EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr M Jones	AND	cmostores.com Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD IN CHAMBERS AT Bristol **ON** 18 August 2022

EMPLOYMENT JUDGE J Bax

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The judgment of the tribunal is that the claimant's application for reconsideration is refused because there is no reasonable prospect of the decision being varied or revoked.

REASONS

1. The Claimant has applied for a reconsideration of the oral judgment given on 2 August 2022. The Judgment was sent to the parties on 9 August 2022 ("the Judgment"). The grounds are set out in his e-mail dated 15 August 2022, which was received at the tribunal office the same day. The Claimant did not request written reasons at the hearing and in his e-mail dated 15 August 2022 specifically said that he did not want to request written reasons.

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 within the relevant time limit.

3. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.

4. The grounds relied upon by the claimant are these: the line in the Claimant's contract that he would not be paid less than National Minimum Wage was taken in isolation and that it also said, "Your salary is set at such a level as to compensate for the need for occasional additional hours." And that they were linked. The Claimant argued that the work could not be considered as occasional and he could have been asked to work over 100 hours per week thereby paying him less than the minimum wage.

5. The matters raised by the claimant were considered in the light of all of the evidence presented to the tribunal before it reached its decision.

6. The earlier case law suggests that the interests of justice ground should be construed restrictively. The Employment Appeal Tribunal ("the EAT") in Trimble v Supertravel Ltd [1982] ICR 440 decided that if a matter has been ventilated and argued then any error of law falls 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".

7. More recent case law suggests that the "interests of justice" ground 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). This requires the tribunal to give effect to the overriding objective to deal with cases 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 confirmed that it is incorrect to assert that the interests of justice ground need not necessarily be construed so restrictively, since the overriding objective to deal with cases

justly required the application of recognised principles. These include that there should be finality in litigation, which is in the interest of both parties.

8. In Outasight VB Ltd v Brown [2015] ICR D11, EAT, HHJ Judge Eady QC accepted that the wording 'necessary in the interests of justice' in rule 70 allows the tribunal a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially, *'which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation'*.

9. At the final hearing the Claimant argued that the work he was required to do between January and June 2021 was not occasional. This argument was considered in the oral Judgment. There was a further clause under hours of work, which was considered in the oral Judgment which said, "you may be required to work additional hours as required to meet the needs of the business and for the proper performance of your duties". The clause referred to by the Claimant in his application read, "Your salary is set at such a level as to compensate for the need for occasional additional hours. However, where specifically agreed in advance, payment may be made at the basic hourly rate … We will always ensure that you always receive no less than the National Minimum Wage/National Living Wage."

10. The tension between the clauses was considered in the oral Judgment. The clauses were read together in the context of the whole contract. It was concluded that the contract did not provide that additional hours could only be occasional. The reference to occasional hours was an explanation that the salary was set at a level to allow for additional hours at various points in time. If the Claimant worked additional hours he would be paid at least the minimum wage. The Claimant was paid a salary and not an hourly rate. It was found that the Claimant was not paid less than the minimum wage at any stage. The provision to be able to agree additional payment was consistent with the Claimant being required to work additional hours for the needs of the business. For the reasons explained orally there was not a breach of an express term of the contract to ask the Claimant to undertake the work which increased his hours of work. The increase was temporary and the Respondent had reasonable and proper cause to ask him to undertake that work.

11. Accordingly I refuse the application for reconsideration pursuant to Rule 72(1) because there is no reasonable prospect of the Judgment being varied or revoked.

Employment Judge J Bax
Date: 18 August 2022

Judgment sent to Parties: 31 August 2022

FOR THE TRIBUNAL OFFICE