EMPLOYMENT TRIBUNALS

Claimant:	And	**Respondent:**
Nr Z Sokolik		Kobre & Kim (UK) LLP

Heard by: CVP **On**: 13 April 2021

Before: Employment Judge Nicolle
Members: Mr D Schofield
Ms C James

Representation:

Claimant: In person
Respondents: Ms G Hirsh, of Counsel

Judgement

The judgement promulgated on 14 April 2021 (the Judgement) is confirmed on reconsideration.

Reasons

1. Oral reasons were given to the parties but the Claimant subsequently requested written reasons.

2. This is an application made by the Claimant for reconsideration of the Judgment following the early cessation of a four-day full merits hearing which had been scheduled to commence on 13 April 2021 (the Hearing).

The Hearing

3. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

4. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended the hearing.

5. The parties were able to hear what the Tribunal heard.

6. The participants were told that it is an offence to record the proceedings.

7. From a technical perspective, there were no major difficulties.

8. The Claimant produced further documents many of which the Tribunal had previously seen together with a witness statement and written representations.

Background

9. The Claimant did not join the Hearing. He says that he was unable to do so due to his health situation at that time and also what he refers to as intimidation by the Respondent which relates to a cost warning letter he had been sent by the Respondent's solicitors. The Tribunal previously found that that did not constitute intimidation and therefore not in itself a reason to justify the Claimant's non participation.

10. The Claimant sent a plethora of correspondence to me on the evening prior to the Hearing. He had been advised that that correspondence should in accordance with Rule 92 be copied to the Respondent's legal representatives. Correspondence continued from the Claimant on the morning of the Hearing to include a letter from a Dr Lutterodt, a so called Push Doctor, following a consultation which would appear to have been an online with the Claimant at 07:20 that morning. We took that letter together with earlier medical evidence into account in reaching our decision to dismiss the claim under Rule 47.

11. We consider that the letter from Dr Lutterodt put the Claimant's position at its highest in that he referred to worsening mental health symptoms and recommended a period of two weeks off work and his hearing until his mental health has improved. It is significant that the letter referred to "his hearing" which at that time would have been the intended four day Full Merits Hearing. What the Claimant was required to attend remotely, in accordance with the directions I had given, was a short hearing to consider his postponement request. That had been made clear to the Claimant in emails from me both on the evening of 12 April and reiterated in an email from the 08:26 on the morning of 13 April 2021. In that email I advised the year Claimant but I had received a total of five emails from him the previous evening, but not copied to the Respondent in accordance with Rule 92. I further advised him that it would be inappropriate for me to consider this correspondence given that it not been sent to the Respondent but advised the parties that no decisions would be made on any element of the claim, or applications in relation thereto, prior to the commencement of the Hearing at 11:30 that day.

12. The Tribunal made exhaustive efforts to facilitate the Claimant's participation, and we can think of no further efforts which could have been made to communicate to the Claimant that the Hearing was taking place and the possible consequences of his non participation. That included a telephone call from the Tribunal Clerk and an email sent by me as the Employment Judge. The Claimant decided that he would not participate. He says he was not well enough to be able to make appropriate submissions.

13. The Tribunal unanimously decided that the consequence of the Claimant's non-participation was that his claim in its entirety should be dismissed under Rule 47. Prior to having reached this the decision the Tribunal had considered all information available to it, after making the above enquiries to ascertain the reasons for the Claimant's absence.

14. Whilst the original extempore decision made reference to strike out under Rule 37, in addition to dismissal under Rule 47, this was reconsidered at the Tribunal's own volition given that the Claimant had not been given the required 14 days' notice under Rule 54. It was confirmed to the parties that the claim had solely been dismissed pursuant to the Claimant's non-attendance under Rule 47. For the avoidance of doubt the claim was not struck out under Rule 37, and regardless of any consideration given to whether the substantive claim had any reasonable prospects of success, the decision to dismiss was based solely on the Claimant's non-attendance.

The reconsideration application

15. Later that day, prior to the decision being promulgated, the Claimant applied for reconsideration under Rule 71.

16. I advised the parties that the reconsideration application would most appropriately be considered at a further hearing.

17. The Claimant was given the opportunity to set out any material considerations in relation to his ability to participate in the Hearing which the Tribunal had failed to take into account. He was unable to point to anything we had missed but in effect argued that we should revisit and vary our previous decision.

18. Ms Hirsch succinctly stated that our decision was the correct one and that there were no grounds for it being revoked or varied.

Approach taken

19. We considered carefully the scope of Rule 71 reconsideration applications and the discretion which a tribunal has where it is in the interest of justice to reconsider an earlier decision. We have also taken account of the fact that reconsideration should only apply where there has been some change in the evidence or circumstances.

20. We assessed and weighed the significance for the Respondent of the possibility of the Judgement being reversed and took into account the prejudice to the Claimant of it being confirmed. We took account of the representations made by the Claimant as to why reconsideration should be granted in his emails of 14 and 29 April 2021 and the Respondent's solicitors' arguments as to why it would be inappropriate in their letter dated 28 April 2021. We also took account of the submissions made by the Claimant and Ms Hirsh.

21. We referred ourselves to the guidance in Phelan v Richardson Rogers Ltd and ANOR EAT 12 March 2021 (0169/19).

Conclusions

22. Having carefully scrutinised the documentation before us, and listened to what the Claimant has said by way of submissions, we do not consider that the position has materially changed. In effect he is asking us to revisit our earlier decision on the basis that he says he was as a matter of fact ill for a period of six weeks afterwards. We remain of the opinion that our decision to dismiss the claim under Rule 47 was the correct one, it was based on the material before us. It was done after careful consideration. The fact that the Claimant may have been seriously ill for a period afterwards does not directly impact on that decision.

23. The requirement was for him to join the Hearing. It may have only been for a matter of minutes. His ability or otherwise to make submissions would have been a factor to take into account. It may well have been we would have granted the postponement request. The Claimant took the risk of not joining and thereby disobeying a clear Order from the Tribunal as to the appropriate sequence of events.

24. We are mindful of the fact that the Claimant had by his own actions demonstrated an ability to communicate cogently and with significant frequency. On the evening before and morning of the Hearing, and indeed in the preceding days and weeks, he was sending multiple emails and making various applications to include under Rule 37 and Rule 50. His application for reconsideration was made within hours of the Hearing. These are factors which indicate to us that the Claimant's failure to participate was not one which was as a result overwhelming prohibiting medical circumstances but rather a choice he had made. That may well have been from his subjective perception understandable. Nevertheless, it was contrary to the clear instruction of the Tribunal and we remain of the view that the decision to dismiss the claim under Rule 47 was the correct one. Therefore the decision of the Tribunal is that the Judgement dismissing the claim under Rule 47 is reconfirmed and will not be varied.

25. In exercising our general case management powers, we considered that the overall balance justified upholding our original decision.

Claimant's subsequent email

26. Further to the hearing the Claimant sent me an email (copied to the Respondent) at 22:35 on 4 October 2021. Whilst it is not my intention to provide a detailed response to this I will for completeness clarify a contention raised.

27. The Claimant sought clarification as to the position was in respect of his various applications under Rule 37 (29 March 2021), for reasonable adjustments (7 April 2021) and Rule 50 (8 April 2021).

28. The Claimant is advised that these applications were not considered at the Hearing in his absence. The applications would have been considered had the Claimant attended. The Claimant was directed to attend the Hearing at which his postponement application, and any other applications he wished to pursue, would have been considered. He chose not to do so. It was on this basis that the claim was dismissed under Rule 47 and which decision the Tribunal has upheld on reconsideration.

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Case Number: 2202529/2019

Employment Judge Nicolle

Dated 7 October 2021

Sent to the parties on:
08/10/2021.
For the Tribunal:
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