EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112400/2021

Held via Written Submissions on 26 October 2022

Employment Judge R Gall

Mr G Madden	**Claimant** **In Person**
Waracle Limited	**First Respondent** **Represented by:** **Mr B Duncan - Solicitor**
Cathcart Associates Ltd	**Second Respondent** **Represented by:** **S Wason**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the Judgment of the Tribunal dated 20 May 2022 and sent to parties on 23 May 2022 is reconsidered. Upon reconsideration the Judgment is confirmed. The claim remains dismissed.

REASONS

Time of issue of this Judgment

1. Apologies are tendered for the time taken to decide upon the application by the claimant for reconsideration. Employment judge Gall retired just after the application was received, although remains a fee-paid Employment Judge. He was unavailable until September and it appears that the reconsideration application being sent to him for determination was a matter overlooked. The claimant made enquiry seeking an update on the application on 2 October and this led to the

setting down of the diet on 26 October. It is regretted that the case has not progressed to this point prior to the present time.

Background

2. This claim was dismissed in terms of Rule 38 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 as there was no compliance at all by the claimant, and therefore no material compliance, with the Unless Order within the period of 21 days given for compliance with that Order.

3. For reasons fully narrated in the Judgment of the Tribunal dated 20 May 2022 and sent to parties on 23 May 2022 ("the Judgment") the application of the claimant for the Order to be set aside, for relief from sanctions, was refused.

4. The history to the request for information from the claimant as to his case and the basis for it was set out in the Judgment. Briefly put, case management Preliminary Hearing took place, following upon which an Order requiring information was issued on 17 January 2022. The claimant did not provide the information as ordered. After other contact with the claimant seeking the information, to which no satisfactory response had been received, an Unless Order was issued on 28 March requiring the claimant to respond with 21 days, that is by 18 April. No reply was received. The claim was therefore dismissed in terms of Rule 38.

5. The decision to refuse to set aside the Order proceeded, essentially, on the basis of the absence of compliance with 2 elements of the Unless Order, the history to the claim and the various opportunities given to the claimant to address those matters. Regard was had to the information supplied by the claimant at that point as to the medical conditions which affected him as he set those out.

6. It is relevant that the information sought in the Unless Order related to matters within the knowledge of the claimant. Those were the impact which he said his illnesses had on his ability to carry out normal day to day activities and also information as to who it was he said he had spoken to within the respondents' organisation to provide information about those illnesses, when he said he had

done this and what it was that he stated he had said. The illnesses by which the claimant states he is affected and which he seeks to have found to have been disabilities in terms of the Equality Act 2010 ate Charcot Marie Tooth Disease ("*CMT*") and depression and anxiety.

7. The email exchanges between the claimant and the Tribunal of 8, 9 and 11 March are detailed in the Judgment. The email of 11 March from the Tribunal set out the elements in the Order which remained unaddressed by the claimant. It sought to assist by posing questions which might be addressed by the claimant. It stated that a reply was required within 10 days.

8. No reply was received to that email. The Unless Order was issued on 28 March. There was no reply to it within the 21-day period permitted for response. The claim was therefore dismissed on 18 April, when the 21 day period for compliance passed without compliance occurring.

9. In an email of 20 April the claimant said he had been in hospital on 28 March. He said he was doped up on morphine for 7 days. He sought a few extra days to comply with the Order to compensate "*for the days I missed due to being in hospital undergoing serious surgery.*"

10. By then the Unless Order had taken effect due to non-compliance within the period permitted for that.

11. The claimant sent emails of 4 and 5 May. Those were before the Tribunal and were considered by it prior to issue of the Judgment. The respondents made submissions which were also considered before the Judgment was issued. Those are matters narrated in the Judgment.

12. The Judgment of 20 May did not set aside the Order. No relief from sanctions was granted.

13. Both parties confirmed that they were content for the application for reconsideration addressed in this Judgment to be dealt with on the basis of written submissions. Both made written representations.

Application for reconsideration of the Judgment

14. By email of 6 June 2022 the claimant sought reconsideration of the Judgment. He referred to there being exceptional circumstances, namely ill health on his part. He said that ill health was related to his long-term health issue or disability. He had, he said, been heavily sedated during his hospital stay and for several weeks thereafter. He submitted a 24-page attachment with information and comment.

15. In the attachment the claimant gave some further information about the medical conditions by which he states he is affected. He provided information that he used a wheelchair. He also provided information as to difficulties he had with walking and balancing, referring to pain in his feet. He gave information as to the person within the respondents' organisation to whom he said he had spoken to inform the respondents of his disabilities and when that occurred as far as he could place that in time. He did not say what he said, as far as he could recollect that. The claimant's position was that anyone in hospital in his circumstances should be resting and recovering. They should not be forced to work. He categorised "*filling out legal documents such as Unless Orders"* as working.

16. 14 days were given to the claimant to respond, he said. 7 of those had been spent in hospital. He was then unfit to reply when home. While he had been in contact with the Tribunal by email whilst in hospital, that did not mean, he said, that he was fit to respond to an Unless Order, especially as he was using a small screen mobile phone.

17. The claimant provided links to, information about and comment on, the effects of morphine, the effects of a hospital stay on patients' physical and mental health and the effects of depression and anxiety on complying with the Unless Order.

18. Although the claimant referred to medical evidence he had provided as having been accepted, in fact the position is that the Tribunal had received medical evidence from the claimant as being the medical evidence in relation to the health conditions upon which he wished to rely to establish that he was, at the relevant time, disabled in terms of the Equality Act 2010.

19. Medical evidence, being letters from the claimant's GP of 1 March 2022 together with an undated note from a Dr Dale, who appeared to be the claimant's GP, were submitted by him. He also included information and copy documentation in relation to Personal Independence Payment. He commented on the Judgment and his health, referencing the Equality Act 2010. He had supplied medical reports and did not see any benefit in himself rewriting the words of medical practitioners.

20. The claimant said he accepted that his original response to the Unless Orders could have been much better. He asked what standard was expected, however, "*from someone lying in a hospital bed high on morphine"* The time prior to the issue of the Unless Orders was irrelevant, he said. He accepted he had been able to communicate, saying that this was in "*the same way that drunk people can drive*". His response at this point showed, he submitted, what he was capable of when not seriously compromised like he was when he spent a week in hospital.

21. The Unless Orders had now been met, the claimant said. He was being penalised by his claim coming to an end when 7 of the 14 days for compliance had been spent by him in hospital. In fact, due to opioid medication being taken, he had less than 7 days to respond, he alleged.

22. What had happened, the claimant said, was that his disability was being evidenced by his failure to meet the Unless Order and he was now paying a price for that by his claim coming to an end. He apologised to the Tribunal for his initial non-compliance with the Unless Order.

23. The Tribunal acknowledged the communication from the claimant. It referred to the fact that there was much more information now about the health issues affecting the claimant. It highlighted that 21 days had been the timeframe for compliance with the Unless Order and that the medical evidence from the claimant had been received by the Tribunal rather than accepted by it. The respondents were asked for their comments.

24. In later correspondence, the claimant submitted that the effects of the operation and taking of opioids lasted for weeks. He had communicated, however his ability

to reply had been impaired by the medical conditions, the after-effects of the operation and the impact of medication being taken. Serious illness was a valid reason for non-compliance, he said.

25. The claimant submitted a communication from a Dr Ma of 21 October 2022. That email from Dr Ma confirmed that the claimant had undergone complex surgery under general anaesthetic on 9 March. He had then been prescribed what were referred to as potent opioid analgesics. The side effects of those drugs were set out. It was unclear if Dr Ma had seen or treated the claimant at this point or during his taking of this medication. Dr Ma said that "U*nder those exceptional circumstances, it would be prejudiced against Mr Madden, to penalise him for not able to comprehend crucial legal documentations"* She asked that the Tribunal took into account the claimant's physical and mental vulnerabilities during his arduous post-operative recovery journey.

26. A further email of 26 October 2022 from Dr Ma was sent on by the claimant. Dr Ma again confirmed the operation as having taken place. She said that the claimant had been discharged from hospital on 15 March. She again stated that pain killing drugs had been prescribed for the claimant in the post-operative period. She said the claimant had required to have return visits to hospital due to complications and on one occasion had had to attend the emergency department. She said that these circumstances would "*undoubtedly place him in a physical and mentally vulnerable state to comprehend crucial legal documents and miss out on certain specifics due to his disjointed and incoherent mind."* She went to say that "*Mr Madden's ability to send an email is by no means an indicator of him being cognitively sound. It is unjust to draw such a conclusion solely from an email response."* Whether Dr Ma was speaking from any personal medical examination of or encounter with the claimant was unclear. She did not offer any specific reflection of how the claimant was affected by the drugs prescribed, describing the generally experienced effects of the drugs.

Respondents' submissions

27. The respondents presented submissions on 29 June.

28. The respondents submitted that the issue was not whether the claimant had now met the Unless Order but rather whether the application for reconsideration should be granted. The touchstone was the interests of justice, they said.

29. The background of communication between the claimant and the Tribunal, the Orders issued in January and the time leading to the issue of the Unless Order were all detailed by the respondents.

30. The claimant had had ample time to respond, the respondents said. The opportunity to seek further time had been highlighted to him. He had assistance from a family member, having mentioned that in an email. It was also unclear exactly when he had been in hospital. He had referred to the time from 9 March however had also referred to the time from 28 March. It was not reasonable or in the interests of justice to grant the application for reconsideration, the respondents submitted.

31. The respondents commented on the email from Dr Ma of 21 October. They said that it was unclear when the claimant had been released from hospital. The claimant had said that he was in hospital at time of the issue of the Unless Orders. That no longer appeared to be the position. Further, the claimant had not sought time to reply more fully when he was in touch with the Tribunal on 9 and 10 March, despite that being stated by the Tribunal as being an option open to him. In addition, the Tribunal should keep in mind the substantial time given to the claimant to address the points given that an Order was issued on 17 January, followed, ultimately, by the Unless Order of 28 March.

32. The respondents confirmed that they were sympathetic to the claimant's health issues. They said, however, that the question for the Tribunal was whether it was reasonable that his failure to comply with the Unless Order should be excused in all the circumstances.

The issue

33. The issue for the Tribunal was whether the Judgment confirming that the Unless Order would not be set aside was to be reconsidered and whether, upon reconsideration it was to be confirmed, varied or revoked.

Applicable law

34. Rules 70 to 73 deal with reconsideration of Judgments. The Tribunal determined that it was not the case that there was no reasonable prospect of the original decision being varied or revoked. Parties agreed to proceed by way of written submissions. They each set out their respective positions as detailed above.

35. The test is whether reconsideration of the Judgment is in the interests of justice. That is a ground which permits of broad consideration of the facts and circumstances by the Tribunal. Upon reconsideration the Judgment can be confirmed, varied or revoked.

36. The claim is one of discrimination. Such claims are not to be readily struck out or brought to an end. Case law and public policy confirm that position.

37. One further aspect properly kept in mind by the Tribunal is the public policy principle of there being finality in litigation. The Rules provide for reconsideration. That is therefore an exception to that principle. Case law confirms that reconsideration is not to be regarded as a means by which a party can get a "*second bite at the cherry".* The case of *Stevenson v Golden Wonder Ltd* 1977 IRLR 474 is an Employment Appeal Tribunal ("EAT") case which sees the EAT comment that reconsideration is not an opportunity to rehearse the same arguments or to provide further evidence which was available before.

Discussion and Decision

38. This case has been current for some time. Form ET1 was presented on 12 November 2021. There has been a case management Preliminary Hearing. An Order was issued following that. That was on 17 January 2022.

39. It is not considered necessary to rehearse the full history of the claim in this Judgment. The Judgment which is being reconsidered, that dated 20 May and issued to parties on 23 May 2022 details the history.

40. The history to the claim is however of some relevance in the reconsideration. It confirms that the claimant has for some time been aware of the need to supply the information ultimately required in the Unless Order. It also confirms that the claimant has, to his credit, been able to communicate with the Tribunal notwithstanding the health issues by which he is affected. He communicated whilst in hospital.

41. There was no reply to the Unless Orders within the time permitted. Whilst the claimant had later referred to being in hospital for 7 days from the time when the Unless Order was issued on 28 March, it now appears clear that he was in hospital for a week on 9 March rather than 28 March. On 28 March he was in the post-operation phase. He has referred to the drugs he was prescribed and the emails from Dr Ma confirm that position. He appears, very unfortunately, to have been required to visit hospital due to complications following surgery.

42. It is also relevant in the view of the Tribunal that the Tribunal highlighted to the claimant the possibility of seeking further time to reply. It also highlighted that the information sought from him was as to facts which were within his own knowledge in two regards. The first of those was as to the person with whom he said he had spoken to provide information as to his illnesses, when that had happened and what he had said, as best he could remember those. The second was as to the impact on his normal day-to-day activities of each of the health conditions said by him to constitute a disability in terms of the Equality Act 2010.

43. As there was no reply to the Unless Order, there was no question for the Tribunal to determine as to whether material compliance with the Unless Order had been achieved.

44. The claimant has supplied the medical information which he seeks to rely upon to establish that he is disabled in terms of the Equality Act 2010.

45. It has been explained to the claimant what the other aspects of required information are. He has supplied some of those now, following the Judgment. He has not, however, set out what it is that he says that he said to the respondents' employee by way of information as to his illnesses. He may, for example, have referred simply to health issues, or serious health issues, or to disability by which he was affected. He may, on the other hand, say that he informed the employee specifically of CMT or of depression and anxiety. It is important that fair notice is given of what it is he says he said, insofar as he can remember that.

46. There was substantial time given to the claimant for reply prior to issue of the Unless Order. The Unless Order was not responded to. The Tribunal has throughout, in my view, kept in mind the terms of Rule 2 in its dealings with the parties. It has sought to ensure that insofar as practicable the parties have been on an equal footing. This has involved, for example, giving the claimant time to reply, highlighting the possibility of time being sought by him and pointing out the elements which required to be addressed by him.

47. Cognisance is taken of the information now provided by the claimant, with supporting information from Dr Ma. The principle of finality of litigation is kept in mind. The prejudice to each party if on the one hand the Judgment is revoked on reconsideration or is confirmed on reconsideration on the other is also relevant and is a factor in the deliberation process. That principle and the prejudice to the respective parties are matters described in the Judgment.

Conclusion

48. I have thought long and hard about this decision. It is a matter of fine balance in my view.

49. I am asked to reconsider the Judgment refusing to give relief from sanctions by setting aside the Unless Order.

50. I understand the claimant's frustration with the situation as he sees it. I note the general medical position as to the drugs which the claimant was taking at the relevant time and the impact and side effects they are likely to have. I also am conscious of information recently provided by the claimant which gives some of the information sought. That information had been sought since January when the initial Order was made.

51. As narrated in the Judgment, the claimant had said on 20 April that he wished a "*few extra days"* to comply with the Order. He confirmed he could provide all the information "*by the end of the week*". The information promised did not appear, however, within that time.

52. The information from the claimant at time of consideration of possible setting aside of the Order was not as full as it now is. As mentioned there is however a conflict in the information provided in that the claimant refers to being hospitalised for 7 days from 28 March, whereas Dr Ma refers to the 7 day period from 9 March. Hospitalisation on 9 March would tie in with the claimant's emails at that time.

53. I have also had careful regard to the claimant's position that although he was in email contact with the Tribunal in early March he was impaired at that point. This can be seen from the contrast with his response to the Tribunal in June, he says.

54. There is certainly fuller information given by the claimant in June. How much of that can be attributed to any change in his medical condition is, however, a moot point. By then his claim had come to an end due to his failure to respond to an Unless Order. His application for the Order to be set aside had also been refused.

55. The medical information from Dr Ma does not accord with the claimant's position as to when he was in hospital. Insofar as it relates to side effects of the drugs prescribed for the claimant, it does not address the side effects as those were experienced by the claimant. That might well be as Dr Ma did not see the claimant or treat him at that time. Whatever the reason, the result is that I have the generalised picture but not a specific picture in relation to the claimant. Those

weigh in my assessment, however not as much as they might have if specifically describing the circumstances of the claimant.

56. The claimant certainly has serious health issues from all he says. There is medical support for that. He brings an Employment Tribunal claim which is one of discrimination. Public policy rightly requires that such claims are capable of being advanced at Tribunal and that very serious consideration should be given if such a claim is potentially to be brought to an end without a hearing.

Conclusion

57. Looking very carefully at all the elements mentioned above, I have concluded that the Judgment will, upon reconsideration, be confirmed.

58. I have had the interests of justice at the front of my mind. It is, as mentioned above, a fine balance when considering the facts and circumstances.

59. The history to the claim is of relevance. That involves the Order earlier issued, the Unless Order issued, the passage of time without information being given to meet those Orders and the communications from and to the claimant. The claimant's health as confirmed in paperwork provided by him and in the emails from Dr Ma is also of significance. The principle of finality of litigation is also something I have weighed.

60. What, in my view, the claimant now seeks to do is to reopen the case by providing information which he had throughout the life of the case. It is not new information. He seeks to explain its absence thus far by reference to his medical issues. I do not regard there as being information before me that the claimant was impaired to the extent that he did not understand the matters he was to address or questions he was to answer in terms of the initial Order or the Unless Order. Communications with the claimant highlighted the elements to which he was to reply. The matters involved were all factual ones not requiring gathering of information from external sources.

61. I appreciate that the claimant's view is that he must have been impaired as otherwise he would have replied fully. There is potentially a certain logic in that. Nevertheless, the length of time over which there was no information given by the claimant points to the absence of information being due to something more than side effects of drugs in the post-operative period. Further, the correspondence from the Tribunal was clear as to what remained as elements to be addressed. It opened the door to more time being sought by the claimant. He referred to the involvement of a family member who appears to have assisted him by collecting and passing on a letter from the claimant's GP.

62. The view to which I have come therefore, taking all of the above elements into account and weighing them carefully, is that it is not necessary in the interests of justice to reconsider and to revoke the Judgment dated 20 May and sent to parties on 23 May, both 2022. That Judgment therefore is confirmed.

Employment Judge: **R Gall**
Date of Judgment: **31 October 2022**
Entered in register: **31 October 2022**
and copied to parties