THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Matthew Tough**

Respondent: **Commissioners for HM Revenue and Customs**

JUDGMENT ON CLAIMANT'S APPLICATION FOR RE-CONSIDERATION

1. The claimant's application for re-consideration of the tribunal's judgement dated 22 November 2018 is refused

2. The claimant's application to strike out the respondent's defence because the tribunal has in consequence of the judgement dated 22 November 2018 already dismissed the claimant's claims.

REASONS

1. The tribunal gave an oral judgement with reasons at the conclusion of the hearing on 22 November 2018. The tribunal found that the claimant was not a disabled person within the meaning of the Equality Act 2010 at the material date of 18 June 2018. The claimant requested written reasons. Written reasons were sent to the parties.

2. Prior to the sending of written reasons, the claimant wrote to the tribunal on 25 November 2018 seeking a reconsideration and requesting that the defence is

struck out. The tribunal informed the claimant that he should await full written reasons.

3. Following the sending of written reasons, the claimant has confirmed his application for reconsideration and requesting a strike out of the respondent's defence. The tribunal directed that the respondent provide its comments and also invited both parties to make submissions on whether the applications should be dealt with on paper or at a hearing. The respondent's response is dated 4 January 2019. The claimant provided further representations dated 4 January in which he dealt with the respondent's comments and also made submissions as to whether the applications should be dealt with on paper or at a hearing.

Dealing with the applications on paper or at a hearing

4. Both parties in their representations have asked for the applications to be dealt with on paper. The claimant has provided further representations in response to the respondent's representations. The tribunal has considered those representations and also had regard to the content of the application. This is a matter that can proportionately be dealt with on paper. The tribunal therefore accepted the parties' representations and proceeded to deal with the applications on paper.

The application for re-consideration

5. The claimant applied for re-consideration on grounds which were expressed to be referable to the Employment Tribunal Rules of 2004, namely, that "(d) new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not hve been reasonably known or foreseen at the time," and "(e) the interests of justice require such a review".

6. Having regard to the provisions of the Employment Tribunal Rules of 2013, the correct principles for a reconsideration are set out in Rule 70:

RECONSIDERATION OF JUDGMENTS

Principles

70. 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.

7. In dealing with the application, the tribunal has had regard to the overriding objective, which is at Rule 2:

Overriding objective

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a)ensuring that the parties are on an equal footing;

(b)dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c)avoiding unnecessary formality and seeking flexibility in the proceedings;

(d)avoiding delay, so far as compatible with proper consideration of the issues; and

(e)saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

8. There is an underlying public policy principle in all proceedings of a judicial nature that there should be finality in litigation. An application for reconsideration is not simply an opportunity to the parties to seek a re-hearing of a case. Tribunals will be astute to ensure that parties are not simply provided with "a second bite of the cherry". Equally, where an applicant can show that there has been in some sense a denial of justice, then the route of re-consideration provides the employment judge with an opportunity to consider whether it is in the interests of justice that the original judgment should be reviewed and if necessary revoked.

9. The claimant contends that he should be given the opportunity to produce further evidence in the form of a GP letter dated 23 November 2018 (the day after the Preliminary Hearing) which in substance states that the claimant had been reviewed by his GP since April 2018 and that he had commenced anti-depressant medication in April 2018 and that it was recommended that he should continue this for at least 12 months. The claimant says in his application that it could not be foreseen that he would have needed further evidence in support of his claim that his condition was long term and that he had not expected that the tribunal would be focussing on dates between April 2018 and June 2018.

10. The claimant also contends that the respondent has conducted aspects of the case in a manner amounting to fraud. The claimant contends that the respondent continues to deny that the claimant was disabled notwithstanding the available evidence. The claimant also complains that the respondent had provided disclosure of documentation only 15 minutes before the hearing. The late disclosure is a reference to the fact that respondent counsel produced to the tribunal a copy of the case of J v DLA Piper in support of its submissions at the Preliminary Hearing.

11. In this case, both parties were fully aware that the purpose of the Preliminary Hearing was to determine whether the claimant was a disabled person. The respondent had itself stated, both in its ET3 defence and in its Case Management Agenda, that the relevant issue was whether the claimant was disabled at the time of the discriminatory treatment. It was specifically identified in the Case Management Agenda by the respondent that this was between 21 March 2018

and 18 June 2018. The claimant had the burden of establishing that he was disabled and he in due course provided disclosure of his medical records.

12. The respondent has complied with its disclosure obligations. The medical evidence relevant to the Preliminary Issue came from the Claimant. The tribunal considers that there are no facts or factual documents that the respondent has sought to disclosure or to rely on that have been provided to the claimant at a late stage or in any way as to cause disadvantage to the claimant.

13. The use on the day by Counsel of case-law is a common feature of the tribunal process. The tribunal was astute to ensure that the claimant was able to respond if he wished to do so. The tribunal was fully aware that the claimant was acting in person but after discussing the case in detail at the outset of the hearing with the claimant, the tribunal formed a clear view that the claimant had clearly studied and researched his case and understood the legal considerations and played a full part in the hearing.

14. The tribunal is satisfied that there was no procedural error or mishap that caused the claimant disadvantage. The claimant at no stage suggested that he did not understand nor wished for further time or indeed an adjournment. The tribunal throughout the hearing was cognisant of the fact that the claimant was acting in person.

15. At the outset of the hearing, the tribunal explained carefully that it would be looking at the issue of disability “at the material time” and the tribunal positively identified that the period of time under review was 26 March 2018 to 18 June 2016 and further that case-law restricted the tribunal’s ability to look at events as they later transpired.

16. The claimant seeks a re-consideration substantially to enable him to rely on the GP letter dated 23 November 2018. The claimant did not during the hearing suggest that he had further evidence or could obtain or would like to seek further evidence. It was evidence that was evidently available to the claimant to have obtained if he had chosen to do so.

17. The tribunal has given anxious consideration to the claimant’s application. It finds that the respondent has not in any material sense contributed to the present position in which the claimant finds itself. The respondent has not conducted the litigation in any manner which lends weight to an application for reconsideration of the judgment. Nor did the claimant appear to believe so prior to the outcome of the Preliminary Hearing being known to the parties.

18. Interests of justice is a consideration that relates to justice to both sides. The tribunal concludes that the hearing on 22 November took place with no apparent procedural shortcomings and no complaint or concern raised at the time; it took place in circumstances where the tribunal was fully aware that the claimant was

acting in person and took pains to explain the process, the law and the burden on the claimant; the decision was reached on the evidence that was available to the tribunal and no complaint is made of the tribunal's decision based on the information that was available on 22 November 2018.

19. The claimant had a fair hearing and after the event is seeking now to provide further evidence. The tribunal is satisfied that the evidence which the claimant seeks to draw from the GP letter dated 23 November 2018 was available to the claimant prior to the hearing. That said, the tribunal also considers that the letter 23 November 2018 does not in fact materially improve the claimant's case. It recites a position later in November 2018. Instead what the tribunal was focused on related to what had happened as reflected in the GP Notes at the material time. In addition the judgment (at paragraph 38) reinforces that the tribunal was fully aware of the point that the claimant now makes: the tribunal took note of the GP Surgery entry of 21 September 2018 (at page 127 of the PH bundle) when it was noted that the claimant "will need to cont(inue) on sert(raline) for at least 12 months".

20. Parties are entitled to expect finality in litigation. The tribunal is satisfied that the hearing on 22 November 2018 was conducted appropriately from a procedural point of view, it dealt appropriately with evidence before it, and reached an appropriate decision applying relevant legal principles. The claimant was not disadvantaged by the reliance by the respondent of case-law, not least because the tribunal had explained the same to the claimant. The claimant now seeks to rely on additional evidence. He could have adduced that for the hearing on 22 November and fault does not lay at the door of the respondent. For all that, the proposed new evidence does not expand the claimant's case given not least the contents of GP surgery entry of 21 September 2018.

21. The tribunal has reconsidered the judgment. It concludes that it is not in the interests of justice to vary or to revoke the judgment and accordingly the application for re-consideration is refused.

The Application to Strike-Out the Defence

22. Both the claimant and the respondent's counsel agreed at the hearing on 22 November 2018 that all of the causes of action in these proceedings that are relied on by the claimant are premised on the basis that the claimant was a disabled person. Both parties agreed that the consequence of a finding that the claimant is not a disabled person is that the claims must be struck out.

23. The claimant has not changed his position. It follows that, as a result of the refusal of the claimant's application, paragraph 2 of the tribunal's order of 22 November 2018 to the effect that the claimant's claims in these proceedings are

accordingly struck out and dismissed remains in force. The tribunal has basis to order otherwise.

24. Rule 37 of the Employment Tribunal Rules provides:

> **Striking out**
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> **37.**—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
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> (a)that it is scandalous or vexatious or has no reasonable prospect of success;
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> (b)that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
>
> (c)for non-compliance with any of these Rules or with an order of the Tribunal;
>
> (d)that it has not been actively pursued;
>
> (e)that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

25. Even if it were the case that the tribunal was able to consider the strike out application, by reference to the provisions of Rule 37, the tribunal would have firmly dismissed an application to strike out. There is no merit in the contention that the respondent was guilty of "fraud" and the respondent has not acted in any manner sufficient to justify a finding of scandalous, vexatious, or unreasonable conduct or otherwise so as to justify an Order for strike out of its response.

EMPLOYMENT JUDGE BEEVER

SIGNED BY EMPLOYMENT JUDGE ON

15 January 2019