Case Number:
1301443/2022

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Ms Holder	Kiondo CIC

AND

APPLICATION FOR A RECONSIDERATION

In exercise of the powers conferred upon me by Rule 72(1) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules), I refuse the application for a reconsideration by the claimant because I consider that there is no reasonable prospect of the judgment being varied or revoked under Rule 70.

REASONS

1 A full hearing took place on 26 - 27 October 2023, with an oral judgment and reasons announced at the end of that hearing. The written judgment was sent to the parties on 2 November 2023. On 16 November 2023 the claimant emailed the tribunal stating that she wished to "appeal". I have treated that email as an application by the claimant to reconsider the judgment.

2 As to the grounds for reconsideration the claimant wrote this:
"I would like to appeal due to the fact there was no mention of the respondent withholding all three main sources of evidence of my work activities. I would like an acknowledgement of the fact that so much of the vital evidence was not presented to the court as a result of the respondent withholding evidence….".

Background

3 The claimant pursued a number of claims of an unlawful deduction from wages over various different periods as follows:

3.1 Whilst engaged under what was known as the KWOC contract she claimed for an unlawful deduction from wages in the total sum of £800 for the period August/ September 2021.

3.2 Whilst engaged under a contract of employment between 14 September 2021 - 3 November 2021 the claimant claimed unpaid wages for the entirety of this period; a total sum of £864.

3.3 It was also the claimant's case that whilst she was an employee there was a failure on the respondent's part to pay her for overtime worked in September/October 2021; specifically a failure to pay her for 43.5 hours overtime worked in September and 77 hours overtime in October, in the total sum of £1,200.50.

4 The first element of the claimant's unlawful deduction from wages claim was dismissed because the claimant failed to establish that she was an employee or worker under the KWOC contract. The second element of the claim succeeded but the respondent was not ordered to pay any unpaid wages to the claimant as it was agreed between the parties that payment of the total outstanding sum had been made by the respondent, albeit very late and in two instalments.

5 The third element of the claim, unpaid overtime for September/October 2021, failed and was dismissed.

6 It would appear that the claimant's reference in her reconsideration application to the respondent withholding evidence in relation to her work activities relates only to this third element of the unlawful deduction from wages claim; certainly at the hearing there was no suggestion that there was any missing documentation in relation to the first or second element of the claim.

7 As to missing documentation in relation to the overtime claim, it is important to understand the context in which this arose. The issue of documentation had come up at a case management preliminary hearing before Employment Judge Hussain on 14 November 2022. On that occasion the Judge had ordered that the respondent should disclose to the claimant a copy of her employment contract, timesheets, "information detailing editing to documents" and slack records between 14 September – 3 November 2019. Of these categories of documents the claimant's contract and timesheets were in the bundle prepared for the hearing before me.

8 There had been only a limited amount of correspondence between the parties concerning documentation after the preliminary hearing. There was an email from the claimant to the respondent and the tribunal dated 3 January 2023 in which the claimant said that she was still waiting for a "time stamped copy" of her employment contract, an email from the claimant on 6 February saying that

she had been told by the respondent that “evidence had been lost” and asking for more time to submit her own documentation and then finally an email from the respondent dated 28 February asking the claimant to identify what, if any documents, were said to be still missing from the bundle, to which there was no response from the claimant. Accordingly, from the tribunal file at least, there did not appear to be an ongoing issue with regard to documentation by the start of the hearing before me.

9 It was not suggested by the claimant at the start of the final hearing that there was any missing documentation and, in fact, both parties confirmed at the start of the hearing that they were ready to proceed.

10 During the hearing the claimant was asked a number of times in cross-examination whether she had any evidence to corroborate the high number of hours overtime that she was claiming for. Whenever the claimant was asked this question she stated that there was no evidence because she did not have access to it. The claimant returned to this issue in closing submissions saying that she had “hardly any evidence” of the hours that she had worked because, she asserted, she had lost access to Google Drive, the website she had worked on and what was termed the the slack board when she was dismissed.

11 As was explained in the oral reasons, there were three reasons why, in broad terms, the claimant was unsuccessful with regard to the overtime aspect of her claim:

> 11.1 Under the express written terms of the claimant’s contract she was required to seek authorisation from the respondent before working any overtime, and the claimant accepted in evidence that she had not done this. Effectively, therefore, it was not disputed that the claimant’s overtime claim did not fall within the express terms of the contract.
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> 11.2 As I noted in my oral judgment, it *might* have been possible to imply a term that the claimant would be paid for overtime carried out *if* there was evidence that the respondent was *requiring* the claimant to work overtime. But being required to work overtime cannot be equated to the claimant, on occasion, doing some work outside of her standard working hours. There was no evidence at all that the respondent was requiring overtime and accordingly I concluded that this was not a case in which such a term should be implied.
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> 11.3 Lastly, I in any event found as a fact that the claimant had not proved that she worked the overtime hours she asserted (43.5 hours in September and 77 hours in October) taking into account in particular that:
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> > 11.3.1 The claimant’s timesheets for September and October were before the tribunal and both timesheets were inconsistent with the

claimant's asserted case with regard to overtime hours worked. For example, in relation to October the claimant, it was not disputed, worked for 3 weeks of this month before being placed on what was then termed as unpaid leave. The claimant had recorded in her October timesheet, page 131, that she had worked 70 hours *in total* during these three weeks of October (contracted hours of 12 hours a week included). That would equate to 36 hours work on contracted hours and 34 hours overtime. Whereas before me it was the claimant's case that, in addition to her contracted hours, she worked 77 hours overtime in October; i.e. a total of 113 hours worked over the 3 weeks of that month (36 contracted hours plus asserted overtime), which was completely inconsistent with the timesheet.

11.3.2 Despite the asserted high overtime figures (43.5 hours for September and 77 hours for October) the issue of overtime was not mentioned at all in the claimant's claim form, which undermined the claimant's credibility on this issue,

11.3.3 The very high number of hours claimed was out of all proportion to the claimant's contracted working hours (12 hours a week), and

11.3.4 The claimant simply could not explain in evidence, even in broad terms, how she had arrived at the overtime figures or on what they were based.

The Law

12 Rules 70 - 73 of the Rules provide (in so far as is relevant) as follows:

70 A Tribunal may ……. on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision… may be confirmed, varied or revoked. If it is revoked it may be taken again.

71 Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all other parties) within 14 days of the date on which the written record, or other communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

72(1) An employment judge shall consider any application made under rule 71. If the judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are

special reasons, where substantially the same application has already been made and refused), the application shall be refused and the tribunal shall inform the parties of the refusal.

13 In **Outasight VB Ltd v Brown UKEAT/0253/14** it was explained that the change in the wording of the 2013 Rules (and in particular the removal of the specific categories which were contained at Rule 34(3)(a) – (e) of the 2004 Rules and the replacement of these by a consideration of what is in the interests of justice) does not signify a change in approach. The same basic principles apply to the 2013 Rules as under the 2004 Rules and cases decided under the old Rules are still relevant to cases under the new.

14 As to what the interests of justice might be these were described in **Flint v Eastern Electricity Board [1975] ICR 395** as being the interests of both the employee and the employer but over and above that the interests of the general public. It is in the interests of the general public that proceedings of this kind should be as final as possible; that is it should only be in unusual cases that a party is given a second bite of the cherry. In **Newcastle City Council v Marsden [2010] ICR 743** it was held that the introduction of the overriding objective did not mean disregarding the principles laid down in earlier cases and in particular the weight that had been attached to the need for finality in litigation.

15 In relation to the submission of new evidence tribunals, under the 2004 Rules, were expressly required to consider whether the new evidence submitted had become available since the conclusion of the hearing and whether its existence could not reasonably have been known of or foreseen at the time. This reflected the guidance in **Ladd v Marshall 1954 1 WLR 1489** in which the Court of Appeal explained that to justify the reception of fresh evidence or a new trial three conditions must be fulfilled. Firstly it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, secondly the evidence must be such that, if given, it will probably have an important influence on the result of the case, though it need not be decisive, and thirdly the evidence must be such that it is presumably to be believed - i.e. it must be apparently credible although not incontrovertible.

16 I take from **Outasight** that these are still relevant considerations when dealing with an application for a reconsideration which involves the submission of new evidence under the 2013 Rules. As per **Flint** new evidence could also be allowed under the interests of justice where the requirements of paragraph 34(d) of the 2004 Rules were not strictly met but where there might be some special additional circumstance or mitigating factor. As to what additional circumstance or mitigating factor would allow new evidence to be adduced despite the fact the strict requirements of **Ladd** were not met, this was explored in **General Council of British Shipping v Deria [1985] ICR 198**. The EAT held that the other circumstance or mitigating factor had to be related to the failure to bring the matter within paragraph (d), as it was then.

Conclusions

17 I decided that there was no reasonable prospect of the original decision being varied or revoked and that it was not, therefore, in the interests of justice for a reconsideration to be conducted for the following reasons.

18 It was not entirely clear whether the claimant was now seeking to be able to introduce new documentary evidence or whether she simply wanted it in some way acknowledged that evidence was missing from the bundle, and that the respondent had withheld this evidence. To the extent that it is the latter then;

18.1 A reconsideration application is not an appropriate forum for raising an issue of this nature. The claimant should have raised this as an issue in correspondence before trial and/or with the judge at the start of the hearing.

18.2 In the absence of this having been done, a tribunal can only decide a case on the basis of the documentation that is put before it.

18.3 Even if it is assumed that documentation was missing from the bundle, if, as seems likely, it is the claimant's case that the documents will show her on occasion working outside of her contracted hours then, for the reasons that I set out in paragraph 20 below, it is difficult to see that such documentation will probably have an important influence on the result of the case.

19 If, on the other hand, the claimant is now seeking to be permitted to introduce new evidence:

19.1 The evidence to which the claimant now refers (documents on the Google Drive, details of the website she had worked on and information on the slack board) is evidence which the claimant knew of at the time of the full hearing.

19.2 As set out above, the claimant did not suggest, at the start of the full hearing, that she was not ready to proceed or that there was vital missing documentation. To the contrary, she confirmed that she was ready to proceed, and the issue of the additional evidence was only mentioned for the first time in cross examination.

19.3 Aside from the claimant's email, referred to above, asking for a time stamped copy of her employment contract there was no indication on the tribunal file that the claimant had continued to try to obtain this documentation/evidence prior to trial in the face of what is now asserted to be only partial disclosure by the respondent. To the contrary, the tribunal file indicated that the respondent

had asked the claimant to identify what, if any, documentation was asserted to still be missing from the file and the claimant had not responded to this. Accordingly, the claimant is not in a position to show that it is information which could not, with reasonable diligence, have been obtained for use at trial.

20.4 Most significantly, in my view, it cannot be said that this evidence will probably have an important influence on the result of the case. That is because what I infer this documentation will show is that on occasion the claimant was working outside of her contracted hours. However:

20.4.1 That type of evidence would not assist with the issue of whether the respondent was *requiring* the claimant to work overtime.

20.4.2 Whilst it might show that on a given day and time the claimant did a particular work related task, it is difficult to see that proving a particular piece of work was done on a particular day would be of any real assistance to the claimant in proving the very high number of overtime hours she asserted that she had worked.

20.4.3 In any event, the primary evidence as to number of hours worked (the claimant's timesheets) were before the tribunal, and these, as already set out, undermined the claimant's case on this issue.

21 I therefore conclude after preliminary consideration that I shall refuse the claimant's application for a reconsideration of the judgment. For the reasons set out above there is no reasonable prospect of the decision being varied or revoked and it is not in the interests of justice for a reconsideration to be conducted.

Employment Judge Harding
27/11/23