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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Ms J McGrandle	**AND**	Ministry of Justice

HELD AT: **London Central** **ON:** 20 February 2023

BEFORE: Employment Judge S J Williams (Sitting alone)

Representation:

For Claimant: Mr Cook, of counsel

For Respondent: Mr Line, of counsel

RESERVED JUDGMENT

1 On a reconsideration of the judgment herein dated and sent to the parties on 16 March 2016, the judgment of this tribunal is that the judgment of 2016 be, and it is revoked.

2 In all the circumstances of the case it is just and equitable that the tribunal should consider the claimants complaint presented in October 2022.

REASONS

Introduction

1 By order of the EAT (HHJ Shanks), sealed 2 August 2022, the decision of this tribunal dated 3 June 2021 was set aside and the present claimant's reconsideration application remitted to be considered de novo by this tribunal. The EAT further suggested that all outstanding issues between the parties should be dealt with at one hearing.

2 The issues to be determined have been identified as follows:

(i) A de novo determination of the remitted issue, namely whether the judgment of 16 March 2016 dismissing the claimant's 2011 claim should be reconsidered;

(ii) If the dismissal judgment is not revoked, whether the claimant is estopped from pursuing her fresh claim presented on 21 October 2022;

(iii) Whether time should be extended on just and equitable grounds in respect of either the 2011 claim or, if necessary, the 2022 claim;

(iv) Whether, if the dismissal judgment is revoked, the 2011 claim can be revived, or whether it remains at 'an end'. This fourth issue arises out of the EAT's judgment at paragraph 15.

3 The earlier hearing of the claimant's application for reconsideration of the judgment of 2016 was determined on consideration of the papers, including written submissions by both parties. On this occasion I have heard the evidence of the claimant and had the advantage of hearing full argument from counsel. I was provided with a trial bundle containing 122 pages and a bundle of 23 authorities.

The Factual Background

4 The claimant, who was born on 8 December 1936, served as a valuer chairman of the Residential Property Tribunal Service from 1981 until 21 April 2008 when she retired after 27 years' service. Most of her service as a chairman was after 2000. She is now 86 years of age. She has no pension from her judicial service. The claimant has no legal training or qualifications; her background is in property. She had great difficulty in following what was happening in the litigation in the lead cases of *O'Brien* and *Miller*.

5 On 17 October 2011 the claimant presented a complaint to the employment tribunal pursuant inter alia to the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, claiming that by reason of her part-time status the respondent had failed to pay her a pension. In its letter of 17 November 2011 the respondent set out its preliminary grounds for resisting the application, and asking that the proceedings be stayed until the determination of the case of *O'Brien v Ministry of Justice* in the ECJ.

6 By their letter of 17 November 2011 the respondent contended that the claimant's claim was presented out of time, that it was not just and equitable to extend time and asked that the claim be stayed behind the claim of *O'Brien* which had been referred to the ECJ. The claim was stayed by order of Regional Employment Judge Potter on 29 November 2011. The claimant did not personally realise the implications of staying a claim. By her solicitor's letter of 25 October 2013 the claimant presented amended particulars of claim comparing her treatment with that of a full-time salaried judge.

7 In 2014 the claimant's legal advisers, solicitor and counsel, advised that her prospects of success were less than 50%, and consequently her legal expenses insurance was withdrawn. She was reluctant to give up her claim to a pension to which she considered herself entitled after 27 years' service, but her limited means did not permit her to fund litigation privately. Her only income was the rent from one holiday home and her state pension. Accordingly, she emailed her solicitor on 25 October 2015, 'Very regretfully I have decided to withdraw from this class action ... I simply cannot afford to continue.' She considered this a prudent financial decision. She did not feel able to continue as a litigant in person due to her lack of legal knowledge.

8 Not having heard from the tribunal, by email of 25 February 2016 the claimant wrote to the tribunal saying that she had asked her solicitor on 25 October 2015 to notify the tribunal that she was withdrawing from the class action. The tribunal replied on 25 February 2016 saying that the claimant's email would be treated as notification of her withdrawal and a judgment dismissing her claim would be issued in due course. The claimant did not understand the implications of a withdrawal or dismissal, or its effect on her ability to reactivate her claim, or bring a later claim. She knew, however, that the consequence of a withdrawal was that her claim was at an end. That reflected the decision she made for economic reasons. After that she made no effort to keep up with the lead litigation because she had no further interest.

9 By a judgment dated and sent to the parties on 16 March 2016 Employment Judge Macmillan dismissed the proceedings on withdrawal of the claim by the claimant.

10 On 21 January 2020 the claimant received a circular letter from Beers, her former solicitors – she did not know why, because she was not at that stage a client of theirs – informing her of developments in the lead litigation. As a matter of fact, it seems to me that neither of the then recent appeal decisions, in *O'Brien* and *Miller*, greatly altered the claimant's prospects. *O'Brien* might have affected the quantum somewhat, but most of her service was after 2000. *Miller* had no direct relevance to the claimant, whose claim was out of time in any event. However, it was the arrival of this circular which prompted the claimant to reassess her claim and to reconsider her earlier decision to withdraw it. She contacted Beers by email of 4 February asking whether it would be possible for her to re-join the action.

11 By email of 3 March 2020 Beers wrote to the tribunal seeking clarification whether her claim had been struck out and, if so, whether in whole or in part. On 6 March 2020 Beers made the present application for a reconsideration of the 2016 dismissal judgment and an extension of time. Further submissions from the claimant followed on 20 March and from the respondent on 4 June.

12 By an email of 6 October 2020 to the tribunal, Beers wrote, 'Before the withdrawal of her claim, the claimant's husband sadly passed very suddenly ... Due to the nature of his passing, the claimant had no time to put any plans in place in relation to her husband's estate. It was around this time that she

feared escalating legal fees with no certainty of a successful outcome and thus instructed us to come off the record as her representative. She describes being under a lot of stress whilst dealing with her late husband's estate, as well as trying to grieve for her husband. The decision to withdraw her claim was made during a very difficult and emotional time for the claimant.'

13 It is not disputed that Beers intended to convey the impression that the claimant's husband's death had occurred fairly shortly before her decision to withdraw her claim, and was highly relevant to that decision. That is the basis on which this tribunal approached the claimant's application in 2021 (see paragraphs 8 and 13 of the tribunal's judgment). The claimant confirmed in evidence that her husband died in 2010, before her claim was presented. She was dealing remotely with her solicitors and did not pick up the error in their letter to the tribunal. The key factor in the claimant's decision was her financial hardship, which was itself connected with her husband's death and her consequently altered financial position. Because the application was originally determined on the papers, the claimant did not have the opportunity to appreciate and correct the error concerning her husband's death, for which she apologised to the tribunal. The EAT dealt with this change in the factual matrix in paragraph 12 of its judgment, and it was the principal reason it gave for regarding the tribunal's judgment unsafe and for remitting the case for rehearing.

14 I stated in the hearing that I accepted without reserve that the mistake was made innocently, and there had been no intention or attempt deliberately to mislead the tribunal on the claimant's or Beers's part.

15 The claimant referred to two other legal judges of the Residential Property Tribunal who had similar time limit issues, whose claims were stayed in 2015 and who were successful in receiving their pensions for similar periods of service. A third judge of similar background to the claimant was also successful. These other cases cause the claimant now to regret her decision to withdraw her claim rather than allowing it to remain stayed. They also cause her to reflect on what she considers would be the injustice of refusing her application, when such refusal will result in the denial of a pension based on her twenty-seven years' service.

16 Prompted by the EAT's remarks, at paragraph 15, the claimant on 31 October 2022 presented a fresh claim to the employment tribunal to protect her position in the event that her 2011 claim was not permitted to proceed. In relation to that fresh claim, the claimant said the passage of time following the EAT hearing resulted from the need to secure her legal expenses insurer's agreement to indemnify the additional costs. The first attempt to present the claim was rejected by the tribunal as she did not have an ACAS EC number – a requirement which did not exist when her first claim was presented.

This Application

17 By her application of 6 March 2020, the claimant applies for a reconsideration of the judgment of 16 March 2016 pursuant to rules 70-72 of

the tribunal's rules of procedure, together with an extension of time for so doing. The letter set out mitigating circumstances relating to the claimant's difficult financial circumstances at that time and the fact that she was acting in person because she could not afford legal advice. In a further letter of 6 October 2020 the claimant's solicitor repeated some of the salient points and added that the claimant was under a lot of stress at what was a very difficult and emotional time for her.

18 Employment Judge Macmillan has since retired, and Regional Employment Judge Wade determined that it was not practicable for him to consider this application. She appointed me to deal with it.

19 The claimant accepts that the present application is itself made out of time, and asks the tribunal to extend the time limit of 14 days provided by rule 71 and to consider this application notwithstanding its presentation on 6 March 2020, almost four years from the date on which the judgment was sent to the parties. She contends that when she realised that her prospects of success had improved, she acted promptly to re-instruct her solicitors, having been without legal representation in the meantime. The claimant submits that the 2016 dismissal judgment should be revoked in the interests of justice because a fair trial is still possible and the balance of prejudice should fall in her favour. She further contends that time should be extended on a just and equitable basis to permit the tribunal to consider either her 2011 or her 2022 claim.

20 The respondent contends that the application should fail because the claimant's withdrawal was unequivocal and unambiguous, her application is presented four years out of time, and to grant it would offend the principle of legal finality. The respondent contends that the dismissal should be confirmed and that the claimant is thereby estopped from bringing a fresh claim on the same basis. Alternatively, and in any event, the 2011 claim cannot be revived and the 2022 claim is an abuse of process even if not caught by an estoppel. In the further alternative, the 2022 claim is time-barred, and the balance of prejudice is not all one way.

The Law

21 The tribunal's rules of procedure relevant to this application provide:

> ***5 Extending or Shortening Time***
>
> *The tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these rules or in any decision, whether or not (in the case of an extension) it has expired.*

WITHDRAWAL

51 End of Claim

Where a claimant informs the tribunal [.....] that a claim, or part of it, is withdrawn, the claim, or part, comes to an end .....

52 Dismissal following Withdrawal

Where a claim, or part of it, has been withdrawn under rule 5, 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.

RECONSIDERATION OF JUDGMENTS

70 Principles

A tribunal may [.....] 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 ....'

22 The Regulations of 2000 provide:

8 Complaints to tribunals etc

(1) ..... a worker may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation 5 .....

(2) Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of three months beginning with the date of the less favourable treatment .....

(3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

Discussion and Conclusions

Time

23 It is necessary at the outset to consider the time for making an application for a reconsideration. By rule 5 the tribunal is given power to extend any time limit specified in its rules of procedure. That power is not circumscribed in any way, nor are any grounds specified for its exercise. Considering the short, mandatory time limit of 14 days provided by rule 71, this application was presented extremely late, some four years.

24 The claimant explained perfectly cogently that her decision to withdraw was taken reluctantly, because she has always felt entitled to a pension. But when her legal expenses insurance was withdrawn, she simply could not take the financial risk of funding the claim privately. In the light of the evidence now before the tribunal, the claimant's husband's death takes on a less direct significance, but it was a contributory factor to the claimant's reduced financial circumstances. After the withdrawal of her claim, the claimant was without legal assistance.

25 The impecuniosity which caused the claimant to decide to withdraw also explains in large measure why she did nothing further for four years. Mr Line submits that, having withdrawn her claim in 2016, the claimant 'turned a blind eye' to later developments in the lead litigation. If that implies some obligation on the claimant to keep herself informed, I cannot accept that. She was at that stage, reluctantly, no longer a claimant, and had no further interest in those developments, which did not affect her.

26 The event which revived the claimant's interest in those developments was the arrival of Beers's circular letter of 21January 2020. In fact, the appeal in *Miller* had no real relevance to her claim, but she thought it did, and it sparked her interest. Though the claimant has some judicial experience in her own field, she is not legally qualified. It was that event which led to this application for a reconsideration of the dismissal judgment.

27 When exercising any power given to it by the rules, the tribunal is enjoined to seek to give effect to the overriding objective of the rules to enable tribunals to deal with cases fairly and justly.

28 Given the complexity of the issues in this litigation, it would in my judgment be unduly formalistic, and unsatisfactory, to reject this application solely on the basis of its late presentation. Beyond the obvious prejudice of having to deal with a case which had been dismissed and then revived, I am not persuaded that the respondent is significantly prejudiced by the late presentation of this application, nor that a fair trial of the issues would not be possible if the claim were revived. This is not a claim which depends on the

recollection of witnesses, and it was on the respondent's application that the claim was stayed in 2011. A large number of such claims have been similarly stayed for long periods. On the other hand, the prejudice to the claimant of losing a potentially valuable claim is both obvious and great. It is 'the interests of justice' upon which rule 70 focuses, and if the interests of justice require a reconsideration, then that requirement should if possible be met despite the claimant's lateness. Accordingly, I extend time and consider the application.

The Merits of the Application

29 I am satisfied that the claimant's withdrawal in 2016 was 'clear, unambiguous and unequivocal' (per Langstaff P in **Segor v Goodrich Actuation Systems Ltd**, and adopted by Simler P in **Campbell v OCS Group Ltd and another**), and that the tribunal was not obliged to make enquiries at the time. That is clear from the claimant's evidence, and the contrary is not now argued. Those matters go to the correctness of the original decision to dismiss, which is not challenged before me, and with which in any event I have no power to interfere. But they do not mean that it is not in the interests of justice to reconsider when fresh, relevant information comes to light: **Campbell**. Rule 70 contemplates not an error of law by the original decision-maker, but circumstances in which 'the interests of justice' require a decision to be looked at again. Such a decision may be 'confirmed, varied or revoked' and, if revoked, 'may be taken again.' The decision in this case either stands or it does not; it must be either confirmed or revoked. It cannot be varied.

30 The interests of justice contemplated by rule 70 may be invoked in a variety of contexts. Facts may later emerge which might well have led the tribunal to a different conclusion had it been apprised of those facts at the time it made the original decision, or an error by a claimant or a representative may dictate a reconsideration. For example, where the assumptions made about a claimant's future employment prospects prove, within a relatively short time, to be wrong, the interests of justice to both parties may make it necessary to revisit and to vary the award of future loss of earnings. In **Yorkshire Engineering Co Ltd v Burnham [1973] IRLR 316** the EAT balanced the need for finality in litigation with a fundamental change in the facts which altered the basis of the tribunal's award 'very shortly after' the tribunal made its decision. That balancing exercise underlies other cases also: **Newcastle Upon Tyne City Council v Marsden [2010] ICR 743**; **Outasight VB Ltd v Brown UKEAT/0253/14.LA**. In **Marsden**, a case concerned with error by a claimant's representative, Underhill J (as he then was) referred to a 'broad statutory discretion' based on 'a careful assessment of what justice requires.'

31 When considering the interests of justice in that broad way, I consider that it is appropriate to stand back from the complicated procedural detail with which I am inevitably concerned elsewhere in this judgment, and look at the respective positions of the parties. The claimant served for twenty-seven years in a capacity which entitled her peers to a pension, and would have entitled her also to a pension had she not made what she now recognises as the mistake of withdrawing her claim, rather than simply allowing it to remain

stayed along with hundreds of others. That mistake was heavily influenced by the claimant's ignorance of the law and impecuniosity at the time. The respondent is, for present purposes, the claimant's employer, who has had the benefit of the claimant's service, for which they have paid her daily fees. As the law now stands, such service is pensionable, and the respondent pays a pension to peers of the claimant who are in all respects, save one, in the same position as her. That one respect is that she withdrew her claim and her peers did not.

32 I ask myself whether the claimant is to be condemned for ever to suffer the consequences of that mistake, made out of ignorance and driven by financial hardship, or whether it would be just, if the tribunal's powers allow it, to reprieve the claimant from the consequences of her mistake, so that she may receive the pension to which her service entitles her. In my judgment, looked at from the claimant's perspective, that is what the interests of justice require.

33 But I have to look also from the respondent's perspective. Certainty and finality in litigation is an important principle, and a successful litigant should in general be entitled to regard a tribunal's decision on a substantive issue as final: **Burnham**; **Marsden.** As I have stated above, and is well known, the present case does not stand alone, but is one of hundreds of such claims with which teams of lawyers and officials are dealing within the respondent. The removal of this claim from that long list would do little to advance the overall finality of the litigation. Conversely, the revival of this claim would mean that the respondent would have to deal with one more case in that list, a case which it had thought to be concluded. That would undoubtedly involve a measure of prejudice to the respondent, and would involve some extra cost. That degree of prejudice is in my judgment very small indeed when set against the enormous prejudice to the claimant of being deprived of the pension to which she is otherwise entitled. The balance falls heavily in the claimant's favour.

34 Accordingly, I consider that the interests of justice require the dismissal judgment of 2016 to be reconsidered, and to be revoked.

35 In the light of my decision above, the second issue in this case does not strictly arise. It appears to be common ground that a withdrawal of a claim pursuant to rule 51, absent a dismissal pursuant to rule 52, does not create an estoppel to prevent a claimant from bringing fresh proceedings on the same facts: **Khan v Heywood &Middleton Primary Care Trust**. Although decided on the 2004 tribunal rules, I consider the principle still holds good.

36 It is convenient to consider here, out of order, the fourth issue identified, namely whether, if the dismissal judgment is revoked, the 2011 claim can be revived, or whether it remains at 'an end' because it has been withdrawn. I have considered the cases of **Campbell v OCS Group UK Ltd and another,** and **Baker v Abellio London Ltd**, on which I heard extensive argument. I observe at the outset that although **Campbell** was referred to in **Baker**, **Khan**, a Court of Appeal judgment, was not. As I have said above, I

think the reasoning in **Khan** applies equally to the current rules and I regard that case as binding on me and determinative of this issue. Moreover, it was referred to in **Campbell**, where Simler P stated its effect at paragraph 11:

> 'Both the employment tribunal and the EAT (in **Khan**) held that there was no power under r 25 to revive a withdrawn claim. The Court of Appeal agreed but held that a withdrawal in and of itself was not a judicial act and therefore did not create any issue or cause of action estoppel, so that a fresh claim based on the same cause of action would not be barred in consequence of the withdrawal.'

The EAT in **Campbell** accepted that position in relation to the 2013 tribunal rules also.

37 In **Baker**, at paragraphs 47-49, Slade J appears to have proceeded on the tacit assumption that revoking the dismissal of a claim had the effect 'that the claim is reinstated and is to be determined by an employment tribunal.' He does not explain how that conclusion is consistent with the words in rule 51 that a withdrawn claim 'comes to an end'. Slade J was, as I have stated, not referred to **Khan**. I prefer the conclusion of the Court of Appeal. Accordingly, I find that this claimant's 2011 claim, withdrawn by her in 2016, is at an end and cannot be revived.

38 Thus, the vehicle for any claim the claimant wishes to pursue must be her 2022 complaint. As was stated in **Khan**, the claimant's withdrawal does not create any estoppel, so that there is no impediment to her presenting this fresh complaint based on the same cause of action. However, Mr Line has two arguments against that claim being allowed to proceed. Firstly, he argues that it is an abuse of process, and secondly that it ought to be struck out as time-barred. This engages the third issue identified for decision, namely whether time should be extended on just and equitable grounds in respect of the 2022 claim.

39 In **Attorney-General v Barker**, Lord Bingham defined an abuse of the process of the court as 'a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.' I derive no benefit from considering the facts of that case, which were vastly different from the instant case.

40 It is quite clear that the reason the new claim was presented in 2022 was that discussion in the EAT in July 2022 had suggested that the withdrawn 2011 claim might not be able to proceed even if the judgment dismissing it were set aside. The fresh claim was presented in October 2022, therefore, to protect the claimant's position if that should turn out to be the case. As it has turned out, that is precisely the conclusion I have come to. Thus, the presentation of the fresh claim has proved to be a wise move. Moreover, on the authority of **Khan**, it was a step which was expressly and properly open to the claimant. I am able to discern nothing in the bringing of the fresh claim in 2022 which remotely approximates to any abuse of the tribunal's process by the claimant. Whilst I do not know the precise ambit of the arguments in the

EAT, I am to some extent fortified in my view by the opinion expressed by HHJ Shanks that the respondent's ground of appeal based on abuse of process seemed to him 'hopeless'.

41 As Mr Lines argues, and Mr Cook concedes, the 2022 claim is presented significantly out of time. The claimant retired on 28 April 2008, so that her claim ought to have been presented by 27 July 2008. It was in fact presented some fourteen years later in October 2022. The reason for large parts of that period of time emerge clearly from, and overlap with, matters I have set out above, and which I do not repeat in full here, namely the bringing of the 2011 claim, its withdrawal and the claimant's position from 2016 to 2022. From 2011 until 2016, while the first claim was extant, it would clearly have been pointless to bring a second claim. From 2016 to 2020 the claimant, for reasons she explained and which are set out above, had no intention of bringing a second claim. From 2020 to 2022 the claimant hoped to be able to revive the first claim. Only in 2022, following discussions in the EAT, did it appear prudent to bring the second, protective claim.

42 Limitation periods serve to bring to a potential respondent's attention, within a stipulated time, that a claim may be brought against them. The position in this case is therefore unusual. From 2016 to 2020 the respondent reasonably believed that the claimant's claim was at an end, but for significant parts of the period of time in question – 2011-2016 and 2020-2022 – the respondent was aware of the claimant's claim and that she wished to pursue it.

43 In **Bahous v Pizza Express Restaurant Ltd** the EAT (HHJ Clark) said 'The question of the balance of prejudice is plainly a material factor' and treated the merits of the claim as part of that balancing exercise. In that case 'the claimant [had] lost, not simply a speculative claim, but a good claim on its merits. Conversely the respondent [had] suffered no prejudice in conducting its defence to the claim.' The balance of prejudice was all one way. In **Abertawe Bro Morgannwg Health Board v Morgan** the Court of Appeal, dealing with the Equality Act, said that the tribunal had the widest possible discretion to allow proceedings to be brought within such period as it thought just and equitable, and the length of the delay and reasons for it would be relevant matters to consider.

44 There is always some prejudice to a respondent who has to deal with a claim which they had thought time-barred. I can find no other prejudice which the respondent will suffer if this claim is allowed to proceed. On the other side, if her claim is struck out, the claimant will lose not merely 'a good claim on its merits', but an unanswerable, and life-changing claim on its merits. The only issue in the case will be the quantification of the pension to which the claimant will be entitled. Whilst the delay in this case is, on its face, long, it is in large part explained by the unusual features of the case to which I have referred. I take into account also the claimant's impecuniosity since her husband's death, her lack of legal knowledge, the fact that she was for some of the relevant time unrepresented, the fact that her legal expenses insurers had to approve

the presentation of the fresh claim, and the fact that the respondent itself applied for the original claim to be stayed rather than dealt with speedily.

45 It appears to me, in the light of the above considerations and in all the circumstances of the case, that it is just and equitable that the tribunal should consider the claimant's 2022 claim notwithstanding its late presentation.

EMPLOYMENT JUDGE S J WILLIAMS

16 March 2023 London Central
Date and Place of Judgment & Reasons

16 March 2023
Date Sent to the Parties

For the Tribunal Office