Case No: 2414722/2019

EMPLOYMENT TRIBUNALS

Claimant: Nellie Ariane

Respondent: White Haus Hair and Beauty Ltd

JUDGMENT

The claimant's application dated 23 May 2023 for reconsideration of the judgment sent to the parties on the 9th May 2023 is allowed and the judgment is hereby revoked.

REASONS

1. I have considered the application for reconsideration of the judgment dismissing sent to the parties on 9 May 2023 in which the claim succeeded in part. That application is contained in a 7 page document attached to an email dated 23 April 2023. I have also considered comments from the respondent dated 22 May 2023.

2. I invited the parties to write confirming whether either wanted a hearing to consider this application. Neither side wrote to say a hearing was needed. I have consider the written application and the opposition from the respondent. I am satisfied a decision can be made on the papers.

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 me 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 majority of the points raised by the claimant are attempts to re-open issues of fact on which the Tribunal heard evidence from both sides and made a determination. In that sense they represent a "second bite at the cherry" which undermines the principle of finality. Such attempts have a reasonable prospect of resulting in the decision being varied or revoked only if the Tribunal has missed something important, or if there is new evidence available which could not reasonably have been put forward at the hearing. A Tribunal will not reconsider a finding of fact just because the claimant wishes it had gone in her favour.

9. That broad principle disposes of almost all the points made by the claimant. However, there are some points she makes which should be addressed specifically in relation to the decision to split the regulation 12 Working Time Regulations claim away from the remainder of the claims. The reason for the decision at the time was, applying the overriding objective, and taking into account the significant delay there has been in this case, that it was in the interests of both parties to deal with those claims I could hear sitting alone. The claimant objected to me hearing the regulation 12 claim sitting alone from the claimant and, so, rather than postpone all of the claims that claim alone was to be relisted on another date.

10. However, the claimant has identified two issues arising from this (a) that she did not fully understand what was being discussed and so this decision adversely affected her ability to properly present her case at the hearing and (b) part of the factual matrix on the unauthorised deduction from wages claim included a need to look at the rest break issue.

11. Given the unauthorised deduction from wages claim may be affected by any finding on the number and length of breaks the claimant did and/or did not take there may be more of an overlapping factual matrix than was considered at the hearing.

12. In those circumstances it would be in the interests of justice to have the same tribunal consider the overlapping facts pertinent to both claims and subsequently it is in the interests of justice to revoke the earlier judgment and list the matter to be heard altogether before a judge sitting with members.

13. I have taken into consideration the respondent's position and objection to the judgment being revoked. The principle of finality has been carefully considered by me in reaching this decision. However, these proceedings are not final in so far as there remains a regulation 12 claim. Having read the correspondence from the claimant it is at least arguable that claim has prospects of success and so the matter would require listing before a judge sitting with members on that one issue. It would be contrary for the interests of justice for that claim to be bound by any findings made at the hearing on 25 April 2023.

14. I do note however, that the application for reconsideration refers to a breach of contract claim in the alternative, which was not addressed by the tribunal in the reasons. At the earlier case management hearing on 12 December 2022 the tribunal confirmed the claims that were being brought in its list of issues. No claim for breach of contract in the alternative was identified. At the beginning of the hearing before me I confirmed the list of issues to be determined and EJ Johnson's list was agreed as being correct. Therefore that list of issues will be the list of issues before the full panel hearing.

15. Finally the claimant asserts now she was disadvantaged by her first language not being English; she speaks Russian. At no time in the hearing did the claimant raise her language as being a barrier to her participating in the proceedings. I cannot see that the matter was raised at the earlier case management hearings either. The tribunal will arrange a Russian interpreter for the claimant unless she objects within 14 days.

Conclusion

16. Having considered all the points made by the claimant I am satisfied that it is in the interests of justice for the judgment sent to the parties on the 9 May 2023 is revoked and the matter shall be listed for a two day hearing via CVP before a Judge sitting with members, at which the claimant's claim including the Regulation 12 Working Time Regulations.

17. The parties had already served bundles and statements, which are uploaded to the electronic case management system, so no further case management orders are required.

Employment Judge Mellor

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DATE 27 June 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
4 July 2023

FOR THE TRIBUNAL OFFICE