



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112400/2021

Held via Written Submissions on 23 March 2023

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
No representations made**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the application by the claimant for reconsideration of Judgment of the Tribunal dated 31 October 2022 is accepted, although made out of time. That Judgment is reconsidered. Upon reconsideration the Judgment is revoked. The Unless Orders issued on 28 March 2022 are set aside. The claim will proceed and a preliminary hearing will be arranged for case management purposes.

REASONS

Background

1. There is history to this claim. I have narrated it briefly as it is set out more fully in the Judgments dated 20 May 2022 (“the first Judgment”) and that dated 31 October 2022 (“the second Judgment”)

2. Unless Orders were issued following the failure by the claimant to provide information in response to Orders earlier made. The claimant did not respond to the Unless Orders within the 21 day period permitted for a reply. The claim was therefore dismissed in terms of Rule 38 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.
3. The claimant sought reconsideration of that dismissal, which would involve the Unless Orders being set aside, a process generally described as seeking relief from sanctions.
4. For reasons fully narrated in the first Judgment the application of the claimant for the Unless Orders to be set aside, for relief from sanctions, was refused. In reaching that decision, 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.
5. The claimant sought reconsideration of the first Judgment. He submitted information as detailed in the second Judgment. The respondents also made representations. Both parties agreed that reconsideration could take place on the papers, without an attended hearing.

Medical Information at time of the second Judgment

6. With the submission from the claimant prior to the second Judgment he provided medical information. He placed particular emphasis upon communications from a Dr Ma, those being dated 21 and 28 October 2022.
7. In considering the information from Dr Ma, it was of significance, as noted in the second Judgment, that it was unclear whether Dr Ma was speaking from any personal medical examination of, or encounter with, the claimant. A relevant passage in the second Judgment states "*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.*"

8. The Tribunal concluded, on balance, that, for the reasons given in that second Judgment, it would not revoke or vary the first Judgment, but rather would confirm it.

Appeal to the Employment Appeal Tribunal (“EAT”)

9. The claimant appealed the second Judgment to the EAT. In course of the progression of that appeal he submitted a further email from Dr Ma, the email being dated 30 November 2022.
10. By a decision dated 26 January 2023, the EAT stayed the appeal to provide an opportunity to the claimant to present a further application for reconsideration of the second Judgment, albeit that such an application would be out of time. The EAT took this step given the information dated 30 November from Dr Ma. It did not express a view on what the Tribunal might do or ought to do in terms of accepting or rejecting any late application for reconsideration and as to what view the Tribunal might or should take upon the substance of any such application, if accepted.

Application for Reconsideration

11. The claimant submitted an application for reconsideration, following upon the decision of the EAT of 26 January 2023. That was not rejected as having no reasonable prospect of success.
12. The claimant relied upon the email from Dr Ma of 30 November as well as points earlier made. The respondents were asked for any submissions and did make submissions. The claimant responded to those.
13. Both parties were asked as to whether they wished a hearing. Neither sought a hearing. The application and opposition were considered without parties being present as I considered that a hearing was not necessary in the interests of justice, having regard to the views of parties, the issues involved, and the submissions made.

14. For clarity, I had regard to the application, including specifically the email from Dr Ma, also to the second Judgment and matters which formed the basis of the view reached at that time. I also kept in mind the history to the case and events as narrated in the first and second Judgments.
15. The principles of law set out in the first and second Judgments remained those application to this reconsideration. The test is not as the claimant states it to be, namely "*Was the claimant cognitively impaired at the time?*" The test is as previously set out.
16. The interests of justice, the fact that this was a discrimination claim and the finality of litigation were all of significance. The fact that the claimant did not respond to Unless Orders, issued after non-compliance with earlier Orders, was of importance. The explanation offered by him for that, with the medical evidence provided by him, was appropriately weighed. The lack of precision in that medical evidence also required to be kept in mind. The medical information, even in the third email, that of 30 November, from Dr Ma, did not state in terms that she had examined the claimant in the period in question or treated him as a patient in that critical time.
17. If I was persuaded to permit the application for reconsideration to be accepted for consideration, although late, I then had to consider whether to reconsider the second Judgment. If I did reconsider it, I then required to consider whether to confirm it, vary or to revoke it. If I revoked it, I then had to consider whether or not to set aside the Unless Orders.

Discussion and Decision

18. I have not set out the submissions. It is appropriate however to summarise them, as I understood them. Essentially, the claimant stated in somewhat trenchant terms, that the opinion of Dr Ma was not, and had not been generalised. It related to him, and confirmed his medical position, he said. He was clearly unable to reply to the Unless Order. The respondents maintained that it remained the case that Dr Ma did not say that she had examined the claimant medically. The information remained unsatisfactory. There was no specific medical information to give the

Tribunal clear information as to the claimant's medical health at the relevant time. Insofar as there was any information, it could and should have been provided earlier.

19. I believe it is relevant to set out what Dr Ma says in her email of 30 November 2022. The is the email received after the second Judgment. It reads:-

"I clearly and specifically noted Mr Graeme Madden's physical and mental well-being concerns around the time of his surgery and post-operative recovery period in the two previous statements. Please kindly revisit and read carefully. I am under the impression that direct and crucial points were blatantly missed.

I saw Mr Madden in the days and weeks following his operation, hence stated what I had written in the previous statements, to confirm the state of Mr Madden's mind and thought process was "undoubtedly disjointed and incoherent" for the duration of post operative recovery.

Once again I would like to highlight the combination of factors which led to Mr Madden's clouded thought process, and this cannot be ignored. Mr Madden suffered from deteriorating pre-existing mental health conditions, with depression and anxiety, which required medication for:as well as had to endure the side effects of concurrent opioid analgesics use, for the purpose of post operative pain management.

Please refer back to the initial statement where common and very common side effects are clearly illustrated as per BNF (British National Formulary).

This is a direct statement concerning of Mr Graeme Madden, as were the previous two statements, but not a generalisation."

20. The respondents have commented on this further information from Dr Ma. The claimant has replied to their comments.
21. The email from Dr Ma of 30 November 2022 does provide some further information in relation to the claimant. The previous emails were, notwithstanding the views of

the claimant, generalised. This is so as they did not contain comments or medical information specifically as to the claimant's state of mind and mental capacity at the time in question with confirmation of how it was that the author was able to provide the comments or medical information in relation specifically to Mr Madden. The reader was left, in my view, potentially to make the connection between the general position expressed and the situation of the claimant. It was unclear whether Dr Ma had examined the claimant or had observed him to enable her to express any view as to his mental capacity at the time.

22. The email of 30 November now contains Dr Ma's statement that she "saw" the claimant in the days and weeks following his operation. That is helpful and provides a basis for her opinion as to his mental capacity. It is not as helpful as it might have been, however, in that, as mentioned above, it does not state whether she clinically examined him, treated him as a patient at that point or perhaps merely observed him in passing in the hospital. There is no clarification of how it was (and when it was precisely) that she "saw" Mr Madden. If it was after his discharge from hospital, information upon the circumstances of that occurring would have been very useful. These are important matters when Mr Madden relies upon the email from Dr Ma as confirming that he was unable to respond by way of compliance with the Unless Order.
23. Nevertheless, the information in the email of 30 November is more clearly linked to the circumstances and position of Mr Madden than the earlier information. It does state that Dr Ma "saw" Mr Madden. That provides a sounder basis for her opinion to carry more weight in the assessment which the Tribunal has to undertake.

Late Application

24. I was prepared to allow the application for reconsideration, although submitted late. Mr Madden obtained the email of 30 November late in the day.
25. I considered the history the interests of justice and the prejudice to each party if the application was permitted to proceed and to be considered, as against prejudice if it was not. The application, whilst late, is made in circumstances where there has

not been a huge delay. The claimant has been engaged with the process, albeit resistant to some of the points the Tribunal made in trying to explain to him why more specific information related clearly to himself was of significance. Better information is now to hand.

26. I concluded that it was appropriate to extend time to accept the application made for reconsideration. Rule 5 permits such an extension of time.

Reconsideration

27. I then turned to reconsider the second Judgment. In addition to the material before me at time of that Judgment I now had the email of 30 November from Dr Ma, with comment from both parties upon that.
28. In the context of this litigation, it has been important that the Tribunal has information as to the situation and capacity of the claimant at the time involved.
29. Subject to the caveats mentioned, the Tribunal now has better information, more clearly related to the claimant and based on the express statement that Dr Ma “saw” the claimant.

Decision

30. I therefore considered all the papers before me, the information therein and the submissions advanced by each party. I had regard to the elements mentioned previously in determining whether reconsideration of the second Judgment was appropriate and what to do upon reconsideration if I did reconsider it. Those were the facts and circumstances involved, interests of justice, prejudice to each party if the judgment was confirmed, revoked or varied and the desirability of finality of litigation. The email of 30 November was a new factor and was helpful, subject to the element of reservation mentioned above.
31. On balance taking all the factors together I am prepared to accept that the information I now have is fuller than previously and is such that it now warrants reconsideration of the second Judgment. Further, upon reconsideration I came to

the view that it is in the interests of justice to revoke the second Judgment, notwithstanding the desirability of finality of litigation.

32. The decision I have reached results from a balancing exercise. I have reached it with a degree of hesitancy given an element of lack of clarity as to when and in what circumstances Dr Ma became aware of claimant's mental capacity and the impact of treatment and medication at the time. I understand the respondents' representations and there is some force in them. I have, however, concluded that there is just enough in the email of 30 November for me to regard the test as being met.

General Comment

33. I would urge Mr Madden in future interaction with the Tribunal to consider carefully the tone of that interaction, given that adopted by him in the reconsideration process. I appreciate that this has been frustrating for him and have kept in mind the disability which he founds upon and its potential impact. The approach he has adopted in the reconsideration process has, however, not been helpful to his cause. He did not seem to appreciate the onus which lay on him to supply appropriate information setting out his situation in the period in question for the Tribunal, supporting that with specific medical information personal to his circumstances and based on medical interaction with the practitioner, as sought by the Tribunal for understandable reasons.

Disposal

34. For the reasons given, the late application for reconsideration is therefore permitted to proceed. Upon reconsideration, the second Judgment is revoked, again for the reasons given. The Unless Orders are set aside and the case is therefore to proceed.
35. A Preliminary Hearing ("PH") for case management purposes should be arranged. The Clerk to the Tribunals is asked to set down a date for that, being a one hour

telephone PH. The agenda is to consider steps to advance towards a hearing of whatever type is appropriate as the next step.

36. The appeal to the EAT was sisted to enable a possible application for reconsideration to be made by the claimant. That was done and has resulted in the Judgment against which appeal was taken being revoked. The Clerk to the Tribunal is requested to confirm these events to the EAT.

Employment Judge: R Gall
Date of Judgment: 23 March 2023
Entered in register: 27 March 2023
and copied to parties