EMPLOYMENT TRIBUNALS

Claimant: Mr N Schofield

Respondents: 1. Bolton Textiles Group Limited
2. Mr J Dawson
3. Mr P A Dawson

JUDGMENT

The respondents' application dated **19 March 2021** for reconsideration of the judgment sent to the parties on **5 March 2021** is refused.

REASONS

1. I have undertaken a preliminary consideration of the respondents' application for reconsideration of the judgment that the claimant is a disabled person for the purposes of section 6 of the Equality Act 2010. References in square brackets (e.g. [25]) are references to paragraph numbers from the Reasons promulgated with the Judgment.

The Law

1. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70).

2. Rule 72(1) of the 2013 Rules of Procedure empowers me to refuse the application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked.

3. The importance of finality was confirmed by the Court of Appeal in **Ministry of Justice v Burton and anor [2016] EWCA Civ 714** in July 2016 where Elias LJ said that:

> **"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."

4. Similarly in **Liddington v 2Gether NHS Foundation Trust EAT/0002/16** the EAT chaired by Simler P said in paragraph 34 that:

"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 by 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."

5. In common with all powers under the 2013 Rules, preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay. Achieving finality in litigation is part of a fair and just adjudication.

6. In **Outasight VB Limited v Brown [2015] ICR D11 EAT** the Employment Appeal Tribunal determined that:

"Establishing whether it would be in the interests of justice to reconsider a Judgment is a judicial exercise which requires the consideration of the interests of both parties, the party seeking the reconsideration but also the other party, and to the public interest that there be finality in litigation."

7. In the case of **Ladd v Marshall [1954] 3 All ER 745, CA**, the Court of Appeal confirmed that reconsideration may apply where there is new evidence if it was not reasonable to obtain that evidence prior to the final hearing, that the evidence is relevant and would have an influence on the final hearing, and is credible.

8. In **Douglas Water Miners Welfare Society Club v Grieve EAT 487/84** the Employment Appeal Tribunal determined that where a party is taken by surprise with a piece of evidence previously undisclosed, the proper course of action during the actual hearing will be for the party to seek an adjournment. The Employment Appeal Tribunal concluded that where such a request is not made, it is unlikely that the Tribunal would agree to reconsider a Judgment on the grounds that a party had been taken by surprise.

The Application

9. The respondents seek a reconsideration of the judgment that the claimant is a disabled person within the meaning of section 6 of the Equality Act 2010 because they have obtained a copy of an assessment by the Department for Work and Pensions which the respondents say casts doubt on the evidence given by the claimant at the preliminary hearing on 13 January 2021, and given by the claimant in his disability impact statement.

10. The respondents also submit that because the Department for Work and Pensions assessment makes reference to other documents which have not been disclosed to the respondents or the Tribunal, the parties were not on an equal footing at the preliminary hearing on 13 January 2021 and therefore it would be in the interests of justice for me to revoke my Judgment and re-list the matter for another preliminary hearing to determine whether the claimant is a disabled person within the meaning of section 6 of the Equality Act 2010 after the respondents are in receipt of the undisclosed documents.

11. The respondents do not appear to challenge the finding that the claimant had a physical impairment nor that it was long-term but rather, that there had been a substantial and adverse effect on his normal day-to-day activities. At paragraph [15] of the Judgment, it was agreed between all, that the relevant period for the purposes of determining whether the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 was February and March 2018.

12. The purpose of the report prepared by the Department for Work and Pensions was to establish if the claimant qualified for payment of benefits from 20 August 2019. The report itself was prepared and sent to the claimant on 24 November 2019. This assessment of the claimant's impairment does not relate to the relevant period of February and March 2018.

13. The respondents do not deal with why the assessment made some 18 months later is relevant to the finding that the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 in February and March 2018.

14. At paragraphs [7] and [8] of my findings I refer to evidence from a Pain Management Clinic produced in March 2018 to which the claimant had been referred in light of his difficulty managing pain.

15. My findings at paragraphs [20] and [21] about the claimant's evidence was not that the claimant could not walk, but rather that he had difficulty walking, was in pain, and it took longer than would normally be expected. In addition, the claimant also gave evidence that he had difficulty bathing.

16. During the course of the hearing the claimant volunteered that he had been for an assessment to the Department for Work and Pensions and whilst this documentation was not contained within the bundle, I determined that the test used by the Department for Work and Pensions was different to the test as to whether a person is a disabled person within the meaning of the Equality Act 2010.

17. I remain satisfied that I had sufficient contemporaneous evidence to make a decision without sight of this report. I was also satisfied that the claimant had misunderstood that that report might be relevant to these proceedings, and that was the reason for the failure to disclose.

18. The respondents did not seek an adjournment for disclosure of this report or any associated documents and continued with the hearing.

Conclusion

19. I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The application for reconsideration is refused.

Employment Judge Ainscough
Date: 2 November 2021

JUDGMENT SENT TO THE PARTIES ON

12 November 2021

FOR THE TRIBUNAL OFFICE