**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102659/2018**

**Held in Glasgow on 19 December 2018**

**Employment Judge: Mary Kearns**

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| **Miss M Degnan** | **Claimant**<br>**Represented by:**<br>**Mr J Fraser - Solicitor** |
| **Elizabeth Girvan**<br>**Formerly t/a Merkland Private Nursery** | **Respondent**<br>**Represented by:**<br>**Mr R Milvenan - Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal on the respondents' application for reconsideration is that:

(1) the original decision is revoked.

(2) the time for presenting the ET3 response is extended to close of business (5pm) on Friday 28 December 2018.

**REASONS**

1. The claimant was employed by the respondent as a nursery nurse from 30 January until 24 November 2017 when she was dismissed. She claims maternity discrimination, sex discrimination, unfair dismissal and breach of contract. Her ET1 was presented to the Tribunal on 14 February 2018. The claim was served on the respondent and she was notified that a preliminary hearing was fixed for 3 May 2018. The respondent failed to present a response to the claim. A Judgment was issued in this case on 9 May 2018

following the hearing on 3 May under Rule 21. The claimant was awarded £19,648. By undated letter received by the Tribunal on 16 August 2018 the respondent applied for a reconsideration.

**Applicable Law**

2. Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides, so far as relevant as follows:

*"RECONSIDERATION OF JUDGMENTS*

***Principles***

***70*** *A Tribunal may, either on its own initiative…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.*

***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.*

***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…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) ……..”*

**Discussion and decision**

3. The test I must apply to this application is whether it is necessary in the interests of justice to reconsider the original decision. All relevant circumstances should be taken into consideration in order to decide whether the balance of justice lies in granting or refusing the application. I must consider the prejudice to the respondent who is seeking the reconsideration as well as the prejudice to the claimant in whose favour judgment has been issued. I must also take into account the public interest in the finality of litigation. The reconsideration rules must be exercised having regard to the over-riding objective of dealing with cases fairly and justly.

4. The respondent’s reason for not presenting her response to the claim at the relevant time was said to be stress, anxiety and trauma she experienced associated with closing down a business she had started and operated successfully for 29 years. In support of her application she has produced a letter from her GP which records that she consulted him on three occasions on 17 July, 25 July and 13 August 2018 demonstrating an acute stress reaction to her situation resulting in anxiety and altered mood for which she was given three different medications over two months. Mr Milvenan submitted that the claimant had not consulted her doctor until prompted to do so by her daughter who was concerned about her. The claimant had also produced a psychiatric report following an examination which took place last week. As Mr Fraser submits, that report states on the basis of the

respondent's account that while the respondent was dealing with the closure of her business (from around January 2018 onwards) she experienced anxiety and insomnia, for which she did not seek medical treatment at the time. She began to receive letters from the Tribunal in February, found it hard to cope with the situation and 'discounted' them. The report goes on to say*: "While I accept that as per Mrs Girvan's own account there was an element of acute stress in her presentation from December 2017 onwards, and she has been experiencing symptoms of anxiety and insomnia, having carefully considered her presentation, her symptoms do not justify a diagnosis of Acute Stress Reaction as per Section F 43.0 of ICD 10 classification of Mental and Behavioural Disorders."* He went on to conclude that while the respondent did not fulfil those diagnostic criteria or of suffering from a mental illness of degree of severity that would have prevented her attending the Tribunal, he was of the view on the balance of probabilities that her inability to cope with her circumstances in January and February contributed to her not attending the ET in February and that her symptoms have continued.

5. The respondent's defence to the claim is, put shortly, that the claimant was dismissed for misconduct and that the respondent was not told that she was pregnant. The claimant avers in the paper apart to the ET1 that she was asked to produce her appointment letter. (She does not say by whom. It is implied but not specifically stated that the letter was for a pregnancy related appointment). She states that she handed it to the respondent and explained that she had had a previous pregnancy scare and did not want to say anything until it was confirmed and safe and that she was then told to go home and thereafter dismissed. The respondent disputes that she was told of the claimant's pregnancy. In other words, there is a fundamental factual dispute on the key facts.

6. I have applied the balance of prejudice to determine the issue of whether it is necessary in the interests of justice to reconsider the original decision. Although the claimant gave evidence at the previous hearing her evidence was not tested in cross examination and the respondent's position in relation

to it was not known. If it were to be made out in evidence that the respondent was not aware of the claimant's pregnancy, the claimant would not be entitled to the sums awarded. Put another way, the respondent may have a reasonable prospect of successfully responding to the claim, depending upon whether her evidence is accepted or not. The prejudice to the claimant in revoking the Judgment is obvious. She would lose the benefit of the Judgment. However, it appears to me that this is out-weighed by the prejudice to the respondent of not having an opportunity to present her defence. I have also taken into account the reason given by the respondent for not defending the case timeously. I accept, as Mr Fraser submits that this falls short of being a disability, but it is nevertheless relevant and backed by some medical evidence. I have taken into account the public policy interest in the finality of litigation. However, balancing the relative prejudice to each party and keeping in mind the over-riding objective I have concluded that it is necessary in the interests of justice to revoke the original decision and to extend time for presentation of the ET3 to close of business on Friday 28 December 2018.

**Employment Judge: M Kearns**
**Date of Judgment: 19 December 2018**
**Entered in register : 19 December 2018**
**and copied to parties**