



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms. D. Navarro  
**Respondent:** Eurostar International Ltd

**London Central**  
**Employment Judge Goodman**

**29 October 2020**

## RECONSIDERATION JUDGMENT

On considering the application under rule 72, there is no prospect of successful reconsideration of the finding that fatigue was not substantial and long-term at the relevant time.

### REASONS

1. On 4 August 2020 I heard as a preliminary issue whether the claimant was disabled within the meaning of the Equality Act. The judgment and written reasons were sent to the parties on 5 August 2020.
2. On 16 September 2020 the claimant's representative wrote seeking reconsideration of that part of the decision that relate to the claimant's fatigue. The tribunal had concluded that fatigue had not been substantial for long enough. The claimant's representative asked the tribunal to reconsider the decision on the basis that a manager's note made at a meeting on 31 January 2019 had been overlooked, and had it been heeded, the tribunal would have concluded that fatigue had lasted longer and was a long term impairment.
3. Due to increased numbers of new claims and staff shortages there is currently a long backlog of unopened emails at London Central. On 21 October I was copied in to a letter from the Employment Appeal Tribunal to the claimant acknowledging the notice of appeal. On reading it I noted the request to stay the appeal pending reconsideration and asked the clerk to search the inbox. The 16 September reconsideration request was then referred to me. The tribunal staff have not been able to locate the hearing bundle used at the hearing, but the claimant's representative has kindly sent an electronic copy.
4. Under the Employment Tribunal Rules of Procedure 2013 a request for reconsideration may be made within 14 days of the judgment being sent to the parties. By rule 70 a Tribunal "may reconsider any judgment where it is necessary in the interest of justice to do so", and upon reconsideration the decision may be confirmed varied or revoked.

5. Rule 72 provides that an Employment Judge should consider the request to reconsider, and if the judge considers there is no reasonable prospect of the decision being varied or revoked, the application shall be refused. Otherwise it is to be decided, with or without a hearing, by the Tribunal that heard it.
6. Under the 2004 rules prescribed grounds were set out, plus a generic “interests of justice” provision, which was to be construed as being of the same type as the other grounds, which were that a party did not receive notice of the hearing, or the decision was made in the absence of a party, or that new evidence had become available since the hearing provided that its existence could not have been reasonably known of or foreseen at the time. The Employment Appeal Tribunal confirmed in [Outasight VB Ltd v Brown UKEAT/0253/14/LA](#) that the 2013 rules did not broaden the scope of the grounds for reconsideration (formerly called a review).
7. When making decisions about claims the tribunal must have regard to the overriding objective in rule 2 of the 2013 regulations, to deal with cases fairly and justly, which includes ensuring that the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay, and seeking expense.
8. The application to reconsider was not made in time. It was made 6 weeks after the decision was sent to the parties, no doubt because that was the time limit for an appeal. The claimant asks for it to be considered out of time because of the holiday period, and because of the “clear and obvious” mistake” in overlooking the manager’s note, which, if rectified, would save the delay and expense of an appeal.
9. In the absence of information about the resources available to the RMT legal department I am not sympathetic to the plea for a 4 week extension because August is a holiday period. All legal representatives involved in litigation are aware of the need to provide cover during holiday periods, especially in employment tribunal cases where the time limits are often short. I am more sympathetic to the argument that a reconsideration may avoid the expense and delay of an appeal, the final hearing of this claim being listed for March 2021. For that reason, exceptionally, there will be reconsideration out of time.
10. However, having reconsidered the material, I conclude there is no reasonable prospect of success in reconsideration.
11. Revisiting the records available for the weeks leading up to the manager’s meeting with the claimant on 31 January 2019, there is a GP note on 2 November 2018 about right sided pain, and another on 30 December 2018 about pain and discomfort, controlled by painkillers, noting that counselling was not required. On 19 January 2019 there is a three page report from an occupational health doctor. She noted anxiety /depression symptoms, that her mother had passed away, she had had professional support then, and now she was coping well. The diagnosis was mild depression and moderate anxiety. There is no mention of tiredness or fatigue. She said she had pain when on her feet over 2 hours, and anxiety that people would bump into her, and she recommended a reduction in peak shifts worked so as to avoid crowds.
12. In this context the claimant met her manager on 31 January. The note reads: “feels generally OK but some physical adjustments. Alternate sitting and standing. Regularly+ crowds+roster. Had to swap sometimes to maintain restrictions... Boarding position giving anxiety – people come from all sides so this is challenging. Can stand but easily tired/overwhelmed. Concourse fine when not busy”.

13. The next page and a half is a discussion on how to adjust the shift pattern. The respondent proposed to remove the Friday shift, that being a peak period, the claimant said that only having Saturday as a break was too difficult, and she could not afford to cut hours overall.
14. It is an occupational health report on 5 June 2019 the claimant reported no improvement in the pain, that alternating sitting and standing every 2 hours was effective, but working peak shifts exacerbated anxiety about being in crowds as it increased the risk of being accidentally bumped into by passengers. In the final paragraph: "Mrs Navarro also mentioned that she was notified that she is premenopausal and feels tired and emotional most of the time". Then on 14 June 2019 she was signed off with anxiety and depression, and on 28 June 2019 a further occupational health report noted that her mood deteriorated "a few weeks ago" and "worried around her health and chronic pain condition" she was now on antidepressants, "she has a lot of side-effects with force-feeding and fatigue" I was seeing her GP again shortly to discuss treatment.
15. On 9 July further occupational health report, from a different doctor, noted "stress from work because of the way Eurostar managed the grievance" and "adding stress, and gave the same issue many times over".
16. On 16 July she was working the ticket office as this "avoids being bumped into".
17. The context of the January note by the manager shows no complaint of tiredness or fatigue to any doctor, before or after. She alternated sitting and standing because of breast pain (as explained by the claimant in her evidence to the tribunal). She wanted to avoid crowds because they might bump into the painful breast, so if on the station concourse preferred to avoid peak time shifts. The note "tired/overwhelmed" is sandwiched between notes which are about the claimant working in crowds. The claimant has consistently expressing her anxiety about being bumped into in crowds, and the "tired/overwhelmed" note is about this. It is also the manager's note. In otherwise thorough reports over a wide range of symptoms and conditions there is no record of any complaint to a doctor or nurse of tiredness or fatigue until June 2019, and then first in the context of being pre-menopausal, and later that month in the context of a recent deterioration of anxiety, poor sleeping, and the effect of antidepressants. Both of these were new.
18. It is for that reason that the note of "tiredness/overwhelmed" was discounted when finding fatigue had not been present at a substantial level before June 2019. It was not overlooked, but considered in the context of other contemporary evidence.

Employment Judge - Goodman

Date : 29<sup>th</sup> OCT 2020

JUDGMENT SENT TO THE PARTIES ON

29/10/2020

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FOR THE TRIBUNAL OFFICE

Note

Reasons for the decision having been given orally at the hearing, written reasons will not be provided unless requested within 14 days of this written record of the decision being sent to the parties.