Case No: 2206345/21

EMPLOYMENT TRIBUNALS

Claimant: **Mr M. Alexander**

Respondent: **Imperial College NHS Foundation Trust**

London Central
Employment Judge Goodman **12 January 2023**

ORDER

The claimant's application for reconsideration dated 30 December 2022 is dismissed under rule 72 because it has no reasonable prospects of success.

REASONS

Relevant Law

1. Under the Employment Tribunal Rules of Procedure 2013 a request for reconsideration may be made within 14 days of the judgment being sent to the parties. By rule 70 a Tribunal "may reconsider any judgment where it is necessary in the interest of justice to do so", and upon reconsideration the decision may be confirmed varied or revoked.

2. Rule 72 provides that an Employment Judge should consider the request to reconsider, and if the judge considers there is no reasonable prospect of the decision being varied or revoked, the application shall be refused. Otherwise it is to be decided, with or without a hearing, by the Tribunal that heard it.

3. Under the 2004 rules prescribed grounds were set out, plus a generic "interests of justice" provision, which was to be construed as being of the same type as the other grounds, which were that a party did not receive notice of the hearing, or the decision was made in the absence of a party,

or that new evidence had become available since the hearing provided that its existence could not have been reasonably known of or foreseen at the time. Ladd v Marshall (1954) EWCA Civ 1 set out the principles on which evidence could be admitted after the judgment: it could not have been obtained with reasonable diligence before the hearing; it would have an important influence on the outcome; the evidence was apparently credible. The Employment Appeal Tribunal confirmed in **Outasight VB Ltd v Brown UKEAT/0253/14/LA** that the 2013 rules did not broaden the scope of the grounds for reconsideration (formerly called a review); the ET will generally apply the **Ladd v Marshall** criteria, although there is a residual discretion to permit further evidence not strictly meeting those criteria to be adduced if for a particular reason it is in the interests of justice to do so.

4. When making decisions about claims the tribunal must have regard to the overriding objective in rule 2 of the 2013 regulations, to deal with cases fairly and justly, which includes ensuring that the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay, and seeking expense.

The Application

5. There was an open preliminary hearing on 13 December 2022 to decide whether some of the claimant's claims were out of time. It was decided that some of them were. The judgement and written reasons were sent to the parties on 14 December 2022.

6. The claimant emailed the tribunal on 28 December (i.e. just as the 14 days allowed expired) with a 10 page draft application to reconsider. He asked for the deadline to be extended by a few days, but if not extended, that the draft was accepted as the application.

7. On 30 December, so 2 days out of time, he sent a 14 page final application. I have not made a detailed comparison of the two. I assume that all the points made in the draft are included in the final.

8. On 29 December the claimant sent two additional items. One is a letter dated 24 June 2021 from the Secretary of State for BEIS (then Paul Scully MP) to Nicholas Paine QC (one of the Law Commissioners) about the BEIS response to the Law Commission report on proposed changes to employment law and tribunal practice. The other is an article by Craig Ludlow, a barrister at 3PB, entitled "Employment Tribunals in the Pandemic – Presidential Guidance, the Reality and the Future". I understand that both items are sent as relevant to a contention by the claimant that during the pandemic the time limit for presenting a claim to an employment tribunal was extended from 3 months to 6 months. On 3 January he added a fit note from his GP dated 29 December, saying he was unfit for work from 3-6 January.

9. On 3 January 2023 the respondent wrote commenting on the various communications they had had from the claimant about reconsideration,

asserting that the final version was out of time, and tribunal was not able to extend time.

Is the reconsideration application in time?

10. The draft version is in time, the final version is out of time. Rule 71 makes it clear that an application must be made within 14 days. Rule 5 of the employment tribunal res says that the employment tribunal has discretion to extend time for any order or rule. Rule six lists a number of exceptions to rule 5, but the time limit in 71 is not one of them. I conclude I can extend the time limit if that appears to be in the interests of justice.

11. I decide to exercise discretion to extend the time limit by two days to include the final version dated 30 December. First of all, there is a substantial reconsideration application which is in time. Next, the additional material was made available to the tribunal very soon after that. At that point, 28 December email had not been considered, so this was no duplication of effort. The respondents have the opportunity to respond if they had wanted to (although under rule 72 I need only consider the application, without taking account of any view of the respondent). It is in the interests of justice that all the claimant's point should be considered, not just those made in the version of 28 December. There is no disadvantage to the respondent, or any drain on tribunal resources. The position may have been different if I had already read and reconsidered. I do not give weight to the claimant's assertion that he was, from 29 December, depressed and unfit for work between 3 and 6 January 2022. Despite depression he was able to complete and send a very substantial document on 28 December, and there is nothing to suggest that why he suddenly became depressed on 29 December. I also take no account of the claimant's assertion that he believed that the intervention of a bank holiday would extend the 14 days allowed. I do not know on what this belief is based.

The Application – Discussion and Conclusion

12. The claimant states that the decisions do not take account of the time limit for presenting claims being extended from 3 months to 6 months during the pandemic. This is likely to come from the Craig Ludlow article dated 3 April 2020, which is about the pandemic. The claimant does not say when he saw or read the Craig Ludlow article. Most of the article is about arrangements for online hearings. It does refer to the President's FAQs of 3 April 2020 shortly after the start of the first lockdown which said: "*time limits remain as normal",* adding: "*Judges have discretion to allow matters to be pursued out of time*". It does not say that the time has been extended for three months to 6 months, quite the opposite. I add that judges have always had discretion to allow matters to be pursued out of time. This was no change in the law.

13. The extension from 3 months to 6 months comes from the Law Commission's report recommending changes in the law, as recited in the June 2021 BEIS letter. The Law Commission report was printed in April 2020, and states that its terms were agreed in March 2020. It is

therefore clear that the recommendation to extend the time limit from 3 to 6 months was not about the pandemic. The text of the report gives other reasons. The law on time limits did not and has not changed. It remains a recommendation by the Law Commission which may or may not be enacted by Parliament. Tribunals must administer justice according to the law, not as it might be. The tribunal did include the pandemic is one of the factors that might be relevant when deciding whether it was just indexable to extend time.

14. I note that the claimant does not say when or how this letter came to his attention, or whether it was available to him at the time of the preliminary hearing in December 2022. Further, if he got this letter at any time after June 2021, when it was written, he cannot have been relying on it when he decided not present a claim earlier, that is, within three months of knowing that he had not passed the first rotation. At the date of the letter, he was already (assuming the finding on the course of conduct is unchanged) out of time.

15. Finally, the claimant does not say why this evidence could not have been presented at the tribunal hearing on 13 December 2022. He made the assertion around that time had been increased to 6 months, but he did not back it up.

16. Moving on, it is asserted that disciplinary hearing should not have taken place until Employment Judge Adkin had resolved the outstanding application to reconsider his decision not to allow a claim in breach of contract. The claimant says that Employment Judge Adkin may decide that there is no point in reconsidering his decision is it has now been decided that all the claims are out of time. I do not know if Employment Judge Adkin has yet dealt with this reconsideration application. The claimant says that the breach of contract claim would "encapsulate Dr Fertleman not rewriting his report as a continuing act". I doubt this is the case. The preliminary hearing judgement deals with whether failing to rewrite the report is or is not a continuing act, and if it was not a continuing act, when the failure to take the action was reasonably decided on. Further, at the date the preliminary hearing judgement, Employment Judge Adkin's judgement had made clear what the claims were at the time of the hearing.

17. The claimant states in a number of places that the tribunal did not take into consideration the points he had made in his submissions. The tribunal did review his submissions carefully, and if the tribunal did not agree with his points, that does not mean that they were not considered. Reconsideration is not an opportunity to reargue arguments that have already been read or heard.

18. There is a detailed critique of the employment tribunal's conclusions from the documents available. As explained in the first judgement, the claimant was given the opportunity at the hearing on 13 December to take the tribunal through the document in detail, with the claimant's explanations of the significance. It is not in the interest of justice to go through them again.

19. A point is made about the date that the claimant went to the BMA for advice. The tribunal was not considering when the claimant went to the BMA for advice. What was relevant was whether the claimant had access to advice. The claimant states that he was not given any advice about time limits. What advice he may have been given is privileged, unless he chooses to waive it. He did not adduce any evidence about this at the hearing, indeed it only came out that he had got advice when he was dealing with another point.

20. There is an analysis of why the tribunal was wrong to conclude *when* a decision was made not to rewrite the report. This is an appeal point.

21. There is an assertion that the tribunal needed to heard evidence from Dr Fertleman, Dr Mitchell and Dr Long, in order to show that they "could have continued to mislead Dr Soubiere", who decided the grievance. This is the point on which the claimant had an opportunity to make representations at the hearing if the tribunal was wrong not to hear the evidence before making a decision about whether there was conduct extending over a period, rather than rely on facie case and documents, as in **Lyfar**, that is a matter for an appeal, not reconsideration.

22. There is discussion of whether the tribunal drew the correct conclusions from the medical evidence in deciding whether it is just and equitable to extend time. This is a matter of discretion for the employment tribunal and if it was wrongly exercise that is not of the appeal tribunal. There is no new material here, nor any explanation why these points could not have been made at the hearing.

23. The claimant rehearses earlier arguments about why he did not present a grievance earlier. There is no new material here, and if there were, no explanation why he did not present it at the hearing.

24. The same goes for the argument that he did not appreciate that what he had thought was unfair was now, when he saw the documents in the subject access request, *disproportionately* unfair such that he should bring a claim. This argument was made at the preliminary hearing, and the tribunal did not see it as a reason to extend time, or to conclude that time had not started to run until he saw them. I note the claimant now says that he could now understand that there was "deception" in saying that he had misty and MRI (myocardial infarction), which was Dr Fertleman's criticism of him. The documents showed that according to Dr Fertleman the claimant had missed signs on ECG that there might have been an MI, which would then lead to a further test which could exclude MI. When Dr Fertleman did this test it showed that there had not been an MI. It remains that the patient could have had an MI, which could not be excluded until he had the test, and would presumably be treated in the meantime. That suggests that the criticism that he was unsafe (for missing the sign on ECG) was not "deception".

Conclusion

25. In conclusion, the claimant seeks to reargue points already made at the hearing. Insofar as there is any new material, he does not explain why it could not have been presented at the hearing.

26. If the claimant considers the tribunal has got the law wrong, that should be the subject of an appeal.

27. There must be finality in decision-making - that is in the interests of justice. Reconsideration is not an opportunity to go over the same arguments the second time. I do not find anything in the application that suggests it is in the interests of justice to overturn any part of the decision. The application has no reasonable prospect of success. Accordingly, it is refused under rule 72.

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Employment Judge GOODMAN

Date 12 Jan 2023

JUDGMENT SENT TO THE PARTIES ON

12/01/2023

FOR THE TRIBUNAL OFFICE