Case No: 1401140/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr J Linton

Respondent: The Athlestan Trust

UPON APPLICATION made by letter dated 16 February 2022 to reconsider the judgment dated 3 February 2022 under rule 71 of the Employment Tribunals Rules of Procedure 2013.

JUDGMENT ON RECONSIDERATION

The claimant's application is refused as there is no reasonable prospect of the original decision being varied or revoked, it is not necessary in the interests of justice for the judgment to be reconsidered.

REASONS

1. The claimant has applied for a reconsideration of my determination that he was not disabled at the material time and my decision to strike out his claim for discrimination arising from disability under the Equality Act 2010, section 15 ("EQA"). He also applied for a reconsideration and a revocation of the deposit order that I made.

2. Rule 70 provides that the Tribunal has a general power to reconsider any judgment where it is necessary in the interests of justice to do so. Only a judgment can be reconsidered using this power. An application for reconsideration of a judgment cannot competently be made in respect of the deposit order that I made.

3. Rule 1 (3) (b) defines a "judgment" as a "decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines:

a. a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs);

b. any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue);

c. the imposition of a financial penalty under Employment Tribunals Act 1996, section 12A.

4. It is only a decision which finally determines a claim or any issue in a claim that can constitute a judgment for the purposes of a reconsideration under Rule 70. The deposit order is not a judgment. It does not finally determine a claim or part of a claim. It is a case management order which is specifically excluded from the definition of judgment in Rule 1 (3) (a). The deposit order cannot, therefore, be subject to reconsideration under Rule 70.

5. I note that the claimant has referred to rule 29 in relation to the deposit order and I have dealt with this in a separate document.

6. In **Outasight VB Ltd v Brown 2015 ICR D11, EAT**, Her Honour Judge Eady QC accepted that the wording 'necessary in the interests of justice' in rule 70 allows employment tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion 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.

7. I now turn to the application to reconsider the judgment.

8. In paragraph 1 of his application, the claimant refers to paragraphs 50 & 51 of my judgment. In particular **C v A. In All Answers Ltd v W 2021 IRLR 612, CA**. The claimant submits that I did not invite counsel for either party to consider either the relevance of the proper interpretation of that decision and no submissions were made on that point. He further submits that I ought to have heard submissions if I considered the decision of the Court of Appeal to be material. I disagree for the following reasons:

a. This is not a situation where a material decision of an appellate court was handed down after an employment tribunal has heard evidence and submissions on a claim but before issuing its determination. Under such circumstances, it would be appropriate for the employment tribunal to invite submissions from the parties' representatives on a decision of the appellate court before issuing its judgment. In this case, the Court of Appeal handed down the decision on 30 April 2021. I conducted the preliminary hearing in this matter on 25 January 2022. Counsel for both parties would

have been expected to have known about the decision in **C v A. In All Answers Ltd v W 2021 IRLR 612, CA** at the time when they made submissions to this Tribunal.

b. Although the decision in **C v A. In All Answers Ltd v W 2021 IRLR 612, CA**, was not specifically referred to by counsel for the respondent, the principles set out in that decision (which simply reaffirmed what was already the case as set out in **McDougall v Richmond Adult Community College 2008 ICR 431, CA**) were addressed in closing submissions. It was open to the claimant's counsel to respond to those submissions if he so wanted.

9. In paragraph 2 of his application, the claimant refers me to EQA, section 6 (4). In particular, the claimant submits that I have not applied that provision when I considered the question of whether he was disabled at the material time. He says that he had had PTSD in the past with symptoms that had lasted for more than 12 months. I remind myself that EQA, section 6(4) stipulates that most of the EQA's provisions (including the employment provisions) apply in relation to a person who has had a disability and modifies the wording of the Act accordingly. The previous legislation expressly stated that a past disability could only be established if the substantial adverse effect of the impairment had actually lasted for at least 12 months — Disability Discrimination Act, para 5, Sch 2. This was subject to an exception where the substantial adverse effect ceased and then recurred, in which case it was treated as continuing). As that requirement has not been carried over into the EQA, it is arguable that a past impairment that was likely at the time to last for at least 12 months — even though in the event it did not do so — is now covered. However, according to the revised Guidance, the test for past disabilities has remained unchanged (see para C12). This appears persuasive, given that if a person cannot show that their past disability 'has lasted' for at least 12 months under para 2(1)(a) of Schedule 1 to the Act, then he or she would have to show that it 'is likely' to last for at least 12 months — para 2(1)(b). The fact that this latter provision is expressed in the present tense strongly suggests that it cannot be used to establish a past disability. The claimant did not establish that he had suffered a disability in the past and prior to his employment with the respondent. He may have suffered from PTSD in the past but any symptoms that he suffered were, on his own evidence, resolved some 23 years prior to his employment. As he did not establish any proof of past disability as defined under EQA, section 6 (4) was not engaged and did not need to be considered.

10. In paragraph 3 of his application, the claimant refers to my findings in fact in paragraph 44 of my judgment and my decision to give little weight to Dr Nabavi's report. In particular, the claimant states that Dr Nabavi was not asked whether he had based his opinion on the wrong information or whether the alleged inaccurate information is otherwise fundamental to his opinion. He goes on to submit that this was because the respondent did not seek to put the question to Dr Nabavi prior to the hearing or request is attendance at the hearing in order for such questions to be put to him. The claimant did not believe that Dr Nabavi was basing his opinion on the alleged fundamental factual inaccuracy and refers to paragraph 2.5 of his report where he states that he had not worn a face mask when requested

to do so. The claimant is correct that in paragraph 2.5 Dr Nabavi states that the claimant had been suspended because he had failed to wear a face mask. In paragraph 2.16 of his report Dr Nabavi also states that the claimant was exposed to a similar situation (wearing face masks) as requested by the respondent which made him feel anxious and agitated. However, he also referred to the claimant's previous psychiatric history and, in paragraph 9.7 he referred to a letter from Ms Humphries which specifically refers to the claimant having difficulties as a result of wearing a mask. This is relied upon by Dr Nabavi. The claimant has provided a supplementary report from Dr Nabavi dated 1 March 2022. In paragraph 13 of that report, Dr Nabavi has clarified that he was aware of the fact that, despite being requested to wear a mask by the respondent, the claimant had not won a face mask during his employment. Consequently, I am prepared to accept that the claimant did not wear a mask during his employment. However, I do not believe that there is justification to revisit the weight I gave to Dr Nabavi's report for the reasons set out in paragraph 44(c) of my judgment and also in the context of all of the evidence as to when the claimant's alleged mental impairment manifested itself.

11. In paragraph 4 of his application, the claimant refers to a letter from his GP dated 7 February 2022 to certify that he was not fit for work because of PTSD. This evidence was not for the Tribunal at the hearing. It postdates the period of the claimant's employment. It would not be in the interests of justice to consider it.

Employment Judge Green
Date: 7th March 2022

Judgment sent to parties: 14th March 2022

FOR THE TRIBUNAL OFFICE