EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104852/2017

Held in Glasgow on 2 September 2019 (Reconsideration Hearing)

Employment Judge I McPherson
Tribunal Member K Thomson
Tribunal Member D Frew

Mr Peter Docherty	**Claimant** **per Written Representations**
Houston Bottling and Co-Pack Ltd	**Respondents** **per Written Representations**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The **unanimous** Judgment of the Employment Tribunal is that, having considered in chambers, at this Reconsideration Hearing, the written representations from the claimant dated 11 January 2019, 16 April 2019, 30 May 2019 and 11 July 2019, and the written representations in opposition from the respondents' solicitor, as per their objections of 10 and 31 May 2019, the Tribunal, in exercise of its powers under **Rules 70 to 72 of the Employment Tribunals Rules of Procedure 2013**, and on the opposed applications of the claimant, **reconsiders** the original Judgment dated 19 and entered in the Register and copied to parties on 20 December 2018, and subsequent Written Reasons, dated 1 April 2019, entered in the Register and copied to parties on 2 April 2019, it being in the interests of justice to do so, and having done so, upon reconsideration, the Tribunal **refuses** the claimant's application for reconsideration as not well-founded, and accordingly **confirms** that original Judgment and Reasons, **without variation**.

REASONS

Introduction

1. This case was listed to call before us again on Tuesday, 3 September 2019, for a Reconsideration Hearing in chambers, further to Notice of Hearing: Reconsideration of Judgment issued to both parties' representatives by the Tribunal under cover of a letter dated 15 August 2019.

2. However, as subsequently intimated to both parties, under cover of a letter from the Tribunal dated 28 August 2019, that listing was brought forward by one day, on account of a change in circumstances affecting one of the lay Members of the Tribunal, and his diary commitments, and relisted for this date.

3. This Hearing was assigned to be heard by us in chambers, as parties had previously been advised that they were not required to attend, as the Tribunal would be dealing with the claimant's opposed reconsideration applications on the papers only, neither party having requested an oral Hearing. Parties were advised that, at the Reconsideration Hearing, the Tribunal's original Judgment might be confirmed, varied or revoked and, if it was revoked, the case would be re-listed for Hearing at a future date.

4. That Notice of Hearing was issued further to previous correspondence to both parties, following issue of our Judgment dated 19, and entered in the Register and copied to parties on 20 December 2018, and our subsequent Written Reasons, dated 1 April 2019, entered in the Register and copied to parties on 2 April 2019.

Background

5. It will suffice here to note and record that, after presentation of the ET1 claim form on 3 October 2017, the case was defended by the respondents, and it proceeded to a Final Hearing before us, on 4 days in August 2018, and a Members' Meeting on 17 December 2018, where we found for the claimant on his unfair dismissal head of complaint, but we refused his complaints in respect of alleged unlawful disability discrimination.

6. We awarded him unfair dismissal compensation totalling **£5,632.01.** That comprised a basic award of **£2,208**, a compensatory award of **£2,977.40**, and a statutory uplift of 15% (for unreasonable failure to comply with the ACS Code of Practice on Disciplinary and Grievance Procedures) on the compensatory award in the sum of **£446.61**.

7. We refer to our original Judgment, and Reasons, for their full terms. We detailed our workings in assessing that level of compensatory award in the calculation schedule shown at paragraph 2 of 2 of the Reasons included in that Judgment which, for ease of reference, we reproduce here, as follows:

B. Compensatory Award:

Past Loss of Earnings:

Net weekly pay with the respondents at £313 per week.

Date of dismissal to the last day of Final Hearing: 1 August 2017 to 28 August 2018 = 56 weeks: 56 @ £313 = £17,528, if the claimant had been at work with the respondents during that period.

But, on account of the claimant not being fit to work during that period, and there being no enhanced contractual sick pay scheme in operation, that amount falls to be reduced, in terms of **Section 123 of the**

Employment Rights Act 1996, to 28 weeks of Statutory Sick Pay @ **£92.05** per week = **£2,577.40**, being the "prescribed element".

Future Loss of Earnings:

Nil award by the Tribunal, on the basis that the claimant, as at the last day of the Final Hearing, was still not fit to work, and he had no new employment obtained, or contemplated.

Loss of Statutory Rights: **£400**

Total Compensatory Award = £2,977.40

8. When our Written Reasons were later issued, we addressed, in narrative form, how we had arrived at that level of compensatory award. For convenience, we note and record here that paragraphs 282 to 321 of our Written Reasons refer, where we described how we assessed the compensation that we awarded to the claimant for his unfair dismissal by the respondents.

9. Compensation was his preferred remedy, as he did not seek reinstatement or reengagement by the respondents, because, as he told us, and as we recorded at paragraph 285 of our Reasons, he could not work with Liz Pryde, his line manager, again.

10. Following issue of our Judgment, and again after issue of our Written Reasons, the claimant applied for reconsideration of our Judgment, and following interlocutory consideration by the Judge, correspondence ensued between the Tribunal, the claimant, and the respondents' solicitor. We refer to more fully this below.

11. As the claimant's reconsideration applications dated 11 January 2019, 16 April 2019, 30 May 2019 and 11 July 2019, are opposed by the

respondents, as per their objections of 10 and 31 May 2019, the matter has now been placed before us as a full Tribunal for our consideration.

Reconsideration Application

12. At this point, it is helpful if we note and record the full terms of that original reconsideration application, dated 11 January 2019, as follows: -

The 11th of January 2019.
Dear Ian McPherson,

Under s.70 and s.71 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the claimant would like to proceed with an application to reconsider, as it is my belief that it is necessary in the interests of justice to do so.

I am in the knowledge that an application to reconsider is to be applied for within 14 days from the date the decision is sent. The decision was sent on the 20th of December 2018. Therefore, it would appear as though I am time barred to raise such proceedings. However, the Employment Tribunal Judgement was not received until a few days after the 20th of December. By this time, I could not access advice from my local Citizen Advice Bureau, whose advice I have sought since beginning proceedings, because they were closed over the festive period. They did not re-open until the 7th of January, hence the reasons for this letter being dated the 11/01/2019. Therefore, without prejudice, I believe I should be considered to be within the time limit.

I believe the compensatory award was incorrectly decided and therefore request an application to reconsider the award. It was stated in the judgement, under the heading 'REASONS', that I was not fit to work and therefore my weekly wage was reduced to the statutory sick pay. Thereby reducing my award from what would

have been £17,528 to £2,577.40. I believe the conclusion made is based on little to no medical evidence. Furthermore, it is in complete contradiction to what the medical professions at the Department for Work and Pensions (DWP) found when I applied for Personal Independence Payment (PIP), in that they considered me fit to work in December 2017.

Further is the argument that if my former employers did not make the decision to dismiss me, it would be the case that I would still be working there at £386 a week as it was their actions that was the cause of my subsequent ill health. I did take a panic attack the day before my dismissal due to my former employer's actions exacerbating a known disability. However, I was set to return to work the following day to resume employment for the foreseeable future.

Therefore, deciding that my loss of earnings should be based on 6 months' statutory sick pay does not make sense. Had the unfair dismissal not occurred, there is no question that I would have earned £17,528. I believe medical reports from my doctors would back up the reason for my ill health following my dismissal.

I did notice the other side had suggested I had only received statutory sick pay but as I considered that argument meretricious**, **I had not directly addressed this for the reasons set out above.

I thank you for your time in considering this application.

Kind Regards,
Peter Docherty

13. Following referral of that reconsideration application to the Judge, a letter was sent from the Tribunal to the respondents' solicitor, with copy to the claimant, on 30 January 2019, noting the claimant's reconsideration

application, stating that Reasons for the Judgment were in preparation, giving the respondents until 11 February 2019 to respond to the application, and both parties were asked to express views on whether the application could be considered without a Hearing.

14. On 31 January 2019, Mr Laurie Anderson, associate at Jackson Boyd, solicitors, Glasgow, as the respondents' representative, emailed the Tribunal, with copy to the claimant, confirming that they were content for the reconsideration application to be considered by the Employment Judge without the requirement for a Hearing.

15. Although not expressly stated, it was inferred by the Judge from that email that they were objecting, albeit that they did not intimate, at that stage, any formal grounds of objection, or indeed any other comments on the claimant's application. Mr Anderson's email did not consent to the reconsideration being granted, unopposed.

16. Further to the Tribunal's letter of 30 January 2019, an update e-mail was sent by the Tribunal to both parties on 27 March 2019 confirming that the draft Written Reasons had been completed by the Judge, and issued to the lay Members for their comments within 7 days. As regards the claimant's application of 11 January 2019, for reconsideration of part of the Judgment issued on 20 December 2018, parties were advised that further direction on procedure in that application would be given at the same time as the Written Reasons were issued.

17. Those Written Reasons were issued to both parties on 2 April 2019. In a covering letter of that date, issued on instructions from the Judge, parties were advised that the Judge had asked that, in light of the claimant's reconsideration application intimated on 11 January 2019, if the claimant could confirm, within the next 14 days, whether or not he considered that reconsideration application could be considered by the Tribunal, but without the need for a Hearing.

18. It was further stated, in that letter from the Tribunal, that if that approach was agreed by the claimant, then the Judge would have the Tribunal administration put in place arrangements for the full Tribunal to meet in chambers, at a ½ day Reconsideration Hearing, to deal with that application on the papers only. In that event, parties would not require to attend.

19. If the claimant agreed to that approach, then the Tribunal stated that it would then fix a date for written representations from both parties, and a later date for its in chambers Hearing. Parties were advised that further procedure would be determined by the Judge upon considering both parties' response to this letter, within the following 14 days.

Claimant's further Reconsideration Application

20. On 16 April 2019, the claimant emailed the Tribunal, with copy to Mr Ciaran Robertson at Jackson Boyd, as the respondents' solicitor, enclosing a document entitled "***New application to reconsider**."*

21. In that new application, the claimant stated as follows:

The 16th of April 2019.
Dear Ian McPherson,

I write to you today to update my previous application for reconsideration, in light of receiving the Tribunal's detailed Written Reasons on the 2nd of April 2019. I can confirm that this updated application for reconsideration can be considered by the Tribunal without the need for a Hearing.

I seek to rely on s.70 and s.71 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, to proceed with an application to reconsider, as it is my belief that it is

necessary in the interests of justice to do so. I also believe I am within the 14 day time limit.

I set out below two heads of complaint.

First I believe the compensatory award to be incorrectly decided. On page 125 of the Written Reasons, under the heading 'Past Loss of Earnings' it states that on account of "the claimant not being fit to work during that period.... the amount falls to be reduced, in terms of s.123 of the Employment Rights Act 1996, to 28 weeks of Statutory Sick Pay". The period referred to here is the date of dismissal to the last day of the final hearing. This thereby reduced my award from what would have been £17,528 to £2,577.40.

I refute the claim unequivocally that I was unfit to work during this period. I believe the conclusion made is based on little to no medical evidence. Furthermore, it is in complete contradiction to what the medical professions at the Department for Work and Pensions (DWP) found when I applied for Personal Independence Payment (PIP), in that they considered me fit to work in December 2017. Subsequently I have not been in receipt of any sickness benefits since my dismissal.

Further is the argument that if my former employers did not make the decision to dismiss me, it would be the case that I would still be working there at £313 net a week as it was their actions that was the cause of my subsequent ill health. I did take a panic attack the day before my dismissal due to my former employer's actions exacerbating a known disability. However, I was set to return to work the following day to resume employment for the foreseeable future.

Therefore, deciding that my loss of earnings should be based on 6 months' statutory sick pay does not make sense. Had the unfair

dismissal not occurred, there is no question that I would have earned £17,528. I believe medical reports from my doctors would back up the reason for my ill health following my dismissal.

I did notice the other side had suggested I had only received statutory sick pay but as I considered that argument meretricious**, **I had not directly addressed this for the reasons set out above.

Secondly, I dispute the disability discrimination award. I believe my dismissal was a consequence of my disability as per Section 15 of the Equality Act 2010, in the way of having a panic attack, and it should have been a case of automatic unfair dismissal. This would then have allowed a further claim for injury to feelings as outlined in my initial claim. I believe with the evidence led by myself and my wife, compounded with the medical reports provided, that my feelings were injured. I also believe s.26 of the Equality At 2010 was breached, in that there was an absolute failure to make reasonable adjustments for a known disability, which ultimately culminated in depression.

I thank you for your time in considering this application.

Kind Regards,
Peter Docherty

Respondents' Reply / Objections

22. On 10 May 2019, the respondents' solicitor, Mr Ciaran Robertson at Jackson Boyd, emailed the Tribunal, with copy to the claimant, stating that:

"I write in relation to the above matter in which I represent the Respondent.

The Respondent's position is that the Claimant was clear and unambiguous in his evidence that he would not be able to work during the period from his dismissal.

The Claimant is now attempting to change his evidence due to the financial implications that his evidence has had on his award for compensation. The Respondent submits respectfully that the Claimant cannot now change his position and attempt to include additional information after the fact.

The Respondent's principal position is that a hearing would not be required."

23. In response, on 15 May 2019, the Tribunal wrote, on the Judge's instructions, to both parties, seeking a response from the claimant within 10 days, and stating that, given the claimant's reconsideration application of 16 April 2019, and the respondents' reply of 10 May 2019, the Employment Judge had directed that the opposed reconsideration application be dealt with on the papers, and without a Hearing.

Claimant's Further Written Comments, and Additional Documents

24. Thereafter, on 30 May 2019, with apology for the delay in his submission, the claimant once again emailed the Tribunal, again with copy to Mr Ciaran Robertson at Jackson Boyd, as the respondents' solicitor, enclosing a set of written comments dated 29 May 2019, and documents as evidence of the Department of Work and Pensions' decision that ***"I am fit to work".***

25. His written comments stated as follows:

WRITTEN COMMENTS – 29/05/2019

1) Ability to work

The claimant accepts in his evidence provided to the tribunal, under cross examination, that if he remained in employment with the employers, he would be unable to work (Page 48; Para d)). The claimant contests that this evidence should be put into context and that weight should only be attached to this to an appropriate degree. Putting this in context, the claimant would simply be unable to continue to work at Houston Bottling Co-Pack Ltd following his unfair treatment. If the claimant were treated fairly, in which case there would have been no dismissal or need for tribunal, then he would have been able to work. Put otherwise, there is no evidence to support that the Claimant would not have been fit to work for other employers if he had not suffered this experience.

It is insupportable to determine that a person is not fit for work as a result of their poor treatment in a workplace but decline appropriate and full compensation for poor treatment because they are consequently not fit for work. The claimant would have been fit for work if not for the poor treatment at the point of unfair dismissal.

The claimant contends it is unfair to use anything other than his ordinary wage to calculate his compensatory amount. To base it on sickness relies on suppositions which were not supported by medical evidence. There is no medical evidence in the paperwork to suggest that, had he not been dismissed for the incident on 24/07/17, the claimant would not have been able to attend work as normal (as he did when he presented for work the following day).

2) Independent Evidence of Ability to Work

Furthermore, the facts are that Department of Work and Pensions found him fit to work. An examination was carried out by a healthcare professional at a work capability assessment. Following an appeal, the decision of the Secretary of State for the Department

of Work and Pensions was confirmed by an independent tribunal which consisted of a medical member and a legal representative. Evidence of this is attached.

3) Discrimination

The tribunal has confirmed Unfair Dismissal. The Tribunal has agreed that the claimant has a disability. These points should be linked to confirm discrimination. However, the Tribunal fails to make this link.

We accept that the key question as to whether the claimant had suffered discrimination arising from a disability is laid at Page 128; Para 323 of the Written Reasons of Judgement. We would argue that the Tribunal's conclusions are not supported by fact and the Claimant meets the two steps described in UKEAT/0397/14. Specifically, the panic attack resulted from the disability, and unfair treatment both caused, and was the result of, the panic attack. The panic attack was a symptom of depression and depression is a known by-product of diabetes, as noted in the medical evidence provided from the Consultant Physician. In the conclusions on Page 132; Para 22 it states that the claimant accepted during cross-examination that his panic attack was caused by anticipating he would have been unable to fulfil the order which he had been tasked to undertake. From this statement the judgement infers as per the view of the respondent Page 133 Para 334 that the claimant has provided only assertion that the panic attack was linked to his disability. However, the facts are these: the claimant had been diagnosed with depression; he had never suffered from depression or the side effects of depression prior to the diagnosis of diabetes; prior to suffering from depression, the order the claimant had been tasked to undertake would not have caused a panic attack. Under these circumstances there is evidence of a direct causal link

between the claimant's disability and the panic attack he suffered. Whether or not the employer was aware of the disability (and we contend they were) and its links to the panic attack, it must be beyond reasonable doubt that the claimant was treated unfavourably when they were dismissed in consequence to their behaviour during the panic attack. Although it is stated by the respondent that the claimant provided no evidence that the panic attack was related to the disability, there is no other credible conclusion, and it is unclear what additional direct evidence could have been provided. However, if the claimant had thought that this obvious conclusion would have been challenged, then the claimant's medical records demonstrating no mental health issues prior to the diagnoses of diabetes would have been provided.

Regarding the Tribunal's treatment of knowledge of depression, the decision is contrary to the balance of probability and the final decision is inconsistent with the preliminary hearing at which it was accepted that the Respondent was aware of depression. (Page 7 Para 15 of the Preliminary Hearing) This is confirmed at Page 43; Para 66 of the Full Written Reasons where it states: "The Tribunal is satisfied that the respondents were aware... that the claimant suffered from diabetes and the respondents were aware... of the medical conditions, including depression, affecting the claimant".

Respondents' Further Reply / Objections

26. On 31 May 2019, the respondents' solicitor, Mr Ciaran Robertson at Jackson Boyd, emailed the Tribunal again, with copy to the claimant, in reply to the claimant's email of 30 May 2019, and stating that:

"The Respondent wish to reiterate that the Claimant is attempting to adduce new evidence after the close of the Tribunal.

It is our position that the Tribunal cannot consider this evidence and that any reconsideration of the judgement would have to be on the basis of the evidence before the Tribunal.

We trust this makes the Respondent's position clear. We can provide further comments if instructed to by the Tribunal."

Clarification sought by the Tribunal

27. On 3 June 2019, on instructions from the Judge, the Tribunal wrote to both parties, stating that, having read the 5 attachments to the claimant's email of 30 May 2019 at 08:41, the Judge sought clarification of certain points, from the claimant, in particular:

(2) With the exception of the one-page First Tier Tribunal (Social Entitlement Chamber) decision notice of 17 May 2018, the documents now submitted by the claimant were not lodged with the Tribunal, at the Final Hearing held between 20 and 28 August 2018, and they were not included in his mitigation evidence added to the Bundle, on 21 August 2018, as document 104.

(3) In these circumstances, the claimant is called upon to explain why these documents from DWP, Jobcentre Plus, and HMCTS, now submitted, which are all dated before 20 August 2018, were not produced to the Tribunal at the start of the Final Hearing, or during its currency, up to and including when Judgment was issued on 20 December 2018?

*(4) Within the enclosure labelled "**ESA Reconsideration Notice**", extending to 14 pages, pages 9 and 10 of 14 are labelled in the bottom right hand corner of the page as pages 7 and 8 of what is clearly another document with the footer ESA 65 05/15 v0.2. Further, pages 11 to 14 of that enclosure are a duplicate of what appears as the decision maker's letter of 28 November 2017, reproduced at pages 1 to 4 of 14. Are there*

pages missing from what the claimant has sent to the Tribunal? Please clarify.

28. The Tribunal's email of 3 June 2019 to the claimant, copied to the respondents' representative, sought a reply to the Tribunal as soon as possible, and certainly within the next 7 days. While a reply was sought within 7 days, none was forthcoming from the claimant within that period.

29. Accordingly, on 18 June 2019, an email was sent to the claimant by the Tribunal clerk stating that the Tribunal had not received a reply to the Tribunal's correspondence of 3 June 2019, and requesting a reply by 25 June 2019. Again, no reply was received, and a further reminder was sent to the claimant, on 27 June 2019, seeking a reply by 11 July 2019.

Reply from the Claimant

30. Thereafter, on 11 July 2019, the claimant replied to the Tribunal, with copy to the respondents' representative, attaching an email sent to him from Renfrewshire CAB in Paisley on that date, and that reply to the Tribunal, which enclosed a Word copy of his earlier written comments of 29 May 2019, was in the following terms, as per his covering e-mail: -

Dear Sirs,

1. I have attached the writen (sic) ***comments as a word document as requested.***

2. I accept that it would have been better for the documents from HMRC and the DWP to have been included in the bundle to be considered at tribunal. However, as I am inexperienced in these matters I did not realise the importance of including them. In addition, although I did read that the Respondent had proposed that my compensation be reduced to SSP level, I didn't think this position had much merit because I was attending work (despite my health

problems) up to my summary dismissal, and this seemed the key fact given that information about my health after the dismissal would be affected by the impact on my health of that event.

3. Apologies for the Document Labelled "ESA Reconsideration" notice. The only ones to consider are the first five pages. Pages 9 and 10 are indeed another document, which I cannot locate and therefore must be discounted. As well, pages 11 to 14 are indeed a diplicate (sic) ***of page 1 to 5 and also must be discounted.***

31. On 16 August 2019, following referral to the Judge on 14 August 2019, the claimant's email of 11 July 2019 was acknowledged by the Tribunal, and the acknowledgment copied to the respondents' solicitor, by the Tribunal clerk, but no further correspondence has been received from them, by way of any further written representations on behalf of the respondents, nor from the claimant.

Relevant Law: Reconsideration

32. As we were not addressed on the relevant law, by either party, although the claimant's application did refer to **Rules 70 and 71,** albeit mistakenly referred to as Sections, we have given ourselves a self-direction.

33. While being addressed on the relevant law is not something the Tribunal would ordinarily expect of an unrepresented, party litigant, we have to observe that we were surprised that the respondents' solicitors, being legally qualified and employment law practitioners who appear frequently in this Tribunal, did not address us on the relevant law in their shortly stated set of two e-mails of 10 and 31 May 2019.

34. This reconsideration application requires to be dealt with as per **Rules 70 to 73 of the Employment Tribunals Rules of Procedure 2013**. As this was an application by the claimant, **Rule 73**, relating to reconsiderations by the Tribunal on its own initiative, does not fall to be considered further.

Further, as always, there is the Tribunal's overriding objective, under **Rule 2,** to deal with the case fairly and justly.

35. **Rule 70** sets forth the principles for reconsideration of Judgments, while **Rule 71** defines how to apply, including time limits, and **Rule 72** details the process. We have also reminded ourselves that **Rule 5** allows a Tribunal, on its own initiative, or on application of a party, to extend any time limit specified in the Rules or in any decision, whether or not (in the case of an extension) it has expired.

36. Further**, Rule 6** provides that where there have been irregularities and non-compliance, that does not of itself render void the proceedings or any step taken in the proceedings, and, in the case of non-compliance with the Rules or any Order of the Tribunal (except for defined exceptions, none of which apply to the present case), the Tribunal may take such action as it considers just.

37. The previous Employment Tribunal Rules 2004 provided a number of grounds on which a judgment could be reviewed (now called a reconsideration). The only ground in the current 2013 Rules is that the judgment can be reconsidered where it is necessary "***in the interests of justice***" to do so. That means justice to both parties.

38. However, it was confirmed by Her Honour Judge Eady QC in **Outasight VB Limited v Brown [2014] UKEAT/0253/14/LA,** now reported at **[2015] ICR D11,** that the guidance given by the Employment Appeal Tribunal in respect the previous Rules is still relevant guidance in respect of the 2013 Rules and, therefore, we have considered the case law arising out of the 2004 Rules.

39. The approach to be taken to applications for reconsideration was also set out more recently in the case of **Liddington v 2Gether NHS Foundation**

Trust [2016] UKEAT/0002/16/DA in the judgment of Mrs Justice Simler, then President of the EAT.

40. The Employment Tribunal is required to:

> "***1. identify the Rules relating to reconsideration and in particular to the provision in the Rules enabling a Judge who considers that there is no reasonable prospect of the original decision being varied or revoked refusing the application without a hearing at a preliminary stage;***
>
> ***2. address each ground in turn and consider whether is anything in each of the particular grounds relied on that might lead ET to vary or revoke the decision; and***
>
> ***3. give reasons for concluding that there is nothing in the grounds advanced by the (applicant) that could lead him to vary or revoke his decision. "***

41. In paragraph 34 and 35 of the Judgment, the learned EAT President, Mrs Justice Simler, stated as follows:

> ***34. In his Reconsideration Judgment the Judge identified the Rules relating to reconsideration and in particular to the provision in the Rules enabling a Judge who considers that there is no reasonable prospect of the original decision being varied or revoked refusing the application without a hearing at a preliminary stage. In this case, the Judge addressed each ground in turn. He considered whether was anything in each of the particular grounds relied on that might lead him to vary or revoke his decision. For the reasons he gave, he concluded that there was nothing in the grounds advanced by the Claimant that could lead him to vary or revoke his decision, and accordingly he refused the application at the preliminary stage. As he made clear, a request for reconsideration is not***

an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered. Tribunals have a wide discretion whether or not to order reconsideration, and the opportunity for appellate intervention in relation to a refusal to order reconsideration is accordingly limited.

35. Where, as here, a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application. It seems to me that the Judge was entitled to conclude that reconsideration would not result in a variation or revocation of the decision in this case and that the Judge did not make any error of law in refusing reconsideration accordingly.

42. There is a public policy principle that there must be finality in litigation and reviews or reconsiderations are a limited exception to that principle. In the case of **Stephenson v Golden Wonder Limited [1977] IRLR 474,** it was made clear that a review (now a reconsideration) is not a method by which a disappointed litigant gets a "***second bite of the cherry***". Lord Macdonald, the Scottish EAT Judge, said that the review provisions 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 produced which was available before".***

43. The Employment Appeal Tribunal went on to say in the case of **Fforde v Black EAT68/80** that this ground does not mean "***that in every case where a litigant is unsuccessful is automatically entitled to have the Tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in even more exceptional cases where something has gone radically wrong with the procedure involving the denial of natural justice or something of that order."***

44. "***In the interests of justice***" means the interests of justice to both parties. The Employment Appeal Tribunal provided further guidance in **Reading v EMI Leisure Limited EAT262/81** where it was stated "***when you boil down what it said on [the claimant's] behalf it really comes down to this: that she did not do herself justice at the hearing so justice requires that there should be a second hearing so that she may. Now, "justice", means justice to both parties. It is not said, and, as we see it, cannot be said that any conduct of the case by the employers here caused [the claimant] not to do herself justice. It was, we are afraid, her own inexperience in the situation."***

45. The 2013 Rules came into force on 29 July 2013 and introduced the new concept of reconsideration of judgments rather than a review of judgments as it was entitled under the previous 2004 Rules of Procedure. In the 2004 Rules there were five grounds on which a review could be sought and the last of the five was the single ground that now exists for a reconsideration under the 2013 Rules namely that the interest of justice render it necessary to reconsider.

46. We consider that any guidance on the meaning of "***the interests of justice***" issued under the 2004 Rules (and the earlier Rules) is still relevant to reconsiderations under the 2013 Rules. We also remind ourselves that the phrase "***in the interests of justice***" means the interests of justice to both sides.

47. Further, we have also reminded ourselves of the guidance to Tribunals in **Newcastle upon Tyne City Council – v- Marsden [2010] ICR 743** and in particular the words of Mr Justice Underhill when commenting on the introduction of the overriding objective (now found in **Rule 2** of the 2013 Rules) and the necessity to review previous decisions and on the subject of a review:

> "***But it is important not to throw the baby out with the bath-water. As Rimer LJ observed in Jurkowska v Hlmad Ltd. [2008] ICR 841, at para. 19 of his judgment (p. 849), it is "basic" "… that dealing with cases justly requires that they be dealt with in accordance with recognised principles. Those principles may have to be adapted on a case by case basis to meet what are perceived to be the special or exceptional circumstances of a particular case. But they at least provide the structure on the basis of which a just decision can be made."***
>
> ***The principles that underlie such decisions as Flint and Lindsay remain valid, and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles. In particular, the weight attached in many of the previous cases to the importance of finality in litigation – or, as Phillips J put it in Flint (at a time when the phrase was fresher than it is now), the view that it is unjust to give the losing party a second bite of the cherry – seems to me entirely appropriate:***

justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final (subject, of course, to appeal").

48. Further, we have also considered the guidance on the 2013 Rules from HH Judge Eady QC in her judgment in **Outasight VB Limited –v- Brown [2014] UKEAT/0253/14**. We have considered that guidance and in particular have noted what is said about the grounds for a reconsideration under the 2013 Rules:

"In my judgment, the 2013 Rules removed the unnecessary (arguably redundant) specific grounds that had been expressly listed in the earlier Rules. Any consideration of an application under one of the specified grounds would have taken the interests of justice into account. The specified grounds can be seen as having provided examples of circumstances in which the interests of justice might allow a review. The previous listing of such examples in the old Rules - and their absence from new - does not provide any reason for treating the application in this case differently simply because it fell to be considered under the "interests of justice" provision of the 2013 Rules. Even if it did not meet the requirements laid down in Rule 34(3)(d) of the 2004 Rules, the ET could have considered whether it should be allowed as in the interests of justice under Rule 34(3)(e). There is no reason why it should then have adopted a more restrictive approach than it was bound to apply under the 2013 Rules".

49. In considering this reconsideration application, we have also taken into account the helpful judicial guidance provided by Her Honour Judge Eady QC, EAT Judge, in her judgment delivered on 19 February 2018, in **Scranage v Rochdale Metropolitan Borough Council [2018]**

UKEAT/0032/17, at paragraph 22, when considering the relevant legal principles, where she stated as follows: -

> ***"The test for reconsideration under the ET Rules is thus straightforwardly whether such reconsideration is in the interests of justice (see Outasight VB Ltd v Brown UKEAT/0253/14 (21 November 2014, unreported). The "interests of justice" allow for a broad discretion, albeit one that must be exercised judicially, which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation."***

50. **Outasight VB Ltd v Brown** is, of course, an earlier EAT authority **[2014] UKEAT/0253/14**, now reported at **[2015] ICR D11**, also by HHJ Eady QC, where at paragraphs 27 to 38, the learned EAT Judge reviewed the legal principles.

51. The EAT President, then Mr Justice Langstaff, in **Dundee City Council v Malcolm [2016] UKEATS/0019-21/15**, at paragraph 20, states that the current Rules effected no change of substance to the previous Rules, and that they do not permit a claimant to have a second bite of the cherry, and the broader interests of justice, in particular an interest in the finality of litigation, remained just as important after the change as it had been before.

52. Further, we have also taken into account the Court of Appeal's judgment, in **Ministry of Justice v Burton & Another [2016] EWCA Civ.714**, also reported **at [2016] ICR 1128**, where Lord Justice Elias, at paragraph 25, refers, without demur, to the principles "***recently affirmed by HH Judge Eady in the EAT in Outasight VB Ltd v Brown UKEAT/0253/14."***

53. Further, at paragraph 21 in **Burton**, Lord Justice Elias had stated that:

"An employment tribunal has a power to review a decision "where it is necessary in the interests of justice": see Rule 70 of the Tribunal Rules. This was one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, as Underhill J, as he was, pointed out in Newcastle on Tyne City Council v Marsden [2010] ICR 743, para. 17 the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Ironsides Ray and Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."

Discussion and Deliberation: Reconsideration

54. We have now carefully considered both parties' written representations, as also our own obligations under **Rule 2 of the Employment Tribunal Rules of Procedure 2013**, being the Tribunal's overriding objective to deal with the case fairly and justly.

55. We are conscious that, as at the Final Hearing, the claimant is an unrepresented, party litigant, and although it appears he is now in receipt of some recent advice from Renfrewshire CAB about these reconsideration applications, we see from his application of 11 January 2019 that he refers there to having sought advice from his local CAB "***since beginning these proceedings".***

56. The claimant's original reconsideration application dated 11 January 2019 was submitted more than 14 days after the date on which the Tribunal

issued our original Judgment only to both parties on 20 December 2018. However, **Rule 71** provides that the 14-day period for reconsideration starts from the date that Written Reasons are issued, if these are issued later than the Judgment only, as was the case in the present case. Had Judgment with Reasons been issued on 20 December 2018, then the 14-day period for applying for reconsideration would have run from that date.

57. As such, we have not required to rule on the claimant's application for an extension of time, although had we required to do so, we would have granted him an extension of time, under **Rules 5 and 6**, being satisfied that that was a just thing to do, and given that his inability to access advice from his local CAB offices over the Christmas / New Year festive period is understandable, and nothing to do with any culpable or blameworthy failure to act promptly by the claimant. His explanation for the delay is accepted by us as good cause shown.

58. The ***"new"*** reconsideration application, submitted by the claimant on 16 April 2019, was submitted on the 14th day after issue of our Written Reasons on 2 April 2019, and so we are satisfied that it was on time. While the claimant entitled that document ***"new"***, his narrative (as reproduced earlier in these Reasons, at paragraph 21 above) refers to it being sent to ***"update my previous application for reconsideration."***

59. The claimant's further correspondence of 30 May 2019, and 11 July 2019, has provided clarification of the reconsideration applications. We have taken all of his correspondence into account, as also the respondents' solicitor's two emails of 10 and 31 May 2019.

60. It is disappointing for the Tribunal to have to note and record that, given a party's duty to assist the Tribunal to further the overriding objective under **Rule 2**, and co-operate generally with the other party and the Tribunal, the respondents' solicitors have not provided us with any written

representations in response to the claimant's more recent correspondence of 11 July 2019.

61. Further, as is self-evident from reading their correspondence, as reproduced earlier in these Reasons, at paragraphs 22 and 26 above, those objections of 10 and 31 May 2019 are somewhat brief, and they certainly do not address the claimant's specific points on his various emails to the Tribunal, seeking reconsideration of our original Judgment.

62. They focus primarily on the request for reconsideration of the amount of compensatory award, and say nothing about the expanded ground dealing with our decision to refuse the alleged unlawful disability discrimination parts of the claim against the respondents.

63. That said, we consider that both parties have been given more than a reasonable opportunity, in advance of this Reconsideration Hearing in chambers, to make their own written representations in respect of the claimant's applications for reconsideration of our original Judgment, and so we have dealt with them on the basis of the papers before us, and then applying the relevant law.

64. There is no dispute that our original Judgment issued on 20 December 2018, with Written Reasons reserved and issued on 2 April 2019, is a Judgment as defined in **Rule 1(3) (b) of the Employment Tribunals Rules of Procedure 2013**. It finally disposed of the claimant's claim against the respondents, by upholding his claim of unfair dismissal by the respondents, and awarding him compensation payable by the respondents, but dismissing his complaints of alleged unlawful disability discrimination.

65. On the test of ***"in the interests of justice",*** under **Rule 70,** which is what gives this Tribunal jurisdiction in this matter, there is now only one ground

for "***reconsideration***", being that reconsideration "***is necessary in the interests of justice***."

66. That phrase is not defined in the **Employment Tribunals Rules of Procedure 2013,** but it is generally accepted that it encompasses the five separate grounds upon which a Tribunal could "***review"*** a Judgment under the former **2004 Rules**.

67. While there are many similarities between the former and current Rules, there are some differences between the current **Rules 70 to 73** and the former **Rules 33 to 36**. Reconsideration of a Judgment is one of the two possible ways that a party can challenge an Employment Tribunal's Judgment. The other way, of course, is by appeal to the Employment Appeal Tribunal ("***the EAT***").

68. As far as this Tribunal is aware, neither party has sought to appeal our original Judgment to the Employment Appeal Tribunal, and the strict 42-day period for an appeal to the EAT has long since been and gone.

69. **Rule 70** confers a general power on the Employment Tribunal, and it stands in contrast to the appellate jurisdiction of the Employment Appeal Tribunal ("***EAT***"). In most cases, a reconsideration will deal with matters more quickly and at less expense than an appeal to the EAT.

70. Here, by parties agreeing to no oral Hearing, they have been saved further expense, other than might have been incurred in making their written representations to the Tribunal, but the public purse has, of course, still had to arrange this Hearing. The delay in fixing this Hearing has, in major part, been down to necessary clarifications sought by the Tribunal after the claimant's second application, dated 16 April 2019, and the claimant's failure to reply timeously to correspondence from the Tribunal.

71. After the most careful consideration of the arguments submitted by the claimant in his written representations, and the respondents in their objections, and taking into account the relevant law, as ascertained in the legal authorities referred to above, in our self-direction, we are satisfied that this is not one of those cases where, on reconsideration, it is necessary for us, in the interests of justice, to vary or revoke our original Judgment, and so we have decided that it is appropriate to **confirm** our original Judgment, and that **without variation.**

72. There is a public interest in the finality of litigation, and to revoke the original Judgment, and start again, is, in our view, contrary to that public interest, and also contrary to the Tribunal's overriding objective, to deal with the case fairly and justly.

73. In essence, on his first two points, from his written comments of 29 May 2019, about ability to work, and independent evidence of his ability to work, the claimant seeks, by his reconsideration application, to have a "***second bite of the cherry***", and have us take into account, after our Judgment has been issued, evidence and documents that were in existence at the time of the 4 day Final Hearing before us, in August 2018, but which were not lodged by the claimant at that stage as productions, on which he could have given evidence, and then been cross-examined, as appropriate, by the respondents' solicitor, and asked any questions of clarification by the Tribunal.

74. As in the Employment Appeal Tribunal's judgment, in **Reading v EMI Leisure Limited EAT262/81,** as cited by us above at paragraph 44 of these Reasons, when we considered the relevant law, when you boil down what it said by the claimant, on his request for reconsideration about the amount of the compensatory award for unfair dismissal, it really comes down to this: that the claimant feels now that he did not do himself justice at the Final Hearing, so justice requires that there should now be a second Hearing so that he may.

75. However, as we have noted elsewhere in these Reasons, the interests of justice means justice to both parties, not just the claimant. It is not said, and, as we see it, cannot be said that any conduct of the case by the respondents as his former employers here caused the claimant not to do himself justice.

76. It was, we are sure, his own inexperience in the situation, where he was emotionally involved in the case, lacked representation, and so perhaps could not see the wood for the trees. We provided both parties at the Final Hearing with a degree of leeway, consistent with our duty under **Rule 2**, but we did not, and cannot, act as advocate or representative for either party by descending into the arena. As and when we appropriate, we sought clarifications of both parties' cases, and we allowed additional documentation to be added to the Bundle used at the Final Hearing.

77. For a Tribunal to take into account, on reconsideration, new evidence, then an applicant for reconsideration requires to establish that it is new evidence that has become available since the conclusion of the Tribunal Hearing to which the decision sought to be reconsidered related, the existence of which could not have been reasonably known of or foreseen at the time.

78. Generally, new evidence applications tend to arise from newly discovered documents, or new witnesses. That, however, is not the situation here, where the claimant has produced as new documents a series of documents pre-dating the start of the Final Hearing in August 2018. He has not sought to introduce any new witness to facts.

79. It is important, in this regard, to recall what the claimant stated in his email to the Tribunal, on 11 July 2019, as reproduced above, at paragraph 30 of these Written Reasons, including his statement there that:

2. I accept that it would have been better for the documents from HMRC and the DWP to have been included in the bundle to be considered at tribunal. However, as I am inexperienced in these matters I did not realise the importance of including them. In addition, although I did read that the Respondent had proposed that my compensation be reduced to SSP level, I didn't think this position had much merit because I was attending work (despite my health problems) up to my summary dismissal, and this seemed the key fact given that information about my health after the dismissal would be affected by the impact on my health of that event.

80. Case law authorities, on what was the **former Rule 34(3)(d)** of the 2004 Rules, make it clear that the former Rule reflected the well-known principles for admission of new evidence on appeal in civil litigation set down by the Court of Appeal in England and Wales in **Ladd v Marshall 1954 3 All ER 745.**

81. Although the current **2013 Rules** do not contain the specific provisions of that former Rule, such a test is still in practice generally applied by Tribunals, even under the ostensibly more flexible "***interests of justice***" ground, as Tribunals remain mindful of the fact that it is not generally in the interests of justice that parties to a litigation should be given a second bite of the cherry simply because they have failed as a result of oversight or a miscall in their litigation strategy to adduce all the evidence available in support of their case at the original Hearing.

82. Furthermore, a Tribunal is likely to refuse such an application unless the new evidence is likely to have an important bearing on the outcome of the case. In **Wileman v Minilec Engineering Ltd 1988 ICR 318**, the Employment Appeal Tribunal stated that the reason for the specific requirements of the former Rule was that unless the new evidence is likely to influence the decision, then a great deal of time will be taken up by sending cases back to a Tribunal for no purpose.

83. Here, the claimant seeks to explain why this "***new evidence***" was not produced at the Final Hearing by saying, as per his application of 11 January 2019, that while he did notice the other side had suggested he had only received SSP, he considered that argument "***meretricious***", which we understand, from its dictionary definition, to mean "***apparently attractive but having no real value",*** and he had not directly addressed this for the reasons set out in his reconsideration application.

84. In that regard, we refer specifically to his statement of 11 January 2019 that: ***"I believe the conclusion made is based on little to no medical evidence. Furthermore, it is in complete contradiction to what the medical professions at the Department for Work and Pensions (DWP) found when I applied for Personal Independence Payment (PIP), in that they considered me fit to work in December 2017".***

85. Again, in his "***new"*** application of 16 April 2019, the claimant stated: "***I refute the claim unequivocally that I was unfit to work during this period. I believe the conclusion made is based on little to no medical evidence."*** He refers again to the DWP considering him fit to work, when he applied for PIP in December 2017, and he states that he has not been in receipt of any sickness benefits since his dismissal.

86. So far as the **PIP** documentation is concerned, the Tribunal notes and records that no such documentation has been produced by the claimant. He has only produced to us documents relating to Jobseekers' Allowance, and Employment and Support Allowance. It maybe, of course, that the claimant has used the wrong label here.

87. As a Tribunal, we readily accept that the JSA and ESA documents lodged by the claimant are important documents in their own context, and Tribunals regularly see such documentation as part of mitigation evidence put forward by claimants at Final Hearing, where there may be an issue

raised by a respondent about whether or not a claimant has taken steps to mitigate their losses.

88. In the present case, however, no such issue was taken by the respondents, in their ET3 response, their Counter Schedule (at pages 102/103 of the Bundle), or their solicitor's closing submissions to the Tribunal.

89. However, documentation about State benefits, such as JSA and ESA, needs to be viewed in the context, and having regard to the statutory State benefits schemes that they operate under the DWP, and that context does not directly appertain to the statutory definition of disability status under **Section 6 of the Equality Act 2010**, nor to an individual claimant's fitness to work, or seek new employment, post-termination of their previous employment with a respondent employer.

90. For the purposes of this case, of course, there had been an earlier Preliminary Hearing on disability status, and Employment Judge Mary Kearns held that the claimant was disabled at the relevant time, but only in relation to diabetes, and not depression.

91. However, when it comes to his written comments of 29 May 2019, the claimant restates his position about (1) ability to work, and (2) independent evidence of ability to work. He attached evidence of the DWP decision, and the Secretary of State decision.

92. As the Tribunal highlighted to the claimant, on 3 June 2019, as referred to above at paragraph 27 of these Reasons, with the exception of the one-page First Tier Tribunal (Social Entitlement Chamber) decision notice of 17 May 2018, the documents then submitted by the claimant were not lodged with the Tribunal, at the Final Hearing held between 20 and 28 August 2018, and they were not included in his mitigation evidence added to the Bundle, on 21 August 2018, as document 104.

93. In these circumstances, the claimant was called upon by the Judge to explain why those documents from DWP, Jobcentre Plus, and HMCTS, then submitted, which were all dated before 20 August 2018, were not produced to the Tribunal at the start of the Final Hearing, or during its currency, up to and including when Judgment was issued on 20 December 2018?

94. The claimant provided an explanation in his reply of 11 July 2019, as detailed above at paragraph 30 of these Reasons, where he stated, at his point (2), that: "***I accept that it would have been better for the documents from HMRC and the DWP to have been included in the bundle to be considered at tribunal. However, as I am inexperienced in these matters I did not realise the importance of including them."***

95. In relation to that failure to lodge those documents at the Final Hearing, the claimant prays in aid that he is "***inexperienced"*** in these matters, and he did not realise the importance of including them. We find that hard to accept, given the standard wording in the Notice of Final Hearing issued to parties in any case before this Tribunal (and so included in the Notice of Hearing issued to both parties in this case on 9 June 2018) makes it clear and unequivocal that it is their responsibility to produce all relevant and necessary documents. Also, it is of note that the claimant was accompanied at the Final Hearing, by his wife, both as a witness, and as moral support.

96. Further, the claimant in his written representations to us accepts that although he did read that the respondents had proposed that his compensation be reduced to SSP level, which we take to be his reference to the Counter Schedule position adopted by Mr Robertson in closing submissions, and his Counter Schedule, the claimant invites us to accept that he did not think this position by the respondents had much merit because he was attending work (despite his health problems) up to his summary dismissal, and this seemed the key fact given that information

about his health after the dismissal would be affected by the impact on his health of that event.

97. At the Final Hearing, we heard directly from the claimant, as also from his wife, and in assessing his compensation for unfair dismissal, we were looking at matters post-termination of employment with the respondents on 1 August 2017 to date of the Final Hearing before us.

98. We narrated that in our findings in fact, and in our assessment of the evidence heard at the Final Hearing. We refer back to our Written Reasons in that regard, specifically our findings in fact at sub-paragraphs (61) to (66) of our findings in fact (at paragraph 104 of our Written Reasons), his Schedule of Loss at paragraph 104(67), the respondents' Counter Schedule at paragraph 104(68), and the claimant's mitigation evidence at paragraph 104(69)(a) to (j).

99. In addition, we took account of the claimant's reply to Mr Robertson's closing submissions for the respondents, as per paragraphs 179 and 180 of our Written Reasons. Further, we noted his acceptance, as reproduced above, at paragraph 25 of these Reasons, that, in his written comments of 29 May 2019, the claimant expressly states that: "***The claimant accepts in his evidence provided to the tribunal, under cross examination, that if he remained in employment with the employers, he would be unable to work."***

100. However, the simple truth of the matter is that, at the Final Hearing, the claimant gave no evidence whatsoever to us that he was fit to work for any other employer, and he produced no evidence to show that he had been trying to source new employment with a new employer.

101. The fit notes we had, in the Bundle, at document 104, dated 14 and 28 May 2018, and 12 July 2018, showed that the claimant was not fit to work, on account of depression, but he produced no later medical certification

from his GP, or elsewhere, and his medical documentation of November / December 2017 produced to us, at pages 92 to 97 of the Bundle, related to his diabetes and depression, and not his fitness to work, and post-dated his summary dismissal, and the respondents' rejection of his internal appeal against dismissal.

102. His handwritten statement, provided to us, on 20 August 2018, as narrated at paragraph 104(69)(a) of our Written Reasons, records the claimant's clear and unequivocal statement that: "I ***have been unable to find work as my GP signed me off as unfit for work due to my depression…. Due to my ongoing depression and anxiety, I have been unable to make efforts to minimise my loss."***

103. As we recorded at paragraphs 179 to 181 of our Written Reasons for our original Judgment, the claimant advised us that he was still in receipt of State benefits, as before, that his GP had told him, around March 2018, to get him back to work, but his GP did not sign him off at that time, as he did not have his diabetes under control due to the stresses connected with the Tribunal process ; and the claimant further stated to us then that he aimed to get a job, and his life back into some semblance of order, after the whole Tribunal process was finished.

104. His current circumstances are not known to the Tribunal, and the claimant has not stated them in his written representations to us.

105. Finally, on the claimant's third point, as per his 29 May 2019 written comments, about the Tribunal's failure to uphold his unlawful disability discrimination heads of complaint, and his submission there that the Tribunal's conclusions in the original Judgment are not supported by the facts, and that our treatment of the respondents' knowledge of his depression is contrary to the balance of probability, and inconsistent with the Preliminary Hearing on disability status Judgment of Employment

Judge Mary Kearns, the Tribunal notes the claimant's comments, but does not regard them as well-founded.

106. Our findings in fact were based on the evidence available to us from both parties at the Final Hearing. Judge Kearns' Preliminary Hearing Judgment of 26 February 2018, as issued on 6 March 2018, was not the subject of reconsideration or appeal by either party.

107. There is a public policy principle that there must be finality in litigation and reviews, or reconsiderations, are a limited exception to that principle. The Employment Appeal Tribunal, in its jurisprudence available to Tribunals at first instance, has made clear that a review (now a reconsideration) is not a method by which a disappointed litigant gets a second bite of the cherry.

108. The provisions were not intended to provide parties with the opportunity of a rehearing at which the same evidence or submissions can be rehearsed with different emphasis, or further evidence produced which was available before. This procedure does not mean that in every case where a litigant is unsuccessful, they are automatically entitled to have the Tribunal review or reconsider it. Every unsuccessful litigant thinks that the interests of justice require a review.

109. "***In the interests of justice***" means the interests of justice to both parties. The Tribunal's overriding objective under **Rule 2** to deal with cases fairly and justly requires the application of recognised legal principles, and these include that there should be finality in litigation, which is in the interest of both parties.

110. In coming to our decision on these opposed reconsideration applications, we have come to our considered and unanimous view based on considering written representations from both parties, and weighing the

competing factors in the balance, as per the applicable case law authorities detailed in his Judgment.

111. The claimant had the opportunity at the Final Hearing to present his case as he thought fit. The respondents tested that case, and the original Judgment shows divided success for both parties. In particular, the claimant had the opportunity at that Final Hearing to present his evidence, and make his closing submissions, as also to test the respondents' witnesses by cross-examining them, and making his own reply to Mr Robertson's closing submissions for the respondents.

112. As such, we are satisfied that the claimant had the opportunity at that Final Hearing to present all evidence and arguments which he felt were relevant and necessary to seek to address the issues before the Tribunal, and in our collective view it is not necessary in the interests of justice to reconsider our original Judgment, either in whole, or in part, as suggested by the claimant.

113. It would be a great and disproportionate waste of the parties' and the Tribunal's resources to revoke our original Judgment in its entirety, and thereafter order that the Tribunal assign a fresh Final Hearing.

114. By revoking the Judgment in its entirety, not that we were invited to do so, by either party, the case would go back to the starting line, and a fresh Final Hearing before a differently constituted Tribunal would be required. That is, in our view, neither appropriate, nor proportionate. It is certainly not consistent with the overriding objective, in particular avoiding delay, and saving expense.

115. The claimant would also lose the benefit of the judicial finding and declaration that he currently holds stating that he was unfairly dismissed by the respondents. They have **not** challenged that finding. If the case were to be reheard, there is no certainty that another Tribunal would

necessarily come to the same conclusions as this Tribunal. It would all depend on the evidence led at any fresh Final Hearing, and that other Tribunal's assessment of that evidence.

116. If we were to revoke our original Judgment, then there would be inevitable further delay and expense to both parties, as well as for the Tribunal, as well as uncertainty for both parties until a fresh Judgment was issued after any fresh Final Hearing.

117. The respondents' objections of 10 May 2019 stated, amongst other things, that "***The Claimant is now attempting to change his evidence due to the financial implications that his evidence has had on his award for compensation."***

118. While the reconsideration applications brought by the claimant have failed, we note and record that he was within his rights to seek reconsideration, and we do not regard his applications as having been vexatious or otherwise unreasonable. In insisting upon his reconsideration applications, the claimant appears to have secured some recent advice from Renfrewshire CAB, and so it seems to us that he has not been proceeding solely on his own initiative.

119. At the Final Hearing before us, in August 2018, the claimant had a full opportunity to advance his case. The points he raised were carefully taken into account by the Tribunal as shown in our detailed written Judgment with later detailed Written Reasons. It would be contrary to the interests of justice to permit the claimant another opportunity to rerun his case.

120. If the claimant considers that the Tribunal's Judgment was wrong in law, then his remedy was to have appealed it to the Employment Appeal Tribunal. As far as we are aware, he did not do so; nor did the respondents. It is, of course, now too late for him to seek to do so.

121. Where, as in the present case, matters have already been fully ventilated and properly argued, at the 4-day Final Hearing before us in August 2018, and in the absence of any identifiable administrative error, breach of the rules of natural justice, or any event occurring after the Hearing that requires a reconsideration in the interests of justice, any asserted error of law by this Tribunal stands to be corrected on appeal and not through the back door by way of a reconsideration application.

Closing Remarks

122. It is clear to us from his written representations that the claimant feels strongly about this case and, as like many other unrepresented, party litigants, he may well have persuaded himself of the justice of his cause, and he may indeed sincerely believe in his cause.

123. However, we have had to assess his reconsideration applications before this Tribunal against these respondents based on our independent and objective judicial scrutiny of his applications for reconsideration, and the respondents' stated grounds of objection.

124. In coming to our decision on these opposed applications for reconsideration, we have taken into account that the claimant is, in these proceedings, an unrepresented, party litigant. In **A Q Ltd v Holden [2012] IRLR 648,** His Honour Judge Richardson, the EAT Judge, held, particularly at paragraphs 32 and 33, that justice requires that Tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life, and that lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser.

125. Further, we consider it appropriate, in relation to the claimant's status as an unrepresented, party litigant, to refer to the Supreme Court judgment in **Barton v Wright Hassall LLP [2018] UKSC 12,** particularly Lord Sumption, at paragraph 18, where he stated that:

"*18. Turning to the reasons for Mr Barton's failure to serve in accordance with the rules, I start with Mr Barton's status as a litigant in person. In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him: R (Hysaj) v Secretary of State for the Home Department [2015] 1 WLR 2472, para 44 (Moore-Bick LJ); Nata Lee Ltd v Abid [2015] 2 P & CR 3, [2014] EWCA Civ 1652. At best, it may affect the issue "at the margin", as Briggs LJ observed (para 53) in the latter case, which I take to mean that it may increase the weight to be given to some other, more directly relevant factor. It is fair to say that in applications for relief from sanctions, this is mainly because of what I have called the disciplinary factor, which is less significant in the case of applications to validate defective service of a claim form. There are, however, good reasons for applying the same policy to applications under CPR rule 6.15(2) simply as a matter of basic fairness. The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take.*"

126. More recently, Lord Carloway, the Lord President of the Court of Session, as Scotland's most senior Judge, in giving the Opinion of the Court, in **Khaliq v Gutowski [2018] CSIH 66**, having quoted from Lord Sumption

in **Barton**, referred, at paragraph 36 of his judgment to a recent judgment by Lady Paton, following **Barton**, stating that:

> *"... the fair balance achieved by the rules of court will inevitably be disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent".*

127. In the present case, we have taken into account that the claimant is representing himself, but that factor does not in any way allow him any special indulgences where the Tribunal decides, as we have done, that it is not in the interests of justice to grant his reconsideration applications. His applications are accordingly refused.

Mr I McPherson
Employment Judge

11 September 2019
Date of Judgment

Date sent to parties **13 September 2019**