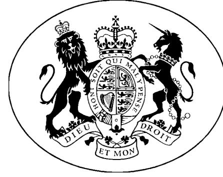

EMPLOYMENT TRIBUNALS

Claimant: **Mrs Lauren Sibbons**

Respondent: **NHS North East London CCG**

JUDGMENT FOLLOWING RECONSIDERATION

The Claimant's application for reconsideration of the judgment sent to the parties on 28 February 2022 is refused because there is no reasonable prospect of the original decision being varied or revoked.

REASONS

Introduction

1. The Claimant presented a claim for constructive unfair dismissal, direct disability discrimination, disability-related harassment, and failure to make reasonable adjustments on 18 August 2020. The final hearing in her claim took place on 18 to 21 January 2022, at which hearing the Claimant represented herself and the Respondent was represented by Mr Adam Ross of Counsel. The Tribunal deliberated in chambers on 22 February 2022 and the judgment was sent to the parties on 28 February 2022. The judgment of the Tribunal was that the Claimant's complaints were not well-founded, and her claim was dismissed. The Claimant applied for reconsideration of that decision on 14 March 2022.

The applicable legal principles

2. The tribunal's powers concerning reconsideration of judgments are contained in rules 70 to 73 of the Employment Tribunals Rules of Procedure 2013. A judgment may be reconsidered where "*it is necessary in the interests of justice to do so.*"

3. Applications are subject to a preliminary consideration. They are to be refused if the judge considers there is no reasonable prospect of the decision being varied or revoked. If not refused, the application may be considered at a hearing or, if the judge considers it in the interests of justice, without a hearing. In that event the parties must have a reasonable opportunity to make further representations.

Upon reconsideration the decision may be confirmed, varied or revoked and, if revoked, may be taken again.

4. Under rule 71 an application for reconsideration must be made within 14 days the date on which the judgment (or written reasons, if later) was sent to the parties. I accept that this application was made in time.

5. The approach to be taken to applications for reconsideration was set out in the case of *Liddington v 2Gether NHS Foundation Trust* UKEAT/0002/16/DA in the judgment of Simler P. The tribunal is required to:

    5.1. 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;

    5.2. address each ground in turn and consider whether is anything in each of the particular grounds relied on that might lead a tribunal to vary or revoke the decision; and

    5.3. if this leads to the conclusion that there is nothing in the grounds advanced by the Claimant that could lead to the decision being varied or revoked, give reasons for that conclusion.

6. In paragraphs 34 and 35 of the judgment Simler P gave the following guidance:

> **"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.**
>
> **Where … 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."**

The Claimant's first ground for reconsideration

7. The Claimant's first ground for reconsideration is that there are factual inaccuracies and conflicting statements in the judgment. She takes issue with, or seeks to add further context to, the Tribunal's factual findings at paragraphs 22, 32, 37, 42, 45, 46, 54, and 66. She further challenges the Tribunal's conclusions at paragraphs 158-159, 161.2 and161.4(xvi)-(xvii), by pointing to further factual matters she would wish to have taken into account.

8. I do not consider there is a reasonable prospect of the original decision being varied or revoked under this ground. The factual matters the Claimant relied upon at trial were considered by the Tribunal when making the findings which

underpinned the Tribunal's conclusions. The Claimant had the opportunity to give her evidence, challenge the Respondent's evidence, and make closing submissions on the facts. A reconsideration application is not an opportunity for the case to be re-argued; that would amount to a "*second bite at the cherry*", in Simler P's words. It is therefore not "*necessary in the interests of justice"* to reconsider the decision in order to take the Claimant's further submissions about the facts into account.

The Claimant's second ground for reconsideration

9. The Claimant's second ground for reconsideration is that she believes that that "*some of the documents within the bundle may have been missed due to the three-week time lapse in the panel reconvening to deliberate and pass judgment on the case, predominantly medical evidence, and policies pertinent to the judgment*". The Claimant has not separately listed the documents, evidence and policies referred to under this ground and so I have assumed it encompasses all of the factual matters raised under the first ground for reconsideration.

10. I do not consider there is a reasonable prospect of the original decision being varied or revoked under this ground, for the same reasons as in relation to the first ground. A reconsideration application is not an opportunity to seek to persuade the Tribunal to find different facts. The Tribunal reviewed and relied on the Employment Judge's and members' notes of the hearing, the witness statements and the bundle of documents when deliberating and I am satisfied that the passage of time between the hearing of evidence and deliberations did not affect the fairness of the outcome.

The Claimant's third ground for reconsideration

11. The Claimant's third ground for reconsideration is: "*I do not feel that the full extent of my disability and mental state has been considered when considering the impact that the respondent's comments had on the claimant and how these intensified and inflamed the claimant's condition further*."

12. The Claimant has not specified which comments she refers to here. Under her first ground, above, she challenges factual findings at paragraphs 44 and 45 of the written reasons regarding comments alleged to have been made. The allegations of harassment addressed at subparagraphs 161.4(iii), (iv), (v), (vii), (viii), (xv), (xvi) and (xviii) of the written reasons relate to things which were said, and so may be the "comments" referred to. The Tribunal found the conduct in issue at those subparagraphs not to have taken place in the way alleged by the Claimant and not to relate to disability, save for subparagraph (viii), in relation to which the Tribunal concluded:

> **'As we found at paragraph 97 above, Ms Shaikh did refer to side effects of the Claimant's medication. She did this because the Claimant had raised the issue and did so in an empathetic and supportive way. The conduct did relate to the Claimant's disability as the medication was taken to treat the Claimant's symptoms of PTSD. However, we do not find that this conduct was unwanted by the Claimant at the time. The Claimant herself told Ms Shaikh that medication side-effects may impact on her work. If the conduct was unwanted, it was not grave enough to reasonably have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.'**

13. The Tribunal further concluded at paragraph 162:

> **'In relation to such unwanted conduct related to disability that we have found did occur, did that conduct cumulatively have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, having regard to all the circumstances and whether it is reasonable for it to have that effect? Overall, we consider that the actions the Respondent took in relation to the Claimant's disability, including removing her line management responsibilities and Ms Shaikh discussing medication side-effects with her, were supportive actions. None of the Respondent's actions reached the threshold of harassment.'**

14. When deciding whether conduct alleged to amount to harassment has the effect of violating a claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for a claimant, the Tribunal must take into account a number of factors, including the claimant's perception, the other circumstances of the case and "*whether it is reasonable for the conduct to have that effect*" (s.26(4) Equality Act 2010). The impact on the claimant is therefore a relevant consideration. However, it is not a wholly subjective test.

15. As set out in the legal section of the written reasons, the test for whether conduct achieved the requisite degree of seriousness to amount to harassment was considered by the EAT in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 at [22]:

> **'We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'**

16. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 at [47] held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

> **'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'**

17. He further held (at [13]):

> **'When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.'**

18. The EAT in *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT/0179/13/JOJ at [12], referring to Elias LJ's observations in *Grant*, stated:

> **'We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'**

19. I do not consider there is a reasonable prospect of the original decision being varied or revoked under this ground because although the effect on the Claimant was part of the circumstances which the Tribunal took into account when assessing whether or not conduct amounted to harassment, the Tribunal's conclusion that the conduct was not grave enough to have the proscribed effect was in line with the legal principles the Tribunal was required to apply.

Employment Judge Barrett
Date: 28 March 2022