THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE TRUSCOTT QC**

BETWEEN:

Mr T Allan **Claimant**

AND

Churchill Retirement Living Limited **Respondent**

ON: **21 February 2022**

Appearances:

For the Claimant: **Ms H Platt of Counsel**

For the Respondent: **Mr S Wyeth of Counsel**

JUDGMENT upon RECONSIDERATION

1. The Tribunal grants the application for reconsideration of its judgment dated 15 November 2021.

2. The Tribunal affirms its judgment dated 15 November 2021.

REASONS

1. By way of a letter dated 29 November 2021, the claimant made an application for a reconsideration of the decision and reasons of this Tribunal dated 20 October 2021 sent to the parties on 15 November 2021.

2. Any application for the reconsideration of a judgment must be determined in accordance rules 70 to 74 of the Employment Tribunal Rules of Procedure 2013.

Rules

3. The relevant Employment Tribunal rules for this application read as follows:

RECONSIDERATION OF JUDGMENTS

Principles

70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

Application

71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

Process

72.— (1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise, the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the

reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

4. In accordance with rule 70, a Tribunal may reconsider any judgment "*where it is necessary in the interests of justice to do so*". On reconsideration, the decision may be confirmed, varied or revoked. If it is revoked, it may be taken again.

5. The case authorities remind Tribunals that there is no automatic entitlement to reconsideration for any unsuccessful party. On the contrary, there is an underlying public policy principle in all proceedings of a judicial nature that there should be finality in litigation. Reconsideration of a judgment should be regarded as very much the exception to the general rule that Tribunal decisions should not be reopened and relitigated. In reference to the antecedent review provisions, in **Stevenson v. Golden Wonder Ltd** [1977] IRLR 474 EAT, Lord McDonald said that the (exceptional) process was '*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 adduced which was available before*'.

6. When dealing with the question of reconsideration, a Tribunal must seek to give effect to the overriding objective to deal with cases 'fairly and justly'. The Tribunal should also be guided by the common law principles of natural justice and fairness. Her Honour Judge Eady QC (as she then was) gave guidance as to the approach to be taken in **Outasight VB Ltd v. Brown** [2015] ICR D11 EAT. Although a tribunal's discretion can be broad, it 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. Earlier guidance as to the approach of Tribunals to the matter of reconsideration remains equally pertinent. In **Trimble v. Supertravel Ltd** [1982] ICR 440, the EAT made the following observations:

7.1. it is irrelevant whether a tribunal's alleged error is major or minor;

7.2. what is relevant is whether or not a decision has been reached after a procedural mishap;

7.3. since, in that case, the tribunal had reached its decision on the point in issue without hearing representations, it would have been appropriate for it to hear argument and to grant the review if satisfied that it had gone wrong;

7.4. if a matter has been ventilated and properly argued, then any error of law falls to be corrected on appeal and not by review.

8. This Tribunal decided that it was appropriate to have a hearing as the application referred to a concession of impairment by the respondent of which the Tribunal was unaware and also disputed the narrative at paragraph 49 of the judgment which was based on the respondent's submission.

9. During the course of the reconsideration hearing, a letter dated 19 July 2021 containing the purported concession by the respondent was produced which states:

"….we write to confirm that the Respondent does not concede that the Claimant's high

> blood pressure and/or anxiety and depression amounted to a disability…
> In any event, whilst the Respondent accepts that the medical evidence relied upon by the Claimant establishes him having both a physical and mental impairment it is the Respondent's case that it does not evidence the fact that at the time of the alleged disability the impairment was substantial and/or had an adverse effect on his ability to carry out normal day to day activities."

This Tribunal was not aware of this letter.

10. During the course of the reconsideration hearing, correspondence between the parties was produced concerning the dispute about which medical experts should be instructed to provide medical evidence to the Tribunal. In an email dated 19 July 2021, the respondent's solicitor states:

> "It is the Respondent's position that there should he an agreed joint instruction of a totally independent medical expert".

In an email dated 1 August 2021, the claimant's solicitors narrate:

> "The Respondent concedes that the Claimant's high blood pressure and anxiety/depression are physical and mental impairments."

The email goes on to set out the disagreement between the parties as to who should provide the expert medical evidence and asked the Tribunal to make a determination. By email dated 11 August 2021, the claimant's solicitors requested a postponement of the OPH listed for 20 and 21 September 2021. The Tribunal understands, but has not seen the letter, that the respondent's solicitor agreed with the application to postpone the hearing. On 25 August 2021, the Tribunal wrote to parties as follows:

> "The Claimants medical conditions are not complex, and the Tribunal is not satisfied that expert evidence is necessary. If this was to be proposed, it shall have been raised at the case management hearing."

This Tribunal was not aware of the correspondence or that such an application had been made and refused.

11. This Tribunal heard oral submissions from the claimant in support of the written application and written objections by the respondent together with oral submissions.

12. This Tribunal addressed each of the points made by the claimant taking them individually and then cumulatively in consequence of its decision set out at paragraphs 9, 10 and 14.

.

13. In the preamble to the application, the claimant submitted that:

I. Para 6 the tribunal has not considered the overall interplay between the Claimant's back condition, cardiology issues (hypertension, hypertensive disease and high blood pressure) and mental health conditions and on the effect of day to day activities and has ignored the unchallenged evidence from the Claimant that hypertension causes anxiety and vice versa.

The Tribunal considered the claimant's pleaded case [217, 260 and 349] that he suffered with three disabilities namely: 1) chronic back condition 2) high blood pressure and 3) anxiety and depression. "C*ardiology issues*" or "*hypertension*" were not pled as disabilities upon which he relies for the purposes of his claims although these terms may have been used as shorthand. The use of shorthand terms is not helpful in a situation where the

medical evidence is difficult to assess. At paragraph 41 of the original judgment, the Tribunal accepted that hypertension is probably synonymous with high blood pressure.

As it was the Tribunal which was concerned with the interplay between the accepted and disputed disabilities when neither party had made any such submissions at the original hearing, the Tribunal proceeded on the basis that the emphasis in this point is on the effect on day to day activities. The Tribunal responds to the contentions in relation to the effect on day to day activities and the claimant's evidence later.

2. Para 21 the tribunal has noted the history of hypertensive heart disease and Dr Patel's note that his heart muscle has maladapted secondary to blood pressure (13 January 2021) but not found that this was an impairment. NB the Respondent conceded that the conditions were "impairments". The tribunal has failed to note that the medical records show.

> He has undoubtedly endured a lot of stress in the last 12 to 18 months. This increased level of stress and anxiety, I am of the firm opinion, is counterproductive to his general health and wellbeing but more importantly from my perspective, will undoubtedly have a scientifically proven negative impact on his blood pressure control. He is on vitamin D and his Nifedipine preparation pending my advice for him to restart Ramipril. He is also on some low dose Naproxen for amusculoskeletal issue. I have advised him that I would like him to try and come off the Naproxen as soon as possible as soon as his other clinicians feel this is appropriate as it can affect blood pressure adversely.

The Tribunal set out the conclusion of Dr Patel at paragraph 21, it was aware of the full contents of Dr Patel's letter but does not see the advantage in narrating it in full in its judgment. The Tribunal adheres to its finding in paragraph 24, that the heart condition would not add anything to the claimant's assertion that high blood pressure was an impairment.

3. Para 25 the tribunal has not noted the full reference to tribunal proceedings or noted that the Claimant was still employed until 8 April 2021.

There was no need for the Tribunal to make any such reference. The Tribunal accepted the evidence that the claimant was employed until 8 April 2021 and that the material time was January 2020 to 8 April 2021 as set out in paragraph 4 of the original judgment.

4. Para 28 the tribunal has referred to the Claimant as a person with "hypertension" only. The Claimant relied on his cardiology issues including hypertension, hypertensive disease and high blood pressure as a physical impairment.

The Tribunal proceeded on the basis that high blood pressure, hypertension and hypertensive disease were synonymous despite its misgivings expressed in paragraph 41 of the original judgment. That they were synonymous was repeated in submission by the claimant's counsel to this hearing.

5. Para 37 the tribunal has found that the Claimant was not reliable but has not said why or whether all of the Claimant's evidence was rejected despite noting that this would be explained "later".

The respondent's Counsel made it clear that he was attacking the claimant's credibility and thus it was a significant feature in cross-examination. It was put extensively that the claimant was exaggerating his conditions and their purported effects and his assertions were unsupported by the medical evidence. The Tribunal had the impact statement of the claimant and the Addenda which gave little information about the impact on day to day activities and their likely duration despite the fact that the claimant had the benefit of legal advice from the early stages of his claims. Paragraph 3 of the claimant's impact statement, states, in relation to high blood pressure, "I have to be careful with physical exertion.." and gives the example of going up and down stairs. Paragraph 4 of the claimant's impact statement addresses anxiety and says that he is isolated from others and has poor sleep, poor concentration and persistent tiredness along with other matters. At paragraph 13, three specific examples are given where anxiety and high blood pressure are said to impact him. In answer to questions in cross examination, the claimant seemed unwilling to go beyond what was said in the impact statements in circumstances where additional information would have been of assistance to the Tribunal. The Tribunal rejected the claimant's account of the impact of his conditions when weighed against the objective medical evidence that existed and, in particular, his evidence as to what impact was attributable to which impairment. It is not correct for the claimant to say that his evidence was not challenged on certain points in cross-examination, it was generally and specifically challenged although the Tribunal might have invited the respondent to move on at certain points of the cross examination as the essence of what was being put was clear.

6. Para 39 the tribunal has noted that the Claimant's evidence showed a panic attack, which is a substantial impairment of a day to day activity but not found that the Claimant was disabled. The Claimant's impact statement and medical records show that this was not a one off event.

The judgment of the Tribunal ought to have referred to panic attacks. The Tribunal reviewed'the claimant's medical history dating back twenty years prior to the material time in these proceedings. The Tribunal did not accept that an episode in the claimant's life in 2000 somehow assisted in demonstrating that the impairment relied on in 2020 to 2021 had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

7. Para 40 the tribunal has failed to take into account the fact that the Claimant was taking amitriptyline and the impact that it may have had on his mental health, even if it was prescribed for migraine despite noting that this is medication for depression. The tribunal has ignored that this is a medication that could have improved his mental health impairment from May 2014.

This submission was made at the original hearing. The Tribunal was not prepared to conclude (particularly in the absence of any medical evidence to support this proposition) that medication the claimant was taking for an unrelated impairment somehow alleviated the possible effects of another impairment.

8. Para 40 the tribunal has accepted that the claimant received counselling but has ignored that this is "treatment" for the EqA 2010 Schl para 5 and that it should consider the impairment without medical treatment.

The Tribunal accepted such evidence as there was in relation to counselling but was unable to draw any conclusion from it. The claimant produced no medical evidence to demonstrate what the position would have been in the absence of any counselling as explained in **Woodrup.**

9. At para 41 of the judgment, the tribunal has concluded that there was no impairment. The Respondent had already conceded that the Claimant's high blood pressure and mental health conditions did amount to impairments (which of course they must) and the only issue for the tribunal was whether they had a long term and substantial adverse impact on the Claimant's day to day activities as at January 2020 and beyond: see the Respondent's letter dated 21 (sic) July 2021, the agreed list of issues and the oral closing submissions of the Respondent's Counsel on 15 September 2021.

The Tribunal was unaware of the concession. The agreed list of issues [383-384] does not record that the impairments are conceded, nor did the issues agreed and identified for the purposes of the OPH indicate that to be the case. The written submissions on behalf of the claimant rely on a proposition/assumption that the respondent accepts the claimant actually had those impairments because it says it had knowledge of them (paragraph 3 of the claimant's submissions). All that appeared to be accepted was that these conditions had the potential to be impairments.

The Tribunal considered the terms of the letter dated 19 July 2021 and the email of 1 August 2021 and concluded that a concession had been made by the respondent or, at least, was being relied upon by the claimant and should have been brought to the attention of the Tribunal or, if there was a dispute, the dispute should have been raised with the Tribunal.

The evidence was so finely balanced that the Tribunal concluded that the concession together with the evidence available were sufficient to enable it to conclude that the claimant had established impairments of high blood pressure and anxiety/depression.

10. At para 42 again the tribunal concluded that there was no physical impairment contrary to the medical evidence and to the concession re impairment from the Respondent made on 21 July 2021 in writing when setting out the scope of the challenge to disability, in the list of issues and also orally in closing submissions. There is also reference to the Claimant's diet and lifestyle and the tribunal appears to find that restrictions on his physical ability as result of his blood pressure are undermined by the yoga and Pilates that he has been advised to undertake to treat his back problems. Neither form of exercise are strenuous. And would be in controlled conditions with expert instructors.

The Tribunal refers to what it says in the foregoing paragraph in relation to the concession. The Tribunal adheres to what it said about diet and lifestyle in the original judgment. This

was derived from the impact statement and the medical evidence and was addressing the impact on day to day activities and its attribution to an impairment.

11. Also at para 42 the deduced effect / impact of medication is ignored by the tribunal. The Claimant has been on medication for years. He is regularly tested, and his medications reviewed. The tribunal acknowledges the effects of medication at 541 yet has not found (SCA Packaging Ltd v Boyle (HL)) it is likely (could well happen) that without any treatment/medication the effects of the Claimant's hypertension/hypertensive maladapted heart muscle would be more pronounced.

The claimant did not produce any evidence to demonstrate what the purported deduced effect was likely to be in the circumstances and the Tribunal was not prepared to speculate.

12. There is no consideration at all in the judgment of the impact on the claimant's day to day activities.

a. Blood pressure - the tribunal has failed to acknowledge the effect on the Claimant's day to day activities as set out in the evidence, including that he could not run up and down a flight of stairs, feeling giddy, lightheaded and unwell from 2013 (52 impact statement) which was not challenged in cross examination.

b. Mental health - the tribunal has failed to acknowledge that the effect on the Claimant's day to day activities, from 2017 were as set out in 54 of his impact statement, which were not challenged in cross examination.

The Tribunal sought to address this in paragraphs 42 onwards in the judgment. Perhaps the Tribunal ought to have inserted a heading "impact on day to day activities". In this section, the Tribunal also considered whether that effect was substantial. The Tribunal concluded that it could not be satisfied on such evidence as it had from the claimant that what he described were effects arising from one or other of the disputed impairments. The claimant supported the impact of high blood pressure by one tangible example of apparently being unable to run up and down stairs. The Tribunal factored in to its decision the contradiction in the claimant's evidence that on the one hand he could undertake exercise to assist his back condition without difficulty despite his claim that he had to be careful with physical exertion. Indeed, there is no evidence to explain why his back condition was/is not the reason why he was/is unable to run up and down stairs. Similar reasoning might apply to back pain and the cause of his sleep issues. The assertions the claimant made in his evidence about any impact on his ability to carry out day-to-day activities were limited and were not ones that he could demonstrate from the medical or other evidence to have arisen from the two impairments in dispute. It should not be overlooked that the Tribunal did not find the claimant to be a credible and reliable witness.

13. At paras 43, 44 and 45: the tribunal's emphasis on "work related stress when he was off work" is ill conceived. The Claimant was employed until 8 April 2021. Up until that point he was having to communicate with his employer, deal with OH requests, requests for holidays etc, and of course the disciplinary proceedings. The tribunal has wrongly assumed (without evidence) that by being off work (ill) that the Claimant was able to

recuperate (and presumably isolate himself form the triggers causing the anxiety/depression). This cannot be right given the circumstances of this case.

In paragraph 43, the Tribunal records that it had difficulty accepting the claimant's evidence on this point. The narrative on the medical certificates provided no reliable analysis because, as the Tribunal found as fact, they reflected what the claimant himself reported and wanted the notes to say. Furthermore, the Tribunal was critical of the claimant for the fact that in a request he made for a medical certificate he sets out "*a diagnosis of Dr Mallett which is not discernible from the letters of Dr Mallett*".

Paragraph 44 explains the Tribunal's rationale for rejecting the claimant's assertions about stress at work. It did not overlook that there might have been contact between the employer and the employee but considered the claimant's evidence was grossly exaggerated. Even on the claimant's account, the impact of his anxiety/depression should have reduced considerably on the cessation of employment. In this paragraph, the Tribunal is seeking to address the likely timespan of any impact.

In relation to paragraph 45, the Tribunal did consider the interplay between the impairments of high blood pressure and anxiety and said so. Indeed, the Tribunal went beyond a comparison of the two disputed impairments and considered the effects of the conceded disability of backpain (as explained in paragraphs 46 and 47).

14. Para 49 the tribunal suggested that the Claimant did not agree to the Respondent's request for an expert. That is not correct. The Claimant wanted to instruct his treating clinicians; whereas the Respondent wanted to instruct two experts jointly. The Claimant asked for a decision on this before incurring fees, and subsequently applied for a postponement of the PH. It was rejected and the PH went ahead. At no point did the Claimant refuse to obtain specific expert reports. The Claimant has been deprived of that right and the Claimant was left without any expert evidence at all and the tribunal refused to postpone the open PH to determine disability.

The relevant parts of the correspondence are narrated at paragraph 10. The Tribunal had proceeded on the basis of the submission by the respondent which was not contradicted at the time by the claimant. The correspondence puts the position of both parties in a different context. The following passage in paragraph 49 of the judgment should be deleted: "The respondent proposed this but the claimant did not agree. The respondent's application to the Tribunal for such a report was rejected for reasons this Tribunal is unaware of. The claimant was content that this issue was determined on the basis of the available evidence." As stated earlier, this Tribunal was unaware of the decision to refuse a postponement. This Tribunal considered that the claimant was not as disadvantaged as the respondent because the hearing proceeded by consideration of the evidence provided by his medical advisers.

15. The tribunal has failed to consider whether if the Claimant was not disabled by January 2020 whether he became disabled at any other point before his dismissal on 8 April 2021.

The Tribunal recorded at paragraph 4 that the material time for determining disability was between January 2020 and the claimant's dismissal on 8 April 2021. The Tribunal noted all the references to stress in the medical records particularly what is said by Dr Mallett on 13 January 2021 [16]. Dr Mallett proceeds on the claimant's description of work circumstances. The Tribunal was not prepared to do so. He says "He has a range of significant anxiety symptoms with sleep and concentration disturbance. I gave him some broad based lifestyle advice." The letter of 26 April 2021 [38] notes that the claimant has been dismissed and has been started on the anti-depressant Mirtazapine.

16. The Tribunal considered that its process of reasoning may have been compromised by the absence of the correspondence referred to in paragraphs 9 and 10 hereof. The Tribunal appreciated that the existence of an impairment is only the starting point and that it should consider the degree to which a person is affected by a particular impairment in order to determine whether a claimant is disabled within the meaning of the legislation. The Tribunal decided in the interests of justice to grant the request for reconsideration and proceeded to reconsider its judgment and reasons in relation to the effect of the impairments.

17. The Tribunal reconsidered its paragraphs 42 onwards to address whether either disputed impairment, or both or all three impairments had a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities as set out earlier. There was no doubt about the spine issues and the wide impact the pain and discomfort caused by the claimant but their attribution to the disputed impairments was not established in the evidence.

18. The Tribunal affirms the judgment in its original decision.

I D Truscott QC Employment Judge

Date: 3 March 2022