# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs M Hannah**

**Respondent:** **David Lewis**

# JUDGMENT

The claimant's application dated **10 February 2017** for reconsideration of the judgment sent to the parties on **30 January 2017** is refused.

# REASONS

1. By a letter dated 10 February 2017 from Kathleen Tootell, the claimant seeks a reconsideration of the tribunal's judgment sent to the parties on 30 January 2017 , in which the claimant's claim of unfair dismissal was dismissed, her other claims having been dismissed upon withdrawal by her. The claimant had been represented throughout the proceedings by Richard Owen, an employment specialist at the CAB , and he appeared for her in the hearing held between 5 and 9 December 2016. The claimant has since clarified that he is no longer her representative, but Kathleen Tootell, her sister, is. The tribunal has therefore been able to accept Ms. Tootell's letter as being an application made on behalf of the claimant.

2. In the body of her letter, Ms Tootell asks for the claim to be reconsidered, for the reasons set out in her grievance against Richard Owen , which is attached, and, because, she says, "many of the points raised in the judgment may well have been viewed differently had the documentation [the claimant] provided for the bundle been in it". She continues that Richard Owen failed to submit any of the documents requested for the bundle, so the claimant could not rely upon it. She says that "evidence over five years was not in the bundle", and this disadvantaged the claimant. She makes specific reference to evidence of a rota in March 2012. She also mentions "photographs of Icare", which she suggests would show that other members of staff were inputting much the same as the claimant was, but the claimant was singled out. She makes reference also to an e-mail relied contained in the bundle (page 729, referred to in para. 4.34 of the judgment) where the respondent was saying that everything being put forward in the claimant's performance improvement plan was evidence based. She challenges this and says that the claimant was doing what her colleague(s) were doing, but she was being picked on, and threatened with disciplinary action. She goes on then to refer to the claimant having recordings of three meetings, the transcripts of which were presented to Richard Owen. She does say when these

meetings were, but the implication is that they were before the claimant was moved to Orchard House, as they are said to show that this move was "to set her up". She asks the tribunal to reconsider, and to look at all the documentation that Richard Owen failed to provide for the hearing.

3. As the application also makes reference to the grievance letter , the Employment Judge has considered this. It is dated 6 January 217, and is a formal complaint, by Ms Tootell, to Gateshead CAB against Richard Owen. It sets out the circumstances and history of the claimant instructing Richard Owen in October 2015. Ms Tootell refers to the documents , in five lever arch files, that the claimant provided to Richard Owen, and how he did not provide her with a copy of the bundle. She alleges that Richard Owen did not put all the documents in the bundle that the claimant wanted him to, and how he failed to seek to obtain a copy of a witness statement made on 14 March 2012, which had been altered. She contends that he did not represent the claimant as instructed , and crucial evidence was not inserted into the bundle. She alleges that he did not look at all the documents in the files provided to him.

4. She also complains that there were some documents in the bundle that the claimant had never seen before, or were different to the versions that the claimant had seen. She refers to photographs from the Icare system that were omitted, and that evidence abut the date of creation of a letter allegedly printed on 27 November 2012 was also not included. She goes on to allege that Richard Owen expected the case to settle, and to allege that he and John Martin of the respondent's solicitor "colluded" over what went in the bundle. Ms Tootell complains that Richard Owen took money to represent the claimant, but failed to prepare the case with the evidence provided to him, and was negligent.

5. She goes on to make a specific point as to his failure to adequate cross – examine Vicky Holloway on the issue of the Service User Passport (see para. 4.38 of the judgment) , and what information was contained in it. She also is critical of his failure to place any emphasis on the e-mail (page 729 of the bundle) wit its comment that there was be "no room for manoeuvre" for the claimant. In summary she complains that Richard Owen failed to represent the claimant by not preparing for the case, ignoring documents that were relevant, and not including documents to establish the case. He failed to raise relevant issues during the hearing because he had failed to include the documentation in the bundle.

***The tribunal rules.***

6. That then is the basis for the claimant's application. The relevant rules of procedure are rules 70 to 72 of the 2013 rules of procedure which provide:

***70 Principles***

*A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or 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 ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.*

***71 Application***

*Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written 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 Process***

*(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. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.*

*(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.*

*(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.*

7. The Employment Judge has accordingly considered this application, pursuant to rule 72(1). He is empowered to do so alone, and has done so.

8. Unlike its predecessor under the 2004 rule, rule 70 provides only one ground for reconsideration, namely that it is in the interests of justice to reconsider the decision in question. That was, however, a residual ground under the 2004 rules, but other, specific grounds formerly in the rules have now been removed. The question therefore is whether there is any reasonable prospect of the original decision being varied or revoked. If there is, a hearing is then required, but if there is not, the Employment Judge can reject the application at this stage.

9. It is clear that the sole ground for the application is the dissatisfaction of the claimant with her representative, Richard Owen, whom she alleges was negligent. Before going any further, however, it is important to bear in mind the nature of the claimant's claim, the tribunal's judgment and the reasons for it. This was a complaint of unfair dismissal, in the form of constructive dismissal. The burden of proving that she was constructively dismissed lay upon the claimant.

Further, as the tribunal's judgment makes clear, the tribunal did not consider that any material prior to the claimant's move to Orchard House could be relied upon, because she had waived any breach before then, by staying on for another 12 months. To that extent anything in 2012 , or pre – mid 2015 was irrelevant. Richard Owen sought to rely upon material prior to this time, but, frankly, the claimant had a major hurdle to overcome, in relation to stale allegations which she did not act upon. Whether Richard Owen was negligent or not, which is not a matter for this tribunal, any such negligence in relation to the period pre – mid 2015 was of no consequence.

10. Thus the tribunal concentrated in its judgment (from para. 33 onwards) on the events after May 2014. Richard Owen did address these issues, but the claimant considers that he did so inadequately, and did not use all the material that she had provided to him.

11. The circumstances in which a party can seek a reconsideration on the grounds of the negligence of their representative have been considered by the EAT, and the leading case upon the topic is ***Ironsides Ray & Vials v Lindsay [1994] IRLR 318*** . In the course of his judgment Mummery, J., said this:

*''Failings of a party's representatives, professional or otherwise, will not generally constitute a ground for review. That is a dangerous path to follow. It involves the risk of encouraging a disappointed applicant to seek to reargue his case by blaming his representative for the failure of his claim. That may involve the tribunal in inappropriate investigations into the competence of the representative who is not present at or represented at the review. If there is a justified complaint against the representative, that may be the subject of other proceedings and procedure."*

The case is authority for the general proposition that reconsideration will not be appropriate if the reason for a point of importance not being dealt with (or not being dealt with adequately) at the hearing is the mistake or oversight of a party or his representative.

12. It seems to the Employment Judge that this is precisely what the claimant is seeking to do here. She is seeking to have the decision reconsidered by reason solely of the alleged (for the tribunal makes no findings on whether they have any force) failings on the part of her representative. Whilst there are some cases where this has been permitted , such as where there has been a "procedural mishap", that is the not the case here, the claimant is seeking reconsideration on the substantive basis of the manner in which her representative argued and presented her entire case. That is not permissible by way of reconsideration.

13. Furthermore, in order to have any reasonable prospects of success, the matters raised by the claimant must have some potential bearing upon the reasons why the claimant was unsuccessful. The tribunal refers to paragraphs 46 to 49 of its judgment. The issues raised by the claimant can only go, at their highest to the issue of whether, between mid - 2014 and late May 2015 , the respondent acted in a manner which constituted a fundamental breach of contract. The tribunal, however, went onto consider, in the alternative, whether the alleged last straw, Emma Jackson's letter was capable of amounting to a last straw. It ruled that it was not. Similarly, on the issue the claimant's reason for resignation, the tribunal too had misgivings. In short, the alleged deficiencies in

Richard Owen's representation of the claimant , even if the tribunal were permitted to entertain any such enquiry, are not necessarily germane to all of the tribunal's findings in any event.

13. The Employment Judge accordingly finds that the application must be refused pursuant to rule 72(1) as he considers that there is no reasonable prospect of the original decision being varied or revoked.

Employment Judge Holmes

Date: 27 February 2017

JUDGMENT SENT TO THE PARTIES ON
03 March 2017
FOR THE TRIBUNAL OFFICE