



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4116491/2014**

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**Written Submissions considered in chambers on 12 May 2022**

**Employment Judge R Gall**

10 **Ms S A Donnelly (nee Mrozs)**

**Claimant  
In Person**

15 **Falkirk Council**

**Respondent  
Represented by:  
Mr C Asbury -  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The application by the claimant for reconsideration of the Judgment dated 16 February 2022 and sent to parties that day in terms of which claim was struck out under rule 37 of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the grounds that the claim has not been actively pursued in terms of rule 37(1)(d), is granted. The Judgment is reconsidered. On reconsideration it is revoked. The claim will proceed.

### **REASONS**

30 1. By Judgment dated and sent to parties on 16 February 2022 the claim was struck out. The claimant sought reconsideration of this Judgment by email of 17 February. That application was made in time in terms of Rule 71 of the Employment Tribunals (Rules of Constitution & Procedure) Regulations 2013 ("the 2013 Rules").

35 2. Strike out had followed the sending to the claimant of a strike out warning letter on 1 February 2022. In that strike out warning, the Tribunal gave the claimant an opportunity to give written reasons by 15 February 2022 or to

request a hearing in order to consider why the claim should not be struck out. It proceeded on the basis that the claim was not being actively pursued.

3. In her email seeking reconsideration, the claimant said that she “*must have overlooked these letters*”. She asked that the tribunal “*consider reopening my appeal*”. Further clarification of any relevant background was sought from the claimant in order that her application for reconsideration could be considered on a preliminary basis as detailed in Rule 72.

4. Rule 72 states, insofar as relevant to this application and decision:-

“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 (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 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. “*

5. By email of 9 March the claimant wrote in reply:-

*“To let you understand I am a single mother of two boys. My 15 year old has autism and my 3 year is having test for addiction needs. I was also working*

*28 hours a week split shifts. I have had to cut my hours down to 21 hours for now.*

*I have been having a lot of issues with my 3 year olds father being abusive to me and not returning my son. Its currently going through the courts and I have a welfare hearing next week on the 18/03/2021. The sheriff suspended his access 3 weeks ago because he didn't turn up for court.*

*My mental health has suffered terrible with it all. I am on antidepressants and getting support from womans Aid to help me cope as I've reached out to police and social work on numerous occasions and they can't help me as its a civil case but have spoke to [child's name redacted] father."*

6. The application for reconsideration was not refused when considered in terms of Rule 72 (1). Any comments from the respondents were sought. Both parties were also asked for any views on proceeding by written submissions or at a hearing. The claimant did not comment on there being a hearing or not. The respondents made written submissions and confirmed that they were content for the application to be dealt with without there being a hearing.
7. The claimant was sent a copy of the written submissions from the respondents. She was given the opportunity to make any further representations in light of those submissions. She made no further contact with any additional representations.
8. The respondents' written submissions set out the basis for their opposition to the reconsideration application. A summary of those reasons is given below. The history of the claim and correspondence entered into is accurately reflected in the respondents' submissions as detailed in this Judgment.
9. The claim was part of a multiple presented in 2014, which had then been sisted given that it involved a claim for alleged underpayment of pay whilst the claimant and others took holiday leave. Other cases were being determined in higher courts, hence the sisting of this case.
10. The solicitors acting for the claimant had withdrawn and the Tribunal had therefore written on 12 April 2021 to the claimant to ascertain if she wished to

continue with her claim, either instructing fresh representation or proceeding on her own behalf. The claimant had confirmed on 20 April 2021 that she wished to be kept informed directly. This was treated as confirmation that she was pursuing the claim on her own behalf.

5 11. The claimant had then been asked by the Tribunal for particulars of her claim. The date for reply was 15 June 2021. There was no reply. A reminder was written on 16 June 2021, seeking a response by 2 July 2021. The claimant did not supply any details of her claim, however on 22 June confirmed by email that she wished to continue her claim.

10 12. The respondents' comments were then sought by the Tribunal on the claim brought by this claimant and other claimants. The respondents replied on 8 September 2021. They noted that the claimant had not provided details of her claim. They confirmed that they took a time-bar point in relation to her claim.

15 13. The following narration of events appears in paragraphs 2.7 to 2.9 of the respondents' submission and its content is accurate:-

20 *"On 10 September 2021, the Tribunal wrote to the Claimant to ask for her comments on our correspondence to the Tribunal dated 8 September 2021, and further specification of her claims. The deadline for her response was 1 October 2021. The Claimant did not respond. The Tribunal issued an email reminder on 18 October 2021. The Claimant responded on 18 October 2021, to say "I'm not very sure as to what you want me to send you. As far as I was aware the union had all the information." The Tribunal responded on the same day to ask the Claimant to confirm specifically whether she accepted the Respondent's position regarding the July 2014 change to the method of*

25 *calculating holiday pay. She responded later on 18 October 2021 to say "In regards to your email. I can't really remember as it was that long ago".*

30 *The Tribunal then wrote to the Claimant by email dated 15 November 2021 to again seek further specification of the Claimant's claim. The deadline for response was 6 December 2021. The Claimant did not respond. The Tribunal issued a strike out warning to the Claimant on 1 February 2022. The letter noted that if the Claimant disagreed that the claim should be struck out she*

should set out the reasons for that in writing by 15 February 2022. The letter also stated that “If nothing is heard from you in the timescale set out above then the Employment Judge will decide whether to strike out your claim, or part of it as the case may be, on the basis of the information which is otherwise available.”

The Claimant did not respond to the strike out warning. The Tribunal issued its judgment, striking out the claim on the basis it has not been actively pursued in terms of rule 37(1)(d), on 16 February 2021.”

14. The respondents referred to the principle of finality of litigation. They founded upon the case of *Flint v Eastern Electricity Board* [1975] ICR 395. In that case the High Court confirmed that proceedings should be as final as possible and only in unusual cases should an applicant be able to have “a second bite at the cherry”. They submitted that the current instance was not unusual in nature and that there had not been something which has gone wrong with the Tribunal's procedure to deny the Claimant natural justice.

### Applicable Law

15. In terms of Rule 70, the a Judgment may be reconsidered “where it is necessary in the interests of justice to do so”. On reconsideration a Judgment may be confirmed, varied or revoked.
16. In the Rules in place before the 2013 Rules referred to above (the 2004 Rules), there were specific grounds detailed on which reconsideration was regarded as being appropriate. Those were (a) where an administrative error resulted in a wrong decision; (b) where a party did not receive notice of the proceedings at which the decision was made; (c) where the decision was made in the absence of a party; and (d) where new evidence had become available since the conclusion of the hearing which could not have been reasonably known of or foreseen at that time.
17. In the 2013 Rules, as stated above, reconsideration is appropriate where a Tribunal considers that it is necessary in the interests of justice. That is therefore a broader basis for possible reconsideration than previously existed.

Cases under the 2004 Rules are still of relevance as the instances given under those Rules would be likely to result in reconsideration in terms of the 2013 Rules.

18. The case of *Outasight VB v Brown* 2015 ICR D11 saw the Employment Appeal Tribunal (“EAT”) confirm that an exercise of discretion was involved as the Tribunal applied the 2013 Rules in reconsideration of a Judgment. The EAT said that discretion required to be exercised judicially. That was confirmed as meaning *“having regard not only to the interests of the party seeking reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation.”*

### Discussion and Decision

19. In this case the claimant has been given the opportunity to set out the specifics of her claim. It appears that she does not have relevant information to hand. That information, in this type of case, would normally involve dates when an alleged underpayment of holiday pay was said to have occurred and, if possible, the amount of the underpayment claimed. Employees may have some of that information. Orders can be sought asking that the respondents are ordered to produce information on those matters, given that an employer will normally hold details of leave taken and holiday pay paid. No such application has been made in this case as matters stand.
20. It may be, from the claimant’s comments in particular in her email of 18 October 2021 set out above, that the claimant’s union has some information on the facts said to support the claim.
21. The Tribunal is faced with an unspecified claim at present. As mentioned above, claims of this type have generally been sisted to await the outcome of litigation in other similar cases. There is a Supreme Court case scheduled for the end of 2022 (*Agnew*) which, it is anticipated, will see clarification given as to the significance or otherwise of gaps of more than 3 months between the dates of alleged underpayments. Many cases remain sisted until that case is determined.

22. The examples in the 2004 Rules of situations where reconsideration might be undertaken and an application for reconsideration granted do not, in my view, assist greatly in this case. In this case, there is not a wrong decision due to an administrative error. Here, the claimant received notice of the proceedings leading to the decision in that she does not state that she did not receive the strike out warning letter sent on 1 February 2022. She says that she must have overlooked the letter. The decision was not made in her absence, in the sense of there having been a hearing at which she was not present and so did not have the opportunity to put forward her position. It is not said that there is new evidence which is of relevance meaning the case should be revisited.
23. The question is therefore as to whether it is necessary in the interests of justice to reconsider the Judgment. The basis of the application is that the claimant wishes to proceed with her claim and has put forward, albeit late, reasons why she has not responded to correspondence up to and including the strike out warning letter. She has detailed the health issues affecting her sons, her own work commitments, issues with the father of her younger son and also referred to the impact of these matters upon her own mental health.
24. The claim was dismissed due to the lack of contact from the claimant. Her absence of reply to the strike out warning letter was taken as confirmation that she was not actively pursuing her case and certainly was not advancing reasons why strike out should not be granted. In the circumstances she sets out, the claimant states she must have overlooked "letters", including the strike out warning letter.
25. It may be that there is a valid claim at the instance of the claimant. It is difficult to say at the moment. The case has not been struck out on the basis of having no reasonable prospect of success. It is the absence of response to the Tribunal which led to the strike out warning letter and subsequent strike out. The claimant is now in contact with the Tribunal. She has explained the circumstances in which there was no contact in reply to communications from the Tribunal.

26. In the situation where there was no reply to the strike out warning letter, strike out was a decision properly open to the Tribunal and one taken by it.
27. I recognise that the respondents highlight finality of litigation as an important principle and as being one which argues against reconsideration leading to revocation of the Judgment. This is not however a situation where the facts have been aired and a decision has been reached by the Tribunal, with the claimant now seeking a “second bite at the cherry”. Rather, she presents a picture of other pressures impeding her ability to reply to the Tribunal. That is not a particularly satisfactory situation. Litigation is important and must be given priority, particularly by a claimant who seeks to pursue a claim.
28. An exercise of judicial discretion is involved in consideration of the facts and circumstances relevant to this application. The claimant seeks the opportunity once more to advance her claim. She explains the matters which caused her to overlook correspondence. If reconsideration takes place leading to the Judgment being revoked, clearly the claimant would require in the future to address any communications from the Tribunal within any time periods set. That would be so notwithstanding general day-to-day life events, recognising that there may be exceptional circumstances which make late or non-response excusable.
29. I understand the respondents’ position and have sympathy with it. I have weighed their representations and carefully considered their points as part of reaching a view as to what is in the interests of justice. I have had regard in so doing to the principle of the desirability of finality of litigation.
30. On balance, I am persuaded that in the circumstances which the claimant sets out it is appropriate that I exercise my discretion and, on reconsideration, revoke the Judgment in terms of which the claim was struck out. I therefore do so. The claim will continue.



31. Given that the decision in *Agnew* is expected towards the end of this year or early next year, it seems to me to be sensible to sist the claim until that time. It would however be helpful to have views from each party on that and any such views should be submitted to the Tribunal and copied to the other party within 21 days of this Judgment.

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Employment Judge: Robert Gall

Date of Judgment: 16 May 2022

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Date sent to parties: 16 May 2022

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