Case No: 2415525/20

EMPLOYMENT TRIBUNALS

Claimant: Miss J Levell

Respondent: Demicon Limited

JUDGMENT- RECONSIDERATION

The respondent's application dated 19 April 2023 for reconsideration of the judgment sent to the parties on 5 April 2023 ("Judgment") is refused.

REASONS

1. I have undertaken preliminary consideration of the respondent's application for reconsideration of the Judgment.

2. The grounds for the application are in a letter dated 19 April 2023 from Peninsula, the respondent's representatives. Attached to this letter are some 26 pages of statements of the respondent's bank account. The bank statements are heavily redacted.

The Law

3. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70).

4. Rule 72(1) of the 2013 Rules of Procedure empowers an Employment Judge to refuse the application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked.

5. The importance of finality was confirmed by the Court of Appeal in **Ministry of Justice v Burton and anor [2016] EWCA Civ 714** in July 2016 where Elias LJ said that:

> **"the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Ironsides Ray and Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."**

6. Similarly in **Liddington v 2Gether NHS Foundation Trust EAT/0002/16** the EAT chaired by Simler P said in paragraph 34 that:

> **"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 by 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."**

7. In common with all powers under the 2013 Rules, preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely, to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues and avoiding delay. Achieving finality in litigation is part of a fair and just adjudication.

The Application

8. The application is for reconsideration of 3 of the 4 claimant's successful complaints. I deal with each in turn.

Detriment (health and safety activities) under section 44 Employment Rights Act 1996 (ERA)

9. The submissions made in this part of the reconsideration application amount to an attempt to relitigate the complaint. The respondent asks us to accept that the claimant was placed on short time working because of financial difficulties that the respondent was facing. The Tribunal considered carefully the circumstances surrounding the decision to place the claimant on short time working before reaching its conclusions. The respondent is referred particularly to paragraphs 64 and 65 of the judgment.

Discrimination arising from disability (section 15 Equality Act 2010)

10. The submissions under this heading also amount to an attempt to relitigate the complaint. The respondent has provided bank statements. These could have been provided for consideration at the final hearing. The respondent will recall (and it is noted in the Judgment) that various additional documents were accepted by the Tribunal as evidence during the final hearing. The respondent's attempt to now add more documents is no more than an attempt to have a "second bite of the cherry."

11. We note that much emphasis is placed on short time working arrangements affecting "other staff" We reached our conclusions on the basis of the evidence provided and our assessment of that evidence. The evidence provided about other workers placed on short time working was limited to MS and, as far as his circumstances are concerned, we reached our decisions on the basis of the evidence provided at the hearing.

Unauthorised deduction from wages

12. The respondent may have misunderstood our conclusions about this claim. I must take some responsibility for that because, omitted from the judgment is a record of a relevant finding of fact. Whilst I am satisfied that there is no reasonable prospect of the original decision on this complaint being varied or revoked, I set out below another explanation of our conclusion – also noting the relevant finding of fact that was not included in the judgment.

a. We accept that the claimant's employment contract included a provision by which she could be laid off or placed on short time working (see para 14.3 of the judgment)

b. The terms of the respondent's email of 25 March 2020, placed claimant on short time working. (see para 59 of the judgment)

c. This email told the claimant that she would be entitled to statutory guarantee pay. This is an extract from the email: "*Entitlement to Statutory Guarantee Pay (SGP) will be in accordance with statutory provisions. SGP is payable in respect of a maximum of five workless days in any rolling period of three calendar months."* (para 59)

d. Our judgment does not record our finding that the claimant did not receive payment of SGP. She gave evidence that it was not received. That evidence was not challenged. We find that SGP was not paid. We omitted to record this finding in our judgment.

e. The claimant succeeds in her unauthorised deductions claim under Part II of the ERA, but only up to the amount of any SGP due to the claimant and not received (see para 165 of the judgment). That amount will be determined at the remedy hearing on 5 May 2023.

Conclusion

Having considered all the points made by the claimant I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The application for reconsideration is refused.

Employment Judge Leach
DATE: 28 April 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
28 April 2023

FOR THE TRIBUNAL OFFICE