CLAIM NO 2302190/2019

EMPLOYMENT TRIBUNALS

Claimant	**Respondents**
	v
Ms N Lifac	**Zoyo Capital Ltd (1)**
	Thomas Brennan-Banks (2)
	Ms Wei Wang (3)
	Mr D Powell (4)

Heard at: London South Employment Tribunal via CVP

On: 7 November 2022

Before: **EJ Webster**
Ms Christofi
Ms Smith

Appearances

For the Claimant: **In person**

For the Respondent: **Mr Brennan-Banks (Barrister and in-house counsel for the respondent)**

RECONSIDERATION OF WRITTEN REMEDY JUDGMENT

1. The Claimant's application for reconsideration of the Remedy Judgment dated 28 June 2022 is upheld.

2. The Remedy Judgment is varied so that all four Respondents are jointly and severally liable to pay the Claimant the sum of £97,921.08 including all interest.

Unpaid Wages	£91,011.54
Interest on unlawful deductions from wages (calculated at 8% on £51,722.32 for 609.5 days which is the midpoint between 22 February 2020 and 28 June 2022)	£6909.54
TOTAL PAYABLE IN RESPECT OF UNAUTHORISED DEDUCTION FROM WAGES CLAIM:	**£97,921.08**

3. For the avoidance of doubt the issue of the Claimant's claim for an award for injury to feelings remains at large and will be decided on the outcome of second claim (2304905/2019).

WRITTEN REASONS

Background

4. The Claimant brought claims for disability discrimination and unauthorised deduction from wages under Claim Number 2302190/2019. The Claimant then brought a subsequent claim for unfair dismissal and disability discrimination under Claim 2204905/2019. An Employment Judge, prior to the full merits hearing, determined that the matters ought not to be heard together so when Claim Number 2302190/2019 was prepared for hearing it was on the understanding by both parties that another liability hearing would be necessary at a future date to determine the remaining claims.

5. The Tribunal heard the first claim via CVP on 16-20 November 2020. Both parties were represented at that hearing. It was expressly agreed at that hearing that determination of aspects of the claimant's remedy for any upheld discrimination claims, would be deferred until the conclusion of both claims to avoid any double recovery. EJ Webster's note of that agreement simply reads that remedy for discrimination would be deferred.

6. In a reserved Judgment, the Tribunal partly upheld the Claimant's claims for disability discrimination. That Judgment is dated 17 December 2020. The Judgment expressly stated that only the First Respondent was liable for the discrimination. The Judgment did not deal with remedy at all.

7. The Claimant applied for a reconsideration of the liability decision on the basis that the Tribunal did not have discretion to apportion liability for discrimination in the way that it had.

8. A Reconsideration (of the liability Judgment) and Remedy hearing were listed for 12 November 2021. On the morning of that hearing a 'Consent Order' was agreed between the parties and signed by EJ Webster on 12 November 2021. That Order stated that both Claims 2302190/2019 and 2204905/2019 would be withdrawn against all Respondents on payment of various sums from the First Respondent to the Claimant on or before 28 January 2022.

9. The First Respondent failed to pay those sums and the Claimant applied for both cases to be reinstated in accordance with the Orders dated 12 November 2021.

10. A Reconsideration and Remedy hearing was re-listed for 27 June 2022.

11. The Tribunal upheld the Claimant's application for Reconsideration of the liability Judgment and ruled that all 4 Respondents were jointly and severally liable for the discrimination. Oral reasons were given at the hearing. Mr Brennan Banks requested written reasons at the hearing on the basis that he wanted to appeal. The Reconsideration Judgment with reasons was sent to the parties on 19 August 2022. It is clear from the Tribunal file that Mr Brennan Banks had been chasing that Judgment on the basis that he wanted to appeal it.

12. Mr Brennan Banks said today that he had not received a copy of that Reconsideration Judgment with written reasons. It is correct that, in error, the Tribunal administration sent the document to the Respondents' solicitor, Mr Sean Walsh, and not directly to Mr Brennan Banks. This was an error as the Respondents had properly informed the Tribunal administration that Mr Walsh was no longer representing them and had provided alternative up to date contact details for Mr Brennan Banks.

13. On realising the Tribunal's error, the Claimant, by email dated 19 August, , notified the Tribunal of its error, copying in Mr Brennan Banks and attaching a copy of the Reconsideration Judgment with written reasons. That email was received but, he says, not read by Mr Brennan Banks because it was from the Claimant. In any event, the Respondents have not as at the date of this

Reconsideration hearing, challenged the Reconsideration of the Liability Judgment.

14. Mr Brennan Banks requested that a further copy of the Reconsideration Judgment be sent to him directly. EJ Webster asked the administration to send him that document.

Remedy Hearing

15. During the Remedy part of the hearing on 27 June 2020, the Tribunal was asked to award an amount, that had been agreed between the parties, in respect of an element of loss that the claimant was claiming for unpaid wages.

16. The Tribunal was provided with an agreed sum by the parties. The sum was, we were told, a sum which represented the Claimant's wages during the period when she had been told to remain on sick leave by the Respondents and had therefore not been paid. The original liability Judgment had found that the respondents' actions in requiring the claimant to remain off sick had been discriminatory. The original grounds of claim sought these unpaid wages under two different heads of damages, firstly as losses flowing from discrimination and secondly as unauthorised deduction from wages claims. Both claims had been upheld by the Tribunal in the original Liability Judgment.

17. At the remedy hearing, EJ Webster queried why no amount was included for Injury to Feelings and she was reminded that this was because that award was being deferred until the Second Claim had been determined. Mr Brennan-Banks agreed that this was the case.

18. The Tribunal was told that the only thing that was not agreed between the parties was the interest calculation. The Tribunal carried out the interest calculation on the basis that the amount payable to the claimant was as a loss flowing from discrimination.

19. However, the Tribunal did not expressly discuss with the parties as to whether the amount was properly payable as losses flowing from discrimination or as an unauthorised deduction from wages claim. The discussions regarding interest payments were around the rate of interest properly payable not whether interest was payable at all.

20. After the calculation had been completed, EJ Webster confirmed, in response to a question from Mr Brennan Banks, that all four respondents would be liable for the amount because they were losses flowing from the discrimination that had been upheld against the respondents. Oral Judgment was given as to the amount payable and the amount of interest payable.

The Written Remedy Judgment

21. Following the Remedy hearing, on writing up the Remedy Judgment, EJ Webster realised that she was not clear as to which head of claim and on what basis the unpaid wages sum had been 'agreed' between the parties. The reason for doubt was that the Schedule of Loss stated, "*Schedule of Loss for wages only, remedy for discrimination claims to be dealt with at conclusion of second claim."* Further her note from the original hearing in November 2020, confirmed that remedy for the discrimination claim would be deferred until after the Second Claim. Further, beyond the discussion regarding an interest calculation, the basis for the damages had not, as far as she could recall, been explicitly dealt with during the hearing.

22. On that basis, EJ Webster issued the Written Remedy Judgment against the First Respondent only providing a narrative as to why. This written Remedy Judgment was dated 28 June 2022 and sent to the parties on 5 August 2022. In summary EJ Webster believed that it had been the parties' intentions for the sum of wages to be paid as compensation for the unauthorised deduction from wages claim only and that the remedy for the discrimination claims were being wholly deferred until after the Second claim had been determined. It is against this Judgment that the Claimant has applied for a reconsideration.

Claimant's application for reconsideration

23.. Unfortunately the administration had initially used an out of date email address for the claimant despite the fact that she had correctly updated the administration of her correct address some time before. The Claimant was not correctly sent the written Remedy Judgment until 22 August 2022. On the same day the Claimant requested permission to have an extension of time to apply for a reconsideration of the written reasons because she had only been sent them that day. The Tribunal confirmed on 24 August 2022 that any deadlines for reconsideration would run from 22 August 2022 as it accepted that she had not received the Written Remedy Judgment until that date.

24. The Claimant sent her first draft of the application for reconsideration at 01.04 on 6 September 2022.

25. This was outside the normal 14 day time limit to apply for a Reconsideration by 1 hour and 4 minutes. Nevertheless, EJ Webster has determined that the Claimant's application for reconsideration ought to be considered despite that point. The time over the normal deadline was incredibly small, the claimant had already asserted that she wanted to apply for a reconsideration (and why) several days earlier but had not yet submitted the exact grounds. The claimant had not been notified that the tribunal would allow the deadline to run from 22 August until the 24 August and finally there was little prejudice to the respondents by allowing the application to be considered only 1 hour over the deadline.

26. The Claimant subsequently sent various emails with various attachments. Following correspondence, the Tribunal considered what the Claimant agreed to be the final version attached to an email sent on 16 September 2022. The differences between the applications were not significant in that they did not change the grounds for the application but some versions provided different levels of clarification about various aspects.

27. The Respondents were given the opportunity to respond to the Claimant's applications on two occasions. The first was when the Claimant sent the application on 6 September 2022, copying the Respondent. They did not respond to that. The second was on 30 September when the Tribunal attached the 16 September version (now being considered). The Tribunal's covering correspondence (dated 30 September 2022) required the Respondent to respond to the Claimant's application. The Respondent did not respond despite being told that failure to do so would mean that the application would be dealt with solely on the basis of the Claimant's application and evidence. The parties were notified that EJ Webster intended to deal with the matter on the papers only at this stage.

28. In the absence of any correspondence from the Respondent in relation to the Claimant's application, on 17 October 2022, the Tribunal sent the parties a proposed outcome which was to uphold the Claimant's application for reconsideration, to revoke the written Remedy Judgment and to revert to the oral Judgment given at the hearing. EJ Webster's grounds for that were:

(i) She accepts that she did not comply with Rules 71 and 72 and did not follow the correct procedure when altering/reconsidering the oral Judgment.

(ii) She based her decision on errors of fact regarding the representations made to her at the remedy hearing. Those errors appear to be

(a) That the parties had not made express representations to the Tribunal regarding the head of claim they were asking the Tribunal to determine. The Claimant's application appears to establish that Mr Heard did make express representations to the Tribunal, particularly regarding the question of interest, demonstrating that these losses were being sought as losses due to discrimination. No application would have been made by the Claimant's representatives for interest if they had not considered it to be a discrimination loss. Equally the Tribunal would not to have awarded interest had it not understood that to be the case.

(b) That Mr Heard (claimant's counsel) had confirmed at the remedy hearing that any award for losses arising out of discrimination had been postponed.

It appears that he had in fact only referred to the postponement of the injury to feelings award.

(c) That the titles of the Schedules of loss were intended to demonstrate that the parties intended to only agree on the amount of loss as an unauthorised deduction from wages claim.

It is clear that the Schedule of loss was entitled "Schedule of loss for wages only" and the phrase unlawful deduction from wages was used which were confusing. However this was a complex claim with the same losses being sought under different headings of claim. Whilst these headers were unclear and confusing, they ought not to be determinative.

29. The Respondent objected to that proposed outcome by letter dated 24 October 2022. The basis for the objection was that in effect the Tribunal was allowing the Claimant a reconsideration of a reconsideration. Further that the individual respondents ought not to be personally liable for any damages for discrimination. On that basis, the Tribunal ordered that the matter be dealt with by way of a hearing as it was in the interests of the Overriding Objective to enable both parties to address the Tribunal on this matter so that the full Tribunal could consider the situation.

The Reconsideration Hearing on 7 November 2022

30. Prior to the hearing, the Tribunal had ordered that the Claimant serve on the Respondent and the Tribunal the version of her application that she wished to rely upon on or before 3 November 2022 as there had been several versions . The Claimant did not serve the version upon which she wished to rely until Saturday 5 November 2022. At the outset of the hearing, the Respondents, represented by Mr Brennan Banks, stated that this meant that they were unfairly prejudiced as they had not had the opportunity to properly consider the final application or understand the version relied upon.

31. Prior to reaching its decision on whether to adjourn the hearing the Tribunal ascertained that Mr Brennan Banks had received a copy of the Claimant's application on 30 September 2022 as it was sent by email to the Respondent by the Tribunal. The Respondent had been ordered to respond to that application but had failed to do so. The Claimant confirmed that this was the version of the document upon which she wished to rely and that although her covering email was somewhat confusing, there had been no changes to the document whatsoever.

32. Mr Brennan Banks also confirmed to the Tribunal that the other Respondents were available though not present at the hearing.

33. The Tribunal refused the Respondent's application for a postponement as it found that the Respondent had had the relevant document since 30 September 2022. It had chosen not to engage with the Tribunal regarding that document and the Tribunal determined that it should not now be able to benefit from that refusal to engage and delay today's hearing. Mr Brennan Banks, whilst not an employment specialist is a barrister. He had access to the other respondents to take instructions and the Tribunal gave them time to consider the document. We weighed up the prejudice to the respondent of now having to engage with the a document that they ought to have engaged

with over a month earlier against the need to resolve this matter once and for all for both parties and so the Tribunal refused the application to postpone.

34. In order to mitigate any prejudice caused by the Claimant's late re-service of the document the Tribunal therefore adjourned the hearing for 2 hours to allow the Respondents to consider the Claimant's application.

35. Prior to the adjournment, the Tribunal asked Mr Brennan Banks to consider the Respondents' position in relation to what, if anything, had been understood or agreed by the Respondents at the Remedy hearing in respect of the unpaid wages and which head of claim be had thought they were being sought by the Claimant. Further we asked him to consider what, if anything, Mr Brennan Banks recalled about the Remedy hearing (not the reconsideration decision) as to what was discussed regarding the interest payments.

Reconsideration Application

36. The Claimant's application for reconsideration was made on two main grounds:

(i) That the Tribunal had erred on a point of law because EJ Webster had reversed the oral decision thus exceeding the Tribunal's powers under Rule 72 of the Employment Tribunal Rules
(ii) That the reversal relied on errors of fact regarding what had been said and done at the Liability and Remedy hearing

37. The Claimant stated that the decision to change the liability for the Remedy Judgment from all 4 Respondents to just the First Respondent was in effect a reconsideration of the original oral remedy decision and therefore the Tribunal ought to have sought the views of the parties before reaching its decision and had exceeded its authority in not doing so.

38. The Claimant stated that there were material factual errors in the Judgment. Those were (in summary):
(i) That Mr Heard (claimant's counsel) had only confirmed at the remedy hearing that any award for Injury to Feelings was being postponed, not any award for losses arising out of discrimination
(ii) That at the original hearing Counsel for the respondent had advocated only for the injury to feelings award to be reserved until the determination of the second claim and that EJ Webster had stated that this was also due to the fact that insufficient evidence had been provided to determine any such award
(iii) That although the Claimant accepted that the Schedule of loss was entitled "Schedule of loss for wages only" as was the phrase unlawful

deduction from wages, this was a complex claim with the same losses being sought under different headings of claim.

(iv) That Mr Heard did make express representations to the Tribunal, particularly regarding the question of interest, that these losses were being sought as losses due to discrimination.

39. The Respondent objected to the application. Mr Brennan Banks stated that the Respondent could not have attended the Remedy hearing knowing that personal liability for the individual Respondents was an issue because at that stage they had not been found personally liable. On that basis the individual respondents had not agreed to liability for anything nor had they properly considered the point. He stated that at the remedy hearing he was led by EJ Webster into understanding that interest would be payable on all damages awarded and took part in the calculations for that reason, not because he accepted liability. He stated that the Respondents could not be held responsible for deductions from wages as they were simply an employee (him) and two directors neither of whom were legally responsible for the Claimant's wages. Responsibility for paying the wages lay with the first respondent.

40. Mr Brennan Banks also stated that in effect this was an application to amend the Claimant's claim after Judgment and after reconsideration as this sum had never been advanced as a loss flowing from discrimination. He stated that on no basis would the individual respondents have accepted any such argument had they had the opportunity to make representations on this point.

41. Mr Brennan Banks stated that the figure agreed was solely the sum of wages because they thought it was under the heading of unauthorised deductions from wages and he would have objected if he had thought that this was an award under the discrimination claim.

The Law

42. Rule 70 of Schedule 1, The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('The Rules') states that a Tribunal can reconsider its own judgment where it is necessary and in the interests of justice to do so.

"A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again."

43. Rule 71 states,

> "Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary."

44. Rule 72 of the Rules states,

(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 (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part."

44. Mr Brennan Banks relied upon the EAT case of Liddington v 2gether NHS Foundation Trust.

> *34. As he made clear, a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public 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. Tribunals have a wide discretion whether or not to order reconsideration, and the opportunity for appellate intervention in relation to a refusal to order reconsideration is accordingly limited.

35. *Where, as here, a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application. It seems to me that the Judge was entitled to conclude that reconsideration would not result in a variation or revocation of the decision in this case and that the Judge did not make any error of law in refusing reconsideration accordingly."*

Discussion and decision

Discussions and Conclusions

36. We do not accept the Respondent's arguments that this is a reconsideration of a reconsideration. This is a determination of an application for reconsideration of the Remedy Judgment. The Reconsideration Judgment following the application for reconsideration from the liability Judgment has not been challenged by the Claimant.

37. Further the Tribunal does not accept that this is a second bite of the cherry as indicated by the Respondent nor that it is inappropriate that the matter is dealt with by way of Reconsideration as opposed to an appeal to the EAT. The grounds for whether a decision ought to be reconsidered are whether it is in the interests of justice to do so.

38. The Tribunal accepts that the Claimant's first ground of application is correct in that EJ Webster ought properly to have consulted the parties before altering the Judgment given during the remedy hearing. Rule 71 clearly sets out that obligation on the Tribunal and EJ Webster omitted to follow that step. The correct thing for EJ Webster to have done, on perceiving that there may have been some confusion or that the matter had not been properly discussed during the hearing, was to write to the parties inviting their comments on the situation and then deciding whether a reconsideration was in the interests of justice before issuing a different Judgment.

39. For that reason alone, it is in the interests of justice to reconsider the Written Remedy Judgment issued as it deviated from that which had been delivered at the hearing and was not in accordance with the Tribunal Rules or the Overriding Objective which, amongst other things prescribes that a fair process is followed.

40. Further grounds for why it is in the interests of justice to reconsider the claim were that the Claimant and subsequently the Respondent, and EJ Webster, all had differing recollections of how the issue of which 'Head of Claim' the agreed sum was discussed and it is therefore apparent that it was not properly explored or discussed at the original Remedy Hearing. The reasons for that appear to be many fold, but the Tribunal accepts that it ought to have properly realised the lack of clarity at the time and for that apologises to the parties.

41. There were, the Tribunal considers, clear errors of fact relied upon on the part of EJ Webster when she wrote the written remedy judgment. Having reviewed the notes of the full Tribunal, it is clear as follows:

    (i) During the remedy hearing on 27 June, the Tribunal discussed awarded and calculated interest applying the rules set out for damages payable pursuant to an act of discrimination. EJ Webster accepts that she did not properly remember this point when writing the Written Remedy Judgment. It is clear that she made a significant further error in the Written Remedy Judgment by continuing to include an interest calculation for an unauthorised deduction from wages claim. That was wrong and demonstrates her lack of proper consideration at the time of writing the Written Remedy Judgment.
    (ii) Mr Heard did make express representations regarding an application for interest to be payable and that in of itself amounted to express representations on the head of claim under which the Claimant was seeking the damages to be payable.
    (iii) Mr Heard's statement regarding the deferral of damages was only in relation to a deferral of the injury to feelings award and not the entirety of damages for the discrimination claim.

42. The Tribunal also considers however that the Respondent did not, at the time of the hearing, understand the significance of the Claimant's application for interest (i.e. that it would only be payable if these were damages pursuant to the Equality Act 2010). On that basis the Tribunal considered afresh Mr Brennan Banks' submissions on this point at this Remedy reconsideration hearing.

43. As we have determined that it is in the interests of justice to reconsider the Written Remedy Judgment, we now have the power, under Rule 70 that we can vary, suspend or revoke the original decision. We asked the parties to make representations as to which head of damages they consider the unpaid wages to be payable under and why.

44. The Claimant stated that it was clear from her original claim form that the wages were sought as losses pursuant to the discriminatory decision to

make her remain on sick leave despite being signed as fit to return to work by her GP. The Tribunal upheld that this was an act of disability discrimination in the original Liability Judgment which was not challenged by either party in this regard.

45. We accept that this disability discrimination claim was part of her original claim and not, as put forward by the Respondents today, an application to amend her claim after Judgment. That is not correct – this discrimination claim was clearly advanced in her ET1 and the Tribunal upheld that claim. The Judgment upheld, amongst others, the following claims:

(i) a claim for disability discrimination arising out of disability in relation to the requirement for her to go off sick between 22 February 2019 and 23 July 2019,
(ii) a claim for direct disability discrimination regarding her being placed on sick leave between 22 February and 23 July 2019

46. As a result of those discriminatory acts, the Claimant was not paid her full wages and suffered losses as a result.

47. The Respondent's submissions are that the individual Respondents ought not to be responsible for the non-payment of wages by the First Respondent. He stated that the individual respondents ought not to be responsible for those monies as he did not accept that the individual respondents bore responsibility for the discriminatory acts upheld against them. This was at least in part on the basis that he had not read the written reasons for the Reconsideration of the liability Judgment (which he stated to us in today's hearing that he disagreed with) and because the First Respondent was responsible for payment of wages.

48. In light of these representations and having considered the matter afresh, we find that the non-payment of wages to the claimant during the periods that she was required to remain on sick leave, ought properly to be awarded as discrimination damages under the Equality Act 2010. We found as conclusions of fact in the original liability Judgment that all 3 individual respondents were involved in the decision to keep the claimant off sick despite her being well enough to attend work and we found that the decision was discriminatory. Her lack of pay during this period is therefore properly attributable to discrimination and ought to be awarded under the Equality Act 2010.

49. In conclusion, we therefore uphold the Claimant's application for reconsideration of the Remedy Judgment. On upholding that application we consider that it is in the interests of justice to either vary or revoke the Written Remedy Judgment and award the sum of monies as originally decided

during the course of the Remedy hearing. That award is made jointly and severally against all four Respondents.

Unpaid Wages	£91,011.54
Interest on unlawful deductions from wages (calculated at 8% on £51,722.32 for 609.5 days which is the midpoint between 22 February 2020 and 28 June 2022)	£6909.54
TOTAL PAYABLE IN RESPECT OF UNAUTHORISED DEDUCTION FROM WAGES CLAIM:	**£97,921.08**

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Employment Judge Webster

18 November 2022