EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
	AND
Mrs S Reynolds	Wye Valley NHS Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Employment Judge: Richardson **Date:** 5th April 2019

JUDGMENT ON THE CLAIMANT'S APPLICATION FOR RECONSIDERATION OF THE JUDGMENT OF 14th February 2019

The judgment of the Tribunal is the claimant's application for reconsideration of the Judgment delivered orally on 14th February 2019 has shown no grounds for the decision to be reconsidered under Rule 72 and there is no reasonable prospect of the decision being varied or revoked. The application for reconsideration is therefore refused.

REASONS

1. The claimant was employed by the respondent as a nurse until her voluntary resignation in April 2014. The claimant registered as a bank nurse in June 2014 and worked for the respondent in that capacity, her last worked shift being in December 2017. The claimant brought a claim of unfair dismissal on 27th February 2018 following a period of ACAS early conciliation between 30th January 2018 and 12th February 2018. The claimant subsequently sought to amend her claim to include a claim of age discrimination. At a preliminary hearing on 14th February 2019 both the late application to amend and the basis for claiming unfair dismissal were considered following evidence from the claimant and submissions from both parties. An oral judgment with reasons was delivered refusing the

application to include a claim of age discrimination and dismissing the claimant's claim that she was an employee and entitled to bring a claim of unfair dismissal under S108 Employment Rights Act 1996. The unfair dismissal claim was dismissed on the basis that the claimant had not been an employee at the relevant time.

2. By email dated 25th February 2019 the claimant seeks a reconsideration of that judgment in respect of the finding that she was not an employee of the respondent NHS Trust and of the dismissal of her late application to amend her claim to include age discrimination.

3. Rules 70, 71 and 72 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 schedule 1 provide (so far as relevant):

> 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. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. It if is revoked it may be taken again.
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> 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 of 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(1) An Employment Judge shall consider any application made under rule 71. If the judge considerations 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 provision views on the application.

4. The claimant's application for a reconsideration was made in time.

5. The claimant sets out 8 grounds to support her application for reconsideration judgment of 14th February 2019. They are:

5.1 it was agreed in 2014 between the claimant and the respondent that the claimant had to work a minimum of 45 hour over a three month period which she always did;

5.2 the respondent's solicitor handed to the claimant a copy of the respondent's skeleton argument just before the hearing and the claimant had not had a chance to read it;

5.3 when the claimant had asked in 2017 for a copy of her original (bank nurse) contract, the respondent had sent a contract that had been updated as it was dated 2017, not 2014. When this was pointed out and the original contract was again requested, the claimant was sent the same document with the date removed; the claimant has not been allowed to see a copy of the original.

5.4 the claimant was subject to bullying, false allegations and slander and has thereby suffered financially in that she cannot find another job and has been deprived of her state pension which she cannot receive until the age of 66;

5.5 Citizens Advice had advised the claimant to add age discrimination to her claim in 2017. The claimant saw a different person at the CAB in 2018 who was unable to advise her. The claimant did her own research before seeking to add a claim of age discrimination;

5.6 the claimant's bank papers were withheld because she had filed a complaint against her manager. This had prevented her from working at the hospital when work was available;

5.7 although the respondent may have had no obligation to provide work to the claimant, there was nevertheless a shortage of nurses. The claimant was prevented from working because of a personal vendetta against her;

5.8 there were no gaps in the two year period commencing June 2014 as the claimant did the shifts she had signed for in the original 'bank' contract. There were no 'gaps' in the period June 2014 – December 2016. The claimant had worked her 45 hours in each three month period.

6. Dealing with each of the grounds for the application to reconsider:

6.1 Paragraph 5.5: the late application to amend to include age discrimination. The information provided by the claimant in hr application for a reconsiderations was in line with the information she provided at the hearing save for the identification of two different advisers at the CAB rather than one, original adviser. This however does not alter the decision not to allow the amendment which was based on: (i) the claimant being made aware of a potential claim of age discrimination following a meeting with CAB in 2017; (ii) the amendment proposed was a new and substantial head of claim; (iii) an allegation of age discrimination did not feature in the 2017 grievance process at the Trust; it wasn't alluded to, let alone expressly mentioned in the original claim filed in the tribunal – there was no hint of age discrimination in the narrative of the complaint; (iv) the application was late – 5 months after the ET1 was filed, 13 months after the claimant first perceived that she was being 'blocked' from working at the Trust and 12 months after the claimant was first put on notice that she may have a age discrimination complaint. Seeing a different person at the CAB in 2018 does little if anything to alter that chronology and its impact on the assessment of the hardship and injustice of allowing or disallowing the amendment. There was a lack of diligence on the claimant's part to pursue this claim on a timely basis. The claimant has not shown grounds to justify granting the application to reconsider the refusal to allow the amendment for age discrimination.

6.2 Paragraph 5.3: The finding the claimant was not an employee but was a worker under S230 Employment Rights Act 2018 was on the basis that she was registered as a bank nurse which provided her with flexibility. The claimant entered into the bank nursing arrangement willingly and worked under the terms of it for over 2 years providing her with some income and flexibility which is what she wanted. She did not at any time object to the terms of the bank contract which did not treat her as an employee. The issue of whether the respondent had supplied the claimant with the correct contract was discussed at the preliminary meeting. In the absence of (i) no reliable evidence from the claimant that this was not the document the claimant signed, and (ii) that she had recalled seeing something similar to the clauses in that contract; (iii) the respondent's representative submitted that this document was a blank copy of the 2014 'bank nurse' contract; on the balance of probabilities I accepted the document as authentic. The relevant clauses in the 2014 contract were cited in the course of the oral judgment. The ground at 5.3 above in the circumstances has no merit.

6.3 Paragraphs 5.1 and 5.8: The decision that the claimant was not an employee was not because of an alleged agreement of hours to be

worked in each three month period with days off in between, as submitted in 5.1 and 5.8 above, but because of the finding on the facts and applying the law to the facts, that the respondent had no obligation to offer work to a bank nurse and the bank nurse had no obligation to accept work if it was offered. There lacked mutuality of obligation in the arrangement. The claimant was able to accept whatever shifts were offered or to refuse to work any particular shift; furthermore after the claimant had accepted a shift she could still cancel on 24 hours' notice, leaving the hospital to appoint another bank worker as it saw fit. The claimant accepted at the hearing that this was how she had worked although she had not often turned down any shift offered. The claimant resigned from permanent full time employment and accepted the flexibility of working 'on the bank'. She enjoyed the benefit of working as a bank nurse for over two years. A subsequent dispute with a line manager does not and cannot alter her employment status.

6.4 Paragraphs 5.4, 5.6 and 5.7: The grounds at 5.4, 5.6 and 5.7 do not undermine the finding that the claimant was a worker rather than an employee. The claimant's undoubted sense of injustice and unfairness together with her concern for the public's and the NHS's need for nurses in hospitals, does not alter her status being that of a worker.

6.5 Paragraph 5.2: The claimant was handed by the respondent's representative a copy of the representative's skeleton argument which was 12 pages in length. This cannot amount to a challenge to the finding on the facts that the claimant was a worker. It is more a matter of courtesy and good form rather than a legal requirement for parties to exchange a copy of skeleton arguments at the commencement of a hearing.

7. For the reasons given above in paragraphs 6.1 – 6.5 above I consider there are no grounds to grant the application to reconsider the judgment of 14th February 2019 under Rule 72. There is also no reasonable prospect of the decision being varied or revoked. On this ground too, the application is therefore refused.

Signed by _____

Employment Judge Richardson

Signed on 8th March 2019

Judgment sent to Parties on

S.Hirons 08.04.2019_____

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