EMPLOYMENT TRIBUNALS

Claimant: Mr J Milne

Respondent: Frimley ICB

JUDGMENT

The judgment sent to parties on 24 October 2024 is not varied or revoked. The entire claim remains struck out.

REASONS

1. A judgment striking out the claim - because of appearing to have no reasonable prospects of showing that the requirements of section 108 of the Employment Rights Act 1996 ("ERA") were met – was approved by me on 5 October 2024 and sent to parties on 24 October 2024.

2. On 1 November 2024, the Claimant applied for reconsideration. The rules in force at the time were the 2013 rules. It is correct for me to make this current decision under the current rules, the 2024 rules, though that makes no difference to the outcome.

3. Rules 68-70 of the Tribunal Rules provides as follows:

68. Principles
(1) The 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.
(2) A judgment under reconsideration may be confirmed, varied or revoked.
(3) If the judgment under reconsideration is revoked the Tribunal may take the decision again. In doing so, the Tribunal is not required to come to the same conclusion..

69. Application for reconsideration
Except where it is made in the course of a hearing, an application for reconsideration must be made in writing setting out why reconsideration is necessary and must be sent to the Tribunal within 14 days of the later of—
(a) the date on which the written record of the judgment sought to be reconsidered was

sent to the parties, or
(b) the date that the written reasons were sent, if these were sent separately..

70.— Process for reconsideration
(1) The Tribunal must consider any application made under rule 69 (application for reconsideration).
(2) If the Tribunal considers that there is no reasonable prospect of the judgment being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application must be refused and the Tribunal must inform the parties of the refusal.
(3) If the application has not been refused under paragraph (2), the Tribunal must send a notice to the parties specifying the period by which any written representations in respect of the application must be received by the Tribunal, and seeking the views of the parties on whether the application can be determined without a hearing. The notice may also set out the Tribunal's provisional views on the application.
(4) If the application has not been refused under paragraph (2), the judgment must be reconsidered at a hearing unless the Tribunal considers, having regard to any written representations provided under paragraph (3), that a hearing is not necessary in the interests of justice.
(5) If the Tribunal determines the application without a hearing the parties must be given a reasonable opportunity to make further written representations in respect of the application.

4. The Tribunal has discretion to reconsider a judgment if it considers it in the interests of justice to do so. Rule 70(2) requires the judge to dismiss an application if the judge decides that there is no reasonable prospect of the original decision being varied or revoked. Otherwise, the application is dealt with under the remainder of Rule 70.

5. When deciding what is “necessary in the interests of justice”, it is important to have regard to the overriding objective to deal with cases fairly and justly, which includes: ensuring that the parties are on an equal footing; dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense.

6. In deciding whether or not to reconsider the judgment, the tribunal has a broad discretion, which must be exercised judicially, having regard not only to the interests of the party seeking the 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

7. The Claimant’s 1 November 2024 application was in time, and complied with the requirements of the rules (both the 2013 and 2024 requirements).

8. The application gave reasons for not having responded to the strike out warning at the time it was sent. It also addressed the merits.

9. By letter dated 2 December 2024, the parties were notified that I had decided that the application met the requirement of having better than “no reasonable

prospects of success". The parties were permitted to make further representations.

10. I have taken account of the Claimant's letters of 20 December 2024 and 5 March 2025, as well as the comments made by the Respondent. I have not received any submissions following the letter sent, on my instructions, on 1 May 2025.

11. I am therefore making the decision on the papers.

12. The rules about continuous employment are contained within Chapter I of Part XIV ERA. Because of section 210(5), "*employment during any period shall, unless the contrary is shown, be presumed to have been continuous*".

13. Section 211 includes:

> **211.— Period of continuous employment.**
>
> (1) An employee's period of continuous employment for the purposes of any provision of this Act—
>
> (a) (subject to (3)) begins with the day on which the employee starts work,
>
> and
>
> (b) ends with the day by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision.

14. Generally speaking, for there to be continuous employment, it has to be with the same employer. This is subject to any exceptions set out in other legislation, or in section 218 ERA. The potentially relevant parts of section 218 are:

> (3) If by or under an Act (whether public or local and whether passed before or after this Act) a contract of employment between any body corporate and an employee is modified and some other body corporate is substituted as the employer—
>
> (a) the employee's period of employment at the time when the modification takes effect counts as a period of employment with the second body corporate, and
>
> (b) the change of employer does not break the continuity of the period of employment.
>
> (8) If a person employed in relevant employment by a health service employer is taken into relevant employment by another such employer, his period of employment at the time of the change of employer counts as a period of employment with the second employer and the change does not break the continuity of the period of employment.

(9) For the purposes of subsection (8) employment is relevant employment if it is employment of a description—

(a) in which persons are engaged while undergoing professional training which involves their being employed successively by a number of different health service employers, and

(b) which is specified in an order made by the Secretary of State.

(10) The following are health service employers for the purposes of subsections (8) and (9)—

….

15. The list of organisations specifically named in section 218(10) changes from time to time as different health bodies come and go (for example, (zb) referred to clinical commissioning groups when they existed) and so it is potentially necessary to consider older versions of the section, and the transitional arrangements (as well as deciding whether section 218(3), or TUPE, applies to any particular change of employer).

16. Section 218(9) is subject to The Employment Protection (National Health Service) Order 1996 ("the 1996 Order") which specifies that (in addition to the other requirements), it applies only to:

(a) employment as a registered medical practitioner or registered dental practitioner in the grade of Registrar, Senior Registrar, Specialist Registrar, Registrar (Public Health), Senior Registrar (Public Health) and Specialist Registrar (Public Health)

(b) employment in the grade of clinical scientist trainee or clinical psychology trainee; and

(c) employment in the grade of general management training scheme trainee or financial management training scheme trainee.

17. There are provisions for preserving continuity of employment when moving between NHS employers that apply to redundancy pay rights (Part XI ERA) that do not apply to unfair dismissal rights (Part X ERA)

18. Although the Claimant has referred to being employed by NHS for 23 years in aggregate, and refers to a gap of less than 2 years within that period (ie when not employed in NHS at all), he accepts that his employment with the entity Frimley ICB was between the dates stated in the claim form (only) and was less than two years.

19. Health authorities are not "associated employers" for the purposes of S.218(6) ERA and there does not appear to be any reasonable prospect of the Claimant using any other mechanism (within section 218 ERA or otherwise) to demonstrate that, for the purposes of Part X ERA, he had two years' continuous employment. In particular, section 218(8) does not apply.

20. Nor do the Claimant's arguments present any reasonable prospect that he can show that an exception to the requirements of section 108(1).

21. For those reasons, the Claimant's application to revoke the strike out judgment is refused.

Approved by:

Employment Judge Quill

Date: 30 October 2025

JUDGMENT SENT TO THE PARTIES ON

22 December 2025

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FOR THE TRIBUNAL OFFICE