EMPLOYMENT TRIBUNALS

Claimant: **Mr D Wraga**

Respondent: **Tesco Stores Limited**

UPON APPLICATION made by email dated 14/07/22 to reconsider the judgment dated 27/06/22 under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing.

JUDGMENT

1. Further to the Tribunal's correspondence dated 05 September 2022 seeking any further representations, by emails sent on 16 September 2022 the Claimant's representative sent further submissions and the Respondent confirmed that they wished to rely upon their previous submissions sent by email of 25 August 2022. Unfortunately the Claimant's email was not forwarded to me until 10 November and I have thereafter provided this decision as soon as possible thereafter.

2. In considering this application, I have considered in particular the cases of *T W White & Sons Limited v White* (UKEAT/0022/21, March 2021) and *Outasight VB Ltd v Brown* [2015] ICR D11.

3. The reconsideration application states that the holiday pay claim relied upon the Working Time Regulations 1998 (the WTR) and asserts that "The judgment reads as if the Working Time Regulations were not relied upon". Contrary to these assertions, my note of the hearing records that at the outset of the hearing I sought clarification of the basis for the holiday pay claim and that the Claimant's representative stated that it was a breach of contract and unlawful deduction of wages claim (as per judgment paragraph 5). Nevertheless, my note of the hearing also record that I discussed with both parties the relevance of the WTR in the hearing. Moreover, paragraph 40 of the judgment reflects some of these discussions and demonstrates that the WTR were considered, notably that the Claimant's case was not about the amount of or rate of holiday pay relating to overtime. Fundamentally, the Claimant's application for reconsideration does not explain why this aspect regarding the WTR means it

is necessary in the interests of justice to reconsider the judgment, nor do I find that it would be regarding this aspect.

4. The next part of the reconsideration application makes the correct point that a claim for unlawful deduction of wages under the Employment Rights Act can include holiday pay then further explains that there was also a "contractual" holiday pay claim. Again, none of this explains why it is necessary in the interests of justice to reconsider the judgment, nor do I find that it would be regarding these aspects.

5. The thrust of the reconsideration application is the statement that it is "well established that where an employee works irregular hours that he is entitled to an average of the hours worked". Two internet links are provided to a government and ACAS website but with no further explanation, citation of law or specific statements made in relation to the facts in this case. Despite paragraph 41 of the judgment and the terms of my provisional view set out to the parties regarding this reconsideration application and opportunity for written representations, the Claimant has not made any references to specific parts of relevant legislation or case law to support this reconsideration application. The submissions sent by email of 16 September states "This is trite law and there is not any caselaw to support it". The Respondent has similarly not referenced any case law on the point, as I consider they would be required to do so were they aware of any, even if adverse to their case.

6. I agree with the Respondent's response to the reconsideration application that the basis for reconsideration attempts to argue the holiday pay claim on a different basis than that advanced in the trial. The holiday pay claim in the trial was advanced on the basis that the Claimant was entitled to a greater entitlement of annual leave (i.e. more days) than he was given because of an oral contract or variation to contract. My note of the Claimant's submissions in trial record the Claimant's submissions beginning, "C under WTR entitled to 5.6 weeks per year and [to be] paid, What amounts to 5.6 weeks depends how many days working" then an explanation that the contract was varied, which was rejected by my judgment.

7. In contrast, the reconsideration application argues the holiday pay claim on the different basis that varying hours entitled the Claimant to an increased entitlement for each day (i.e. more pay for each day of annual leave). The argument advanced in the reconsideration application and developed in the further submissions addresses the calculation of annual leave payments rather than the amount of days owed. The submissions state, for example, "Where he works irregular hours, he is entitled to pay for time not worked that represents the reality of his working situation".

8. This was not the case pursued by the Claimant's professional representative in the trial, referenced in particular by paragraphs 5 and 40 of the judgment, including that regulation 16 of the WTR was not relied on. As explained in

paragraph 40 of the judgment, the calculation of the amount of holiday pay for each day of leave was explained by Mr Varadha's witness statement and the table he included. There was no challenge to his evidence to the effect that the calculation he presented was wrong, nor were submissions made on this basis. To allow the Claimant to re-argue the case on a different basis would in my judgement be to impermissibly permit 'a second bite of the cherry', erode the principle of finality of litigation and be contrary to the Overriding Objective.

9. Further, I consider that even putting aside the view that a different argument is now being pursued the reconsideration application falls far short of explaining why further holiday pay is owed. This would be the case even if I interpreted the reconsideration application to be on the same basis as the holiday pay claim was pursued at trial. There is an assertion that more is owed but with no adequately detailed, persuasive or specific argument about the calculation when applied to the Claimant's situation.

10. Finally, a further new argument is made by the Claimant's emailed submissions that "Given the Respondent has not put an actual defence to the claim, therefore surely the Claimant should win". Not only do I consider this to be wrong because the Respondent did defend the holiday pay claim and provided evidence of their position but this is a further new argument that was not made in either the trial or the reconsideration application itself.

11. For all of the reasons above and in considering the test under rule 70, I confirm that the original decision is therefore confirmed and will not be varied or revoked.

Employment Judge England
16 November 2022

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