EMPLOYMENT TRIBUNALS

Claimant: Mrs L Brennan

Respondent: St Helens and Knowsley Teaching Hospitals NHS Trust

UPON APPLICATION made by letter dated 18 September 2022 to reconsider the judgment given on 13 September 2022 under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing:

JUDGMENT

The claimant's claim under section 74 of the Equality Act 2010 succeeds. The respondent has made an unlawful deduction from wages from the claimant. The respondent is therefore ordered to pay to the claimant the sum of £1,070.94 (including interest of £93.02).

REASONS

Application for reconsideration

1. This was an application for reconsideration made on 18 September 2021 by the claimant following a judgment in which the claimant was awarded £977.92 plus interest of £93.02. Reasons were given orally at the hearing held on 13 September 2022, but no written judgment was issued after the first hearing as a reconsideration application was made immediately.

2. The claimant now explains that the claimant's amended schedule of loss, on which the judgment was based and which was filed on the morning of the hearing ("the amended schedule"), was in error, by reason of the salary sacrifice of £243 per month being taken into account. In the amended schedule, the claimant reduced the sums of maternity pay said to be owed in April - October 2020 by £243 to factor in the salary sacrifice. This was in error, the claimant contends, as the fact that the sum would be diverted from maternity pay did not detract from the fact that it was payable from the gross salary owed.

3. The claimant therefore asserts that it is necessary in the interests of justice for the Tribunal to vary its judgment to award £2,673.63 plus interest of £254.32 to account for the mistaken reduction from the amended schedule relied upon at the hearing of the salary sacrifice sum.

4. As the Tribunal did not consider that there was no reasonable prospect of the original decision being varied or revoked, the Tribunal wrote to the parties on 25 October 2022 to request them to set out their views as to whether the application could be determined without a hearing.

5. The parties confirmed their view that the application should be dealt with without a hearing and based on submissions received from the parties.

6. The Tribunal considered that a hearing was not necessary in the interests of justice and has reconsidered its decision without a hearing and based on the submissions of the parties.

Law

7. Rule 70 of the Employment Tribunal Rules 2018 gives the Tribunal a power to reconsider *"any judgment"* if it is in the interests of justice to do so. Rule 1 on interpretation defines *"judgment"* as *"a decision … which finally determines … a claim, or part of a claim, as regards liability, remedy or costs"*.

8. The Tribunal can confirm, vary or revoke the original decision (rule 70).

9. The Tribunal should have regard to the interests of the party seeking the reconsideration, the interests of the other party, (known as the balance of prejudice) and the public interest requirement that there should, where possible, be finality of litigation.

10. The Tribunal must also bear in mind the overriding objective to deal with cases fairly and justly.`

11. In **Williams v Ferrosan Ltd** 2004 IRLR 607 the EAT held that the tribunal should have granted a review (as reconsiderations were then known) where the parties and tribunal had all acted on the erroneous assumption that the unfair dismissal compensation being awarded was not taxable. It was held that the "interests of justice" required that the error be put right at a review and putting it right at the review meant that the case would be dealt with "justly". In that case, it was agreed that the error would have been corrected by the EAT if an appeal had been launched, and so using the review procedure to remedy the error would save expense and help to ensure that the matter was dealt with expeditiously.

Calculation of maternity pay

12. Paragraph 15.22 (pages 92 – 93), of the NHS Terms and Conditions of Service Handbook) states: 15.22 Full pay will be calculated using the average weekly earnings rules used for calculating Statutory Maternity Pay (SMP) entitlements. This relates to the claimant's entitlement to Occupational Maternity Pay (OMP).

13. Both entitlement to SMP and the rate payable depend on an employee's normal weekly earnings. Normal weekly earnings are calculated as a weekly average of the employee's total gross earnings from the employer during a reference period.

14. Where part of the employee's salary has been sacrificed under a salary sacrifice arrangement (for example, in return for childcare vouchers), the sacrificed amount does not count as earnings for SMP purposes.

15. This is because there are special tax and NIC exceptions for employer-provided childcare vouchers. Up to a certain threshold, the value of the childcare vouchers are not subject to class 1 NICs (see *paragraphs 7* and *7A, Part V, Schedule 3, Social Security (Contributions) Regulations 2001 (SI 2001/1004)*). As "earnings" for SMP purposes only include anything that is subject to class 1 NICs, childcare vouchers up to the relevant threshold are not taken into account for calculating earnings.

The claimant's application

16. The claimant referred the Tribunal to the case of **Williams** (above) which the claimant asserts suggests that an error as to calculation of remedy, arrived at by reason of the joint misapprehension of the parties, is one which is suitable for remedying by reconsideration.

17. The Claimant's position is that her original schedule of loss (page 37 of the bundle), took no account at all of the £243 diverted from gross salary in November and December 2019 (see the payslips at pages 113 and 114 of the bundle), and it was therefore not factored into the sums she contended were payable as OMP between April and October 2020. Equally when she recorded the sums of OMP paid by the Respondent in those months she took no account of the fact that £243 had in each of those months been diverted to a childcare voucher provider (see the payslips at pages 118 to 124 of the bundle). That was the correct approach as the salary sacrifice for childcare vouchers was as much a sum paid to her as the rest of her salary – it was simply diverted out of pre-tax income to a childcare voucher provider. It had no bearing on what was paid to her by the Respondent either in the reference period for calculating OMP or in the periods in which OMP was paid.

18. The claimant contends that the respondent's counter schedule of loss (page 131 – 133 of the bundle) showed that they did take into account the salary sacrifice in calculating the claimant's average weekly salary in November and December 2019. Whereas the claimant had calculated average weekly pay as being £923.84, the respondent had (even once the 20% supplement was treated as having been paid throughout November and December 2019) reached a figure of £867.77 (see bottom of page 132).

19. The claimant further contends that, in the lead up to trial she noted that she had made an error in failing to include in her schedule of loss (see page 37) the sum of OMP paid in September 2020 (£1,642.65) and she amended the schedule of loss accordingly (see amended schedule). However, she also considered that the salary sacrifice should have been factored in, and she did this by reducing the sums of OMP said to be owed each month in April – October 2020 by £243. The claimant alleges that this latter amendment was in error, as the fact that that sum would be diverted from OMP paid did not detract from the fact that it was payable.

20. The claimant's position is that the sum which ought to have been contended for at trial is 17 weeks x £923.84: £15,705.28 (almost exactly the sum recorded in the Claimant's original schedule of loss and reflected in the

Respondent's counter schedule) less OMP paid in the sum of £13,007.21 (see Respondent's counter schedule – page 133 of the bundle). That is £2,673.63. That is (almost exactly) the sum awarded by the Tribunal (£977.92) but adjusted to remove the error of deducting 7 months of salary sacrifice (7 x £243: £1701): £2,678.92.

The respondent's position

21. The respondent asserts that the Tribunal has not made a determination which requires reconsideration.

22. Further, the respondent contends that it was informed by the Claimant's Counsel on the day what the correct calculation was, and what the interest element on that was, and entered a judgment accordingly. It asserts that **Williams** does not assist them as, in that case, the Judge and parties laboured under the same misapprehension. It says that there was no misapprehension here as the Claimant indicated clearly what the correct figures were on the day of the hearing and there was no discussion or debate around them.

23. The respondent also asserts that there is no error in any event, and that the proper calculation as to the increase in the Claimant's pay would be made after the deduction of the childcare vouchers, as it is the impact on her net pay that matters. The Claimant's amended schedule was an accurate analysis of what was due, and that was agreed.

Conclusions

24. The Tribunal is satisfied that it has made a determination which is capable of reconsideration. Rule 70 gives the Tribunal a power to reconsider *"any judgment"*. Rule 1 on interpretation defines *"judgment"* as *"a decision … which finally determines … a claim, or part of a claim, as regards liability, remedy or costs"*.

25. In this case, the Tribunal is satisfied that its judgment should not be re-considered. This is because the Tribunal accepts the respondent's position that it is the claimant's net pay that matters.

26. The ET3 clearly states *"pay will be calculated using the average weekly earnings rules used for calculating Statutory Maternity Pay".*

27. Although normal weekly earnings are calculated as a weekly average of the employee's total gross earnings from the employer during a reference period, where part of the employee's salary has been sacrificed under a salary sacrifice arrangement, the sacrificed amount does not count as earnings for SMP (and therefore, in this case, OMP) purposes.

28. The calculation on which the judgment was based is therefore correct. The claimant's assertion that the salary sacrifice amount of £243 should be included in the calculation is incorrect. The judgment will not be varied or amended and the application for reconsideration is refused.

29. Even if the Tribunal had not considered the claimant’s assertion that the salary sacrifice amount should be included in the calculation to be incorrect, the claimant’s application would have failed in any event.

30. In **Williams**, the EAT granted a review where the calculation of compensation was based on a mistaken view about the taxation of future losses by both parties and the Judge. This was an error of law which would have been corrected on appeal.

31. Whilst it is true that the Respondent confirmed that it considered the Claimant’s calculations, put forward during the hearing when remedy was being considered, to be correct, those calculations were positively asserted by the claimant. Therefore, whether or not there may have been an error of calculation, the Tribunal does not consider that it was led into error by a joint mistake of the parties. Rather, in this case, the claimant positively put forward a calculation, and the respondent and the Tribunal were content to accept that calculation. The case is therefore distinguishable from **Williams** on the basis that there was no misapprehension by the parties and the Tribunal, and rather the claimant’s schedule and argument, as advanced by the claimant’s professional representative, was accepted.

32. In **Williams**, there was a discussion, in a remedy hearing, around whether an element of the award was taxable or not. Both parties and the Judge laboured under the same misapprehension as to the taxable nature of that element of compensation, following the issue having been debated. In this case, the Tribunal was simply told, assertively, what the calculation should be by the claimant and was happy to accept the figures put forward, as was the respondent. That was the case put forward for the claimant. It would be incorrect to say that the Tribunal (or the respondent) was labouring under any misapprehension as there was simply no discussion around the figures. To grant the application would be to grant the claimant a "second bite of the cherry" and to allow her to put a different calculation forward.

33. Whilst the reconsideration procedure enables errors occurring in the course of proceedings to be corrected, it is not normally appropriate when the proceedings have given both parties a fair opportunity to present their case. In this case, the remedy granted was positively requested by the claimant. There was no relevant argument or discussion because no issue was taken with the claimant's schedule.

34. The Tribunal was therefore not persuaded that **Williams** assisted the claimant.

35. There should be, whenever possible, finality in litigation. That said, where a mistake has been made and the matter has come to light, it may be desirable for the Tribunal, if there is an application for reconsideration, to correct the matter even if it involves overturning the original decision of the Tribunal. In circumstances in which a mistake has been made, it may be in the interests of justice to require a reconsideration, once the Tribunal has considered the balance of prejudice and the overriding objective. It is notable, in this case, that the respondent has not pointed to any prejudice. However, the Tribunal is also not persuaded that there has been an error, and so the balance of prejudice cannot fall in favour of the claimant.

36. In considering the balance of prejudice and the overriding objective, the Tribunal is satisfied that it would not, in any event, have reconsidered its judgment in this matter, given the overriding objective that there should be finality in litigation.

Employment Judge Rice-Birchall
Date: 8 March 2023

JUDGMENT SENT TO THE PARTIES ON
9 March 2023

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2408153/2021**

Name of case: **Mrs L Brennan** v **St Helens and Knowsley Teaching Hospitals NHS Trust**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 9 March 2023

the calculation day in this case is: 10 March 2023

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note:
   www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.