



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Marcelo

**Respondent:** Powys Teaching Health Board

## JUDGMENT

The Claimant's application, dated 30 August 2022, for reconsideration of the Judgment, written reasons for which were sent to the parties on 18 August 2022, is refused.

## REASONS

### Background

1. The Claimant's document, attached to his email of 30 August 2022, set out his application for reconsideration of the Judgment in relation to his above-numbered claims. Oral judgment had been delivered, dismissing the Claimant's claims, on 15 July 2022, at the conclusion of a nine-day hearing. The Claimant subsequently requested written reasons which were produced, and sent to the parties on 18 August 2022.

### Issues and Law

2. Rule 70 provides that reconsideration of a judgment will take place where the Employment Judge considers that it is necessary in the interests of justice to do so.
3. Rule 71 provides that applications for reconsiderations of judgments should be presented in writing within 14 days of the date on which the written record was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and should explain why reconsideration is necessary. The Claimant's application satisfied those requirements and therefore a valid application for reconsideration was made.

4. Rule 72(1) notes that an Employment Judge shall consider any application for reconsideration made under rule 71, and that if the Judge considers that there is no reasonable prospect of the original decision being varied or revoked then the application shall be refused and the Tribunal shall inform the parties of the refusal. Alternatively, rule 72 sets out the process that is then to be followed for further consideration of the application.
5. Rule 72(3) provides that, where practicable, the consideration under Rule 72(1) shall, in a case such as this where a full tribunal was involved, be by the Employment Judge who chaired that tribunal.

### The Application

6. The Claimant's reconsideration application spanned 72 numbered paragraphs. Whilst not easy to follow, I discerned several common themes:
  - a. That incorrect comparators were used.
  - b. That the Claimant was not allowed to cross-examine the Respondent's witnesses on certain topics.
  - c. That evidence was not considered.
  - d. That incorrect findings were made on the evidence.

### Conclusions

7. It was noteworthy that this case had undergone several case management preliminary hearings, during which the issues that the Tribunal was to decide at the final hearing had been discussed at length and had been agreed. Notably, these were recorded in Case Management Orders of Employment Judge Moore at a preliminary hearing on 10 February 2020, which dealt with the issues arising in respect of the Claimant's first claim, and in Case Management Orders issued by Employment Judge Howden-Evans, following a hearing on 14 May 2021, which dealt with the issues arising in the Claimant's second and third claims. Judge Vernon had then, at a preliminary hearing held on 8 June 2022 (incorrectly referred to as 2020 in the Reasons) directed that an amalgamated list of issues setting out the issues to be determined in respect of all three of the Claimant's claims should be produced for the final hearing. That was done, and we made it clear to the parties at the outset of the final hearing that those were the issues that fell to be considered.
8. In several of the paragraphs in his application however, the Claimant appeared to seek to raise a number of points which were not included in the list of issues as a matter to be determined, and also to expand upon the issues.
9. An example of the former is the Claimant's references to cleaning schedules, which the Claimant during the hearing, and indeed in his reconsideration application, contended indicated failings on the part of Mrs Williams, a Facilities Supervisor. However, the matter of cleaning schedules and compliance with cleaning requirements was not raised within the list of issues as any matter giving rise to detrimental or less

favourable treatment of the Claimant.

10. An example of the latter is the reference in paragraph 4 of the reconsideration application to four individuals who were investigated about the handling of liquid nitrogen, following a complaint about that matter having been raised by the Claimant, said to be comparators in the sense of having been given proper notice of an investigation when the Claimant was not. The list of issues did include a contention that the failure by the Respondent to give the Claimant notice of a disciplinary investigation amounted to less favourable treatment of the Claimant. However, the Claimant did not identify those four individuals as comparators in relation to this allegation, despite the fact that he identified three of them as comparators in relation to other allegations.
11. In any event, as we noted in our Judgment, we did not consider that there was anything which was unfavourable or detrimental to the Claimant due to him not being given advance notice that a disciplinary process in relation to him would be commenced. The question of his comparative treatment did not therefore arise.
12. With regard to the Claimant's several comments that he was not allowed to cross-examine the Respondent's witnesses, that only arose where the questions the Claimant sought to ask were not relevant to the to be considered, for example the questions over cleaning schedules.
13. A similar comment arises in relation to the Claimant's contentions that evidence was not considered. All evidence relevant to the issues under consideration was considered, although, as has already been noted, the Claimant attempted on occasions to discuss matters which had no bearing on the issues to be adjudicated upon.
14. In several parts of his reconsideration application the Claimant makes reference to evidence, and indeed admissions, that he considered had been made during the course of the hearing. One example is at paragraph 13, where he states, "*The court excluded during cross examination that Jamie Marchant admitted that specialist nurses decant liquid nitrogen*". My notes of the Claimant's cross-examination of Mr Marchant in relation to this issue indicate however, that the matter was explored, and that Mr Marchant expressly confirmed that nurses did not decant liquid nitrogen. My notes record the exchange as follows.

*Q: Yesterday it was confirmed that those using liquid nitrogen were practitioners and consultants?*

*A: To my knowledge, GPs, consultants, and possibly highly trained nurses use liquid nitrogen.*

*Q: They will require a training certificate in the handling and decanting of liquid nitrogen?*

*A: Decanting was not done by them.*

**Case Numbers: 1601448/2019**

**1601074/2020**

**1601905/2020**

*Q: Do you know the clinical procedure? Where does the liquid nitrogen go to from a flask?*

*A: Porters need to decant liquid nitrogen into the clinical device, often referred to as a flask. That is only done by trained porters.*

*Q: From the flask the liquid nitrogen is normally used in a syringe or a spray?*

*A: I cannot confirm that. The standard operating procedure is clear. The decanting is done by porters into the device.*

15. The Claimant clearly therefore misunderstood the evidence the witness was giving about the decanting of liquid nitrogen. He did not admit that specialist nurses decanted liquid nitrogen. On the contrary, he confirmed that they did not decant liquid nitrogen.
16. In other areas, the Claimant simply disagrees with the findings made and the conclusions drawn. Much of his assertions however demonstrated a fundamental misunderstanding of the issues the Tribunal was to consider or a misunderstanding of the evidence provided.
17. The content of the Claimants reconsideration application confirmed our view of the evidence he gave during the course of the hearing, as noted at paragraph 33 of the Reasons, i.e. that the Claimant was someone who was unwilling to accept that matters were not how he perceived them, even when it would have been apparent to a neutral observer that that was the case.
18. Overall, I did not consider that there was any reasonable prospect of the original decision being varied or revoked and therefore considered that that the Claimant's reconsideration application should be refused

---

Employment Judge S Jenkins

Date: 7 September 2022

JUDGMENT SENT TO THE PARTIES ON 9 September 2022

FOR THE TRIBUNAL OFFICE Mr N Roche