Appeal No. UKEAT/0231/15/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 24 November 2016

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

MS A LEADER — APPELLANT

THE BOROUGH COUNCIL OF BOLTON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES STUART (of Counsel) Bar Pro Bono Scheme
For the Respondent	MS AMY SMITH (of Counsel) Instructed by: Borough Council of Bolton Legal Department Town Hall Bolton BL1 1RU

SUMMARY

PRACTICE AND PROCEDURE - Review

PRACTICE AND PROCEDURE - New evidence on appeal

DISABILITY DISCRIMINATION - Disability related discrimination

The Employment Appeal Tribunal ("the EAT") dismissed an appeal against a Decision of the Employment Tribunal ("the ET") refusing to reconsider an earlier Decision ("Decision 1"). The EAT held that the application for a review did not explain what was said to be wrong with Decision 1, and that the ET was not obliged to carry out a general re-investigation of Decision 1 in order to see whether it could detect any error in Decision 1. The ET refused to reconsider Decision 1 on the grounds that there was no reasonable prospect that Decision 1 would be revised or revoked and that the application for a review was out of time, and no reasons had been given for the delay. The EAT did need to, and did not, decide whether or not the ET was entitled to refuse to reconsider Decision 1 on the grounds that the application was out of time. On the face of it, there was no flaw in the ET's approach. However there had been various procedural mishaps. The EAT would have required those to have been investigated before it could reach a final view on this issue.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. This is an appeal from a Decision of an Employment Tribunal sitting at Manchester ("the ET") sent to the parties on 2 February 2015 ("Decision 2"). The ET consisted of Employment Judge Robertson ("the EJ"). The ET refused to reconsider its earlier Judgment of 9 July 2014 ("Decision 1"). Decision 1 had been announced orally at a hearing on 3 July 2014. Decision 1 was a Judgment on the disability issue in this case, and it also contained case management Orders. A written record of Decision 1 was sent to the parties on 9 July. In breach of Rule 62(3) of Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the 2013 Rules"), that written record did not say that the parties could apply within 14 days for Written Reasons of the Decision. The written record referred to Rule 29 of the **2013 Rules**, which permits case management Orders to be varied without limit of time, but it did not refer to Rule 71 of the **2013 Rules**, which allows parties to apply within 14 days of Decision for that Decision to be reconsidered.

2. I shall refer to the parties as they were below. The Claimant was represented by Mr James Stuart under the auspices of the Bar Pro Bono Unit, and the Respondent was represented by Ms Amy Smith of counsel. I am grateful to both counsel for their written and oral submissions, and I record in particular my gratitude to Mr Stuart for doing this case pro bono. He has been of great assistance to the court.

3. This appeal and its preliminaries have unfortunately been beset by delays. There was, first, an unfortunate delay between the date when the Claimant applied for a reconsideration - or, in her words, a "variation" - of Decision 1 and the date when that application reached the EJ.

The fact that she had made the application only came to light in January 2015 when the case was listed for a substantive hearing. Her mention of her application for reconsideration led to that hearing being postponed. The date of the application appears to have been 1 August 2014, as the application was made by email, and attached to the email of 1 August 2014 was a document asking for a variation of the Decision. As HHJ Hand QC pointed out in his Judgment on 2 June 2016, the application for the reconsideration was nine days late (see his Judgment, paragraph 14). This was not, he observed in that paragraph, such a short delay.

4. There was also considerable delay before the EJ provided Written Reasons for Decision 1. There is a dispute, which I cannot resolve, about whether the Claimant was told in July 2014 whether at the hearing, or in some document sent when the Judgment was sent to her, that she could ask for Written Reasons of the Decision. I have already noted the deficiency in the written record of the Decision. In any event, she did not ask for any Written Reasons at the time. There was therefore no reason for the EJ to provide any Written Reasons until he was ordered to do so by this Tribunal in an Order sealed on 10 December 2015. To the EJ's credit, he duly provided those Reasons on 8 January 2016. I should also record that there have been delays in resolving the question of whether or not there should be a Full Hearing of this appeal.

5. In Decision 1, in short, the ET decided that the Claimant was a disabled person only in respect of her leg oedema and only from 1 June 2013. In Decision 2, in short, the EJ gave short Reasons for refusing the Claimant's application for a reconsideration of Decision 1. Those Reasons were, first, that the application was out of time and, secondly and in any event, that it was without merit. The Claimant's case in this appeal is that those were Decisions to which no EJ properly directing himself on the law could have come.

6. On 6 March 2015, Langstaff P (as he then was) decided on the papers that the appeal raised no arguable point of law pursuant to Rule 3(7) of the **Employment Appeal Tribunal Rules** ("the Rules"). On 13 May 2015 there was a hearing under Rule 3(10) of the **Rules**. The Claimant was represented by Ms Mallick of counsel under the auspices of ELAAS. HHJ Eady QC adjourned the application as it was not possible for her to decide it without having seen the Claimant's application to the ET for a reconsideration. There was a further hearing under Rule 3(10) of the **Rules** before HHJ Eady QC on 12 August 2015. The Claimant was represented by Mr Rajgopaul of counsel; he too was acting under ELAAS. HHJ Eady QC ordered a hearing at which the Respondent could attend. She ordered the Claimant to lodge amended grounds of appeal. Those were duly provided on 12 August 2015.

7. There was a further hearing, before HHJ Hand QC, on 9 December 2015. The Claimant was again represented by counsel, Mr Stuart, who represented her today, acting under ELAAS. The Respondent was represented by Ms Smith. HHJ Hand QC decided that the appeal could not be considered without the EJ's Written Reasons for the Judgment of July 2014. On 9 December 2015 he ordered the EJ to produce those. As I have said, the EJ duly complied with that Order. There was then a regrettable delay in relisting the matter before HHJ Hand QC because of his other judicial commitments. He apologised for that delay in his Judgment. The appeal was allowed to go forward for a Full Hearing by HHJ Hand QC after a hearing on 2 June 2016 at which both sides were represented. Although the Order made after that hearing records that the appeal was allowed to proceed only on ground 3, I am satisfied from reading the Judgment given by HHJ Hand QC that he intended that the appeal should also go forward on the question of whether the Employment Judge should have extended the Claimant's time for applying for the reconsideration, and I have considered both issues today.

The Evidence Before the EJ When He Made Decision 1

8. The EJ had two witness statements from the Claimant. The EJ heard sworn evidence from the Claimant. He had a letter from her GP dated 22 April 2014. This recited that its author had been asked by the Claimant to provide a report "with regards to the medical problems that have impacted on her ability to work". The letter said that the Claimant had:

> **"… unfortunately had a number of health issues including low back pain, chronic swelling of both her legs with leg cramps, which have been occurring after prolonged periods of standing. She has also suffered from stress with disturbed sleep, poor concentration and extreme fatigue. She is currently taking Water tablets for her leg swelling, and she is awaiting counselling for her stress. I hope this information is of help."**

The letter is signed by Dr Mihajlovic.

9. There was also a two-page document headed with the Claimant's name and date of birth. Under that, it was headed "Confirmation of Illness and Conditions". The EJ in his Written Reasons called this a "curious document". I agree. The font seems to be the same font as that which the Claimant prefers. So, it looks as though this document is a document that she made. It lists various conditions: "back pain", "mid - to upper back pain & burning sensation", "chronic odema [sic]", "head injury", "stress" and "leg cramps". The "Current Situation" of each is said to be "Ongoing". To each is attributed a "History" and a "Current Diagnosis". The information about "chronic odema [sic]" is that the Claimant has had symptoms for seven years, "Regular flare ups but significant" and "extreme flare up: June 2012 and May 2013". The document then says, "Current Diagnosis: June 2013". The information about stress is "History: Ongoing but flare up in May and December 2013. Diagnosis: Awaiting Counselling". This document is not dated. At the foot of the second page is the text "Confirmation of the above according to our records". Against the word "Signed" is an illegible signature, which the Employment Judge held was the signature of the GP who had

signed the letter dated 22 April 2014; that is, Dr Mihajlovic. Under the signature are the words "For Range Surgery". Below those words is what looks like a stamp of the doctor's surgery.

10. One of the witness statements from the Claimant was dated 30 June 2014. This describes her back pain, which she has had since 2004 and "flare up" in May 2012 (paragraphs 2 to 8). She said she contracted a virus in 2006, she had swelling in her hands and feet, she had a "severe flare up" in 2008, her GP treated her and she was off work for four weeks. She said that "these flare ups" continued over the next few years. She had severe "flare ups" again in June 2012 and May 2013, when she sought medical help. It is not clear whether she sought medical help both times or only once and, if so, when. She described her symptoms. She said she was signed off work but did not say when or for how long. She said she was diagnosed with chronic oedema but does not say when. She said that she was issued with surgical tights and stockings and given medication; she did not say when. She referred to leg cramps and said that the GP was managing those with medication. She also said in the witness statement that she has a history of stress. She was off work for four weeks with stress and depression in 2008. She had flare ups in 2012 - no dates were given - and in May and December 2013 "due to ill health". She sought medical help for this and high blood pressure "in 2013"; she gave no dates for that. She was diagnosed with extreme fatigue and stress, and she has had counselling; again, she gave no dates for that. She also described the effects of a head injury after an assault in 2013; she gave no date for that. She was advised to have complete rest in October 2013. The symptoms are all recounted in the past tense.

11. I see from the documents in the bundle that the Claimant was sending documents about her claimed disabilities to the Respondent from May 2014 onwards. It seems that there had been a case management Order on 16 April 2014 requiring the Claimant to provide details of

her claimed disabilities (see page B3 of the bundle). She had therefore had ample opportunity to submit evidence about her medical conditions in time for the hearing in July 2014 on the issue of disability.

The Case Management Order

12. After the hearing on 3 July the Judgment and case management Orders were sent to the parties on 9 July 2014. The Judgment was that the Claimant was a disabled person within section 6 of the **Equality Act 2010** ("the 2010 Act") from 1 June 2013 by reason of leg oedema but not otherwise. Paragraph 3 of the Orders recorded that the Claimant had not sought to pursue any contention that she was also a disabled person by reason of a head injury and/or stress or depression. The EJ said that the claim was inadequately particularised. He ordered the Claimant to provide Particulars (see paragraph 8 of the Order). The substantive hearing was then listed for 26-28 January 2015 inclusive. I have already commented on the formal deficiencies in this record of the Decision. I have not seen any covering letter that may have been sent with it.

The EJ's Written Reasons for Decision 1

13. The EJ concluded that the Claimant had a disability within section 6 of the **2010 Act** at all material times for the claim from June 2013 by reason of oedema but not otherwise. The EJ set out the relevant statutory provisions: that is, section 6 of and paragraphs 2 and 5 of Schedule 2 to the **2010 Act**. It is not suggested that in these passages he misdirected himself in law. One important point to emerge from this is that for "P" to have a disability for statutory purposes he or she must have an impairment that has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. An effect of an impairment is long-term if it

A has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of P's life.

B 14. The EJ also referred in the Decision to the statutory guidance and to the definition of "substantial" in section 212 of the **2010 Act**. The EJ summarised the Claimant's case. He recorded her concession at the start of the Preliminary Hearing that the effects of her head injury were not long-term and that though she had relied on stress in her disability impact statement she did not seek to rely on that either.

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D 15. The EJ set out her evidence about her back pain and oedema. Her evidence was that after flare ups in June 2012 and May 2013 she had tests in hospital that led to a diagnosis of chronic oedema. This followed visits to her GP for several months with swelling of her legs and difficulty walking. Since then she has taken tablets and worn surgical stockings when necessary. She gave evidence of the effect of these impairments on her everyday activities. The EJ said that he found her evidence "vague and imprecise" (paragraph 13). The effects of the impairments on her mobility were essentially the same. He was troubled by the subjectivity of the term "major flare ups". She did not seek medical advice after such a "flare up" of back pain in April 2011. He recorded her evidence about her oedema at paragraph 14 of the Decision. Her evidence was that the effects of her back pain became substantial in June 2012 and those of her oedema in March 2012.

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G 16. The EJ then quoted the whole of Dr Mihajlovic's letter. He rightly said that it did not identify the duration or severity of either condition or describe their effects on the Claimant. It did not identify treatment for the back pain or say how the Claimant would be without the "water tablets". The words "long periods of standing" were unhelpfully imprecise, the EJ said.

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17. The EJ then referred to the "curious document", which I have already described. He said it had clearly been written by the Claimant but countersigned by Dr Mihajlovic as "confirmation of the above according to our records". He did not regard the document as "medical confirmation" that the Claimant had suffered "extreme flare-ups". As the EJ said, "That is not a medical term". The document simply confirmed, the EJ said, that the Claimant's description of events accorded with the practice's records.

18. The EJ had to decide on the evidence whether the Claimant's two impairments singularly or together meant that she had a disability within section 6 of the **2010 Act**. He had to focus on their effects on the Claimant's ability to carry out normal activities, specifically with regard to her mobility. He had to decide when she became disabled for the purposes of section 6. The Employment Judge said that he came away from the evidence with the impression that the mobility issues arose principally from the chronic oedema. This is what had made the Claimant seek medical help for difficulty with walking. He accepted that she had suffered from back pain since 2004 but said that the effects of this had always been minor (Judgment, paragraph 22). Except at the very outset, she did not seek medical help for it until 2012. He had no evidence, he said, about the effect of the pain management programme. He concluded that the Claimant was not a disabled person as a result of that condition.

19. He said, however, that he reached a different conclusion in relation to the chronic oedema. He found that from June 2013 this substantially affected her mobility and her ability to walk, to drive or to stand for more than ten minutes. That, he said, was more than minor or trivial. He said that the Claimant described an initial episode in 2006 and a further episode in 2008. Each time, the Claimant consulted the GP and the effects were resolved quickly. He did not know what treatment she was given. He had no evidence that at that stage the condition

A was likely to recur. The GP's report was silent about that. The Claimant did not suggest that she was told in the early stages that it was likely to recur. He referred to evidence about the episodes in June 2012 and May 2013. He found that these episodes were more severe. By May 2013 she had been consulting her GP for some months about the issue. In June 2013 she was diagnosed and started regular treatment. By the beginning of June 2013, he concluded, it was clear that the condition was a chronic condition that was likely to last for 12 months, and from June 2013 she was a person with a disability by reason of that condition.

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The Application for Reconsideration

20. Mr Stuart told me on instructions that the Claimant wrote to the ET two to three weeks before 1 August 2014 in order to see if the date in the Judgment could be changed. She spoke to the ET, he told me, on the telephone. He told me that her instructions were that she was told by the ET to make a formal application. These matters were referred to at the hearing in front of HHJ Hand QC, as one can see from his Judgment. Ms Smith submitted that there was no copy of this letter and that all the correspondence that we have seen from the Claimant had been by email. She said that this letter was not referred to at the January 2015 Full Hearing when the application for reconsideration had first come to light. She was counsel who was instructed to represent the Respondent at that hearing. I assume (for the time being) in the Claimant's favour that these events that were recounted by Mr Stuart on instructions did happen.

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G 21. It is not in dispute that the Claimant sent an email dated 1 August 2014 to the ET. The Respondent says that it was not copied to the Respondent, and certainly the text of the email itself and its header do not suggest that it was copied to the Respondent. The text simply said, "Please note attached variation request", and the email was of course addressed to the ET. A document with the case title and the heading "Variation of order request" was attached to the 1

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August email. That document said that the Claimant had completed Further Particulars in accordance with the case management Order and had realised that the Order's constraints about "Medical conditions to be included" and "Timescales I am allowed to use" "Currently put my case at a serious disadvantage". By this, the Claimant meant, in my judgment, that the majority of what she saw as disability discrimination had happened to her before she had a formal diagnosis and before the date found by the EJ in Decision 1. She wanted to rely on all the conduct that she saw as disability discrimination. Mr Stuart accepted in his oral submissions that in this respect the application put the cart before the horse.

22. The Claimant went on to say in her application that it had been suggested that "no credible" medical evidence had been presented, but, she said, she had produced a letter and a report:

> **"I went to great lengths to ensure that my GP produced and signed off a document detailing my medical journey. This is credible because it is signed by my GP and stamped at the practice where I am being treated."**

23. She asked for the Order to be varied to:

> **"… include dates of the main discrimination from January 2012 - to [October] 2013**
>
> **… inclusion of the other health conditions in my disability claim"**

24. She asked for time to resubmit a "full version of events". She then went on to complain about the Respondent's conduct of the case.

The Refusal of the Application for Reconsideration Sent to the Parties on 2 February 2015

25. The EJ recorded that the hearing had been adjourned when it was discovered that the Claimant had applied for a reconsideration. The EJ apologised for the fact that the Claimant's application had not been referred to him when she had made it. He had considered the

application and decided that it should be refused for two reasons: first, it was out of time; and secondly, there was no reasonable prospect of the earlier Judgment being revised or revoked.

26. As HHJ Hand QC pointed out in his Judgment on the inter-parties hearing the EJ mistakenly thought that the time limit for applying for a reconsideration was 21 days. In fact, the time limit is 14 days. The EJ therefore thought that the Claimant's application was only two days out of time when in fact it was nine days out of time. The EJ said that there was no explanation in the application for the lateness of the application. The EJ therefore thought that there was no material on which he could base the exercise of his discretion to extend time, and he refused to do so. He then concluded that there was "no reasonable prospect of my judgment being varied or revoked". He carefully considered the relevant evidence at the July hearing, including material obtained by the Claimant from her GP. The Claimant asked him to reconsider his decision because it constrained her "in terms of the allegations she can pursue". He said that that may well be true but he had considered the evidence carefully and there were no grounds for him to revisit it.

27. It is convenient here, although it is slightly out of chronological sequence, for me to deal with a letter dated 18 August 2014. The Claimant's GP wrote a further letter, dated 18 August 2014, addressed "To Whom It May Concern". It said:

> **"Subsequent to my previous letter [about the Claimant] I am writing to confirm that she has suffered from chronic leg swelling since October 2008. She has had subsequent exacerbations of her ankle swelling in May 2012 and in July 2013 when she was again assessed at the surgery."**

28. This letter could not have been before the EJ at the June hearing. It is from the same GP as the April 2014 letter. There is no reason, however, why the information it contains could not have been put before the ET at the June hearing. I do not know if it was before the EJ when he

considered the application for reconsideration. I suspect not, because if it had been I imagine that he would have referred to it. I note at this stage that it is in three respects inconsistent with the "curious document". It gives different dates for each of the two "flare ups"/"exacerbations" and for the period for which the Claimant is said to have been suffering from chronic oedema. HHJ Hand QC recorded at paragraph 8 of his Judgment that Mr Stuart's instructions were that the letter was sent to the ET at some point and that it was or should have been before the EJ when he made his decision in January 2015. At paragraph 44 of his Judgment HHJ Hand QC said that he did not know if the letter had in fact been before the Employment Judge.

Submissions on the Time Issue

29. Mr Stuart on behalf of the Claimant makes seven points in support of his argument that the appeal should be allowed on the time point. He relies on the short length of the delay, and he submits that that short delay should be seen in the context of the overall process which in fact occurred in this case; in other words, that a substantive hearing had been listed for 2015 and that by the time the EJ in fact came to consider the application for reconsideration that hearing had been adjourned and a considerable delay had occurred. He relies on the fact that this short delay in the scheme of things causes no prejudice to the Respondent. He relies on the fact that, as he submits, the Employment Judge knew that the Claimant had a history of medical problems including stress and lack of concentration and that as at April 2014 she was awaiting counselling for her problem with stress. He relies on the fact that the Claimant was unrepresented and was not told of her ability to apply for a reconsideration under Rule 71 at the hearing or in the Written Judgment or Order. He submits that it would not be easy for her to find out about Rule 71 or that there is a very short deadline under Rule 71 of 14 days.

30. He also submits that at the time that the Judgment was sent out it referred to Rule 29, which is a Rule that applies no time limit for an application to vary a case management Order, but did not refer to Rule 71 with its strict time limit of 14 days, and he also relies on the fact that in breach of Rule 62(3) of the **2013 Rules** the written record of the Decision did not contain the information that it was open to the parties to apply within 14 days for Written Reasons for the Decision. He submits that all of these matters are relevant to the exercise of the discretion to extend time.

31. Ms Smith submits that the delay by the ET postdates the application for a reconsideration by the Claimant. She says that the delay by the Claimant is in and of itself a not insignificant delay and that the subsequent delay by the ET is logically irrelevant to the question of whether or not time should be extended for the Claimant to make her application. She submits that the delay by the ET should not, as she puts it, give a free pass to the Claimant to make her application late. She submits that it is not enough to point to the fact that there was evidence before the EJ in July 2014 to suggest that the Claimant was suffering from stress or that she was getting counselling. There was simply nothing in the application itself which explained the delay in applying for reconsideration, and this was in the context of the fact that the Claimant is an intelligent, well-educated lady who, although she was unrepresented, had put in an ET1, two sets of Further and Better Particulars, and two witness statements.

My Decision on the Time Issue

32. Had the application stood on its own, I do not consider that the EJ's decision on the time point could have been faulted. In my judgment, the strict time limit should be observed unless material is put before the EJ that persuades him that in the interests of the overriding objective time should be enlarged pursuant to Rule 5 of the **2013 Rules**. The application does not stand

on its own, however. The context includes a series of procedural mishaps. First, the application was not put before the EJ promptly when it was made; secondly, the application was not considered until many months later; and thirdly, the Claimant was not told of her right to apply for Written Reasons, in breach of Rule 62(3) of the **2013 Rules**. Moreover, there is some material that might suggest that the Claimant made an earlier approach to the ET, in July 2014. I consider that if that material had been on the file the EJ would have been aware of it. So, I infer that that material was not on the file. The earlier approach, if made, is a key factor, in my judgment, but at the moment there is no satisfactory evidence about this letter. I simply have it on instructions from Mr Stuart. There is no signed witness statement from the Claimant with a statement of truth, and, as Ms Smith pointed out, this approach to the ET only emerged in June this year, nearly two years afterwards. I would have required a witness statement, and I would have given an opportunity to Ms Smith to cross-examine the Claimant on that witness statement, before deciding whether there had been a sufficient procedural mishap in this case in order to entitle this Tribunal to intervene on an appeal, but this is academic in view of the decision that I have reached on the merits of the application, the issue to which I now turn.

Submissions on the Merits

33. Mr Stuart submitted that the material before the EJ, which included a reference in the ET3 to a prolonged period of sick leave between 11 May and 8 November 2012, when coupled with the 18 August letter, should have meant that the EJ sought further evidence from the GP about the duration and severity of the lower back pain and oedema. He submitted that the 18 August letter provided clarification. He next submitted that the EJ should have looked at the Claimant's request for reconsideration of the start date of her oedema in the round. He should have looked again at his analysis in the light of her request. He had, or should have had, in his papers the 18 August letter, which further explained the position. It was clear that the oedema

was a longstanding condition dating back to 2008 at least. He further submitted in his skeleton argument that it was undesirable to reach a conclusion on the issue of disability at this early stage. If the EJ had taken a further look at his reasoning in the light of the application for reconsideration, he would "probably have altered his decision as to the date of the oedema disability" (paragraph 6).

34. Ms Smith submits that the application for reconsideration is no more than an expression of the Claimant's disagreement with the outcome. She submits that the Claimant is saying, "You got it wrong", but is not saying, "You got it wrong because …". She submits that the Claimant identifies in the application no error in the EJ's approach. What the Claimant is doing, submits Ms Smith, is simply to say that she does not like the outcome. Ms Smith submits, further, that the Written Reasons show that the EJ carefully considered all of the evidence, directed himself correctly in law and reached a decision that was open to him. There was nothing in the application that suggested that he had made any mistake of law or fact in that assessment. She submitted that it was "a solid Judgment" and that was the background to the application for reconsideration. She submitted that one could contrast a situation in which there was an obvious error in the Judgment to which an application for reconsideration had been addressed.

My Decision on the Merits

35. I should deal first of all with the letter of 18 August 2014. The question in relation to this letter is what impact it should have had on the EJ's approach to the application for reconsideration, assuming, for the moment, that it was before him. Ms Smith submits, rightly in my judgment, that this letter was or would have been at that stage for that purpose "new evidence". HHJ Hand QC said in his Judgment that the letter did not take matters much further.

A I agree. There are two key points. First, it does not provide any warrant for a conclusion that the Claimant has been "disabled" for statutory purposes with leg oedema since October 2008 or indeed at any time before June 2013. Secondly, it does not give the same dates as the material that was before the EJ, which is said to be based on the Claimant's notes at the same surgery. That material describes extreme flare ups in June 2012 and in May 2013. The letter described "exacerbations" in May 2012 and July 2013, and there is a discrepancy in the dates from which the oedema is said to have started.

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36. In any event, even if this letter had been put before the EJ at some point between 18 August and the date of his Decision to refuse the application for reconsideration he would have been bound, in my judgment, to ignore it. There are two reasons for that. First, it was material that the Claimant could and should have obtained for the July hearing. She has not explained why it was not provided for that hearing. Secondly, it does not give any grounds for thinking that the July Decision was wrong. If anything, it muddies the waters of the medical evidence more than those waters were muddied before the letter was written. There are, in my judgment, no reasons to admit it. The criteria in **Ladd v Marshall** [1954] 1 WLR 1489 are not met. This is miles away from being an exceptional case in which it could possibly be proper to relax those criteria. In that regard, it resembles the facts of **Outasight VB Ltd v Brown** UKEAT/0253/14, a case that Mr Stuart referred to in his skeleton argument.

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G 37. I have set out the primary materials and parties' submissions at some length. I can give my decision on the merits of the substantive part of the appeal quite shortly. In short, I accept Ms Smith's submissions. In my judgment, the application for reconsideration provided no grounds on which a reasonable EJ could have decided that there was any prospect of revoking his original Decision. The application simply fails to explain what any such grounds might be.

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What it does instead is to assert that the Claimant would like a different result. It is not, in my judgment, for an EJ on receiving such an application, which provides no reasoning and support of the suggestion that the Decision should be reconsidered, to sift through all of the primary materials again looking for a possible error in his approach.

38. For those reasons, I dismiss this appeal.