# EMPLOYMENT TRIBUNALS

**Claimant:** **LR**

**Respondent:** **Westminster City Council and 2 others**

**London Central**
**Employment Judge Goodman** **11 May 2023**

# ORDER

The claimant's application of 11 April 2023 for reconsideration of the costs judgment dated 28 March 2023 is refused under rule 72 because it has no reasonable prospect of success .

# REASONS

1. The tribunal gave judgment on 28 March 2023, following a hearing at which the claimant was represented by counsel, that the claimant was to pay the respondents' costs after detailed assessment.

2. The claimant applied on 11 April for reconsideration. There is a four page application prepared by Reculver solicitors, and a 25 page document prepared by the claimant herself, to which a further 34 pages of documents are appended.

**Relevant Law**

**3.** 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.

**4.** 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.

**5.** 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** sets 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.

**6.** 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.

**Discussion and Conclusion**

The solicitors' application

7. The solicitors points fall into five groups. The first is that the employment tribunal did not take account of the effect of autism when considering the merits of the claim and how that would affect became its perception and her fixation on what was happening at work. It is argued that in the interests of justice the employment tribunal should wait for a definitive diagnosis before making a judgement on whether costs are in the interest of justice, or that it should disregard conduct that can be attributable to autism.

8. The employment tribunal notes that there is no evidence that the claimant has autism; there is a suggestion that she has an autistic spectrum disorder. The important point for the employment tribunal is that made in the cost judgement, which was that the claimant knew what had happened, and had to denounced the individual respondents opportunistically, when they complained about her. There was no contemporary evidence suggesting that their conduct was unwanted, it tended to show the opposite. It is not easy to see why the possibility of an autistic spectrum disorder diagnosis, if made, would alter these findings.

9. The second group of points is that the claimant's conduct can be explained by ADHD, and the tribunal therefore should have exercised discretion to disregard conduct attributable to ADHD, or wait for a diagnosis. The tribunal notes that the ADHD diagnosis is not clear,

because it apparently is made by testing whether symptoms respond to treatment, and the claimant has not commenced treatment, although it was proposed many months ago. In any case, the tribunal made the observation in the costs judgement that it was not easy to see why ADHD affected the claimant's knowledge of the true nature of what occurred, or that any want of attention affected her conduct of the claims. The interlocutory orders were recorded in writing, so she had the opportunity to go back to them to understand proceedings, even if concentration had been interrupted in the course of a hearing, and the claimant makes no claim that this occurred. At best she says, in her own application, that she did not understand that the list of issues was to apply to the final hearing, rather than just the preliminary hearing. Given what was written down for her, this is hard to understand. If concentration failed when she first read it, she had the opportunity to go back over it.

10. In both cases, there was no indication to the tribunal at the time of the costs hearing that they should postpone it while waiting for a diagnosis. These are points that have been made earlier, came up before the final hearing, and were considered in the reasons for the judgement.

11. The third point made is that the employment tribunal, when considering whether proceedings were conducted reasonably, should discount claims that were struck out, or claims that were not preceded with because the claimant did not pay a deposit. The tribunal observes that defending the claims, and getting them struck out or deposit orders made, will have caused the respondent to incur costs, which would have been even higher if they had not done so, and they were defended at a final hearing. For those that were not proceeded with, the final hearing was not concerned with them. The costs of these claims will only relate to the work done before they were struck out or the subject of deposit orders.

12. The fourth point relates to the evidence about beneficial ownership of the claimant's flat in Croydon. Nothing was said in her witness statement about beneficial ownership. This emerged only in oral evidence, was tentative, ill defined, and lacking detail. There is no further detail in the application. The claimant does not explain why evidence on beneficial ownership was not available for the costs hearing, but is available now. It is a well-known principle that a party cannot seek to have a decision reviewed or reconsidered on the basis of evidence that would have been available had they brought it at the time. I add that is clear from the claimant's own statement that the respondents had asked whether she had a mortgage and she had refused to say, and she now says she does have a mortgage, but not in what amount. She also says that an uncle has lived there, and that she may live there in future. Evidently there is a great deal more information about this flat than the claimant chose to put to the tribunal at the time of the costs hearing, or chooses to state now. Documents about the mortgage could have been produced. I conclude that the claimant had an opportunity to give evidence of ability to pay. She gives no reasons why these were not supplied.

13. The final point made by the solicitors is that the tribunal should have made an order for summary, not detailed assessment. The tribunal's reasoning was that in exercising its discretion on whether to award costs and if so

whether to order summary assessment or detailed assessment, they should give some weight to whether summary assessment, with a shorter process, would assist the claimants recovery, but concluded for the reasons given that it was unlikely to achieve that, and in the meantime would not do justice to the respondent.

Claimant's points

14. The claimant argues that it is premature to decide costs when there is an outstanding appeal. As yet there is no order to pay because the detailed assessment process has not yet begun. Once a certificate of costs is available, it would be open to the claimant to apply for a stay pending resolution of the appeal, which might or might not be granted**.**

15. The claimant says a detailed assessment will be stressful given her ADHD, autism and other life stress, and is therefore unfair. The tribunal has taken into account of the length of the process, but decided that the interests of justice favoured detailed assessment.

16. The claimant also makes the point about her ability to pay which has been discussed in conjunction with her solicitors' application. She adds to this that the respondent acted unfairly by making a Land Registry search prior to an offer to settle the claim. The Land Registry is intended as a public record. There is a very small fee payable for an online search, which is only to discourage frivolous or automated applications. There is nothing unfair about a respondent considering the ability of an opponent to pay costs, and nothing underhand about making a land registry search.

17. She adds that a county court judgement registered against her will affect her ability to get credit and will have an effect on her qualification as an accountancy technician, and ability to qualify for other grades of accountancy. She does not explain how this would affect her status. She does not explain why she could not satisfy judgment by selling the flat, or getting the respondent to agree to registering a charge against its eventual sale.

18. She makes a number of points about the size of the bill (paragraphs 26 to 29 and 104 for example). These are relevant to the detailed assessment process. but not to whether an award of costs should be made at all.

19. There are many points about the liability judgement, and even about the preliminary hearings. Arguments that the decision was wrong, or that the hearing should have been postponed, are for appeal against the liability judgement, not reconsideration of the costs judgement. On preliminary hearings, it is for the detailed assessment judge to decide whether the respondent's costs were necessarily incurred. On whether the claimant should be ordered to pay, the reasons appear in the costs judgement. The claimant re-argues the points in her application to reconsider, but these are matters which were considered at the costs hearing and a reconsideration is not an opportunity to argue them again.

20. The claimant argues that she did her best to withdraw her claim, but was not permitted to do so. Following the discussion in her letter indicates

however that what she meant was that the respondent had an opportunity to settle but did not make the offer she wanted. At any stage she could have withdrawn her claim simply by writing to the employment tribunal to say so. Mentioning settlement proposals at the final hearing stage (she says she was not able to say this) would have been discouraged because they were privileged.

**Conclusion**

21. I conclude that it is not shown that it is in the interest of justice to reconsider the cost judgement, because the arguments advanced have no reasonable prospect of success. They could all have been advanced at the costs hearing, and many were.

Employment Judge GOODMAN

Dated 11 May 2023
JUDGMENT SENT TO THE PARTIES ON

12/05/2023

FOR THE TRIBUNAL OFFICE