EMPLOYMENT TRIBUNALS

Claimant: **Mr E Nii Larbi**

Respondents: **(1) Thurrock Council**
(2) Lisa Preston

JUDGMENT ON AN APPLICATION FOR RECONSIDERATION

The Judgment of the Tribunal that the claimant was not a disabled person as defined in section 6 and Schedule 1 **Equality Act 2010** at the relevant times is confirmed.

REASONS

1. In a Judgment sent to the parties on 12 March 2020 the Tribunal held that the claimant was not a disabled person. By three emails sent to the Tribunal on 1 and 2 May 2020, the claimant made an application for the judgment to be revoked.

The applicable law

2. Rule 70 Employment Tribunals Rules of Procedure states that:

> 'A Tribunal may … 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.

3. Under Rule 71 the application must be made within 14 days after the date the decision has been sent to the parties and must set out why reconsideration is necessary.

4. Rule 72 Employment Tribunals Rules of Procedure states that:

> An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The

notice may set out the Judge's provisional views on the application.

5. The only ground for granting a reconsideration of a judgment is 'where it is necessary in the interests of justice to do so'.

6. The reasons it might in the interest of justice to reconsider a judgment can include where (a) the decision was wrongly made as a result of an administrative error; (b) a party did not receive notice of the proceedings leading to the decision; (c) the decision was made in the absence of a party and (d) new evidence had become available since the conclusion of the hearing which could not have been reasonably known of or foreseen at that time (**Outasight VB Ltd v Brown** 2015 ICR D11, EAT).

7. There is a long-established principle that there should be finality in litigation. The general rule is that employment tribunal decisions should not be reopened and relitigated.

8. An application for reconsideration is not a method by which a disappointed party to proceedings can re-argue the case all over again. **Stevenson v Golden Wonder Ltd** 1977 IRLR 474 is an EAT case which gave guidance about reviewing decisions which remain relevant to applications for reconsideration. The guidance is that rules on review were 'not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before'.

9. In summary, reconsiderations are exceptions to the principle of finality and can only be granted where to do so is necessary in the interests of justice.

The background

10. The preliminary hearing to decide whether the claimant is a disabled person within the meaning of the Equality Act 2010 (the 'disability question'), took place on 20 February 2020 and the judgment was sent to the parties on 18 April 2020.

11. There is a lengthy background to this claim. The claimant is a litigant in person and the tribunal found it particularly difficult to understand what he was relying on as his disability in support of this claim. After two preliminary hearings (1 November 2019 and 13 January 2020), the claimant confirmed he suffered a physical impairment caused by an assault on him by a member of the public on 12 September 2018, namely he had:

> *'a post-trauma physical impairment. His case is that the impairment causes pain when walking (from his foot and knee) and chest pain and from time to time when leaning over. The pain causes the claimant's stress and leads to his body becoming itchy causing the claimant discomfort.'*

12. The respondent disputed that the claimant was disabled and a judge ordered the case to be listed for a preliminary hearing on the 'disability question'.

13. By the date of the preliminary hearing held on 13 January 2020, the claimant had presented a second claim form to the tribunal on 25 December 2019. At the (open) preliminary hearing the claimant confirmed that he relied on the same disability, as described at the case management hearing, for the second claim and that the claims and allegations made in the second claim concern allegations of a continuation of the

respondent's alleged discriminatory treatment, because of his disability.

14. For the claimant's claim of disability discrimination to be permitted to proceed to a final hearing, the Tribunal had to decide the preliminary matter of whether he has or had a disability and, if he did, whether the claimant had a disability at all of the relevant times.

15. The question for the Tribunal to decide was:

Was the claimant a disabled person as defined in section 6 and Schedule 1 Equality Act 2010 at all of the relevant times?

16. The Tribunal found that the claimant was not a person with a disability at the relevant times.

The applications

17. The claimant made his application for reconsideration by three separate emails. The first was sent to the tribunal on 1 May 2020, the second was sent on 2 May at 21.29 and the final was sent on 2 May 2020 at 22.01.

18. In the 1 May 2020 application, comprising of 15 pages, the claimant gives reasons why he considers reconsideration of the judgment to be necessary in the interests of justice, in summary:

18.1 By the date of the second case management hearing on 13 January 2020, the claimant had recently presented a second claim. The respondent had not yet submitted a response and the Judge did not see the second claim before making case management orders concerning the disability question. The claimant had mentioned 'depression' before the case management preliminary hearing on 13 January 2020. This diagnosis was not added to the description of his disability.

18.2 The claimant did not understand that the order for disclosure of information made at the case management preliminary hearing on 13 January or the order for him to prepare a witness statement on the disability question was also relevant to the second claim. Therefore, the witness statement he prepared on the issue of disability and giving an account of his physical or mental impairments was not valid for dealing with the disability question that was relevant to the second claim.

18.3 The claimant was not allowed to revisit how he had described his disability at the hearing on 20 February 2020, which was unfair, having regard to rule 41.

18.4 The claimant has a condition he describes as 'body itching', which he claims is a part of the collection of symptoms which amount to a disability. The respondent had access to the claimant's medical records compiled by the occupational health physician. The respondent would have been aware that he had an impairment of body itching and also a diagnosis which included stress, anxiety and depression from the outset of his employment. Therefore, the tribunal made an error in its findings of fact when it concluded that the respondent only knew of the body itching in October 2018 and the

Tribunal overlooked stress, anxiety and depression.

18.5 An application made on by the claimant on 17 February 2020 to postpone the preliminary hearing listed on 20 February was refused, which put the claimant at a disadvantage because by then the respondent had not provided some documents.

18.6 In deciding that the claimant was not disabled, the Tribunal did not take into proper account the totality of the medical evidence, including that the claimant was having counselling to do with chest pain, flashbacks of the assault and had other physical effects that were triggered after the incident of assault and was taking pain killers. The Tribunal made an error in the way it reached its decision and should have concluded that the claimant had a disability.

19. A second email dated 2 May 2020 21:29, comprising of four pages, was sent to the tribunal supporting the application for reconsideration. This correspondence included attachments that were included in the hearing bundle: an email to Mr Carver from the claimant's dated 12 October 2018 (A28), an email from the claimant to Mr Carver dated 15 February 2019 (A49) and a letter sent to the claimant from the respondent on 8 October 2018 (Outcome of Stage 1 informal sickness meeting.)(A25).

20. In this email:

20.1 The claimant reasserted that he was not at all well from October 2018, with chest and back and knee pains and was taking pain killers, which the respondent knew.

20.2 There is nothing to suggest that the two assaults taken were not the direct cause of his pains in his chest and also his knees and legs.

20.3 In response to the claimant's sick absence record after the second assault occurred in 2019 the respondent took formal action against him, by monitoring him under the sickness absence policy. Therefore, the respondent was aware that he had continuous ill health from October 2018 and had a disability that was long term.

21. In a third email the claimant attached extracts of general information about causes of groin pain, and causes chest pain (presumably obtained from the internet). These had not been included in the hearing bundle. They did not contain evidence following an examination of the claimant.

The Tribunal's deliberation and conclusion

22. The claimant contends that he should have been permitted to rely on a diagnosis of depression as amounting to a disability at the open preliminary hearing on 13 February 2020. The Tribunal has considered the case management background to this case. The claimant attended two preliminary hearings on 7 October 2019 and 13 January 2020. These hearings were each listed to specifically to define the issues. The clamant is not represented and it is apparent from the case management summaries that the Judge

carefully considered and examined the points the claimant made and made every reasonable effort to make sure that what impairments the claimant relied on as his disability, for the purpose of his claims, was confirmed. This was specifically discussed at both case management hearings and an agreed list of issues concluded. If he thought an error had been made in defining his disability the claimant could have said so at the case management hearings. If for any reason that was not possible, the claimant had every reasonable opportunity to make an application to amend his claim or to add to his claim that he had depression, after the case management hearing. The parties were invited to make applications to vary, suspend or set aside the order on receipt of the case management summary, that was set out in each case management order.

23. Any application to add or amend his claim could then have been made and considered at those hearings which were listed for that purpose. The starting point would have been what was set out in the claim forms and any such application could have been accepted or rejected on its merits. The claimant did not make any such application and the preliminary hearing continued on the basis of the agreed issues including how he defined his disability.

24. Having regard to the circumstances, the fact that the claimant did not apply to vary the case management orders or apply to add or amend his disability claim when he was given opportunities to do so, is not sufficient reason to grant the application for reconsideration of the judgment.

25. The claimant says that the witness statement he prepared on the issue of disability and giving an account of his physical and/or mental impairments was not valid for dealing with the disability question that was relevant to the second claim. The second claim was discussed at the second case management hearing and the parties were told that the claims would be heard together. The claimant had already confirmed that he was relying on the same disability for both claims and even if he was mistaken as he describes, this is not sufficient reason to grant the application for reconsideration of the judgment.

26. The claimant argues that he was at a disadvantage at the start of the open preliminary hearing because documents had been presented late. It is unclear what documents were received late. A complete and comprehensive hearing bundle for the preliminary hearing on the disability question was prepared by the respondent. The claimant did not mention that he had not seen any of the relevant documents. This is not a sufficient reason to grant the application for reconsideration of the judgment.

27. The claimant says that the Tribunal arrived at the wrong decision on the evidence when deciding whether he had a disability.

28. The matter for the Tribunal to decide was whether the physical and mental impairments relied on by the clamant amounted to a disability as defined. The Tribunal carefully considered how the claimant put his case and considered the evidence presented by the parties. The Tribunal arrived at its conclusion that the impairments did not amount to a disability, as defined in section 6 and Schedule 1 Equality Act 2010 at the relevant times. The claimant would like the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, and on a different basis, this time including depression, and would like further evidence of stress or depression to be adduced. This much is illustrated by the general information about causes of groin pain,

and causes of chest pain which the claimant has sent to the tribunal in support of this application. The general articles do not amount to new evidence about the claimant and for that reason the tribunal cannot take them into consideration.

29. The Tribunal understands that the claimant disagrees with the conclusion that he is not disabled as defined in section 6 and Schedule 1 Equality Act 2010 but concludes that the claimant has not provided sufficient reason to grant the application for reconsideration of the judgment. The only ground for granting a reconsideration of a judgment is 'where it is necessary in the interests of justice to do so'. Having considered the application the Tribunal is satisfied that it is not in the interests of justice to reconsider the judgment.

30. Therefore, the Judgment of the Tribunal that the claimant was not a disabled person as defined in section 6 and Schedule 1 Equality Act 2010 at the relevant times is confirmed.

Regional Employment Judge Taylor
Date: 17 June 2020