



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Okon

Respondent: Home Office

At: London South Tribunals

Before: Employment Judge Freer

Members: Ms. Y Walsh
Mr. M Walton

JUDGMENT UPON A RECONSIDERATION

It is the unanimous judgment of the Tribunal that the reserved judgment promulgated on 07 March 2018 remains the same but the reasons for the judgment are varied to the effect that the conclusion to alleged reasonable adjustment (6) is changed to one of a failure by the Respondent in its duty to make a reasonable adjustment.

REASONS

1. The Claimant has made an application for a reconsideration of the judgment of the Tribunal promulgated on 7 March 2018, specifically the decision that it was not a reasonable adjustment for the Respondent to pay for a return taxi journey for the Claimant from her home in Deptford to New Cross Gate railway station.
2. EJ Freer determined that the application was not refused under rule 72(1), the Respondent provided its response to the application and the parties agreed that the matter can be determined on the papers and without a hearing.
3. The application has been considered by the full Tribunal.
4. It should be stated that although the members of the Tribunal are all familiar with South London one way or another, they had no knowledge of the train connection from New Cross Gate to East Croydon at the material time, particularly any which might be put to the parties for confirmation. The Tribunal was reliant entirely on evidence from the parties in the usual way.

5. The Tribunal has referred itself to Rules 70 to 73 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Rule 70 provides: “A 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. On reconsideration, the decision (“the original decision”) may be confirmed, varied or revoked. If it is revoked it may be taken again”.
6. Although the Tribunal was not specifically referred to any law by the parties, it has referred itself to the relevant authority of **Outsight VB Ltd – v- Brown** UKEAT/0253/14, which provides guidance on the approach to ‘interests of justice’ under the 2013 Tribunal rules and the relationship with the separate categories of review formerly under the 2004 Rules, and the well-established case of **Marshall –v- Ladd** [1954] 3 All ER 745, CA (see below).
7. The Tribunal has reminded itself of the general principles that its discretion must be exercised judicially, with regard to the interests of both parties and the public interest requirement that, as far as possible, there should be finality of litigation. Also, when exercising its discretion, the Tribunal must seek to give effect to the overriding objective under Rule 2.
8. The Tribunal accepts that the Claimant raised the availability of a fast train from New Cross Gate to East Croydon in her pleadings. However, given the pleadings are not entirely clear about the reasonable adjustments suggested as part of the claim, it is not altogether surprising that the Respondent did not specifically plead to the point in its Response.
9. However, the matter was in issue at the time of the Tribunal hearing and the suggested adjustment of: *“To pay for a taxi from the Claimant’s house to New Cross Gate station and back again in the evening, allowing her to get a direct train to and from East Croydon with a much shorter journey time than travelling by bus and a shorter/less stressful/less expensive journey than travelling by train via London Bridge”* (see Tribunal reasons at paragraphs 100 to 123).
10. It was the single factor that gave the Tribunal the most difficulty in reaching its original decision, particularly given the sparse nature of the evidence.
11. It is correct that the Claimant raised in her witness statement the fact of there being a fast train from New Cross Gate to East Croydon at the material times (as is recorded by the Tribunal in its reasons at paragraph 104). Mr McCabe, witness for the Claimant, also stated the same in his witness statement. No further corroborative evidence was provided by the Claimant. It is correct that neither the Claimant nor Mr McCabe were cross-examined on the issue.
12. Ms Walton first raised the issue of a fast train not being available at the time from New Cross Gate to East Croydon in an answer to a question in cross-examination at the end of evidence on day three. The only documentary evidence relevant to the point was the timings Ms Walton calculated as part of

the grievance process, which the Tribunal refers to at paragraphs 104 and 105 of its reasons.

13. The Tribunal does not have the e-mail at page 587 marked as entered in evidence, as referred to by the Claimant in her application, but it does have marked the e-mail above it from Ms Julie Little where she advises Mr Lewsey to confirm whether the Claimant can use public transport at all. In any event that e-mail does not confirm the existence of a fast train from New Cross Gate to East Croydon.
14. The issue of a return taxi from the Claimant's home to New Cross Gate station was raised in the Claimant's grievance appeal letter (page 614), as confirmed in the appeal outcome letter (page 645) and which was considered not to be a reasonable adjustment, as confirmed by Ms Hutchison-Hudson in her witness statement (paragraph 12) and set out in the Tribunal reasons at paragraph 111.
15. At submissions the Claimant produced some train timetables relating to New Cross Gate to East Croydon, but they were current timetables and did not relate to the periods under review and were therefore not accepted into evidence.
16. The Tribunal has found this a very difficult matter to determine and it must be said that the Tribunal considers that the letter making the application for a reconsideration has put the matter with significantly greater clarity than it was at the hearing.
17. However, upon reconsideration the Tribunal concludes that it is in the interests of justice to vary its reasons to find that there was a fast train from New Cross Gate to East Croydon at the material time.
18. The evidence of the Claimant and Mr McCabe went unchallenged. The matter was raised and addressed at the appeal stage of the grievance process and was dismissed by Ms Hudson on the ground of costs only and which was subject to review by Access to Work. If Access to Work considered it was a cost that should have been made the Respondent would pay it (Tribunal reasons at paragraph 112). The suggestion was not rejected on the basis that the route was unavailable. The Claimant had proved the pcp, the detriment and led evidence on the fast train route as a reasonable adjustment. The Tribunal considers that in those circumstances it looks to the Respondent to show that the route was unavailable as a matter of fact and the Tribunal considers upon reconsideration that it did not place sufficient weight to the fact that the evidence of the Claimant and Mr McCabe passed unchallenged and as a consequence did not allow them an opportunity to address Ms Walton's contention of the unavailability of the route. On this basis it is in the interests of justice to reconsider the decision that there was no train route available between New Cross Gate and East Croydon at the material times. Upon reconsideration and giving appropriate weight to the fact the Claimant's evidence was unchallenged the Tribunal concludes that there was such a route.

19. Further or alternatively, the Tribunal has considered the issue of the new evidence supplied by the Claimant of train timetables for the material times.
20. The Tribunal has referred itself to the well-established authority of **Marshall – v- Ladd** (above) and the three criteria to be considered with regard to the reception of fresh evidence upon a reconsideration: “First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible”.
21. The Tribunal considers that the second and third criteria have obviously been met. On balance, although on the margins, having regard to the lack of cross-examination of the Claimant on the evidence of a fast train route being in existence, the raising of the matter late afternoon on the penultimate day by Ms Walton in answer to a question in cross-examination and the fact the train timetable records are in an on-line data-base of historic records, the Tribunal concludes that the first category has been made out and the timetable relevant to the period in question should be allowed as part of the reconsideration. Once accepted as fresh evidence, that material clearly demonstrates that it is in the interests of justice to reconsider the matter. There was a fast train route available at the material times as argued by the Claimant as a matter of fact.
22. The Tribunal has further considered whether, on a finding that the faster train journey from New Cross Gate to East Croydon was available at the time, it was a reasonable adjustment for a daily taxi journey to be provided to the Claimant for her journey to and from her home to New Cross Gate station.
23. The Tribunal refers to its findings on cost at paragraphs 112 and 113 of its reasons. Cost was not an impediment to making the adjustments.
24. Therefore, the only matter remaining is whether the Claimant could physically undertake the journey so that the adjustment would have been reasonable in that it would have provided a prospect of avoiding the substantial disadvantage to the Claimant.
25. Again the Tribunal has found this another very difficult decision. The Tribunal refers to its reasons at paragraphs 115 to 123 and the significant points raised by the Claimant on why on her own account she could not use public transport.
26. The further difficulty with this issue is that the Claimant’s resistance to travelling to East Croydon at the time was because, in essence, she wanted a move to Beckett House. The Tribunal is not entirely convinced that if the route from New Cross Gate to East Croydon had been run as a trial, as suggested at the time, the Claimant would have confirmed that she was able to cope such that a permanent arrangement would have been a reasonable adjustment.

27. However, alternative train routes did form part of the considerations at the time and if it was true the Claimant could not manage train travel at all at that time it would have been likely that both she and her representative would have definitively precluded it as a possibility and the matter would not have been under review or suggested as a possibility in the grievance appeal.
28. The Tribunal concludes on balance, having reviewed all the evidence, that there was 'a prospect' of the Claimant being able to manage the journey under review with a taxi journey to and from home and a 15 minute train journey, such that it was a reasonable adjustment for the Respondent to pay for a daily taxi from the Claimant's house to New Cross Gate station and back again in the evening.
29. Consequently the Tribunal unanimously concludes that the judgment of the Tribunal promulgated remains, but the conclusion to suggested adjustment (6) in the reasons is varied to a conclusion of a failure by the Respondent in its duty to make a reasonable adjustment for the reasons set out above.

Employment Judge Freer
Date: 06 February 2019