



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms G Ahir

v

St Swithun Wells Catholic
Primary School

JUDGMENT ON AN APPLICATION FOR RECONSIDERATION OF A JUDGMENT UNDER RULE 71 OF THE EMPLOYMENT TRIBUNAL RULES OF PROCEDURE 2013

1. The claimant has applied for a reconsideration of the judgment sent to the parties on 30 September 2022 by which I found that the claimant was disabled within the meaning of s.6 of the Equality Act 2010 (hereafter the EQA) at the time the incidents which are the subject took place by reason of asthma only. This application is made under r.71 of the Employment Tribunal Rules of Procedure 2013. The application was attached to an email on 15 October 2022. However, later that day, the claimant sought to amplify it and/or substitute it and made further representations on 17 October 2022 in response to the respondent's objections of the same date. In November 2022, the claimant added further information including about the reasons why the application was late.
2. The application was made by email on 15 October 2022, one day outside the 14 day time limit. I grant an extension of time for making the application for a reconsideration to 15 October 2022 for the following reasons:
 - 2.1. The extent of the delay was short: the email was sent at 01.41 in the early hours of the morning when it should have been sent before midnight on 14 October 2022.
 - 2.2. The delay does not cause prejudice to the respondent.

2.3. The claimant has relied upon her “continuing ill health and serious medical conditions” as a reason for her delay. However, she does not explain why those meant that she was unable to present the application in time. She states that she can provide a doctor’s certificate as evidence of her ill health but does not do so. She should understand that, although on this occasion, I have accepted her reliance on her alleged ill health and serious medical conditions at face value, in general, if she relies upon a medical condition as reason for her delay or for an application that must be backed up with medical evidence.

2.4. The claimant was legally represented at the time of the preliminary hearing in public on 15 September 2022 but is now acting in person. She will have needed time to adjust to conducting litigation on her own behalf.

3. I consider that there appears to be a reasonably satisfactory explanation for the delay and that in all the circumstances an extension of one day should be granted.
4. Having considered the application under r.72(1), I consider that there is no reasonable prospect of the judgment being varied or revoked. The application for a reconsideration is rejected.

4.1. The procedure for an application for a reconsideration is set out in rule 72 of the Rules of Procedure 2013. It is a two stage process. If the employment judge who made the original judgement considers that there is no reasonable prospect of the original decision being varied or revoked the application shall be refused under rule 72(1) 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 and seeking the views of the parties on whether the application can be determined without a hearing. That notice may set out the Judge’s provisional views on the application. Unless the judge considers that a hearing is not necessary in the interests of justice, if the application is not rejected under rule 72(1) then the original decision shall be reconsidered by the tribunal who made the original decision.

4.2. The application seeks a reconsideration of my judgment that the claimant was disabled by reason of asthma and my rejection of the arguments that the claimant was disabled by any other condition at the period of time covered by the allegations. It had been agreed between the parties that the period relevant for the claim was 1 November 2020 to 31 July 2021 and that is the time period covered by the agreed List of Issues appended to the Record of Preliminary Hearing.

- 4.3. My judgment should not be taken as a finding that the claimant was not disabled by reason of asthma at an earlier period; is it simply that it is only relevant for the claim whether or not she was disabled from 1 November 2020 onwards. It may be that the claimant does not understand that I only made a judgment about the time period which it was necessary to consider because she appears to apply for a reconsideration of the judgment that was in her favour. There is no reasonable prospect of me varying my judgment that the claimant was disabled by reason of asthma because the finding is already in the claimant's favour. The specific effects of asthma at the relevant period remain in issue, in particular in the reasonable adjustments claim.
- 4.4. It is important to note that a list of the issues to be decided by the Tribunal at final hearing in this matter was agreed between the representatives following amendment overnight between day 1 and day 2 of the preliminary hearing. I have now ruled that that list of issues is definitive and that was communicated to the parties on 1 December 2022. However, any reference to a health condition other than asthma as a grounds of direct disability discrimination should be disregarded.
- 4.5. The only disability discrimination claims are a claim of direct disability discrimination and a claim of breach of the duty to make reasonable adjustments where the claimant is alleged to have experienced a substantial disadvantage compared with people who are not disabled by reason of asthma. It does not appear that the claimant will achieve any significant forensic advantage if her application for reconsideration is successful unless it is argued that individuals were prejudiced against her by reason of joint pain and anxiety who were not also prejudiced against her by reason of asthma.
- 4.6. The application also appears to seek to reconsider my judgment that the claimant was disabled by reason of joint pain and anxiety. Oral reasons having been given at the preliminary hearing in public, they were not automatically provided and were not requested within 14 days of the written record of hearing being sent to the parties. At the time the claimant contended that she was disabled by reason of the following conditions: Asthma, migraines, joint pain and anxiety & depression.
- 4.7. The basis of the application appears to be:
- 4.7.1. That the conditions are fluctuating health conditions;
 - 4.7.2. That the medical evidence had not been fully considered;

- 4.7.3. That additional medical evidence is now available and the claimant also indicated that more would become available when her DSAR had been complied with;
- 4.7.4. Action taken by her former legal advisers explained a lack of the relevant evidence in the file of documents for the preliminary hearing on 15 September 2022.
- 4.8. In oral evidence, the claimant herself confirmed that she was only seeking to rely on the alleged disabilities which were in her supplementary witness statement. There were 15 different impairments covered by the first impact statement. In those circumstances, her statement that the respondent has inaccurately stated that she reduced the number of conditions relied on from 15 to 5 is not understood.
- 4.9. The argument that the claimant was disabled by reason of migraines because they were likely to recur was relied on by counsel on behalf of the claimant at the preliminary hearing in public. This was clearly an argument that counsel was well aware of and deployed in relation to migraines. There is no explanation for any failure to use the same argument in relation to joint pain or anxiety had that been fairly arguable.
- 4.10. There was a joint file of documents for the preliminary hearing in public to which both parties had contributed and which was 617 pages long. It included the claimant's impact statement and there was a supplementary impact statement which was also considered. To the extent that the claimant complains that there was a failure on the part of her then representatives to include some evidence in that bundle which was available to them and which was relevant and necessary to the determination of the preliminary issues, that is a matter between the claimant and those representatives. She was represented by apparently competent solicitors and counsel. Nothing she raises goes so far as to raise the prospect that she did not have a fair hearing on 15 September 2022. The claimant's complaint that key documents were omitted or that her representatives failed to brief counsel adequately is at odds with the way that the hearing was conducted and, in any event, is a matter for her to take up with those representatives if she believes she has grounds for a complaints.
- 4.11. However, the claimant's submission appears rather to be that she had not obtained medical evidence in preparation for that preliminary hearing. She seeks to rely on additional evidence.
- 4.12. Where a litigant applies for a reconsideration on the grounds that new evidence is available they must persuade the employment tribunal that the

evidence could not have been obtained with reasonable diligence for use at the hearing, that the evidence would probably have had an important influence on the outcome of the case and that it is credible (Ladd v Marshall [1954] 1 WLR 1489 CA). As was said in Wileman v Minilec Engineering Ltd [1988] I.R.L.R. 144 EAT, the evidence must not only be relevant but it must be probable that it would have had an important influence on the case for tribunal hearings are designed to be speedy, informal and decisive. However, it is not necessary that the new evidence should be shown to be likely to be decisive. The question for the tribunal on reconsideration is

“in the light of what we know about this case, has it been shown to us that the evidence is relevant and probative, and likely to have an important influence on the result of the case?” (paragraph 15 of Wileman v Minilec)

- 4.13. There is no explanation put forward for any failure to obtain or adduce in evidence at the hearing on 15 September 2022 which, in all probability, would have been available had it been sought at the proper time. Indeed, a large quantity of documentary evidence was available.
- 4.14. In their correspondence of 16 November 2022 (timed at 10.02) the respondent sets out the preparation orders which the parties were working towards prior to the preliminary hearing. The claimant was represented between 24 February 2022 and 20 May 2022 and between 1 August 2022 and after the preliminary hearing in public. The preliminary hearing had been listed since March 2022. She was therefore represented during the period when there were deadlines by which medical evidence should be provided and when evidence gathering was taking place. There was ample opportunity for the claimant and/or her representatives to obtain medical documentation and I am not satisfied that any additional evidence could not have been obtained with reasonable diligence for use at the original hearing.
- 4.15. The claimant says that she was advised that there was sufficient in the medical evidence that was disclosed. Where a judgment has been made about what evidence to include and not to seek further evidence then it is not in accordance with the overriding objective of avoiding delay and ensuring that the parties are on an even footing to permit one party to seek to re-hear the preliminary issue by adducing evidence which could have been introduced at the original hearing. This does not cause injustice to the claimant – who has had the original opportunity to present her case – but does potentially cause in justice to the respondent.

- 4.16. All relevant evidence to which I was taken at the preliminary hearing was taken into account. I only referred in my oral reasons to that evidence which it was necessary to cited in order to explain my judgment.
5. Taking into account all of the above and the arguments raised by the claimant, I conclude that there are no reasonable prospects of my judgment being varied or revoked and the application is dismissed.

Employment Judge George

Date: ...1 March 2023.....

Sent to the parties on: 2/3/2022

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For the Tribunal Office