THE EMPLOYMENT TRIBUNALS

Between

Claimant: **Miss R Kubaisi**

Respondent: **Surrey & Sussex Healthcare NHS Trust**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON AN APPLICATION FOR RECONSIDERATION UNDER RULE 70 OF THE EMPLOYMENT TRIBUNALS RULES OF PROCEDURE 2013

JUDGMENT

It is the judgment of the Tribunal in accordance with rule 72(1) that the application by the Claimant for a reconsideration of the judgment be refused on the ground that there is no reasonable prospect of the original decision being varied or revoked.

REASONS

1 The provisions of the Employment Tribunals Rules of Procedure 2013 relating to the reconsideration of judgments are as follows:

> **Principles**
> **70.** 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**.[1] On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.
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> **Application**
> **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 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.
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> **Process**
> **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. 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

[1] My emphasis

> 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.
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> (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.
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> (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.

2 The history of the matter is somewhat complex, but I do not consider it necessary to list every item of correspondence in the Tribunal file. The Claimant presented a claim to the Tribunal on 17 March 2018. The precise issues for the Tribunal to decide have never been ascertained. The claims can broadly be categorised as claims of constructive unfair dismissal, discrimination based on the protected characteristics of race, sex and religion or belief. The Claimant also made money claims. On 7 June 2018 the Respondent presented a response and in it included an employer's contract claim. An Employment Judge decided that the employer's claim be accepted and served in the usual way, but apparently that instruction was overlooked at the time, and the Claimant was not provided with a copy of the response, nor the employer's claim until later.

3 On 18 June 2018 the Claimant sent an email to the Tribunal the contents of which were as follows:

> I am writing to inform you that I have decided to withdraw my ET claim against SASH.
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> I would like to let you know that I haven't received the respondent's response to my claim that was sent to the tribunal services on 07/06/18. Also I haven't received a response regarding my objection the change of the location of the hearing and/or rescheduling for the planned preliminary hearing of 25/06/18.

4 On 17 August 2018 I signed a judgment under rule 52 of the Employment Tribunals Rules of Procedure 2013 dismissing the claim, although a copy of the judgment was not sent to the Claimant until 7 September 2018.

5 Following the email of 18 June 2018 the Claimant has sought to revoke that withdrawal, most recently on 30 October 2018. There is no issue as to the time limit for applying for a reconsideration as I have agreed to extend the normal 14 day period.

6 Rule 52 of the 2013 Rules is as follows:

> **Dismissal following withdrawal**
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> **52.** Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—

> (a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or
> (b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.

7 On 19 June 2018, following receipt of the Respondent's response I caused an email to be sent to the Respondent's solicitors asking if they wished to withdraw the employer's claim in the light of the Claimant having withdrawn her claim. The Respondent's solicitors replied just over two hours later confirming that it was withdrawing the employer's claim but it was reserving the right to pursue it elsewhere. The Claimant then wrote to the Tribunal saying that she wished to pursue her claim as she had not been aware of the fact that there was to be an employer's claim. There was no mention of the email from the Respondent's solicitors.

8 The Claimant wrote again to the Tribunal on 21 June confirming that she wished to withdraw her claim, and she asked that the employer's claim brought by the Respondent also be dismissed. On 22 June the Respondent's solicitors confirmed that there was now no objection to the dismissal of the employer's claim. Administratively that was difficult because the employer's claim had never become a substantive claim before the Tribunal and did not have a claim number.

9 The email from the Claimant of 18 June 2018 was absolutely clear. The first sentence was an unequivocal withdrawal of the claim. There was therefore an obligation on the Tribunal to issue a judgment unless either of the two exceptions applied. The first exception did not apply as there was no reservation of a right to bring a further claim. The judgment I made at the time of dismissing the Claimant's claim was that the second exception did not apply either. There was simply no basis for disapplying the ordinary requirement of the rule. Any suggestion that the ignorance of the fact that the Respondent was to make an employer's claim had become irrelevant after the Respondent had confirmed that that claim was not to be pursued.

10 The Claimant's application for reconsideration dated 30 October 2018 is of some length. In my view there were two basic grounds put forward. The first was based around an email from the Respondent's solicitors of 21 June 2018 when the Claimant was unrepresented which, said the Claimant, 'negatively influenced my decision, misled me and lead me to hastily undertake irrational decision which prejudiced my position.' A copy of the email of 21 June 2018 was provided.

11 The email was written on a without prejudice basis and appears to have been sent at exactly the same time as the Claimant's email of the same date referred to in paragraph 8 above. The email confirmed that the Respondent was not pursuing an employer's claim and said that if the Claimant confirmed that she was not pursuing her claim then the Respondent would not seek costs from the Claimant. I cannot see anything objectionable in that email. Further, it was sent three days after the Claimant had given notice to the Tribunal that she was withdrawing her claim. It cannot therefore have influenced that decision.

12 The second basis for reconsideration was that the merits of the Claimant's claims meant that it was in the interests of justice for those claims to be heard. I do not consider as a matter of principle that that by itself can be a valid ground for reconsideration in the circumstances. If it were then it would render rule 52 nugatory.

13 For those reasons I consider that the application has no reasonable prospect of success and it is dismissed.

Employment Judge Baron

23 January 2019