



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Bardsley

**Respondent** Commissioners for Her Majesty's Revenue and Customs

## JUDGMENT ON A RECONSIDERATION

The claimant's application dated 5 February 2021, for reconsideration of the Judgment dismissing the claim on withdrawal sent to the parties on 26 January 2021, is refused.

### REASONS

There is no reasonable prospect of the original decision being varied or revoked, because:

1. I have considered the claimant's application for reconsideration of the dismissal Judgment. The application was emailed by the claimant and received by the Tribunal on 5 February 2021. It consists of 7 pages of tightly typed submissions. The respondent wrote to the Tribunal on 24 March 2021 with comments on the claimant's application, and it submitted a number of items of correspondence between the parties regarding the terms of the COT3 which are raised by the claimant. The respondent's comments were provided before the judgment of the Employment Appeal Tribunal in *T W White and Sons v White UKEAT/0022/21* was handed down and so I have taken the respondent's comments into account.

#### Rules of Procedure

2. Rule 72(1) of the 2013 Rules of Procedure empowers me to refuse the application without convening a reconsideration hearing if I consider there is no reasonable prospect of the original decision being varied or revoked.
3. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70). Broadly, it is not in the interests of justice to allow a party to

reopen matters decided, unless there are special circumstances, such as a procedural mishap depriving a party of a chance to put their case or where new evidence has come to light which could not reasonably have been brought earlier and which could have a material bearing on the outcome.

4. Rule 51 provides that when a claimant informs the Tribunal in writing, or in the course of a hearing, that a claim is withdrawn, the claim comes to an end.
5. Rule 52 of the 2013 Rules of Procedure provides that the Tribunal shall issue a judgment dismissing the claim upon withdrawal unless, at the time of withdrawal, either the claimant has expressed a wish to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so, or the Tribunal believes that the issue of a judgment dismissing the claim would not be in the interests of justice.

### **Background**

6. On 1 December 2020, the claimant wrote to the Tribunal to say that he had *“reached a settlement with the respondent, and that all claims under the above case number are withdrawn”*. The settlement was reached via ACAS and incorporated into a COT3 which had become legally binding on 30 November 2020.
7. On 15 December 2020, the Tribunal gave notice to the parties by letter, that the claim was withdrawn and the listed hearing was cancelled.
8. On 21 January 2021, I signed a judgment dismissing the claim upon withdrawal pursuant to rule 52. The dismissal judgment was sent to the parties on 26 January 2021.

### **The application**

9. The claimant’s application for reconsideration is based on a contention that the respondent had (a) misrepresented an aspect of the settlement reached between the parties, in clause 2-d of the COT3 and (b) breached the settlement agreement. The Tribunal has not been provided with a copy of the COT3 agreement.
10. The claimant contends that he was “misled” during the settlement negotiations into believing that he would be returned to the role of Business Manager for Reviews, a role that he had occupied before, as part of the settlement agreement. The claimant says that the respondent told him, in the course of negotiations, that the role of Business Manager for Reviews remained largely unchanged. However, the claimant has since been in touch with a former colleague who has informed him that the role of Business Manager for Reviews has been changed, in that it is said that 50% of the responsibilities have been removed, and that an announcement to that effect was made by the respondent on or about 12 November 2020 but the claimant was not told of it. A director of

the respondent has apparently told the claimant that he did not authorise such a change and was not aware of it until after the COT3 had become legally binding.

11. The claimant says that, on 27 January 2021, the respondent made a further announcement in relation to the role of Business Manager for Reviews, as a result of which the claimant believes he cannot return to that role because the respondent had filled the 2 halves of the newly split role with 2 other employees. The claimant contends that the respondent's conduct in relation to the role of Business Manager for Reviews creates an estoppel and is a continuation of the discriminatory treatment which he alleged in his claim and that he has suffered emotional and reputational damage in consequence of the respondent's actions.
12. The claimant refers to the case of *Cole v Elders' Voice UKEAT/0251/19*, in which it was held that a Tribunal can go behind a settlement agreement in a COT3 and look at without prejudice correspondence in circumstances where a claimant alleges misrepresentation which might invalidate the COT3. The claimant requests that the Tribunal investigate the circumstances relating to the alleged misrepresentation and he contends that the Tribunal can set aside the COT3.
13. The claimant also argues that the respondent's actions, after concluding the COT3, constitute a continuing course of discriminatory conduct about which he believes he has no redress unless the Tribunal declares the COT3 invalid and reinstates his claim. In addition, the claimant has expressed a fear that he will be the target of further "unacceptable behaviour" from the respondent and that, without the reinstatement of his claim, the respondent will have no incentive to address or remedy its behaviour towards him.

#### **The respondent's comments on the application**

14. The respondent accepts that, at the date upon which the COT3 was concluded, the role of Business Manager for Reviews was not unchanged because, on the day of signing the COT3, a restructure took effect under which the duties of two Business Managers were reallocated by type of work, albeit that the grading, pay and management responsibilities of the Business Managers were unchanged. The respondent explained that its personnel who conducted settlement negotiations with the claimant were not aware of the restructure. However, the respondent says that the claimant has since been assured that the respondent would seek to accommodate him in the role of Business Manager in the new structure. Further, the respondent says it has honoured other terms of the COT3 and in particular has paid the claimant a sum of money as part of the settlement. The respondent contends that the COT3 is not void for misrepresentation and that the claimant has recourse for any alleged breach of contract through the county court.

15. In the alternative, the respondent had invited the claimant to elect to avoid the COT3 whereupon the respondent says it would consent to the revocation of the dismissal judgment but the claimant has declined to concur. The respondent opines that, in the event that the claimant had agreed to this proposed course of action, it considers that the parties might be able to remedy the situation through further settlement negotiations.

## Conclusions

16. Despite the lengthy and detailed points raised in his application, there is no reasonable prospect of the claimant establishing that the Tribunal made an error of law, or that the issue of a dismissal Judgment pursuant to rule 52 upon withdrawal of the claim was perverse. Such contentions are in any event better addressed in an appeal than by way of reconsideration.
17. In particular, I consider that the effect of rule 52 is that, following a withdrawal, the Tribunal must issue a judgment dismissing the claim subject to the two exceptions set out in rule 52. If a claimant wants to bring the same or a similar claim against the respondent in the future, he must make his intentions known at the time of withdrawal in order not to lose the right to do so. I am mindful of the doctrine of cause of action estoppel, whereby an order dismissing proceedings operates as a bar to any future proceedings being brought in respect of the same subject matter. Rule 52 of the 2013 rules of procedure brought the Employment Tribunal's procedure into line with that in the civil courts which draws a clear distinction between the dismissal and the discontinuance of proceedings, as in CPR rule 38.7.
18. In this case, the claimant did not indicate at the time of withdrawal that he wished to bring similar proceedings against the respondent in future. There was nothing to suggest that the claimant's withdrawal was ill-considered or irrational nor was there any grounds to believe that that it might not be in the interests of justice to dismiss his claim upon withdrawal. The claimant's withdrawal was clear, unequivocal and unambiguous; the reason for withdrawal was that a settlement had been reached. The Tribunal has no jurisdiction to set aside a notice of withdrawal of a claim, per *Khan v Heywood and Middleton PCT [2006] EWCA Civ 1087* and the Tribunal is not obliged to make enquiries about the circumstances which led a party to withdraw. In any event, in this case there was nothing to suggest anything untoward – the parties has settled. Accordingly, a dismissal judgment was issued pursuant to rule 52, which is mandatory, and the claimant lost the rights he now seeks to restore.
19. In deciding the claimant's application for reconsideration, I have considered the judgment of the Employment Appeal Tribunal in the case of *Campbell v OCS Group [2017] UKEAT/0188/16 (11 April 2017, unreported)* in which it was held that different considerations shall be applied to an application to reconsider from those relevant to the rule 52 dismissal decision, particularly the interests of justice test under rule 52(b) and that in rule 70. In *Campbell* it was held that, at the stage of reconsideration, the Tribunal should look at all the circumstances

of the case, not limited to what was expressed at the time of withdrawal but also including matters arising after the date of the dismissal decision. In the instant case, I have considered the circumstances occurring in the period after the claimant's withdrawal and also after the dismissal decision, taking account of the fact that the referral to an Employment Judge for dismissal had been delayed by the current administrative backlog.

20. Having regard to the following matters, I do not consider that it would be in the interests of justice to revoke the dismissal decision sent to the parties on 26 January 2021.
21. It is not in the interests of justice to allow the claimant to present a fresh claim based on the same facts, merely because he takes issue with one aspect of the COT3. The claimant's view of the term in question arises because he has been told that the role of Business Manager has changed. The claimant believes such change to be to the extent that he is unable to return to the role at all. His belief appears to be based largely on hearsay from third parties and is disputed by the respondent which maintains that the claimant can nevertheless be accommodated in such a role within its restructure. I consider that where a dispute exists as to the implementation and effect of a single term, that is not a legitimate basis for revoking the dismissal of these proceedings altogether. It is arguable that the claimant should have waited to ensure that the terms of the settlement were implemented, before withdrawing his claim, in light of the mandatory nature of rule 52.
22. The claimant also seeks a declaration that the COT3 is void in light of a misrepresentation which affects a single term. I do not consider it appropriate, in dealing with the claimant's application for reconsideration of the dismissal judgment, to embark on an adjudication on the validity or implementation of the terms of the COT3. In the case of *Cole v Elders' Voice UKEAT/0251/19* it was held that a Tribunal can go behind a settlement agreement in a COT3 and look at without prejudice correspondence in circumstances where a claimant alleges misrepresentation which might invalidate the COT3. However, *Cole* concerned an appeal against a decision that a Tribunal did not have jurisdiction to hear a claim where a COT3 had been concluded in respect of one of the respondents. The claim had not been withdrawn nor dismissed as it has been in this case. The Employment Appeal Tribunal did not decide whether the COT3 in *Cole* was in fact invalid nor did it consider how a declaration as to its validity might impact on a dismissal judgment under rule 52, if at all.
23. I am mindful of the doctrine of finality in litigation. I consider that rule 52 was introduced to ensure finality. To proceed to revoke a dismissal judgment in circumstances where a party, later, has second thoughts about any aspect of a settlement or later forms a view that the settlement had not produced the result anticipated, would negate the intention of rule 52 and offend the principle of finality.

24. I do not agree with the claimant's contention that he has no recourse to litigation if the dismissal judgment stands. In the event of breach of a term of the COT3, where other term(s) have been carried out as in this case, the proper course is for the claimant to pursue an action for breach of contract in the county court.
25. Likewise, if the claimant wishes to pursue a further claim about the respondent's conduct towards him in the period after the settlement was agreed, he is able to do so. A new claim about matters arising since the settlement cannot, as a matter of public policy be compromised by a COT3 where such matters were not in the contemplation of the parties at the time the COT3 was agreed. What the claimant cannot do is to bring a fresh claim based on the same facts as the claim which has been settled.
26. I have also considered the prejudice to the respondent if the dismissal judgment is revoked. I cannot ignore the fact that the respondent has performed other terms of the COT3; in particular it has paid the claimant a sum of money which it would no doubt wish to recover. The claimant has indicated that he is in a parlous financial state, from which I understand that he may not immediately be able to repay the settlement monies if the COT3 were to be set aside. It is entirely possible that such a situation would therefore provoke further litigation which is undesirable.
27. I also take account of the fact that the claimant had time to reflect, between his withdrawal on 1 December 2020 and the issue of the dismissal judgment on 26 January 2021. The claimant did not contact the Tribunal until 5 February 2021 to raise the issue of the respondent's apparent failure to honour a term of the COT3 even though the situation now complained of arose some time before then. It was incumbent upon the claimant to act promptly in that regard. The administrative delay in issuing the dismissal judgment afforded the claimant almost 2 months in which to notify the Tribunal of a matter that might affect the decision to dismiss the claim upon withdrawal but he did not do so. Any recourse he may have now lies elsewhere.

## **Summary**

28. Having considered all the points made by the claimant I am satisfied that there is no reasonable prospect of the dismissal judgment being revoked. The application for reconsideration is refused.

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Employment Judge Batten  
Date: 28 May 2021

JUDGMENT SENT TO THE PARTIES ON:

7 June 2021

FOR THE TRIBUNAL OFFICE