EMPLOYMENT TRIBUNALS

Claimant: **Mr M Thomas**

Respondent: **Bespoke Care Group Limited**

UPON APPLICATION made by email dated 7 December 2022 to reconsider the Judgment, Reasons for which were sent to the parties on 24 November 2022 ("**Judgment and Reasons**"), under rule 71 of the Employment Tribunals Rules of Procedure 2013 ("**Rules**").

JUDGMENT

The Respondent's application for reconsideration is refused and the Judgment is confirmed.

REASONS

Background

1. The Respondent's email of 7 December 2022 set out its application for reconsideration of one element of the Judgment and Reasons, namely the award of compensation in relation to holiday pay.

Issues and Law

2. Rule 71 provides that applications for reconsiderations of judgments should be presented in writing within 14 days of the date on which the written record was sent to the parties and should explain why reconsideration is necessary. The Respondent's email satisfied the requirements of rule 71 and therefore a valid application for reconsideration had been made.

3. Rule 72(1) notes that an Employment Judge (where practicable the Judge who chaired the Tribunal which made the original decision, in this case, me) shall consider any application for reconsideration made under rule 71, and

that if the Judge considers that there is no reasonable prospect of the original decision being varied or revoked then the application shall be refused and the Tribunal shall inform the parties of the refusal.
Alternatively, rule 72 sets out the process that is then to be followed for further consideration of the application.

4. Rule 70 of the 2013 Rules specifies only one ground for reconsideration; namely where it is necessary in the interests of justice. This is a change from the provisions relating to reviews of judgments under the previous Rules issued in 2004, which specified, in Rule 34, certain specific grounds for review. These included, at Rule 34(3)(d), the availability of new evidence. As the Respondent's application involved evidence which was not before the Tribunal at the initial hearing, I considered it appropriate to have regard to case authorities which dealt with applications under that ground.

5. With regard to applications on the ground that new evidence was available, it has been long established, following the case of Ladd –v- Marshall [1954] 1 WLR 1489, that the party making the application needs to be able to show that the new evidence could not have been obtained with reasonable diligence for use at the original hearing, was relevant and would probably have had an important influence on the hearing, and was apparently credible. That requirement was largely reflected within the wording of Rule 34(3)(d) of the 2004 Rules which allowed a review where "*new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time*".

The Application

6. The essence of the Tribunal's Judgment in relation to holiday pay is set out at paragraphs 79 to 82 of the Reasons. In those paragraphs we indicated that we approached the Claimant's claims of unauthorised deductions from wages and holiday pay together. That was on the basis that the Claimant had spent the last four weeks of his employment under suspension, which was expressly without pay. He had however previously booked two of those four weeks as annual leave and was paid in respect of those two weeks. However, we concluded that, as the Claimant had been required to remain available whilst suspended, he had not genuinely been able to take annual leave during that period. That therefore meant that the payment made to him in respect of those two weeks fell to be considered as payment of salary, with a consequently increased amount of untaken holiday outstanding at the termination of his employment, for which payment fell to be made.

7. The Respondent's reconsideration application set out its case that the holiday pay compensation was incorrectly calculated. It contended that the Claimant only had some seven hours of leave outstanding rather than the two weeks we had concluded had been outstanding, setting out a calculation which recorded the Claimant has having taken nine days' leave between 19 May 2021 and 3 June 2021, i.e. part of the period at issue.

Conclusions

8. In this case, the evidence provided by the Respondent in its email could clearly have been made available at the original hearing but was not put before the Tribunal. Applying the direction provided by the Ladd case, it was not therefore appropriate for me to consider its contents, which led me to conclude that there was no reasonable prospect of the original decision being varied or revoked.

9. However, the email's contents would not, in any event, have had any influence on the hearing. As we noted, we did not consider that the leave ostensibly taken by the Claimant in May and June 2021 should be considered to have been validly taken, as he was subject to the requirement to make himself available during that period. If he had been freely able to take holiday at the time, that requirement would have been disapplied.

10. In our view, the holiday booked during that period had not been validly taken and therefore remained outstanding at the termination of the Claimant's employment. The amount of compensation was therefore correctly calculated.

11. For that reason as well therefore, I would not have considered that there was any reasonable prospect of the original Judgment being varied or revoked.

12. I therefore concluded that the Respondent's application for reconsideration should be refused.

Employment Judge S Jenkins

Date: 8 December 2022.

JUDGMENT SENT TO THE PARTIES ON December 2022

FOR THE TRIBUNAL OFFICE Mr N Roche