EMPLOYMENT TRIBUNALS

Claimant: Ms A Male

Respondent: Milewood Healthcare Limited

Heard at: Manchester **On:** 3 May 2019

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: Mr M Broomhead (Non-practising solicitor)
Respondent: Mr J Anderson (Counsel)

JUDGMENT

The claimant's application for reconsideration of the decision of 24 July 2014 dismissing her claim succeeds. That decision is revoked and the case is reinstated.

REASONS

Introduction

1. This was an application by the claimant for reconsideration of the dismissal of her claim in 2014 as a consequence of her failure to pay a hearing fee under the fees regime then in force. The application was made following the decision of the Supreme Court in **R (Unison) v Lord Chancellor [2017] ICR** on 26 July 2017 which found that the fees regime had been unlawful.

2. At the hearing I had the benefit of a bundle of documents running to 101 pages which contained documents from the current application, the original claim form and response form, and some documents from the claimant's unsuccessful appeal to the Employment Appeal Tribunal. Any reference to page numbers in these Reasons is a reference to that bundle unless otherwise indicated.

3. In addition, I had the benefit of oral submissions from Mr Broomhead for the claimant, and of written and oral submissions from Mr Anderson for the respondent.

4. At the start of the hearing I asked Mr Broomhead whether he intended to give evidence. I identified that it might be necessary for me to make a finding of fact about whether copies of the claim and response forms had been provided to the Tribunal in 2018. He said he was content to rely on submissions alone. In any event it transpired that there was no dispute about the primary facts.

Relevant Legal Framework

5. The relevant provisions of the Tribunal Rules of Procedure 2013 can be summarised as follows.

6. The statutory regime concerning fees found its way into the Rules by means of rule 40. Where a party had not paid a fee or made a remission application rule 40(1) provided for a notice to be sent specifying the date by which that should be done.

7. Rule 40(2) provided that if neither was done within the time specified the claim would be dismissed without further order. In practice that was done by means of an administrative notice rather than a judicial decision.

8. Rule 40(5) provided for a party to apply for a claim to be reinstated. It envisaged that a further date for payment would be specified, and that the reinstatement would be effective only if the Tribunal fee were paid (or a remission application presented and accepted) by the date specified in the order.

9. The general power of reconsideration of Tribunal judgments appears in rule 70 as follows:

> **"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."**

10. Under rule 71 the application is to be made within 14 days of the date on which the written record of the original decision is sent out to the parties, but this time period can be extended under rule 5.

11. The power to extend time under rule 5, and the power to reconsider a judgment in the interests of justice, must both be exercised in accordance with the overriding objective in rule 2, which is to deal with a case fairly and justly.

12. There is also available in the rules a power to strike out a claim under rule 37(1) where it has not been actively pursued, or if the Tribunal considers that it is no longer possible to have a fair hearing. Although this application was not directly made under rule 37, that was relevant as part of the background to the overall question of the interests of justice under rule 70.

Factual Summary

Claim and Response Forms

13. The claim form was presented on 23 December 2013. The claimant was a manager of a care home run by the respondent. She was dismissed following an incident in which she allowed a patient to attend a GP appointment on her own, allegedly in breach of a Deprivation of Liberty Safeguarding Authorisation issued pursuant to the Mental Health Act 2005. The claimant complained of unfair dismissal and of a failure to pay notice pay. She also claimed holiday pay and alleged there had been unlawful deductions. It was alleged that the real reason for dismissal was that the claimant was the most highly paid member of staff.

14. The response form lodged in early 2014 resisted the complaints on their merits. It asserted that there had been a fair dismissal for gross misconduct, and that no notice pay was due. No other sums were admitted to be due to the claimant.

15. The parties had finalised the hearing bundle and exchanged witness statements before the case was dismissed for failure to pay the hearing fee.

Dismissal – Non-Payment of Fees

16. Following a succession of warning letters from the Tribunal, the claimant was notified by a letter of 24 July 2014 that her claim had been dismissed because she had neither paid the hearing fee nor submitted a valid application for remission.

17. An immediate application for reinstatement under rule 40(5) was made. Following prompting from the Tribunal, grounds for that application were supplied on 4 September 2014. On 19 September 2014 the Tribunal issued an order signed by me reinstating the claim subject to payment of the fee by 26 September 2014.

18. A few minutes before the expiry of the deadline that day a further extension was sought, which I granted. By a letter of 29 September 2014 the time for payment of the fee or submission of the application for remission was extended to 4.00pm on Friday 3 October 2014.

19. Less than an hour before that deadline an application was made for further extension. I refused it in a Judgment with Reasons signed on 9 October 2014 and sent to the parties the following day. The effect was that the dismissal of the claim on 24 July 2014 remained effective because the claimant had failed to comply with the terms of my reinstatement order of 19 September 2014.

20. The claimant sought reconsideration of that Judgment in emails of 6 and 28 October 2014. I refused those applications in a Judgment and Reasons sent to the parties on 5 November 2014.

Employment Appeal Tribunal

21. The claimant pursued an appeal to the Employment Appeal Tribunal (“EAT”). On 29 April 2015 the Acting Registrar refused an application for an extension of time because the appeal had been validly presented five days late. The claimant's appeal against that order was listed for 30 July 2015, but the claimant failed to comply with

an Unless Order requiring a bundle and skeleton argument to be lodged by 27 July. The EAT appeal came to an end. The hearing was vacated (page 65).

2016

22. The Employment Tribunal file of papers was destroyed at some point after this. It is likely that it was destroyed 12 months after the EAT proceedings came to an end. I infer that the file was destroyed in the second half of 2016.

Reconsideration Application 2017

23. Following the **Unison** judgment in late July 2017, the claimant applied via Mr Broomhead for reconsideration on 14 September 2017 (page 64). The grounds were that the claim had been dismissed for an unlawful reason (payment of fees) and an extension of time for the application was sought.

24. The Tribunal responded the following day (page 63). The email said that no records were held and Mr Broomhead was asked to provide copies of the claim and response forms and the Judgments to which he referred in order that fuller consideration could be given to the application for reconsideration.

25. At the end of September 2017 Mr Broomhead suffered a severe diabetic stroke. He was an inpatient in hospital for six days and upon his discharge he was confined to home with four daily visits by nurses. This lasted for several weeks.

26. The Tribunal reminded Mr Broomhead by email of 4 October 2017 that it needed the documents by 18 October (page 60) and he responded on 10 October 2017 in the following terms (page 58):

> **"I have just been discharged from hospital after suffering a diabetic stroke. I spent six days in hospital and am still having outpatient care. I shall let you have the documentation which you should still have when I am able to do so."**

27. On 11 October 2017 the Tribunal wrote to Mr Broomhead (page 56) on the instructions of Regional Employment Judge Parkin to confirm that no records were held by the Manchester Employment Tribunal, and that although there was sympathy for his difficulties, no progress could be made without provision of the documents.

October 2017 – November 2018

28. There is no record of any further correspondence for over a year.

29. Mr Broomhead said that he remained unable to pursue the case because of his own health difficulties until early 2018. He also said that he had posted the relevant documents to the Tribunal in around March 2018. He produced no record of posting, nor any proof of postage (e.g. by recorded delivery). Nor did he make any effort to check that the documents had been received until November 2018.

30. Mr Broomhead did not produce any medical evidence about his health or its impact on his ability to progress the application for his client. He said that he had provided some medical evidence to the EAT in another appeal which was pending at the time.

November 2018 – February 2019

31. On 19 November 2018 (page 52) Mr Broomhead emailed the Tribunal asking for an update. In response to a query from the Tribunal about the case number, an email the following day said:

> **"After the application was made I received a letter from you stating that the file had been destroyed and you requested certain copy documents in order to reconstitute the file. I then had a diabetic stroke. As soon as I was well enough I sent the documents you had requested, this was some time ago. So lying about on someone's desk are the papers."**

32. Mr Broomhead sent further reminders asking for an update on 29 November and 19 December 2018 (pages 46-49), and on 21 December 2018 (pages 44-45) a letter was issued by the Tribunal on the instructions of REJ Parkin. There had been an exhaustive search of records at Leicester Central Processing Office and the physical Judgments Register at Bury St Edmunds. Only the latter of the two Judgments in the autumn of 2014 had been recovered. A reconsideration hearing could not be listed without copies of the claim and response forms, and any other correspondence.

33. Mr Broomhead responded by email of 27 December 2018 at page 43. He said he would deliver copies by hand. That was subsequently done, and by a letter of 25 January 2019 the Tribunal invited comments from the respondent before consideration was given to listing the matter.

34. Submissions were provided on behalf of the respondent on 8 February 2019 (pages 5-13). This hearing was then listed.

Submissions

35. Mr Broomhead made an oral submission in which he took me through the chronology of events summarised above. He emphasised that the origin of this application was that fees had been declared unlawful by the Supreme Court. He did not accept that the Tribunal had no jurisdiction over the matter. Reconsideration applications when an EAT appeal had already been lodged were common. The delay in providing documents and in pursuing the matter had been due to his illness. A fair hearing was still possible because of the availability of the hearing bundle and witness statements.

36. Mr Anderson had helpfully prepared a further written submission. He made three main points.

37. The first was that the jurisdiction of the Tribunal had been exhausted by the appeal to the EAT. He relied upon paragraph 24 of the Judgment of the Court of Appeal in **Aparau v Iceland Frozen Foods [2000] IRLR 196**. The fact the EAT appeal had ended meant the Tribunal had no jurisdiction anymore.

38. His second point was that the claim had not been actively pursued. Given the history of the matter it was incumbent on the claimant and her representative to pursue matters particularly actively once the application for reconsideration was made. Even if the assertions made by Mr Broomhead about his medical position

were accepted, there was no justification for him not having passed the matter to a different representative or to have advised the claimant to pursue matters on her own, or even simply to have advised the Tribunal by email that he was experiencing difficulties which meant he could not provide the documentation for the moment. The delay of 13 months between October 2017 and November 2018 was inordinate and inexcusable, and had contributed to the risk that a fair hearing was no longer possible. Had the claim been active it would have been grounds for striking it out. There was also prejudice to the respondent, as illustrated by the decision of the EAT in **Elliott v The Joseph Whitworth Centre Ltd UKEAT/0030/13**, a decision of HHJ McMullen QC of 15 July 2013. In that case a decision to strike out a claim was upheld where the claimant's union representative failed to chase it up after presenting the claim form for a period of some two years during which the unserved claim form had been with the Employment Tribunal. The reason for the delay was entirely the fault of the Tribunal Service but the failure to pursue matters and to find out what was happening counted against the claimant.

39. The third point was that in any event a fair hearing was no longer possible. Employment law time limits are short, and that has to be taken into account in assessing when a fair trial remains possible. These were events between August and October 2013. The written submission indicated that the respondent did not have the bundle, although it transpired that it did have the index and Mr Broomhead confirmed in the hearing that he had a physical copy of the bundle itself. Statements were available but only one of the three witnesses was still with the respondent, and one of the other two was believed to live in Spain. The effect on their memory of events would be significant. In addition, the respondent would be deprived of its ability to adduce evidence that the claimant had failed to mitigate her losses.

Conclusions

40. At the conclusion of submissions I asked if either side wanted an adjournment. That would have enabled Mr Broomhead to have supplied medical evidence and the trial bundle, and it would have enabled the respondent to have consider the trial bundle and provide copies of the witness statements. The representatives agreed that I should proceed to make my decision on the basis of information available today.

41. The test I had to apply was the interests of justice under rule 70, a test to be applied in light of the overriding objective. Considerations of whether the claim would be struck out under rule 37 were background matters. It would not of course be in the interests of justice to reinstate a claim which would then have to be struck out under rule 37.

42. I was satisfied that it was in accordance with the overriding objective to extend time for the reconsideration application under rule 5. It could not have been made until the publication of the Supreme Court judgment in the **Unison** case at the end of July 2017. It was made two weeks into September 2017. In my judgment that was reasonably prompt. However, I accepted the argument of Mr Anderson that in the context of employment law time limits generally, the fact that it was already four years from the events in question meant that it was particularly incumbent on the claimant to pursue the case actively thereafter.

43. I rejected Mr Anderson's argument that I had no jurisdiction to reinstate the claim by means of this reconsideration application. The paragraph in **Aparau** to which he referred expressly acknowledged the power of reconsideration (or, as it then was, review) as an exception to the general principle. There is nothing to prevent an Employment Tribunal reconsidering a judgment even if that judgment has already been appealed. The question why the application for reconsideration was not made prior to an appeal may be relevant but it is no formal bar. I agreed with Mr Broomhead that the fact that the dismissal of the claim was based on the unlawful fees regime meant that the unsuccessful appeal on that point was of no significance.

44. In considering whether the interests of justice meant that the claim should be reinstated I took into account the passage of time and delay.

45. Despite the absence of any medical evidence I accepted that Mr Broomhead had been incapacitated by a diabetic stroke in late September 2017. He had mentioned that in his correspondence at the time. Mr Anderson did not base his opposition to the application on the suggestion that this was not true.

46. I was concerned, however, by the lack of any record of contact between Mr Broomhead and the Tribunal from late 2017 until November 2018. Although he said that he had posted copy documents he had not produced any record of posting and nor had he sought to check whether those documents had actually been received. Nor had Mr Broomhead taken any steps to advise the claimant to deal with the matter herself for the moment, or to suggest that she find another representative, or even simply to email the Tribunal to say that he was too ill to deal with matters for the moment. In that sense I was satisfied that he had not actively pursued the case in the period between January and November 2018. That was the sort of conduct which could give rise to a successful application to strike out the claim if it contributed to the risk that a fair trial was no longer possible, or if it otherwise prejudiced the respondent. In many cases that would be easy to establish.

47. This case was different, however, because of an unusual feature: the final hearing bundle had been agreed and witness statements prepared and served by both parties prior to the original dismissal of the claim for non-payment of the hearing fee. Although it was not apparent prior to today's hearing, Mr Broomhead had a full copy of the hearing bundle and those instructing Mr Anderson had the witness statements and a Schedule of Loss. The evidence on both sides had been gathered and crystallised in 2014.

48. Even so, Mr Anderson argued that a fair trial would still not be possible. He relied on three different points.

49. His first point was that the respondent would not be able to obtain evidence to prove that the claimant had failed to mitigate her losses. I did not regard this as a strong point. The respondent had had the opportunity to do that in preparation for the final hearing in 2104. It was clear from the file that the claimant had obtained new employment by the end of October 2014 (page 90). Whether there was any claim for ongoing losses after that date remained to be seen, but ultimately if she was successful it would still be incumbent on her to prove her losses and the Tribunal would make whatever compensatory award appeared just and equitable. That could take account of any difficulties caused to the respondent by the passage of time.

50. The second point was that although the witnesses may be traceable they might be reluctant to attend and give evidence. In making this point Mr Anderson acknowledged the ability of the Tribunal to issue a witness order, even where a witness lives abroad. It is also possible for the Tribunal to take evidence electronically in accordance with the provisions of rule 46. Even if a witness order becomes necessary the respondent has the protection of the witness statements prepared in 2014. The fact that a witness may be surprised and disappointed at having to give evidence in 2019 about events that occurred six years earlier is understandable but it does not prevent a fair trial being possible.

51. The third point made by Mr Anderson was that the passage of time was such that the effect on memory would be significant and thereby prevent a fair trial taking place. He reminded me that in the claim form the claimant asserted that the true reason for dismissal was her level of pay. As the reason for dismissal is an issue this will require the witnesses to cast their mind back and give evidence about the facts or beliefs in their mind some six years earlier. I acknowledged the force of this argument but ultimately it seemed to me not to be such as to prevent a fair trial taking place. The memory of the witnesses can be refreshed by reference to the contemporaneous documents, no doubt in particular the dismissal letter and the letter rejecting the appeal. There are also available in the trial bundle notes of meetings and other investigatory documents which will assist witnesses to remember their thought processes. That was quite different from the position in **Elliott** where the respondent had not been aware of the case and therefore had had no opportunity to gather and preserve the evidence upon which its defence would rely.

52. Accordingly, although I was satisfied that there had been a failure actively to pursue the matter by the claimant in the period between January – November 2018, when Mr Broomhead should have taken steps to have progressed the matter despite his illness or to have notified the Tribunal that he was unable to do so, I concluded that a fair trial remained possible. Given that the underlying reason for delay between 2014 and 2017 rested with the unlawful fees regime, it seemed to me overall in the interests of justice for the matter to be reinstated and listed for a final hearing. That will be the subject of a Case Management Order to be promulgated separately.

Employment Judge Franey
8 May 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON
10 May 2019

FOR THE TRIBUNAL OFFICE