EMPLOYMENT TRIBUNALS

Claimant: **X**

Respondent (1): **Y**
Respondent (2) **Z**

HELD AT: **Leeds**

ON: 30 June 2020

BEFORE: Employment Judge Eeley, sitting alone

REPRESENTATION:

Claimant: **In person**
Respondent: **Mr S Healy, counsel**

JUDGMENT on the application for recall/reconsideration having been sent to the parties on 9 July and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Recall of judgment

1. I have been referred to various authorities in relation to the issue of recall. The primary judgment of relevance here is that of Hanks v Ace High Production Limited [1979] IRLR 32. That is an EAT case and it demonstrates that there is a limited power of recall. The power of recall cannot be used to just rehear a case or invite fresh argument on matters where the Tribunal has already made a clear finding. There is really only the opportunity to use it where there is a clear error or omission by the Employment Tribunal. The question is whether it is necessary to recall the judgment in order to do justice to the parties in line with the overriding objective.

2. I have also been referred to the case of L & B Children 2013 UKSC 8. As a Supreme Court decision, it is clearly a higher authority. However, I struggle to conclude that I am bound by it in this case given that it deals with the application of the Civil Procedure Rules whereas the Employment Tribunal has its own rules of procedure. It also deals with the inherent jurisdiction of the County Court. As a creature of statute, the Employment Tribunal does not have such inherent jurisdiction. I have to work with the Employment Tribunal Rules of Procedure. In any event, even if that case were binding on me on the assumption that there is no material difference between the Civil Procedure Rules and the principles in the Tribunal's Rules of Procedures, I find that the facts and the nature of the case in L&B are rather different to those of the instant case. In L&B it was concluded that one shouldn't apply a limitation or test of 'exceptional circumstances' before deciding to recall a judgment. However, it was suggested that there still needs to be a good reason why the judgment should be recalled even if an 'exceptional circumstances' test was not applicable. In L&B an ex tempore judgment had initially been given and it was concluded that there had been a carefully considered change of mind by the judge in that case, a children's case. That is different to the current case. Here I gave a reserved judgment and I have not come to the conclusion on my own that I need to change it. There has been no 'considered change of mind.' I conclude, therefore, that this case is not suitable for recall of the judgment. I don't think that is the proper vehicle for looking again at the judgment I have given. This isn't an ex tempore judgment. It isn't a case where there has been a considered change of mind. The Tribunal Rules provide for a reconsideration and I would consider that to be the appropriate mechanism in this case if any change to the judgment were to be made. I am not sure that I have inherent jurisdiction to make the recall in any event. I make it clear I am not applying any exceptionality test but I still need to look for a good reason or justification to recall the judgment and I don't think there is one in this case. I think the EAT judgment in Hanks is more properly to be followed in this case.

Reconsideration

3. As the parties have indicated, the applicable rules here are Rules 70 - 73 of the Employment Tribunal Rules of Procedure 2013. I have to ask myself whether it is necessary in the interests of justice to reconsider the judgment. The interests of justice include the claimant's interests, the respondent's interests and the public interest and that includes the interest in the finality of litigation. I have got to look at the overriding objective to do justice in the case which includes ensuring the parties are put on an equal footing. It includes considerations of proportionality; avoiding unnecessary formality; avoiding delay so far as possible with the proper consideration of the issues; and saving expense. The reconsideration procedure is not designed to allow the parties to re-argue the case with a change of emphasis. There has to be something more substantive than that.

4. Where a party seeks to introduce new evidence, the principles derived from Ladd v Marshall [1954] 3 All ER 745 apply. One has to ask oneself as a starting point: whether the new evidence could not have been obtained with reasonable

diligence for use at the original hearing; whether the new evidence is relevant and would probably have had an important influence on the hearing; and whether the new evidence is apparently credible. The decision of the EAT in Outasight VB Ltd v Brown [2015] ICR D11 is also relevant because it shows that even where the elements of the Ladd v Marshall test are not fully made out it may still be possible and appropriate to introduce the new evidence. However, there would need to be some good reason why one would not follow the Ladd v Marshall test. I do have to consider where the new evidence that is being put forward is going to take the overall decision in the case. Bearing that in mind I will deal with the issues in this reconsideration application effectively in reverse order.

5. I want to look first at whether or not the new evidence should be allowed in as part of a reconsideration. I have gone through the new bundle of documents with the claimant and identified what each of them is and how each of them is said to influence or impact upon the decision on the issue of disability. I will briefly set that out here.

5.1 Pages 1 to 7 of the new bundle are medical evidence from 2007 when the claimant was a teenager and relate to a previous court hearing. In terms of where they take matters, I am not convinced that they are terribly helpful in determining whether or not the claimant was disabled as of May 2019. In particular, it is notable that there is no medical evidence tying those earlier problems back in the claimant's adolescence to the later 2019 issues and saying that they are part and parcel of one ongoing or recurring condition. I also note that the claimant could have produced this information at the previous hearing but chose not to. On balance I conclude it would not have made a material difference and the same essentially goes for the court documents which are referred to, including the claimant's witness statement from the 2007 proceedings. They are not of central relevance to the issues I have to determine.

5.2 Page 18 onwards in the bundle is university counselling documentation from 2012 to 2014. Again, there is nothing to specifically link this to the position in 2019 as part and parcel of the same ongoing or fluctuating condition. The documents from 2012 to 2014 don't assist me in determining the severity of the impairment at the 'relevant time' for the purposes of these proceedings, which was the crucial point in this case and the judgment that I previously gave. Notably, the claimant could have obtained this documentation for the last hearing and chose not to. In considering the original judgment I did take into account a number of similar documents which the claimant did choose to rely upon and which he produced for the last hearing. The new documents evidence a larger number of tests but they do not take matters materially further given the similar documents which were already before me on the last occasion.

5.3 Pages 104 to 114 are a university policy document. The claimant indicates that this shows that he had to have had a significant mental health condition during his time at university or he would only have been

given short term counselling. Again, it doesn't have direct relevance to the severity of the impairment at the material time (i.e. 2019) so the same principles apply.

5.4 Pages 115- 121 are counselling service documents from 2017. They do show that the counsellors at university were specialist trained. They were qualified. Again, the documents don't really take matters further in relation to the impairment in 2018/2019. In addition, the claimant could have chosen to provide that document on the last occasion but did not do so.

5.5 The claimant has provided a series of documents from page 119 to 140 which are references from his previous employment showing that he was a good performer. Again, that may be so but it doesn't assist in showing that there was an adverse impact on his ability to work at the material time which is what I was considering. Again, I am not sure that they take matters much further and I would also question why they weren't provided on the last occasion if they were thought to be of importance.

5.6 The claimant has provided further GP records. Some of them post-date the material period of time by quite some time. Whilst it is clear that these could not be provided until they had actually been written, documents which relate to 2020 don't help me to assess the significance of the impairment at the material time. My judgment on the last occasion made it clear that the real issue in this case was the severity of the impairment rather than the claimant necessarily struggling to show that the impairment was of sufficient longevity or that it was likely to recur.

6. Applying the tests that I have outlined from Ladd and Outasight and looking overall and holistically at whether or not any of this new documentation needs to be adduced in order for me to do justice in the case, I conclude that it does not and I therefore will not permit the addition of the further evidence at this stage.

7. I have considered the 21 points that the claimant makes in relation to my judgment and in support of his application. As I have already indicated the central issue in this claimant's case was whether or not there was a substantial adverse impact upon the claimant's ability to carry out day-to-day activities. The duration of the impairment or the longevity of symptoms was not the main reason why I determined that he was not disabled for the purpose of these proceedings. If the claimant doesn't overcome the 'substantial adverse impact' point and the 'normal day to day activities' point then the longevity issue takes matters no further.

8. I am, in brief, going to reflect on some of the points that the claimant has made. The issue of the resignation from his previous employer is not critical to the issues that I had to determine. It is over a year before the material time so even

if it is correct that it was one of many factors as to why he left his previous employer I am not convinced that it would materially assist him in showing the relevant substantial adverse impact at the material time.

9. Paragraph 2 refers to paragraph 11 of my judgment which I consider, on reflection, is still factually correct.

10. The issue that is raised at paragraph 3 is about propranolol. All I'm in fact saying in the reasons is that there is one prescription and if it was being prescribed on a long-term basis one would expect to see more than one prescription. That is a conclusion I am entitled to reach based on the evidence that was available.

11. In relation to the issue of the self-referral to IAPT I find that my conclusion is still legitimate. A GP referral would have helped the claimant to show that the symptoms were serious such that a GP referral was required (i.e. the GP needed to take matters into his/her own hands rather than leave them with the claimant). So, the absence of a GP referral is something that I am entitled to consider as part of the wider factual matrix. It is the absence of some evidence which might have strengthened the claimant's case. My judgment has to be a weighing of all the various factual and evidential elements in the case and this is but one of those.

12. Paragraph 18 of the judgment is referred to in paragraph 5 of the application. Again, I understand what the claimant says there but factually it is a conclusion that is open to me based on the evidence. I have taken account of what the GP records say and accurately summarise that before reaching my conclusions and I note that the points that the claimant relies upon relate in a large part to August 2019 and the fact that the claimant also looks at reporting lack of sleep to the therapist in April 2019. Well, of course I note that but the point that I was making within my judgment is that one would expect (if it was a substantial problem as opposed to the difficulties that many people have with the ability to sleep) that perhaps it would have necessitated further visits to the GP or further treatment rather than a reference in the context of wider counselling.

13. At paragraph 6 the claimant effectively disputes my conclusion about the impact on his inability to sleep or his inability to hold down a full-time job. My conclusion was based on the evidence that was available to me and I am not going to revisit it. I am afraid the claimant disagrees with it but there we have it. I have to come to a judgment weighing all the evidence.

14. The point raised at paragraph 7 is in relation to paragraph 27 of the judgment. Again, this and the following few points can be taken together. Essentially there are two ways of looking at the issue of the one night stands. Are they part of the symptoms of the impairment, the disability? Or are they personal lifestyle choices? When considering this case I had to look at the information available and consider whether there was anything to suggest to me that, rather than being a decision that the claimant made about how he wanted to conduct his

life, they were in fact the manifestation of a mental health disability. Whilst I don't have to look for a medical diagnosis and I don't have to have that sort of medical evidence to conclude that there is a disability, I am entitled to look and see if there is evidence to assist me in deciding whether it is a choice or whether it is a symptom. In this case there was no evidence to show to me that it was a symptom rather than a choice. The next few paragraphs that the claimant raises in his application all come under that element of the case.

15. I dispute what the claimant says at paragraph 12 about the suggestion that I am focussing on what he can do rather than what he can't do or can only do with difficulty. If one takes the judgment as a whole I do focus on what the claimant cannot do or can only do with difficulty. That doesn't prevent me from also noticing the things that he can do. It is part and parcel of weighing up the evidence in the case and so I don't accept that that takes matter further or requires me to overturn or vary my previous judgment.

16. The claimant makes some points made about the Open Door Team evidence and I think I have already made the point that the strength and relevance of that evidence is perhaps less than the evidence closer in time to the 'material time' for the purposes of this case. Likewise, the conclusion I reach at paragraph 54 that the claimant critiques at paragraph 14 of his application about career choices. Again, I have to weigh the evidence and draw a conclusion. That is what I have done. I appreciate that the claimant disagrees with it but that conclusion is based in the evidence that I heard and unfortunately this is an example of the claimant re-arguing the case on issues where he is unhappy.

17. Paragraph 16 of the application talks about my conclusion that the claimant did not say that it had taken him longer or been harder to concentrate on litigation preparation than he would normally find similar intellectual administrative tasks. This is in relation to the litigation against his previous employer. The claimant says that is not what he said. Having reviewed my hearing notes I have to say, in fairness, that there is relatively little noted either way in relation to that issue and it is quite difficult to decipher the meaning and context of the notes that I have made in this regard so long after the hearing took place. It is noted that there was a preliminary hearing in those other proceedings in February 2019 and that the claimant had to provide a schedule of loss by April 2019 and disclose documents by May 2019. He says he took some annual leave (1 week at the beginning May) to do this work. It was a whistleblowing complaint and there was no complaint of disability discrimination within those proceedings. He is noted as saying that "the disability had no impact on me as such." He accepted that the shadow of the other Tribunal litigation had been hanging over him since July 2018 when he presented the claim to the Tribunal. He said he had no previous experience of litigation save as a witness in a different jurisdiction. He appears to have accepted that running a 10 day Employment Tribunal case himself was always going to be stressful irrespective of his health. He also mentioned that around 15th May his previous employer was taking an aggressive stance and there was a threat of costs. The final hearing in that set of proceedings was March 2020. He later referred to two employment cases and there is a note which says "detailed documents for litigation. Takes a

substantial length of time- longer than if not suffering anxiety." In re-examination there is a note: "Complex litigation greater than 12 months likely to last more. Not an adverse reaction."

18. As stated above it is difficult to piece together the notes of precisely what the claimant said about this so long after the event. However, I did write the judgment and reasons considerably closer in time to the hearing based on my own recollection of the evidence as well as on my notes. The judgment and reasons were written by no later than a week after the hearing. So, on balance, I am satisfied that they are accurate. But in any event, even if my recollection of the evidence on this point were wrong, this point on its own would not, in my view, overcome the more fundamental difficulties that the claimant has in his case. Taking a holistic approach to the evidence I would still conclude that the claimant had not demonstrated the necessary substantial adverse effect on the ability to carry out normal day to day activities. The issue of the impact of his mental health on his ability to conduct litigation would not be determinative.

19. The remaining points that the claimant raises are, as I have previously said, areas where I have weighed the evidence and come to a conclusion that the claimant disagrees with but which is based on the evidence that was available to me at the time. The upshot of all of this is that whilst it is possible for the claimant to go through paragraph by paragraph and find matters that he disagrees with, I have to apply the test and ask whether it is necessary in the interests of justice for me to reconsider my judgment. Clearly the claimant has an interest in me reconsidering and the respondent has an interest in me not doing so. I also have to also look at the wider public interest and there is nothing here in my view that requires me to re-open the case and to ignore the need for and the public interest in finality of litigation. I am bearing in mind the overriding objective. I do appreciate what the claimant says about putting the parties on an equal footing, but the rules and principles apply whether the parties are represented or not and I have taken pains to give the claimant every opportunity to put his case both on the last occasion and at this hearing. I also have to bear in mind proportionality. This is but one issue of many in this case and there is a risk that we get held at this preliminary stage and it delays the substance of the case (which has many different causes of action) from being resolved in a reasonably prompt fashion which cannot be in anybody's interests. That is another relevant factor in my consideration.

20. Taking all that into account I am going to confirm my previous judgment. In light of what I have already said this morning on the anonymity point I will sign off that judgment as it is and it will be entered on the register as it is. I will send out the formal decision in relation to anonymity and in relation to the reconsideration application.

Employment Judge Eeley
Date 3rd August 2020