came from Dr Robby Steel. He referred to the oral evidence of Dr Stel together with reports and letters distributed throughout the Joint Bundle.
10. Mr Bathgate argued that the claimant's symptoms were exacerbated by the incident in February 2018 and the actions of the respondent thereafter, in particular the failure of the respondent to resolve the matter. There is therefore a causative link between the claimant going off in November 2020 and the acts of discrimination determined by the Tribunal. Any wage loss flows from the acts found to be established in the Tribunal's Judgment.
11. He submitted that the claimant's past wage loss to the Tribunal Hearing flowed directly from the respondent's failure to make reasonable adjustments and the claimant continued to be absent from work despite having been signed by her GP as fit to return with adjustments.
12. He concluded by arguing that it would be just and equitable for the Tribunal to award compensation "in respect of past wage loss and for a short period of future wage loss to provide the Claimant with further time to return to work, which we would quantify as being 6 months standing the fact that we are now in August 2022."

### **The Respondent's Response and Submission**

13. By email dated 5 July 2022, Mr McCormack, for the respondent, opposed the application for reconsideration. He pointed out that even if the claimant had made a claim for past wage loss for the period June 2021 to March 2022 in terms of the Schedule of Loss, the Tribunal's reasoning at paragraph 253 applied not only to future but also to past wage loss from June 2021 to March 2022.

14. Mr McCormack provided a short further submission on 12 August 2022, in which he noted that the claimant was now seeking to add an application for reconsideration in relation to future wage loss. He contended that this was out of time, but in any event maintained that paragraph 253 of the Judgment and reasoning therein applied and was correctly determined.

### Discussion and Decision

15. Essentially, it seems to us that there are 3 issues to address in this application for reconsideration:

**1. Did the claimant suffer any wage loss up to the date of the Tribunal, and if so, for what period?**

**2. Can that wage loss be said to be attributable to the discriminatory acts found to have been committed by the respondent?**

**3. Should any future wage loss be taken into consideration?**

**4. What, if any, part of the Judgment should be varied or revoked?**

16. The first question, then, is whether the claimant suffered any wage loss up to the date of the Tribunal.

17. The Tribunal made a finding, in paragraph 253, that the claimant had not suffered any past wage loss. We are referred, in reviewing this matter, to paragraph 150 of the Judgment. In that paragraph, we noted:

*“She continued to work until November 2020, when a number of events occurred which led to her being absent on sick leave again. Since then until the date of this Hearing, the claimant has not returned to work. She received full pay until the end of May 2020, then half pay until the end of November 2020. Thereafter the claimant received four payments of £806.44 net in respect of holiday pay, the last of which was paid at the end of March 2022.”*

18. We accept that the factual position is not set out accurately here. There was, in our view, some confusion in the claimant's evidence about her period of pay. She was asked by Mr Bathgate, in the Employment Judge's notes, whether her sick pay ran out in November 2021. She replied that that was the case, and that she was paid in full for a period of special leave. It is recorded that she then said that she was given 6 months of full pay to the end of May 2020, and half pay until the end of November 2021. That reference to May 2020, whether inaccurately testified to by the claimant or noted by the Employment Judge, is plainly incorrect.
19. A letter required to be written by the respondent to the claimant on 9 September 2021 (841) to clarify how an error in her pay was to be dealt with. The claimant had contacted the respondent to advise that she had received an overpayment in her August salary, but this letter confirms that there was then a correction in her September salary, and accordingly the matter was rectified.
20. The payslips for the claimant were produced at 926ff.
21. They record that the claimant received the following pay on these dates:
- 27 March 2021: £1,009.86
  - 27 May 2021: £1,011.60
  - 27 July 2021: £1,019.39
  - 27 August 2021: £527.23
  - 27 January 2022: £806.44
22. As we understand the evidence, that final payslip in January 2022 represents a payment in relation to holiday pay (the payslip notes that itself). In the claimant's own evidence, she confirmed that she received 4 payments at that level, the last of which was received at the end of March 2022.

23. It was therefore our conclusion that the claimant received half pay until November 2021, when her entitlement to sick pay expired, and thereafter received four payments of £806.44 in December, January, February and March.
- 5 24. In the claimant's submissions before us, Mr Bathgate did not go into detail but simply referred us to the Schedule of Loss presented on behalf of the claimant (925).
25. The Schedule of Loss set out, under loss of earnings from June 2021 until the date of the Tribunal:
- 10 "5 months @ £500 per month  
4 months @ £200 per month"
26. By calculating backwards, we understand that the claimant is claiming £200 for each month from December 2021 to March 2022 when she received payments in respect of holiday pay, and £500 for each month from June 2021 until November 2021, when she was in receipt of half pay.
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27. The figures claimed are not strictly accurate, as far as we can understand them, since the claimant's pay, according to the payslips which we have seen, which do not cover each month she was paid, varied by small amounts. They are, it appears, a summary of the rounded-up losses made by the claimant. To be fair to the claimant, the respondent has not expressly disputed these figures at all, nor does Mr McCormack make any comment about them in his response to the application for reconsideration.
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28. In summary, the evidence, and the submissions, presented on the wage loss to the claimant have been somewhat opaque, which is why the Tribunal reached the conclusion that no wage loss had been suffered by the claimant. In submission, little was said about loss by either party.
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29. While this could have been put more helpfully, we have reflected upon the evidence and consider that it is appropriate to accept the claimant's submission that the loss of £3,300 (approximately) has been sustained by her for the period during which she was on half-pay and the period during which she was receiving no monthly salary but was paid outstanding holiday pay.

30. However, paragraph 150 of the Judgment, albeit not entirely accurate with dates, records accurately that, if one amends May 2020 to May 2021, the period during which the claimant received half pay was from June until November 2021.

31. What is at issue here, plainly, is the conclusion that paragraph 253 reached, which is set out here:

*"The claimant was paid until March 2022, and accordingly there is no claim for past wage loss made by her. We did not understand the claimant to be pursuing a claim for significant future loss of earnings, and certainly the submission made on her behalf before us did not suggest such an award. We consider that to be appropriate. The claimant remains in employment with the respondent, and has been absent on sick leave for a considerable period of time. She has expired the right to receive pay from the respondent, which is a contractual matter between the parties. While it might be suggested that the reason for the claimant's absence is related to the matters which are the subject of this claim, we are of the view that the link is not clear, based on the evidence, and accordingly we are not minded to make any award in respect of future wage losses."*

32. In reviewing this paragraph, we have concluded that it is appropriate to accept that the claimant was making a claim for past wage loss. We would reiterate that that claim was not clearly or forcibly put on her behalf, but that with some work and the assistance of this application it has become apparent the extent to which losses have been drawn to our attention.

33. We move then to the next issue.

**Can that wage loss be said to be attributable to the discriminatory acts found to have been committed by the respondent?**

34. We addressed this point in paragraph 253, in the final sentence, expressing the view that the link was not clear, based on the evidence, to find that the claimant's absence was related to – or indeed caused by – the findings of discrimination made in this case.
35. It is fair to say that we were not persuaded by the claimant's submissions on this point, largely because they were confined to pointing to the Schedule of Loss, in the Hearing on the Merits. We have now had a full submission presented to us, but based on the evidence which we had heard in the Hearing. Accordingly, this is appropriate ground for reconsideration to be considered.
36. The primary cause of the claimant's wage loss was her extended absence from work, which meant, contractually, that her entitlement to full and then half pay was restricted after a period of time.
37. Was that absence then caused by the discriminatory acts of the respondent? We are now referred to the regular statements made by Dr Steel to the respondent in which he urged them to resolve the outstanding dispute with the claimant, maintaining to them that she would not make a recovery from illness until this matter were resolved.
38. It is important to note that the claimant had had previous periods of absence, in 2018, and had been suspended on medical grounds for a period, before the lengthy absence which led to her pay being reduced to half in June 2021; and that Dr Steel had made comments over a period of time urging the respondent to resolve the outstanding matters as soon as possible, both before this latter absence and after it had begun.
39. We have found that the respondent failed to make a number of reasonable adjustments not just in relation to the meeting of February 2018 but also in relation to the handling of the disciplinary and grievance issues which followed on from that. Since those failures were ongoing to



the point when the claimant submitted her Tribunal claim, it is correct, in our view, to find that they did have a causative effect which led to the claimant's lengthy absence, and thus the halving of her pay, which brought about the wage loss for which she now contends.

- 5 40. It is therefore our conclusion that the application for reconsideration is well-founded, in that it is just and equitable to attribute the loss of earnings sustained by the claimant in 2021 and into 2022 to the respondent's actions up to the point of the Tribunal claim being presented by the claimant.

10 **Should any future wage loss be taken into consideration?**

41. In our judgment, the application for reconsideration as submitted on 24 June 2022 expressly excluded any request that future wage loss should be taken into account in the compensation awarded. The application stated that "We seek a Reconsideration of the Judgment restricted to the matter of past wage loss."

- 15 42. As a result, no application for reconsideration relating to the Tribunal's findings in relation to future wage loss is before the Tribunal.

43. The further submissions presented by Mr Bathgate on 9 August 2022 were a response to the invitation by the Tribunal to present any further submission on the application for reconsideration which the claimant wished to. It was not an invitation to renew the application or to expand upon its terms. In any event, no application was made to amend the terms of the reconsideration application before the Tribunal, but a short request in the penultimate paragraph requested that the Tribunal award compensation "in respect of past wage loss and for a short period of future wage loss".

- 20 25 44. The respondent's objection to this aspect of the application is, in our judgment, well-founded. The application for reconsideration was presented in time, and only sought an award in respect of past wage loss.

In order to include reference to future wage loss, the application should have been presented in quite different terms.

- 5 45. As to the question of whether or not this amounts to a fresh application for reconsideration, which the respondent infers from its terms, we do not accept that this is so. There is nothing in the terms of the email of 9 August 2022 to state or imply that this is a new or amended application for reconsideration. The Tribunal has not been asked to address this in terms.
- 10 46. Even if it were intended to be such an application, the Tribunal would not be minded to grant it. Rule 71 states that where reconsideration is being considered on the basis of an application by a party (and in this case the Tribunal is not seeking to reconsider the Judgment on its own initiative), it must be presented within 14 days of the date upon which the original Judgment was sent to the parties. That was done on 10 June 2022, and  
15 the email of 9 August 2022 falls well outwith that timescale. There is no request to extend time, nor is there any reason given as to why that was not included within the original application.
- 20 47. We are inclined to the view that this was an opportunistic attempt on behalf of the claimant to expand the terms of the application for reconsideration by referring to the award to be made rather than to the original application. There is no basis upon which reconsideration should be granted in these circumstances, and accordingly, we have concluded that no award should be made in respect of future wage loss. That opportunity was there in the original application, but was not taken and  
25 has now gone.

**What, if any, part of the Judgment should be varied or revoked?**

48. In our judgment, it is appropriate to vary the original Judgment to the extent that an award is made for past wage loss, of £3,300, as requested by the claimant.

49. To that extent the application for reconsideration is granted. The remainder of the Judgment remains unaffected.

Employment Judge: Murdo Macleod

5 Date of Judgment: 22 September 2022

Entered in register: 27 September 2022

and copied to parties