EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4120793/2018

Hearing Held in Glasgow on 29 May 2019

Employment Judge McFatridge

Miss C Osborne	**Claimant** **Represented by:** **Mr Healey** **Solicitor**
Buckley Support Services Limited	**Respondents** **Represented by:** **Ms Mohammed** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that

(1) On reconsideration the Judgment of the Tribunal issued on 9 January 2019 dismissing the claim is revoked.

(2) The claimant is permitted to withdraw the letter dated 4 January 2019 intimating that she wished to withdraw her claim which was sent in error by her representatives. The claim is reinstated to proceed as accords.

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unfairly dismissed by the respondents. The respondents submitted a response in which they denied the claim. They referred to the claimant having been suspended pending investigation into theft of money and thereafter dismissed for gross misconduct. In her ET1 the claimant's position was that the allegation of theft was unfounded. Matters then proceeded with a Final Hearing being listed for 4 and 5 February 2019. On 4 January however the Tribunal received an e-mail from the claimant's representative Messrs Livingstone Brown stating that the claimant wished to withdraw her claim. The e-mail was referred to an Employment Judge and on 9 January 2019 Employment Judge Whitcomb issued a judgment dismissing the claim. On 11 January 2019 the claimant's representatives wrote to the Tribunal indicating that the claimant was applying for reconsideration of that judgment. She also applied for her claim to be reinstated. The e-mails from the claimant's representative indicated that the e-mail had been sent in error in that the claimant's representative had confused the claimant with another client of a similar name, who had given instructions to withdraw her claim. The matter was considered by Employment Judge Whitcomb who decided not to refuse the application but to fix a hearing at which it could be heard. On 4 February the respondents' representative wrote to the Tribunal setting out detailed reasons why the Tribunal should not follow the course suggested by the claimant's representative. A hearing took place on 29 May in order to deal with the matter. Employment Judge Whitcomb was unavailable and the President directed that I deal with the application. Evidence was led from the claimant and from Lucy Neil the solicitor who had had responsibility for conduct of the claimant's case at the relevant time. The claimant gave her evidence in chief orally. Ms Neil gave her evidence by way of a witness statement. The claimant's representative lodged various productions. On the basis of the evidence I made the following findings in fact relevant to the issue before me.

Findings in Fact

2. Following her dismissal the claimant was recommended Messrs Livingstone Brown Solicitors by a Jim McCourt of an Employment Rights Advice Agency. She was originally in touch with a male solicitor however subsequently she spoke to Lucy Neil. Ms Neil commenced employment with Livingstone Brown in September 2018 and took over a workload from a departing solicitor. Ms Neil had only been with the company for two months when her father died. She returned to work on 22 November 2018. She did not believe, with hindsight, that she was fit to return to work at this time but was eager to do so. She worked for a week and then discovered the level of stress was higher than she could manage and took further time off work between 30 November and 4 December 2018. Having consulted her GP on 3 December 2018 she indicated she was keen to remain engaged in the workplace and also wanted to take her mind off recent personal events. Ms Neil lives with her parents and found it very difficult being at home. At her GP's suggestion she agreed to return on amended duties limiting her working days to three per week with a stipulation that she would not appear in court. Many of her court appearances had to be reallocated or dates postponed as a result of this. She returned to work on 5 December doing these restricted hours. During this period she suffered from poor concentration and low mood. This was not something that had happened before and she was unfamiliar how to deal with this.

3. On 14 December Ms Neil took a telephone instruction from a claimant called Claire Lily. Ms Lily instructed her to withdraw her claim. Ms Neil followed her usual practice and dictated a note to her secretary. It was then her secretary's responsibility to upload this note on to Livingstone Brown's Law Ware computerised case management system. It would appear that instead of saying Claire Lily that Ms Neil dictated Claire Osborne instead. Ms Neil then went on to correctly send an e-mail to the Employment Tribunal withdrawing Ms Lily's claim. Her secretary however typed a note which was placed in Ms Osborne's file as if Ms Osborne had given an instruction to withdraw the claim.

4. Ms Neil worked restricted hours between 14 and 24 December when she went on annual leave. She was in the office for around three and a half days over this period. Ms Neil carries her own workload and has autonomy as to how she deals with this. None of the other solicitors in the firm would have had occasion to look at the claimant's file over this period.

5. Ms Neil returned to work on or about 4 January. She had occasion to look at the claimant's file and saw what appeared to be an unactioned telephone message from the claimant instructing the withdrawal of the claim. Ms Neil had never met either the claimant or Ms Lily and had a substantial workload. Her belief was that she must have received this message from the claimant and then for some reason – possibly associated with her poor concentration levels – had not properly dealt with it at the time. She therefore sent the e-mail to the Tribunal withdrawing the claim. The error was discovered shortly thereafter.

6. The claimant is keen for her employment tribunal to continue. She was, of course, completely unaware the respondents had written to the Tribunal withdrawing her claim since she had not instructed this. The claimant feels very strongly that she wishes her claim to proceed. She believes that she requires to be vindicated. She worked with the respondents for nine years. She has applied for other jobs but has found great difficulty in obtaining other employment because of what happened.

Observations on the Evidence

7. I had no hesitation in accepting the evidence of both the claimant and Ms Neil as being credible and reliable.

Discussion and Decision

8. Both parties made full submissions. Both also incorporated into their submissions the letters which had been sent from the representatives on 11 January and 4 February respectively. Rather than repeat the

submissions at length I will deal with them where appropriate in the discussion below.

Discussion and Decision

9. Rule 51 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 states

> "Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.
>
> **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."

10. Rule 29 states

> "The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. [Subject to rule 30(a)(2) and (3)] The particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."

11. Rule 70 states

> "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."

12. In this case it was correctly identified that the Tribunal required to do two things. The first was to decide whether to revoke the judgment dismissing the claim. The second was whether to allow the claimant to effectively withdraw the letter of withdrawal which had been made in terms of rule 51 so as to allow the claim to proceed. I shall deal with both matters separately.

13. So far as the reconsideration is concerned it appears to me that this could competently be done within the terms of rule 70. I note that rule 70 is drafted in much wider terms than the previous rules which dealt with reconsideration and that whilst the discussions of general principles found in these cases is of value, I did not consider that the earlier cases were in any way binding on me given that they dealt with a different set of rules.

14. I am required to approach the issue of whether or not to grant a reconsideration under rule 70 in terms of the overriding objective to deal with cases fairly and justly. There is no doubt that one important part of justice is that of finality in litigation. In general terms where a Court of Tribunal issues a judgment there is a strong policy argument for considering that judgment to be final subject to whatever rights of appeal are available. On the other hand the very fact that there is a power to reconsider judgments recognises that there are circumstances where this presumption of finality can be overcome.

15. In this case it is clear that the claimant never instructed her solicitors to lodge an e-mail withdrawing her claim. I was entirely satisfied that the error came about in the manner set out by Ms Neil in her witness statement. The

claimant's representatives sought to characterise this as an administrative error and pointed out that under the old rules it was clear that an administrative error was not restricted to administrative error by the Tribunal staff or administration. I was referred to the case of ***Sodexho Limited v Gibbons UKEAT/0318/05***. I did find that it was helpful to try to characterise the error in this way. The error is what it is. Under the old rules it was necessary to put reasons for reconsideration into categories. The new rules do not require me to do this. I am required to look at matters taking into account overall fairness and the various matters which are to be weighed up with regard to fulfilling the overriding objective of the Tribunal. I consider that the balance of prejudice is an extremely important consideration which I required to bear in mind when doing this. In this case I entirely accepted the respondents' argument that if the Tribunal does not revoke the judgment dismissing the claim then the claimant would in all probability be able to pursue a remedy against her solicitors Livingstone Brown. On the other hand whilst the claimant may be successful in obtaining a financial remedy she would not have any remedy in respect of what she termed "vindication". If this were simply a claim for holiday pay or unpaid notice, or for a redundancy payment then it might well be sufficient for the claimant to receive financial compensation from her lawyers or her lawyers' insurers. In this case however the claimant was dismissed after nine years following an allegation of theft. It is clear from the ET1 that the claimant disputes that this allegation is well founded. The claimant in evidence spoke of having difficulty in obtaining another job because of "what happened". I am in absolutely no doubt that what the claimant is looking for from the Tribunal is more than simply a financial remedy but that in a significant way she is seeking to clear her name. She is seeking "justice" in a way which goes beyond a financial remedy. In my view it weighs heavily on the balance of prejudice that if the decision to dismiss the claim is not revoked the claimant will lose that opportunity forever. On the other hand the prejudice to the respondents is slight. The respondents speak of a delay in the process but if the claim is reinstated now the overall delay will not be anything at all out of the ordinary in such cases. All that the respondents are really losing is the windfall benefit of not having to defend the claim against them. If their defence is well founded they will still be able to pursue it. In my view the

balance of prejudice falls firmly in favour of reconsidering the decision to dismiss and revoking it. I therefore grant the reconsideration and revoke the judgment dismissing the claim.

16. The second part of my decision relates to the withdrawal itself. I have set out the terms of rule 51 above. Rule 51 and rule 52 are essentially new rules which appear in the 2013 rules and which replaced rule 25 in the 2004 regulations. The respondents referred to the case of ***Khan v Heywood and Middleton Primary Care Trust (CA) [2007] ICR*** which was a case determined under the old rules. This case makes the point that the court did not accept the claimant's submission that as a matter of law no order was required to enable the claimant to revive a withdrawn claim. Although that decision was made under the old rules it appears to me that it also correctly describes the position under the new rules. Rule 51 makes it clear that a withdrawal is the end of the claim. It appears to me that for the Tribunal to thereafter be in a position to deal with the claim some order of the Tribunal is required. The key question is whether the Tribunal has power to grant such an order. The ***Khan*** case which dealt with the old rules concluded that under the old rules there was no specific power to "withdraw a withdrawal". They then went on to consider if this was something which was within the general power to manage proceedings which was contained in rule 10 of the old rules. ***Khan*** decided that it could not be within the general power to manage proceedings under rule 10 essentially because rule 10(1) began with the words "subject to the following rules". The Court of Appeal decided that this meant that the position was analogous to that in the English common procedure rules which, in relation to issues of time limits, begin with the phrase "except where these rules provide otherwise". In the ***Khan*** case it was recognised that one could not use a general power to extend a time limit where there were specific provisions which related to this issue and where the terms of these specific conditions were not met.

17. In this case however I am dealing with the matter under the 2013 rules where the general case management power is phrased differently. Crucially, in my view rule 29 states

> "The particular powers identified in the following rules do not restrict that general power."

As I understand it this means that I have a general case management power which gives me a discretion to allow the claimant to withdraw her withdrawal even given the quite specific terms of rule 51. I consider that as with the decision as to whether or not to reconsider, I am bound to exercise my discretion in line with the overriding objective. In this case I consider that much the same considerations apply as in the question of whether or not to revoke the dismissal decision. It is my view therefore that the claimant be permitted to withdraw her withdrawal of the claim which was submitted in error and that the case be reinstated to proceed as accords.

Employment Judge **Ian McFatridge**

Date of Judgment **06 June 2019**

Entered in register and copied to parties **13 June 2019**