EMPLOYMENT TRIBUNALS

Claimant: Mr F Martey

Respondent: Peninsula Heights Management Company Ltd

RECONSIDERATION JUDGMENT

1. This is the determination on paper at the second stage of reconsideration – that is, under rule 72(2) – of the claimant's application of 18 November 2022 for reconsideration of the Tribunal's judgment of 11 October 2022 for which written reasons were sent to the parties on 4 November 2022. Notice under rule 72(1) having been given on 8 December 2022, the parties have not availed themselves of the opportunity provided to request a hearing.

The original decision

2. The Tribunal held that the claimant was a disabled person by reason of a physical impairment of Type 2 Diabetes Mellitus no earlier than 20 February 2022 and continuing up to and including the date of termination of employment. For this purpose, the substantial and long-term adverse effects of the impairment were in respect of the normal day-to-day activities of urination and, from 18 May 2022, vision. The Tribunal was unable to find on the balance of probabilities a substantial and long-term adverse effect of the impairment in respect of the normal day-to-day activity of being voluntarily or involuntarily awake or asleep.

The original reasons

3. The Tribunal reasoned that there was very little corroborating evidence that the claimant was experiencing involuntarily falling asleep from as early as 2017 or that he was exhibiting signs of a progressive condition that was interfering with his ability to discharge his duties on a night shift. His evidence as to when he began to experience blurry vision and frequent urination was inconsistent and contradictory. None of this was supported by the medical evidence until February 2020 at the earliest. The Tribunal did not feel confident in drawing inferences from the February 2020 diagnosis. It was unable to conclude that the claimant must have been experiencing sleepiness, tiredness or fatigue, blurred vision, lack of urination control or impotence during 2019 or earlier. The

claimant had not discharged the burden of proof upon him on the balance of probabilities.

4. The Tribunal concluded that the claimant had a physical impairment. That impairment was Type 2 diabetes, first diagnosed in February 2020. It was not possible or safe to extrapolate from that diagnosis that he had an impairment or adverse effects in 2019 or earlier. By 2020, the impairment did affect the claimant's ability to carry out normal day-to-day activities. It affected his urinary functions; his vision; and his impotence. The adverse effects were more than minor or trivial (and that was not really in dispute). The adverse condition was long term, in that it was expected to last for at least 12 months (and, again, that is not really in issue).

5. The Tribunal went on to rule on when the individual adverse effects could be said to have arisen. There was no reference in the medical records to the claimant's difficulty in staying awake or of his falling asleep involuntarily. The Tribunal would have expected some reference to this adverse effect when an informal diagnosis of diabetes was made in February 2020 and then confirmed in May 2020 – whereas there was reference to the adverse effects of blurred vision, urinary control and impotence elsewhere in the record. There was a reference to sleep disturbance in the occupational health evidence in June 2020, but this was not a reference to difficulty in staying awake or of his falling asleep involuntarily. There was also a reference to there being no evidence of drowsiness arising as a side effect of medication. In October 2020 there was evidence of the claimant having difficulty in sleeping (but not present or historical difficulty in staying awake). In the internal employment evidence, there were three inconclusive references to sleep (March 2019, April 2019 and September 2020), which took the Tribunal no further.

The application for reconsideration

6. The claimant submits that following the hearing on 11 October 2022 he met with the GP who had made the original diabetes diagnosis in February 2020. The GP agreed to write an urgent letter for the claimant.

7. The letter from the GP is dated 27 October 2022. The GP says that he can confirm that the claimant has a diagnosis of Type 2 diabetes. He says that an official diagnosis was made in February 2020 when the claimant presented with abnormal blood results and symptoms of excessive urination, thirst and fatigue. The GP states that these symptoms are typical of undiagnosed or inadequately treated diabetes and could certainly have impacted upon the claimant's performance at work. He avers that it took some months for the claimant's blood sugars to improve on medications, which had to be altered during this period, such that it is possible that his work was also impacted at that time.

8. The claimant's application for reconsideration contends that this letter is material and supports the claimant's case that at this time he was suffering from fatigue and tiredness, which had an impact on his work.

9. The letter was not available at the hearing, the claimant argues, because the respondent did not make known its position as to its issues with the claimant's medical evidence until 5 October 2022, less than a week before the hearing

and several months after the claimant had disclosed his medical evidence to the respondent. As at 5 October 2022, it is said, the respondent's position was expressed generally and broadly, without detail about what aspects of the medical evidence the respondent took issue with. It is contended that the respondent's position only became clear at the hearing on 11 October 2022 during the cross-examination of the claimant. That position was that the respondent did not accept that the claimant's fatigue, tiredness and sleepiness was a substantial adverse effect because of an absence of reference to it in the medical records.

10. The claimant concedes that he did not request an adjournment. Instead, he drew to the Tribunal's attention the timing of the respondent's revelation of its position. As a result, the claimant was unable to produce further medical evidence. Instead, reliance is placed upon the Tribunal's assessment of the claimant as an honest witness and upon the fact that tiredness is a well-known symptom of diabetes. The claimant believed that his witness evidence would be sufficient. He was unaware that, in the absence of medical evidence specifically referring to tiredness, the Tribunal would not accept this. Reference is also made to obtaining a more detailed report from the GP, although that is not before the Tribunal at this point.

The respondent's position

11. The respondent's position in opposing the application for reconsideration is dated 24 November 2022. It makes four headline points: (1) The burden of proof at the preliminary hearing rested upon the claimant; (2) It is not the purpose of a reconsideration to permit a party a second bite at the cherry; (3) It would not be in the interests of justice to reconsider the original judgment; and (4) The issue of disability is a question of law.

12. As to the burden of proof, the respondent submits that there was no evidence to support the claimant's assertion that he experienced extreme fatigue caused by diabetes or that this improved with medication. This assertion was known to the claimant and his representative from the outset. It was the bedrock of his claim. The content of the claimant's disability impact statement was not corroborated by the medical evidence or otherwise. It was incumbent upon the claimant to marshal sufficient evidence to discharge the burden of proof upon him.

13. As to the purpose of a reconsideration and the interests of justice, the respondent makes the following points. It is said to be perverse to suggest that additional medical evidence was not obtained because the respondent had not made its position clear. The issue of disability was the bedrock of the claim. The claimant was professionally represented. He was aware of where the burden of proof lay. An approach to his GP after the fact does not assist the Tribunal as to whether the claimant had experienced fatigue or sleepiness where there is no reference to this in the contemporary records.

14. The respondent asserts that the claimant was aware that it did not concede that the claimant was disabled at the relevant time so far as the substantial adverse effects relied upon by the claimant were disputed. The respondent queried whether, as a result of his evidence in his impact statement, the claimant had

informed the DVLA of the adverse effects he relied upon. The claimant's response was that he did not drive.

15. The respondent states that the claimant disclosed his medical evidence later than required by the case management orders. It accepts that it could have made known earlier its objections to the claimant's disability status. However, the basis of those objections should have been clear to the claimant. The claimant knew where the burden of proof lay. He made no application for a postponement. His position at the hearing was that the medical evidence was sufficient. The Tribunal found the claimant's evidence not to be compelling or persuasive, and his impact statement did not create a positive impression of the adverse effects of an undiagnosed condition. He did not discharge the burden of proof upon him.

16. As to the issue of disability being a question of law, the respondent's submission sets out the legal question that the Tribunal had to decide and its findings of fact in relation to that question. It submits that the GP's letter takes the matter no further. The question is a matter of law and not one of medicine. The GP's letter does not support the claimant's assertions. It does not explain the gap in the medical evidence. It speculates as to the impact of the condition. If reliance is to be placed on this letter then the respondent is prejudiced by its inability to test that evidence (for example, by cross-examining the GP).

Relevant legal principles

17. The overriding objective in rule 2 of the Tribunal's procedural rules enables the Tribunal to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable, (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense. The Tribunal shall seek to give effect to the overriding objective in interpreting or exercising any power given to it by the procedural rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and shall co-operate generally with each other and with the Tribunal.

18. Rule 70 provides that a Tribunal may on the application of a party reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the original decision may be confirmed, varied or revoked. If it is revoked it may be taken again. Rule 71 requires the application to set out why a reconsideration is necessary.

19. Rule 72(1) requires an Employment Judge to 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, 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.

20. If the application has not been refused at that stage, the original decision shall be reconsidered at a hearing, unless the Employment Judge considers, having regard to any response to the notice provided under rule 72(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. Where practicable, the reconsideration shall be by the Employment Judge who made the original decision (rule 72(3)).

21. Rules 70-73 replace the individual grounds for review that existed prior to the introduction of reconsideration in 2013. The test now is simply whether the interests of justice require that a decision be reconsidered. However, as the EAT has emphasised in *Outasight VB Ltd v Brown UKEAT/0253/14 (21 November 2014, unreported)* the existing case law on review has not been replaced by the new rules on reconsideration. In particular, the relatively stringent rules as to when reconsideration will be granted on the basis of evidence not available at the initial hearing will continue to apply.

22. Drawing upon the commentary in *Harvey on Industrial Relations and Employment Law* and the IDS Employment Law Handbook on *Employment Tribunal Practice and Procedure*, under the pre-2013 procedural rules the power of review on the interests of justice ground might only be used in "exceptional circumstances". However, that pre-dated the introduction of the overriding objective in what is now rule 2. The exceptional circumstances approach might be said to be relaxed as a result: *Williams v Ferrosan Ltd [2004] IRLR 607* EAT. However, in *Newcastle-upon-Tyne CC v Marsden [2010] ICR 743 the EAT* said that the existence of the overriding objective was *not* to be used to overturn all the existing principles on this ground. See also: *Outasight VB Ltd v Brown* (above).

23. The Court of Appeal in *Ministry of Justice v Burton [2016] EWCA Civ 714, [2016] ICR 1128* held that: (1) the discretion must be exercised in a principled way; (2) there must be an emphasis on the desirability of finality, which militates against the discretion being exercised too readily; (3) it is unlikely to be exercised because a particular argument was not advanced properly; and (4) it is unlikely to be exercised if to do so would involve introducing fresh evidence, unless the strict rules on such admission are separately satisfied. In general, the failings of a party's representative will not be a good reason to grant a review on the grounds of the interests of justice.

Discussion

24. This application overcame the first hurdle in rule 72(1). This is a consideration of the application under the second stage: that is, rule 72(2).

25. As the application has not been refused under rule 72(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 rule 72(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. Those procedural requirements have been satisfied. The reconsideration proceeds on paper.

26. The reconsideration process is apt where the Tribunal has made an obvious error that can be best remedied by varying or revoking the judgment upon review; or where there is new evidence unavailable at the time of the hearing; or where there has been a procedural irregularity or an obvious injustice. The threshold is set by what is in the interests of justice.

27. The Tribunal is not satisfied that that threshold has been met by this application. The preliminary hearing was convened because the respondent did not concede that the claimant was a disabled person at the relevant time by virtue of having a physical impairment (diabetes) which had a substantial and long-term adverse effect upon his day-to-day activities (his ability to stay awake or to avoid falling asleep involuntarily).

28. The burden of proof was upon the claimant. It was for him to establish on the balance of probabilities that he had the impairment. It was for the claimant to show that it caused or resulted in the adverse effect on the normal day-to-day activity relied upon and that that adverse effect was substantial and long-term. That analysis would be subject, of course, to the application to the evidence of the relevant statutory provisions (for example, on progressive conditions or recurring conditions) and the relevant case law (for example, whether an impairment might be inferred from adverse effects).

29. Central to his substantive complaint and fundamental to his putative status as a disabled person was the question of whether the claimant experienced fatigue, sleepiness or tiredness – whether he was prone to falling asleep involuntarily, particularly during working periods. It was for him to give evidence as to his condition and its effects. That would require medical evidence – whether from his medical records and/or from expert evidence (as might be provided by his GP or a consultant) – and a personal impact statement and/or other witness or documentary evidence. It would be necessary to establish this at the relevant times relied upon in support of the complaints of disability discrimination.

30. The Tribunal's assessment of the witness evidence and the documentary evidence is apparent from its original reasons. There were gaps in the medical evidence. Those gaps were unexplained. They were not filled by the claimant's own evidence as a witness. They remain unfilled, despite the GP's letter in support of the claimant, provided after the event. The claimant failed to establish on the balance of probabilities that he had a condition (or a progressive or recurring condition) that resulted in the relevant substantial adverse effects at the relevant times.

31. There was no procedural irregularity. The respondent had simply not conceded disability. The claimant was not ambushed by that position. The respondent had not spelt out in detail why it considered that the evidence disclosed was insufficient for there to be a concession or why it necessitated a preliminary hearing to proceed. That was not for the respondent to determine or to advise, unless ordered to do so on application. The burden of proof remained throughout upon the claimant. It was for the claimant to bring forward his best evidence and to make good his status as a disabled person.

32. The claimant was professionally represented. It would be apparent that disability was disputed. It was plain that there were gaps in the evidence – particularly between what the claimant asserted in his pleadings and in his impact statement, on the one hand, and what appeared in the medical records and occupational health and the workplace evidence, on the other hand. The claimant's evidential case simply fell short of what was required of him in order to satisfy the burden and standard of proof that he was expected to meet.

33. The claimant could have asked for a postponement of the hearing in order to make good the evidential gaps. When at the hearing itself those gaps were made obvious, the claimant could have requested an adjournment. Although there was a hint that somehow the respondent was the cause of the problem – by not making or explaining its refusal to concede disability sooner or more clearly – the reality was that the claimant should have anticipated the difficulties created by the gaps in the medical evidence.

34. Those gaps are not made good by the GP's letter, which the Tribunal otherwise readily assumes has been provided in good faith. First, this is not new or fresh evidence. The claimant could always have asked his GP to give evidence of the basis of his diagnosis in February 2020 at any time. Second, it is evidence that could have been reasonably available before or at the time of the preliminary hearing. Third, taking this evidence at its highest, it remains speculative rather than conclusive.

35. Fourth, it lacks the detail of recollection that would be expected of compelling evidence produced late in the proceedings and in the circumstances described. For example, there is no indication of how or why the GP can now recall the basis of his diagnosis of this particular patient on that particular day approaching 3 years ago. Did he, for example, retain notes or some other prompt to his recollection, or is he working back from a diagnosis of diabetes to a conclusion that the claimant must have presented with a history of typical symptoms of diabetes?

36. Finally, it is not evidence that meets the test for fresh evidence under the well-known principles in *Ladd v Marshall* [1954] 3 All ER 745 CA that the evidence could not have been obtained with reasonable diligence for use at the original hearing; that the evidence is relevant and would probably have had an important influence on the hearing; and that the evidence is apparently credible. There is no additional factor or mitigating circumstance such that the interests of justice would require this new evidence to be admitted.

37. If this evidence were to be admitted, the respondent would be entitled to request an opportunity to test it. That creates an unvirtuous circle of late evidence that requires to be tested or amplified, and which therefore requires a further hearing and potentially further evidence. That is not in the interests of justice. It prejudices the respondent or its privileges the claimant at the expense of the respondent. In any event, as it presently stands (that is, without the more detailed evidence the application for reconsideration appears to promise) this fresh evidence is insufficient to cause the Tribunal to revisit its findings of fact or its application of the law to those findings. Weighing it in the balance would not cause the Tribunal to revisit its original findings or its original decision.

38. This is a case where the interests of finality in litigation are not to be set aside lightly. New evidence is being introduced that could and should have been placed before the Tribunal at the hearing and where the claimant's case was not advanced in the way that it might have been at that hearing. The claimant was represented by a solicitor both before and at the hearing. The new evidence would have been unlikely to have changed the Tribunal's view of the matter. The claimant is simply trying to have a second bite of the cherry when his case should have been brought before the Tribunal fully formed at the original hearing.

Decision

39. In all these circumstances, applying the overriding objective in tandem with rules 70-73, it is not necessary in the interests of justice to reconsider the original decision. The original decision is confirmed.

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Judge Brian Doyle

DATED: 5 January 2023