EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103696/2023

Employment Judge D Hoey

Ms Sarah Louise Olckers **Claimant**

E&K Hair Salon **Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent's application dated 5 October 2023 for reconsideration of the judgment dated 20 September 2023 is refused, it not being necessary in the interests of justice to revoke the judgment.

REASONS

1. On 11 July 2023 the claimant presented a claim arguing that she had not been paid holiday pay to which she said she was entitled. The ET1 suggests the claimant received no holiday pay during her employment (although it is not clear and the ET1 could be interpreted as the claimant not having received holiday pay for a holiday that was taken rather than having been paid no accrued holidays). The respondent did not defend the proceedings and lodge an ET3 nor seek to lodge an ET3 late and give reasons why a late response should be issued.

2. Judgment was issued for 6.4 days' worth of holiday (in the sum of £486.40) on 20 September 2023.

Respondent seeks to reconsider judgment

3. On 5 October 2023 the respondent wrote to the Tribunal saying the respondent had agreed to pay the claimant 2 week's holiday over the year. The respondent was advised that if it wishes to defend the claim it should consider lodging a response late (in terms of Rule 20). The respondent did not do so.

Correspondence from the parties as to the position

4. On 31 October 2023 the claimant advised she had been employed for 9 months. It was confirmed that the claimant had been paid holidays for her first holiday but nothing in respect of the second period, which it was said was the sum in respect of which judgment had been issued.

5. On 10 November 2023 the claimant letter setting out their position was sent to the R. Having considered matters from the information before the Tribunal, the parties were advised on 22 November 2023 that there appeared to be no reasonable prospects of successfully defending the claim as the respondent appeared to be arguing there had been agreement to reduce the claimant statutory entitlement to paid holidays (which is not possible, entitlement to statutory holidays arising in terms of the Working Time Regulations). On that basis the respondent was advised that subject to any further points arising, the application for reconsideration was likely to be refused.

6. On 28 November 2023 the parties were given 7 days to confirm whether or not matters had been resolved as no response had been received and the respondent was asked whether the application for reconsideration was still being maintained particularly in light of the fact it is not possible to reduce entitlement to paid holidays (given the legal rights that arise in terms of the Working Time Regulations). Neither party provided any response within the 7 days and on 14 December the parties were asked to update the Tribunal within 7 days.

7. On 19 December 2023 the claimant wrote to the Tribunal saying no contact had been made by the claimant. On 20 December 2023 the respondent was asked to confirm the position and whether or not the application for reconsideration was still being maintained.

8. On 3 January 2024 a friend of the respondent wrote to the Tribunal on the respondent behalf noting that correspondence had been sent to the Tribunal. This had been overlooked. The letter was dated 18 December 2023. It does not appear to have been sent to the claimant. The respondent stated the claimant was paid holidays in May and September (the September sum being shown in a payslip and the May sum being paid in cash). The respondent said the claimant was paid all sums due.

9. The claimant was asked for their response given what was presented and the respondent was asked to provide the information supporting their position to the claimant.

10. On 30 January 2024 the respondent copied their response to the claimant and the claimant's agent replied. In short the respondent alleged some payments were made in cash and some via payroll but the claimant denies receiving any such cash payments and indicated that the pay slips did not match the sums the claimant received in her bank account. The claimant also noted that it is not possible to agree to vary the statutory minimum period of notice set by law.

11. On 7 February 2024 the respondent's agent replied noting that the respondent is a small business and tried to comply with the law.

The law

12. 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).

13. If an application is not refused in terms of rule 72(1) of the 2013 the original decision should be reconsidered at a hearing unless the Employment Judge

considers that a hearing is not necessary in the interests of justice and the parties are given a reasonable opportunity to make further written representations.

14. The importance of finality was confirmed by the Court of Appeal in **Ministry of Justice v Burton and another [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."

15. Similarly, in ***Liddington v 2Gether NHS Foundation Trust EAT/0002/16*** the Employment Appeal Tribunal 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."

16. In common with all powers under the 2013 Rules, a reconsideration application 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, due regard to the costs involved and avoiding delay. Achieving finality in litigation is part of a fair and just adjudication. It is also important to recognise that fairness and justice applies to both parties – the claimant and the respondent.

The application and decision

17. In this case the judgment that was issued was issued as the respondent had failed to lodge a response. It was issued as a result of a determination of the information the claimant had presented as set out in the ET1. The respondent had been given a number of opportunities to defend the claim by lodging a response but had chosen not to do so.

18. Following receipt of the judgment, the respondent now argues that the sum that was issued was incorrect. The respondent argues there was no outstanding holiday entitlement, the claimant having received all she was due. The claimant argued the sum awarded was lawfully due as the legal entitlement to holidays had not been exhausted prior to her employment ending and she was entitled to a payment in lieu of accrued holidays.

19. The respondent's reconsideration application was not refused in term of rule 72(1) and the parties' views were sought. The respondent had suggested that the sums sought had in fact been paid. It was necessary to seek the claimant's view given what was said.

20. Given the sums in dispute and circumstances of this case, it was not in the interests of justice to fix a hearing to determine the reconsideration application. The parties were able to comment upon each other's position in writing. Full written representations have now been provided by both parties.

It is not necessary in the interests of justice to reconsider the decision

21. Having considered the respondent's application and the claimant's response, the Employment Judge's decision is that it is not necessary in the interests of justice to reconsider the judgment that was issued. The respondent was given the opportunity to defend the claim when it was first raised. The respondent was reminded of the right in terms of rule 20 to present a response, even if

late, and seek to defend the proceedings. The respondent chose not to do so. Nevertheless the respondent now argues the sums awarded were not due. That argument has been considered in light of the claimant's response to what the respondent now alleges.

22. The claimant has argued the sums awarded were due. It is alleged the sum due is in respect of outstanding holidays that had accrued as at the termination of employment, the sum representing the accrued holiday entitlement as per the Working Trime Regulations. The claimant disputes that she received cash payments as alleged by the respondent and presented written evidence showing how the payslips the respondent provided did not match up with the sums the claimant received into her bank account.

23. The respondent referred to being a small business and suggested agreement had been reached to vary the statutory holiday entitlement to a level below that set by law.

24. It is not possible to reduce the statutory entitlement to holidays as fixed by the Working Time Regulations. The calculation the claimant presented was accurate and was her legal entitlement pursuant to regulation 13, 13A and 14 of the Working Time Regulations 1998. Regulation 35 prevents parties from contracting out of the minimum entitlement fixed by law. In other words, parties cannot agree to lessen the statutory entitlement to annual leave as fixed by law.

25. In terms of the overriding objective it is important that the decisions made by the Tribunal are just and fair and take proper regard to proportionality of the issues and the costs incurred by both parties. The Tribunal has taken account of the overriding objective, particularly in light of the time that has passed and the sums in dispute. The Tribunal has considered both the respondent and the claimant in assessing whether it is necessary in the interests of justice to revoke the judgment that was issued.

26. In all the circumstances it is not necessary in the interests of justice to reconsider the judgment dated 20 September 2023. The claimant has shown that the sums awarded were sums that were lawfully due to the claimant.

While the respondent disputes the position, the position set out by the claimant supports the decision that the sums awarded by the Tribunal were sums lawfully due to the claimant.

Conclusion

27. I considered the overriding objecting in reaching my decision to ensure the decision taken was fair and just. That applies to both the claimant and the respondent since justice requires to be achieved for both parties. I have done so carefully.

28. Having considered all the points made by the respondent it is not necessary in the interests of justice to reconsider the judgment. The judgment that was issued was correct and represented the sums the claimant was lawfully due.

29. Regulation 35 provides restrictions to prevent parties from contracting out of the Working Time Regulations which provide a minimum statutory entitlement to paid holidays, the accrued entitlement to which arises upon termination of employment.

30. The application for reconsideration is therefore refused under rule 72(2) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Summary

31. Given the issues arising in this case and the time that has passed, the respondent should make payment of the sums set out in the judgment, namely £486.40 (gross) (6.4 days) without further delay.

Employment Judge: **D Hoey**
Date of Judgment: **14 February 2024**
Entered in register: **15 February 2024**
and copied to parties