



EMPLOYMENT TRIBUNALS

Claimant: Mr P Wilkins

Respondent: Java Art Limited

JUDGMENT ON APPLICATION FOR RECONSIDERTATION

The respondent's application for reconsideration is refused because there is no reasonable prospect of the decision being varied or revoked.

REASONS

1. The claimant issued a claim on 20 September 2022 and in a Case Management Preliminary Hearing on 9 June 2022, it was confirmed that the claim was for unpaid wages, failure to pay holiday pay and failure to provide a Statement of Main Terms and Conditions under s1 Employment Rights Act 1996.

2. This case came before the tribunal on 3 November 2023 and the for the reasons I gave orally at the conclusion of the hearing, I found

“The claimant’s complaint of unauthorised deductions from the pay contrary to Part II Employment Rights Act 1996 is well-founded and succeeds. The respondent made an unauthorised deduction from the claimant’s pay of £532. The respondent is ordered to pay the claimant the gross sum of £532 deducted from pay.

The claimant’s complaint of unpaid holiday pay is well founded and succeeds. The respondent is ordered to pay the claimant the gross sum of £84.

The respondent failed in its duty to provide the claimant with a written statement of the main terms of employment complying with section 1 Employment Rights Act 1996. Pursuant to section 38 of the Employment Act 2002 the respondent is ordered to pay the claimant the sum of £690 being two weeks’ gross pay.

3. The respondent requested written reasons and these were provided on 8 December 2023. In an email dated 22 December 2023, the respondent requested a reconsideration of the decision.

Law

4. Rule 70 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides an Employment Tribunal

with a general power to reconsider any judgment where it is necessary in the interests of justice to do so. This power can be exercised either on the Tribunal's own initiative or on the application of a party. Rules 71 to 73 set out the procedure by which the power is to be exercised.

5. Rule 70 provides a single ground for reconsideration. That ground is where it is necessary to do so in the interests of justice. This does not mean that where a litigant is unsuccessful, they are automatically entitled to reconsideration. Instead, a Tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases fairly and justly and the Tribunal should be guided by the common law principles of natural justice and fairness. On reconsideration, the decision may be confirmed, varied or revoked.
6. Rule 71 provides that an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties.
7. The process by which the Tribunal considers an application for reconsideration is set out in Rule 72. Where a Judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application shall be refused. Otherwise, the Tribunal shall send a notice to the parties setting out a time limit for any responses to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing.
8. Rule 71 and 72 give the Tribunal a broad discretion to determine whether reconsideration of a decision is appropriate. Guidance for Tribunals on how to approach applications for reconsideration was given by Silmer P in the case of *Liddington v 2Gether NHS Foundation Trust* UKEAT/0002/16/DA.

“34. [...] 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 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 of 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. Tribunals have a wide discretion whether or not to order reconsideration.

35. Where [...] a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application.”

9. The claimant's application was received within the relevant time limits. I therefore consider it under Rule 72.

10. In terms of new evidence, the Employment Appeal Tribunal confirmed in *Outasight VB Ltd v Brown UKEAT/0253/14* that the test laid down in *Ladd v Marshall (1954) 3 All ER 745* applies. This test has three limbs. It must be shown:
- that the evidence could not have been obtained with reasonable diligence for use at the original hearing;
 - that it is relevant and would probably have had an important influence on the hearing; and
 - it is apparently credible.
11. Notwithstanding this, there has been an acknowledgement at the Employment Appeal Tribunal (including in the *Outasight VB* case itself) that there might be cases where the interests of justice permit fresh evidence to be adduced notwithstanding that these principles were not strictly met.

Conclusion

12. The substantive element of the respondent's application relates to 2 bank statements ("the Bank Statements") and the respondent asks the Tribunal to consider this "*further evidence.*" The Bank Statements are not from a bank account in the name of the respondent but from a bank account in the name of "*Nigel Nicholas Mark Turner and Yuanita Hikmahsari Turner*" and cover the periods 17 April – 16 May 2022 and 17 May – 16 June 2022. The statements show deductions from ATMs of £250 on 13 May 2022 and 18 May 2022.
13. In the claim form, which was received by the Tribunal on 20 September 2022, the claimant refers to
- "I have not been paid money I am owed despite requesting this."*
14. To the extent that there was any ambiguity as to what the claimant was claiming, this was clarified in the Case Management Preliminary Hearing on 9 June 2023 ("PH"). The contentious issues were clear at that stage – this was some 5 months prior to the full hearing.
15. In paragraph 8 of the Record of a Preliminary Hearing, the respondent expressly confirms that all documents relevant to issues had been sent to the claimant. Even if this was not the case – and additional documents emerged subsequently – the respondent still had sufficient time prior to the full hearing to disclose such documents. This would have included any documents which may have emerged when Mr Turner was preparing his witness statement (which was dated 9 October 2023).
16. Ultimately, when the case came to a full hearing, there was a bundle of 155 pages and 3 witness statements. The bundle included a bank statement from the claimant which confirmed receipt of a payment (from a "Java Art" bank account rather than the bank referred to in the Bank Statements) that a payment of £78 had been paid by the respondent to the claimant on 9 May.

17. The Bank Statements are not dated but were addressed to Mr Turner. Whilst acknowledging the fact that the respondent was not represented, given the period to which the Bank Statements relate and the contentious issues in the case, there is no reason why the respondent could not have obtained the Bank Statements with reasonable diligence and presented them to the Tribunal for consideration at the full hearing. The respondent did not do so. I am satisfied however that the respondent had every opportunity to present these documents to the Tribunal at or before the hearing itself.
18. In any event, I consider that the Bank Statements would not have changed the decision of the Tribunal even if these documents had been before it. The Bank Statements provide that a sum of £250 was taken out of a bank account (not in the name of the respondent) on 13 May and 18 May. Unlike the payment of £78 made from the respondent's bank account on 9 May 2022 (referred to above), there remains no evidence that the respondent made the subsequent (larger) payments to the claimant. This was dealt with in paragraph 25 of the Written Reasons.
19. In terms of the other grounds raised for reconsideration, these amount to the respondent disagreeing with the findings of fact made by the tribunal at the hearing. These issues have substantively been ventilated at the hearing and it is recognised and acknowledged that the respondent strongly disagrees with the findings of the Tribunal in this respect. However, the respondent's comments on the claimant's text of 20 May 2022 were fully considered and evaluated carefully alongside the other evidence available and all the circumstances of the case. The Tribunal had regard to the timing of the text, the fact that the claimant was unrepresented when it was sent, the entirety of the exchanges that the claimant had with Mr Turner and the fact that by 20 May 2022 the claimant had received some monies from the respondent in respect of which the respondent had not paid tax/national insurance or provided the claimant with holiday pay.
20. The reconsideration application focuses on the finding in respect of the unauthorised deductions as opposed to the findings in respect of unpaid holiday and failure to provide a statement under section 1 Employment Rights Act 1996. For completeness, however, there is no power to divert sums awarded to the claimant under s38 Employment Act 2002 for a failure to provide a claimant with a written statement of main terms of employment under section 1 Employment Rights Act 1996 to the Tribunal.
21. Having carefully considered the respondent's application and bearing in mind the importance of finality in litigation and the interests of both parties, I am not satisfied that there is any reasonable prospect of the Judgment or any part of it being varied or revoked. The application for reconsideration is therefore refused.

Employment Judge Chivers

25 February 2024