Case Number: 3313304/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss T Hurynovich	v	1. Leo Scheiner 3. Oscar Scheiner 4. 08344730 Limited (in voluntary liquidation) 5. Fyrtorr Limited

JUDGMENT ON AN APPLICATION FOR RECONSIDERATION OF A JUDGMENT UNDER RULE 71 OF THE EMPLOYMENT TRIBUNAL RULES OF PROCEDURE 2013

1. Having considered the application under r.72(1), save in one respect, the employment judge considers that there is no reasonable prospect of the judgment being varied or revoked on those grounds. The application for a reconsideration is rejected except to the extent that it seeks reconsideration of the failure to award a redundancy payment.

2. The claimant has correctly pointed out that the Tribunal was in error when it stated that she had not claimed a redundancy payment. The employment judge has consulted with the non-legal members and the decision of the Tribunal is that it is plain and obvious from our existing findings that, had we not mistakenly believed no claim for a redundancy payment had been made, we would have awarded one. It is therefore in accordance with the overriding objective that the judgment be varied to award a redundancy payment calculated in accordance with the statutory formula and that that should be done without the need for a reconsideration hearing. A varied remedy judgment will be sent out with this reconsideration decision.

REASONS

3. The liability judgment in this case was sent to the parties on 11 May 2022. The remedy judgment was sent to the parties on 4 October 2022.

4. By an application dated 18 October 2022, the claimant has applied for a reconsideration of the judgment sent on 11 May 2022 and that sent on 4 October 2022 under r.71 of the Employment Tribunal Rules of Procedure 2013. The application in respect of the liability judgment was made nearly five months late; the time limit under r.71 having expired on 25 May 2022.

5. The procedure for an application for a reconsideration is set out in rule 72 of the Rules of Procedure 2013. It is a two stage process. If the employment judge who chaired the tribunal panel which made the judgement considers that there is no reasonable prospect of the original decision being varied or revoked the application shall be refused under rule 72(1). Otherwise the original decision shall be reconsidered by the full tribunal who made the original decision.

6. The claimant applied for an extension of time to apply for a reconsideration of the judgment sent to the parties on 11 May 2022 and that was refused on 4 October 2022 for reasons given in a letter of that date. The claimant says that the liability judgment was only sent to the fourth respondent on 4 October 2022. Whether that is true or not does not change the date by which she should have applied for reconsideration of it, namely within 14 days of the date on which it was sent to her. The remedy judgment sent on 4 October 2022 only set out the award for failure to provide a written statement of particulars of employment under s.38 Employment Act 2002. It is only insofar as the application for a reconsideration seeks a variation of that judgment that it is in time.

7. The claimant's reasons for her application can be categorised as follows:

    7.1. New evidence;

    7.2. Her belief that there were errors in the findings of fact;

    7.3. Her belief that certain submissions had not been considered;

    7.4. Failure to consider the claimant's mental and physical impairments and her incapacity during her employment and the proceedings and failed to consider the Presidential Guidance for vulnerable parties;

    7.5. Failure to take into consideration that English is a second language for the claimant.

8. She also puts forward as an argument why the ET reached a conclusion not open to it in respect of the evidence about PAYE.

9. In substance, the vast majority of the reconsideration application seeks to overturn the Tribunal's findings of fact set out in the reserved judgment sent on 11 May 2022 and the conclusions reached within that judgment. It is only in pages 67 to 70 of the reconsideration application that the claimant sets out her arguments in favour of reconsidering the award under s.38 EA 2002 – the subject of her timely application. Written submissions were

made by the claimant prior to the award being made and, to the extent that anything new is raised in the reconsideration application, there is no explanation for those arguments not having been made at the appropriate time.

10. Although it was for the fourth respondent to ensure that the claimant had a statement of employment particulars (and therefore an award is rightly made) on the fact we found the claimant was disinclined to engage with the fourth respondent's attempts to discuss the details of a service agreement and that is why we decided it was just & equitable to award the lower amount.

11. The claimant complains that, despite the fourth respondent not being active in the litigation and not making submissions on this point, the award of the higher amount was not made. Essentially she queries why the award was not made when the claim was undefended. An undefended claim does not inevitably succeed on all points. It is nevertheless for the Tribunal to decide whether it is just & equitable to increase the claimant's award from the lower amount and, for reasons given at the time, we decided not to do so. There is no reasonable prospect of the judgment awarding the lower amount under s.38 EA 2002 being varied or revoked.

12. Otherwise, the application for a reconsideration is made out of time, despite an application for an extension of time having been rejected on 4 October 2022. That in itself is sufficient grounds to reject the application. Nevertheless, the arguments put forward in the application dated 18 October 2022 have been considered on their merits on the presumption that the claimant intended to make a further application for an extension of time within which to apply for a reconsideration of the reserved judgment sent to the parties on 11 May 2022.

13. The claimant did, in her covering letter dated 18 October 2022, explain why the application itself is, to a limited extent, incomplete. She describes the challenges of being a litigant in person with a disability and a single parent who has had to set out arguments in a relatively complicated case with over 1800 pages of documentary evidence. She reminds us that she has a diagnosis of chronic fatigue syndrome with concurrent anxiety and depression. She says that English is her second language (although she needed to use the Tribunal appointed interpreter only very rarely in the final hearing). She finds work on a personal computer particularly challenging and paces herself in her use of that device. Although in that covering letter she applied for reasonable time within which to amend her reconsideration application, it is already 71 pages and a couple of hundred paragraphs long. It needs no amplification. The application for extra time in which to do so is refused.

14. There has been an unfortunate delay in responding to this application, due to pressure of work, for which the employment judge apologises. Furthermore, on reading the application it appears that the Tribunal, in error, overlooked the claim for the redundancy payment that had been made and, we should on our own initiative, reconsider the judgment sent to the parties on 11 May 2022 to correct that error.

15. So, at page 60 paras.1 to 4 of the application the claimant points out that the statement in the reserved liability judgment para.65.33 that she has not claimed in respect of a redundancy payment is incorrect. She has drawn attention to hearing bundle page 29 Qu.8.1 (where the box for a redundancy payment is ticked) and hearing bundle pages 147 – 148 in her further and better particulars.

16. It appears that this claim was overlooked when the List of Issues set out in Employment Judge Alliott's Case Summary was drawn up. However it is referred to in para.3 of Judge Alliott's order. Presumably because it was omitted from the List of Issues, it appears that this was overlooked in error by us. On the basis of our existing findings it is clear that the claimant is entitled to that redundancy payment. Given that it appears incontrovertible that the claim for a redundancy payment was made within the original claim form, the employment judge considers that the failure to make a judgment on that claim should be reconsidered.

17. The employment judge has been able to consult with the non-legal members of the Tribunal panel and we are in agreement that it is in accordance with the overriding objective that this be dealt with by us reconsidering and varying our original judgment to include an award of a redundancy payment without the need for a reconsideration hearing. The remedy judgment sent to the parties on 4 October 2022 will be corrected to that effect. That is a decision of the whole Tribunal.

18. The claimant also correctly points out that there is a discrepancy between the reserved judgment sent on 11 May 2022 and para.1 of the reasons for the remedy judgment. Whereas in para.65.28 of the reserved judgment we find there was no breach of contract in respect of payments of salary to the claimant in January and February 2018, in para.1 of the reasons for the remedy judgment we state that the claimant had been successful in "claims of unauthorised deduction from wages in respect of shortfall of pay from January to March 2018".

19. This was clearly an error. As we set out in para.65.27 of the reserved judgment, the unauthorised deduction from wages claim in respect of alleged underpayment of salary was out of time but the breach of contract claim based upon the same facts was not. We dismissed that claim on the basis that the claimant had, prior to January 2018, been paid sums in

excess of her net monthly pay because she had been paid sums which ought to have been deducted from her salary and paid to HMRC in statutory deductions. In the light of that historic overpayment, we decided that the clamant could not show that the failure to pay more than £676 in January and February 2018 was a breach of contract. The arguments raised by the claimant in the reconsideration application either could have been raised previously or were raised and were rejected previously.

20. The error in referring to an unauthorised deduction from wages claim in para.1 of the reasons for the remedy judgment will be corrected when that judgment and reasons are varied.

New evidence

21. Where a litigant applies for a reconsideration on the grounds that new evidence is available they must persuade the employment tribunal that the evidence could not have been obtained with reasonable diligence for use at the hearing, that the evidence would probably have had an important influence on the outcome of the case and that it is credible (Ladd v Marshall [1954] 1 WLR 1489 CA). As was said in Wileman v Minilec Engineering Ltd [1988] I.R.L.R. 144 EAT, the evidence must not only be relevant but it must be probable that it would have had an important influence on the case for tribunal hearings are designed to be speedy, informal and decisive. However, it is not necessary that the new evidence should be shown to be likely to be decisive. The question for the tribunal on reconsideration is

> "in the light of what we know about this case, has it been shown to us that the evidence is relevant and probative, and likely to have an important influence on the result of the case?" (paragraph 15 of Wileman v Minilec)

22. The claimant has submitted an 18 page bundle of documents with this application for reconsideration but no explanation as to why these documents could not, with reasonable diligence, have been obtained before the final hearing.

23. The first set of documents are correspondence with AXA Health insurers and concern her arguments in favour of reconsidering our findings of fact on her entitlement to medical insurance. She criticises the Tribunal's acceptance of the third respondent's oral evidence that she had agreed to reimburse the company. She refers to documents in the bundle (which either were or could have been drawn to our attention at the original hearing) and seeks to introduce lately acquired correspondence with AXA to refute the statement of the third respondent that there had been an advantageous rate because the policy was a business policy.

24. Even if one were to presume in the claimant's favour that she made this enquiry only because of oral evidence which could not reasonably have been predicted, overall we preferred to evidence of the third respondent for a number of reasons. These concerned other issues in the case and the

contrast between his evidence generally and that of the claimant. It is not possible to say that this more recent correspondence with AXA is likely to have an important influence on the result of the case. If the third respondent were mistaken about the amount of the premium, the issue which was determinative of whether the policy was a contractual benefit or not was whether the claimant had agreed to reimburse the company for it and the additional documents have no reasonable prospects of altering the Tribunal's findings on that.

25. At page 4 of the 18 page appendix, the claimant produces a heavily redacted email which appears to be from her to her then legal representative. It is highly unlikely that the Tribunal would give any significant weight to a document which had been so heavily redacted. The email merely contains self-serving accusations.

26. The claimant has also provided an article apparently published in Spiritual Psychology and Counseling on the relationship between disability and spirituality. There is no reasonable prospect of the contents of this paper leading to the judgment being varied or revoked. We made adjustments to the Tribunal process for the claimant as detailed in the reserved judgment. Although the claimant appears to suggest in her application for reconsideration that insufficient account has been taken of her as a person with disabilities, she does not specifically explain an occasion when she need an accommodation which was not provided. She seems to argue that the Tribunal failed to consider her incapacity in some respect (para.41 on page 18) but it was never suggested that the claimant was incapable of carrying out her role or that the financial transactions were done because the claimant was affected by disability. The key area of dispute was about whether the manner in which the claimant caused the fourth respondent to pay her and failure to cause the fourth respondent to account for that to HMRC was approved or not. We found her to be less credible than the respondents' witnesses, among other reasons, because of her refusal to answer questions about whether she had accounted for tax and her authorisation of the payment of false invoices (para.64.43). There is no connection between disability and these activities.

27. She alleges in para.90 (page 32) that reasonable adjustments should have been made in cross-examination because of her assertion about her mental health. She specifically says that allowance should be made for her inability to recall a matter which she now recounts in para.92. Adjustments were made for the claimant as set out in the reserved judgment and this specific occasion in July 2014 is unlikely to affect our conclusion that, overall it was not company wide practice to pay company sick pay.

28. She alleges that the Tribunal has infringed upon her medical freedom by accepting the respondent's evidence that she was on holiday when her evidence was that she was on a retreat necessitated by her health. In order for her to be regarded as on sick leave from her job she should have been certified unfit to work by a medically qualified practitioner. This is normal

employment practice. The claimant would not need to accept treatment from a General Practitioner but merely to consult with one and seek a certificate that she was unfit to work. Otherwise the respondent was entitled to regard her as not being absent due to ill health.

29. Other than those matters, it is hard to understand what relevance the claimant seeks to attach to the article she wishes to rely on. It is not likely to have an important influence on the case.

Alleged errors in findings of fact and in weight given to submissions

30. The next two types of criticism the claimant makes are that she believes that there were errors in our findings of fact and that certain submissions were not given sufficient weight. It is accepted that, in error, we relied upon the absence of a claim for a redundancy payment from the List of Issues as meaning that there was no such claim when it is clear that one had been included from the start. There is a discrepancy in reasons for the remedy judgment which will be corrected. Otherwise, the arguments raised by the claimant are complaints that the Tribunal failed to draw inferences that she argued we should draw or otherwise preferred the evidence of the respondents and JS over her own. The Tribunal was well aware that the claimant fundamentally disagreed with, refuted and challenged the respondents' narrative about the events and, in particular, about her own behaviour and what they knew about it. The claimant's application for reconsideration seeks to relitigate the final hearing using evidence or arguments which either were or which could have been deployed at the original hearing. There is no reasonable prospect of the original judgment being varied or revoked on the basis of such arguments.

Alleged failure to take into account impairments and the Presidential Guidance on vulnerable parties

31. As set out in para.27 above, the Tribunal made adjustments for the claimant's ill health, principally by adjustments to the timetable. Although we may not have specifically mentioned the Presidential Guidance on vulnerable parties, it is clear from the adjustments that we made as set out in the reserved judgment (paragraphs 5 to 7) that we had the underlying principles of that guidance firmly in mind.

Alleged failure to take account of English not being the claimant's first language

32. The claimant alleges that we failed to take into account that English is not her first language. The Tribunal appointed interpreter was present throughout the hearing and available whenever the claimant needed to seek clarification of anything. Time was taken to explain the process, the issues and the applicable law to the claimant in straightforward English and that could be interpreted if there was anything she did not understand. There is nothing specific that she points to about the conduct of the proceedings which disadvantaged her or caused the hearing to be unfair. This argument

does not have any reasonable prospect of causing the judgment to be varied or revoked.

PAYE and Income Tax

33. The claimant submits that the conclusions of the Tribunal gave substantial weight to the issue of PAYE which was outside our expertise and not an issue in the case. She appears to say that she considers that PAYE and Income Tax have been introduced without "enabling legislation" and the inference from her arguments is that she does not consider that the Income Tax, Earnings and Pensions Act 2003 (and other tax legislation) to be binding in law.

34. We readily accept that the Employment Tribunal is not a specialist tax tribunal. However, it is uncontroversial that employers have to register their employees with HMRC before paying them and have to declare the tax and national insurance contributions which are deducted from employees' wages and which are payable as the employer. These deductions and employers' national insurance contributions are then remitted to HMRC. The circumstances in which this started to be done for the claimant and was done for the other employees of the business were part of the factual matrix about which we heard evidence.

35. Although tax law will have changed during the time the claimant has lived in the U.K., we found that as the chief finance officer with the fourth respondent she instructed the accountants how much should be paid to HMRC in respect of income tax and national insurance deducted from the gross wages of other group employees and from such income as she was declaring for PAYE to HMRC in respect of her salary. This evidence in the case weighed heavily with us in concluding that the claimant was aware of the right way to account for tax. In the light of that evidence, for the claimant to say that there is no legal charge for tax without a self-assessment having been carried out is disingenuous as is the statement that PAYE does not exist. Unreferenced submissions on the derivation of PAYE and Income Tax are extremely unlikely to affect our findings about the claimant's knowledge compared with direct evidence of how she conducted herself when carrying out the role of chief finance officer.

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Employment Judge George

Date: 13 February 2023……..

Sent to the parties on: 14 February 2023

For the Tribunal Office