EMPLOYMENT TRIBUNALS

Claimant: Dr P Vashishtha

Respondent: 01. Health Education England
08. St Helen's and Knowsley Teaching Hospital NHS Trust
11. Dr Sajid Zaib
12. Dr A Chakraborty

JUDGMENT

The claimant's application dated **17 May 2023** for reconsideration of the judgment, sent to the parties on **3 May 2023** is refused as it has no reasonable prospects of success.

REASONS

1. Rules 70-72 of the Tribunal Rules provides as follows:

70. Principles
A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

71. Application
Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

72. Process
(1) An Employment Judge shall 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(including, unless there are special reasons, where substantially the same application has already been made and refused), 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. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (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 paragraph (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.

2. The Tribunal has discretion to reconsider a judgment if it considers it in the interests of justice to do so. Rule 72(1) requires the judge to dismiss the application if the judge decides that there is no reasonable prospect of the original decision being varied or revoked. Otherwise, the application is dealt with under the remainder of Rule 72.

3. In deciding whether or not to reconsider the judgment, the tribunal has a broad discretion, which must be exercised judicially, having regard not only to the interests of the party seeking the reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation.

4. Under the current version of the rules, there is a single ground for reconsideration — namely, *"*where it is necessary in the interests of justice*"*. This contrasts with the position under the 2004 rules, where there specified grounds upon which a tribunal could review a judgment.

5. When deciding what is "necessary in the interests of justice", it is important to have regard to the overriding objective 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, so far as compatible with proper consideration of the issues; and saving expense.

6. In Outasight VB Ltd v Brown 2015 ICR D11, the EAT explained that the revision to the rules had not been intended to make it more easy or more difficult to succeed in a reconsideration application. In the new version of the rules, it had not been necessary to repeat the other specific grounds for an application because an application relying on any of those other arguments can still be made in reliance on the "interests of justice" grounds.

7. The situation remains, as it had been prior to the 2013 rules, that it is not necessary for the applicant to go as far as demonstrating that there were *exceptional* circumstances justifying reconsideration. There does, however, have to be a good enough justification to overcome the fact that, when issued, judgments are intended to be final (subject to appeal) and that there is therefore a significant difference between asking for a particular matter to be taken into account before judgment (even very late in the day) and after judgment. As was stated in Ebury Partners Uk Limited v Mr M Acton Davis Neutral Citation Number: [2023] EAT 40

> The employment tribunal can therefore only reconsider a decision if it is necessary to do so "in the interests of justice." A central aspect of the interests of justice is that there should be finality in litigation. It is therefore unusual for a litigant to be allowed a "second bite of the cherry" and the jurisdiction to reconsider should be exercised with caution.

The Claimant's application

8. Julie Norris, of Lawyers For Doctors Ltd, on behalf of the Claimant, submitted an email dated **17 May 2023**, within the relevant time limit, seeking reconsideration.

9. The attachments to the email were:
   9.1. 16 page letter with 3 page appendix.
   9.2. Bundle of 10 pages, which was paginated but not indexed

10. The letter set out 7 grounds for reconsideration, followed by a summary.

Ground 1 – Timetabling the hearing (also Appendix to letter)

11. This ground appears to allege either that I misunderstood what arrangements for timetabling had been made prior to my involvement and/or that I misunderstood what timetabling arrangements might have been feasible.

12. For the first of these, the hearing had been listed for 35 days, on the basis that this was going to be long enough for there to be some non-sitting days.
   12.1. I do not think that anything I wrote in the strike out reasons implies that I misunderstood the timetabling arrangements for the period from 31 October to 16 December. However, even if anything I wrote did give that impression, I did, in fact, understand the arrangements
   12.2. The specific non-sitting days were not pre-allocated, but were to be determined on an as and when required basis by the panel as the hearing progressed. That is what had been proposed prior to my involvement, and is consistent with what I ordered on 27 September 2022.
   12.3. In my reasons for refusing the postponement (and for making other case management orders) at the 27 September 2022 hearing, at paragraph 94 I made some comments about the timetable, with paragraph 94g making the obvious point that the panel would deal with timetabling issues as they arose. To the extent, if at all, that the reconsideration application is arguing that there could be no flexibility in the timetabling arrangements other than for the reasons set out by EJ Lewis (in July 2021, or elsewhere) that is not correct.
   12.4. The original 35 day listing (from which 17 and 18 November had been removed as per paragraph 94b of the September reasons) included time for the panel to deliberate. As commented upon at paragraphs 94e and f, if there had been a significant loss of sitting days in the first six weeks of the seven week period, then some or all of Days 31 to 35 could be used to conclude evidence and submissions.

13. For the second of these, Ms Norris, on behalf of the Claimant, sent an email after 9pm on Friday 21 October 2022, seeking postponement of the hearing due to commence Monday 31 October 2022.
   13.1. I read it on Monday 24 October 2022, and decided that I would like to give the Claimant the opportunity to supply further information before I made a decision. I ordered that a letter be sent which asked, amongst other things:
      c. Which dates, in the window 7 November 2022 to 16 December 2022 can counsel do and not do? For any dates they are not available, what are the reasons in each case
   13.2. I asked the question for the reasons I gave which accompanied the strike out judgment. That question was not answered in October 2022, and was not answered subsequently.
   13.3. In my reasons accompanying the strike out judgment, I commented on the reasons given by Ms Norris for not answering the question. The reconsideration application seems to be a further attempt to justify the fact that no answer has ever been given. It seems to be an attempt to argue

that it would not have been possible to arrange the sitting dates around counsel's availability, but without actually specifying what counsel's availability was.

13.4. To the extent that the reconsideration application is making the point that any non-sitting time for reasons A or B reduces the opportunity for non-sitting time for reasons C or D, then that is obviously true, but, equally obviously, is not a point that I had previously overlooked.

13.5. The application fails to acknowledge that there is a vast difference between counsel having non-availability of 2 or 3 days, compared with 10 or 15 days. It also fails to acknowledge that there is a vast difference between counsel being unavailable during a period which was likely to be used for pre-reading or deliberation (or on 17 and 18 November), compared with non-availability in a period in which evidence or submissions were otherwise likely to take place.

14. My finding was that the Claimant had decided that he would not send counsel to the 31 October hearing regardless of availability. See, for example, paragraph 52 of the reasons. This renders Ground 1 somewhat academic. I asked the Claimant if he was aware that Ms Norris had not supplied an answer to the above-mentioned question, and he said that it would have been impossible for the hearing to go ahead between 31 October and 16 December (essentially for the same reasons that had been considered by me, and rejected by me, when refusing postponement in September). The Claimant had already reached the decision, before my 27 September refusal of postponement, that he would not take part in the hearing, and would not send counsel, if it was not postponed.

15. In any event, nothing written in Ground 1 causes me to doubt the findings I made at paragraphs 50 to 59 of the written reasons, or creates any reasonable prospect that I would revoke the strike out decision.

<u>Ground 2 – Finding Alternative Counsel</u>

16. This is an argument that I made an incorrect finding of fact, and purports to rely on new evidence.

17. To the extent that the Claimant seeks to rely on an email sent by Ms Norris to counsel's chambers at 3.05pm on 3 October 2022, that email is simply giving instructions on potential grounds for appeal. Where it refers to "could not find counsel for the hearing", that is a reference to the 27 September preliminary hearing before me, not to the final hearing commencing 31 October 2022.

17.1. To the extent the email says "we have found out that Mark Sutton KC is not available nor is anyone else at Old Square", I observe that it does not say, "the Claimant has tried to book counsel for the hearing, but the response to our request was that Mark Sutton KC is not available nor is anyone else at Old Square". Even on the face of this document, I do not see anything in it which is inconsistent with my findings of fact, or which contradicts the analysis at (for example) paragraph 122 of my reasons.

17.2. Furthermore, and in any event, there is no good reason that this email could not have been put forward at the 3 February hearing, if it contained relevant evidence. The fact that it was on the Claimant's solicitors' EAT

file is not evidence that it was misfiled or overlooked. I am also not convinced that it does contain evidence that there were attempts to book counsel. It certainly does not explain the absence of emails or file notes of phone calls showing such attempts, or even say which specific discussions took place, or when (other than that, of course, the argument would be that such discussions were prior to 3.05pm on 3 October 2022 and no earlier than my oral decision on 27 September 2022).

18. An email to the Respondents' solicitors on 3 October (at 4.48pm) is included in the reconsideration bundle and referenced in the application.
    18.1. Again, there is no good reason that this email could not have been put forward at the 3 February hearing, if it contains relevant evidence. Again, I am not convinced that it does contain evidence that there were attempts to book counsel.
    18.2. In any event, this email was written 18 days before the 21 October application to the Tribunal. Its contents do not contradict anything in my strike out judgment and reasons.
    18.3. I note that this 3 October email refers to the surgery being delayed (because of delays to the chemotherapy). This does not seem to be consistent with the Claimant being of the opinion, until 6 October, that the surgery was still due to take place in last week of October. I note what is written in Ground 6(c) of the reconsideration letter about that.

19. The email from William Meade at 10.11am on 25 October 2022 is not new evidence. It (as well as the email from Ms Norris, to which it is a reply) was referred to in paragraph 54 of the reasons.

20. To the extent (if at all) that the Claimant's reconsideration application is hinting that no attempts were made to look elsewhere because it was anticipated that there would be no-one available (at the right price, and/or at all) elsewhere then my finding was that the reason for not looking for suitable counsel was that the Claimant had decided not to instruct counsel for the 31 October hearing if the postponement application was refused.

21. While I have addressed the above points for completeness, the real substance of Ground 2 is the opening paragraph of it, following the quotations from paragraphs 52 and 55 of my reasons.

22. The paragraph opens "If this was the Claimant's evidence …". It goes on to say that Ms Norris was not at the whole of the 3 February 2023 hearing. It is unclear from the paragraph whether the application is made on the basis that the Claimant is denying giving the evidence mentioned, or whether it is simply made on the basis that Ms Norris does not know one way or the other. Obviously, the Claimant, his wife, and Mr Sutton KC were present, so if Ms Norris does not know then she could have and should have asked them before submitting this application on the Claimant's behalf.

23. I am confident that the Claimant did understand the questions clearly.
    23.1. When he believed that Dr Morgan KC was going too fast, he – quite rightly and reasonably – asked for him to slow down (a request which I reiterated) and that was done. He was pushed for an answer by the Respondents' counsel about whether he had sought to book counsel for the final hearing,

after the postponement refusal on 27 September. His answers all seemed to include some variant of "not personally, no", or similar. Therefore, when I asked my questions, after cross-examination and before re-examination, I made clear that he was not just being asked whether he personally had contacted any counsel, or counsel's chambers, but included whether that had been done on his behalf. At first his answer appeared to be "yes", but the answer made clear that he was talking about the issue alluded to in the last sentence of paragraph 47 of his witness statement, "*If the postponement was granted, I would reinstruct counsel at a later date*".

23.2. I made sure that he understood that the question was about the hearing between 31 October and 16 December 2022. His answer was that he did not seek to instruct counsel (via Lawyers for Doctors or at all) for that hearing (after I refused postponement on 27 September). He explained that, on the contrary, he had already decided, before 27 September, that he would not seek to instruct counsel for those hearing dates if postponement were refused, and did not change his mind afterwards.

24. Nothing written in Ground 2 causes me to doubt the findings of fact which I made, or creates any reasonable prospect that I would revoke the strike out decision.

Ground 3 – Blood Transfusion Issue

25. This is simply an attempt to re-argue the same points which were already rejected, by reference to the same evidence which I already considered.

26. At the risk of stating the obvious, Dr Mangal's letter was written at the Claimant's request, and was written after the Claimant had already decided that he was not going to attend the 31 October hearing or send counsel to it. In any event, I already taken its full contents into account, along with the fact that the Claimant did not travel to India in September in anticipation of chemotherapy commencing in September, and along with the contents of the other letters from the doctors treating the Claimant's mother.

27. Nothing written in Ground 3 causes me to doubt the findings of fact which I made, or creates any reasonable prospect that I would revoke the strike out decision.

Ground 4 – acute care and Diwali

28. This ground appears to argue/clarify that the Claimant would not have been required to quarantine for 7 to 10 days prior to caring for his mother. The Respondents were not arguing that he would have had to do that. The Claimant's confirmation that he would not have had to do it does not contradict any of the findings which I made.

29. Ms Norris comments that the Claimant "always" planned to be with his mother for Diwali in 2022. In context, the comment appears to suggest that the original plan had been to go to India for Diwali, and then be back in UK in time to start the hearing on 31 October. If true, this would not contradict what I stated in paragraph 97.2 about the possibility of being in India for Diwali and back in UK for 31 October.

30. There was, and is, no decision by me that it was unreasonable conduct of the proceedings for the Claimant to decide to be with his mother for Diwali, or to plan to be outside the UK during the week prior to the start of the 31 October hearing. My written reasons simply point out that the basis of the postponement application which I refused in September was not that he wished to be in India for Diwali; it was that he had to be in India from 21 October because his mother was having surgery in the last week of October.

31. I referred to the Claimant's travel plans in paragraphs 60 to 64 of the reasons, including the dates on which his flights appeared to have been booked.

32. The Claimant's witness statement for the February hearing (at paragraph 3) stated "my solicitor provided a skeleton argument [page 2088a-k]" for the September hearing. That skeleton, amongst other things, stated:

> 6. The Claimant needs to be with his mother whilst she undergoes major surgery
>
> … Professor Bora has recommended in his letter of 24 Sept 2022 that a family member as a potential blood donor is available for surgery which carries significant risks including risk of bleeding and risk to life of up to 10%. …
>
> 7. The Claimant has no choice other than to go to India. This is a devastating time for the Claimant and not a journey that he wishes to undertake.

33. Nothing written in support of Ground 4 causes me to doubt the findings of fact which I made, or creates any reasonable prospect that I would revoke the strike out decision.

<u>Ground 5 – dates of and reasons for transfusion</u>

34. This is simply an attempt to re-argue the same points which were already rejected, by reference to the same evidence which I already considered.

35. The Claimant was not being treated as an expert in cancer treatment. He was entitled to have an opinion about the reasons for the blood transfusion. However, I considered the evidence that was presented, including what Dr Bora had written in September and October, and the dates on which the chemotherapy ceased, and the dates on which the surgery took place, and the dates on which the blood transfusion took place.

36. The Claimant (via Ms Norris) relies on the words (emboldened in the application) "chemotherapy induced anaemia" in an attempt to argue that the transfusion was NOT for the reasons mentioned in Dr Bora's communication of 5 (and 24) September 2022 (discussed in paragraph 65 of the reasons) or in Dr Bora's communication of 17 October (discussed in paragraphs 66 to 69 of the reasons). Instead, it is argued that it was given for reasons that were independent of the fact that the surgery was due to take place imminently (and relies on Dr Mangal's letters in support of that argument).

37. The fact is that on 18 November, there was a decision made that the Claimant's mother would have a transfusion, and she had it the same day. She was admitted for surgery on 21 November, had the surgery on 22

November, and left hospital on 23 November. The chemotherapy had ceased around 2 weeks prior to the 18 November assessment. My inference from these facts was, and still is, that the transfusion was because of the surgery. Dr Bora had not stated that a blood transfusion, prior to surgery, would be given without testing the patient's blood, and deciding whether a transfusion was necessary (whether because of "chemotherapy induced anaemia" or at all).

38. Furthermore and in any event, the fact that the Claimant has later sought to argue that he (believed that) he needed to be present for blood transfusions reasons *during* the chemotherapy period (as opposed to after the chemotherapy had ceased, and in the period in which surgery was being arranged and was due to take place) is inconsistent with both:
    38.1. The fact that the 27 September application was made on the basis that he needed to travel to India on Friday 21 October for surgery which was scheduled to take place between Monday 24 and Monday 31 October. AND
    38.2. The fact that, after the chemotherapy started, he changed his return flight (to a later date) but did not change his outward flight (to an earlier date).

39. I do not agree that Dr Bora's 17 October 2022 was a change of circumstances.
    39.1. I do not agree that it contained information that the Claimant was unaware of as of 27 September 2022. Had Dr Bora thought it necessary/preferable for his patient's blood donor (the Claimant) to be present through the chemotherapy phase of the treatment, he would have set that out in the 5 September letter. That 5 September letter was plainly seeking (or else recording) his patient's informed consent to the treatment plan, including highlighting the risks associated with the treatment.
    39.2. Dr Bora's letter of 17 October 2022 was not the Claimant's reason for deciding that he would neither attend the 31 October to 16 December hearing himself and nor would he send counsel. He had already decided prior to 27 September that he would not attend between those dates if the postponement was refused, and he stood by that decision following my refusal of postponement.
    39.3. Dr Bora's letter did not state that the Claimant needed to be present during the chemotherapy phase of the treatment.

40. Nothing written in Ground 5 causes me to doubt the findings of fact which I made, or creates any reasonable prospect that I would revoke the strike out decision.

<u>Ground 6 – When the Claimant became aware that the surgery would not be in "last week of October"</u>

41. I refused a postponement application on 27 September 2022. In the reasons for that refusal, I discussed in detail what I was told about the plans for the surgery. I referred to those reasons in the strike out reasons.

42. In the skeleton argument produced by the Claimant's solicitor for that September hearing, there is a heading "Letter of Dr Bora of 24 September 2022 regarding the Claimant's mother", immediately followed by a quotation

which commences, "The next stage of treatment will be the surgery planned in the last week of October 2022". The skeleton for the hearing was suggesting that, as recently as 3 days prior to the 27 September hearing, the plan was still for surgery last week of October. The entire postponement application at the hearing was based on surgery in "last week of October" being firmly planned.

43. The 24 September letter is a replication of what had been written on 5 September. As the Claimant was aware, the chemotherapy had not started on the dates that had been envisaged on 5 September. I was not aware of that fact, and nor were the Respondents and, presumably, nor was the Claimant's solicitor.

44. I remain satisfied that, as of the 27 September hearing, the Claimant knew that the 5/24 September document was not a reliable indicator that, as little as 3 days before the 27 September hearing, Dr Bora was advising that the surgery would be in the last week of October. However, the application was without any clarification from the Claimant that – contrary to what was stated in the documents that I was being asked to rely on – the chemotherapy had not started in September.

45. I am slightly confused by the penultimate paragraph on page 9 of the reconsideration application. It appears to conflate two different issues and/or to misattribute what was said during the hearing.
    45.1. I did say during the hearing that it appeared that the information which I had been given on 27 September 2022 (about planned surgery dates, and treatment dates in general) was incorrect.
    45.2. I did not say that the 21 October application was not made on the basis that there had been a change of circumstances. I assume that is a reference to an exchange between me and Dr Morgan KC in which Dr Morgan KC suggested that the application was not made on that basis, and I drew his attention to Ground 2 of the application (page 2130 of the bundle) and suggested that that did appear to be arguing that there had been a change of circumstances). The Claimant's counsel, Mr Sutton KC, commented that he agreed with what I had said, and had been about to make the same point, disagreeing with Dr Morgan KC.

46. To the extent that the reconsideration application is implying that I accepted during the hearing that there had in fact been a change of circumstances, the opposite is true. I said that I understood that the application was made on that basis, but I would have to decide whether it was true that there had been a change of circumstances. For the reasons I gave on 3 May 2023, I decided that there had not been, and that the actual circumstances (that the surgery would not take place in last week of October) were already known to the Claimant on 27 September.

47. Under this ground, Ms Norris quotes extensively from letters which were already taken into account when making the strike out decision.

48. The reconsideration letter acknowledges that the Claimant did know, as of 27 September, that the chemotherapy had not commenced in accordance with Dr Bora's schedule contained in the 5 (and 24) September communication.

It asserts that it was not unreasonable conduct of the litigation for the postponement application to be made by reference to Dr Bora's schedule contained in the 5 (and 24) September communication, while omitting to inform the judge and the other parties that the treatment had been delayed. I disagree. The letter was relied on as evidence that: "*The next stage of treatment will be the surgery planned in the last week of October 2022*".

48.1. Firstly, I do not accept the argument that if the Claimant did not know for certain that the surgery would definitely be delayed then he was under no obligation to reveal that the chemotherapy treatment had not started on schedule. He knew the basis of the application that was being made to me, and knew which documents were being relied on.

48.2. He knew that it was being argued on his behalf that the 5 September information was still up to date as of 24 September, and knew that that representation was false. The chemotherapy was delayed. Even if (which I do not accept) he did not realise that the delay to the chemotherapy meant the surgery would take place later than last week of October, he was obliged to at least make sure that the tribunal and other parties were aware that there had been a slippage in the schedule set out in the 5 September document and that, had Dr Bora written a fresh letter on 24 September, it would have had to contain a different timetable for the treatment (for the chemotherapy phase, as a minimum).

48.3. Secondly, the Claimant, through Ms Norris, wrote to the Respondent's representatives on 3 October 2022 (6 days after the postponement was refused) commenting on the fact that the chemotherapy had been delayed and that the "surgery which was to follow this treatment will also **consequently** be delayed" (my emphasis). My finding was, and remains, that the Claimant was aware by 27 September (and I note what is said in paragraph 6(c) of the reconsideration application) that the delay to the chemotherapy would mean a delay to the surgery.

49. I note that the reconsideration application refers to the fact that the Claimant did not speak to Dr Bora.

49.1. The Claimant was questioned about Dr Bora's letter of 17 October (page 2318 of bundle). It was put to him that this letter was not the first time that he knew about changes to the schedule, and was not the reason he changed his flight booking (which he did on 7 October) and did not contain specific dates for surgery.

49.2. In terms of the flight booking, the Claimant was clear that he remembered the date of 6 October well (for the reasons he gave in his evidence) and was sure that it was on that date that he had got the information which caused him to change his return flight date (pushing it back). My misunderstanding of his evidence was that he was referring to a direct conversation between himself and Dr Bora. I am happy to accept that he was referring to information which originated from Dr Bora but which was conveyed to him by other people, such as his mother and/or his brother.

49.3. The 5 September 2022 communication was copied to the Claimant by email. I am sure that the reconsideration application would say so if there were further direct emails to the Claimant (or copied to the Claimant) from Dr Bora, and so I accept the representation that there were not.

50. Therefore, what I wrote in the reasons in paragraphs 61, 67, 76 and 100 should be taken as references to information which was supplied by Dr Bora

on 6 October, but was communicated to the Claimant by others, rather than directly by Dr Bora.

51. However, the issue of who directly conveyed information to him on 6 October is less important than my finding about what the information allegedly was. The misunderstanding on my part about the Claimant's evidence of who supplied allegedly new information to him on or around 6 October does not change my analysis that the Claimant already knew, as of 27 September, that the treatment plan was not proceeding in accordance with Dr Bora's 5 September schedule (re-sent as a duplicate, formatted differently, on 24 September). In particular, in response to Mr Cook's observation that Dr Bora's 17 October letter gave no estimate about the surgery date, the Claimant answered that he had changed the return flight date, on 7 October, by taking into account the schedule in Dr Bora's September schedule, and amending it to take account of the delay to the start of chemotherapy, and he agreed that Dr Bora had not himself supplied a new estimated date (on 6 October or 17 October or earlier).

52. Furthermore, even if – contrary to my finding – the Claimant did not know until 6 October, that the surgery would take place later than "last week of October", even on his own account, he had the information on 6 October, and did not write (via Ms Norris) to the Tribunal about the alleged change of circumstances until after 9.30pm on 21 October, which was after he had left for India. He still left on the same outward bound journey that had been discussed on 27 September despite what was (it is now alleged) a change of circumstances which had arisen since 27 September.

53. I note what is said in paragraph 6(e) of the application (about part of what I said in the reasons for refusing the postponement application at the hearing on 27 September 2022). That extract does not seem relevant in relation to the issue of whether failing to reveal the changes to the schedule outlined first on 5 September (and represented as being accurate as of 24 and 27 September) was unreasonable. What is far more relevant is what I said elsewhere in my reasons following the 27 September hearing, namely:

> 20. I have read and fully considered the email the medical evidence supplied in relation to the claimant's mother including the email of 5 September and the letter from Dr Bora dated 24 September.
>
> 21 . The correspondence sets out the full treatment that the claimant's mother has needed and continues to need. It is not necessary for me to discuss everything in those items fully save to say that the timetable that has been set out is, for one thing, something that is outside the claimant's control. **For another thing, I accept that the timetable set out is genuine**
>
> 22. The surgery it is said is planned for the last week of October 2022.

54. The emboldened sentence shows that I accepted, and relied upon, an assertion that the correspondence showed the genuine timetable. In actual fact, I now know that, as of 27 September 2022, the Claimant knew that the timetable was no longer "genuine". It had been genuine when produced, but, as the Claimant knew, it had been overtaken by subsequent events, and was not still genuine as of 27 September. That change of circumstances took

place prior to 27 September but was not revealed on 27 September.

55. I note what is written in paragraph 6(f) of the application letter. It is unclear which Dr Bora letter is being referenced. Either way, paragraphs 18, 19, 20 of the Claimant's witness statement were fully considered by me (as was the statement as a whole) when making the strike out decision.

56. Nothing written in Ground 6 causes me to doubt the findings of fact which I made, or creates any reasonable prospect that I would revoke the strike out decision.

Ground 7 – Brief Fee

57. A simple point is that, if (i) the Claimant had not cancelled the booking for Mr Sutton for the 31 October 2022 hearing and (ii) had the postponement application failed and (iii) had the hearing gone ahead within the 35 day window from 31 October to 16 December, then the Claimant would not have incurred two brief fees.

58. A further simple point is that the fact that the Claimant might (hypothetically) incur two brief fees if he applied for a postponement and the postponement were to be granted is not a good argument that the Claimant should be entitled to choose the dates of the final hearing to be those dates which minimised his risk of incurring two brief fees.

59. It seems that Ground 7 invites me to decide that there is nothing inconsistent between the arguments put forward by Ms Norris, on the one hand, that the Claimant might have incurred two brief fees if he had not cancelled Mr Sutton's booking in September, and the 31 October hearing was postponed, but, on the other hand, that there was something surprising or unreasonable about the Respondents' arguments that they would incur two brief fees if, on 27 September, I postponed and re-listed the 35 day hearing that was due to start 31 October.

60. In my opinion, there is an inconsistency between those two arguments. However, this is simply a background issue which I addressed because of comments made by the parties at the hearings. It is not the reason the claims were struck out.

61. The Claimant's witness statement (paragraph 47) made clear why he cancelled Mr Sutton KC for the 31 October hearing. It is not the case that (i) the Claimant stood counsel down to avoid incurring an unnecessary brief fee and that (ii) after doing so, and after the postponement request was refused, he sought to re-instruct counsel again (on the basis, of course, that he would now pay the brief fee for the 31 October hearing). It is the case that the Claimant stood counsel down for that hearing, and it is the case that the Claimant would have sought to re-instruct counsel again for new hearing dates, had I postponed and re-listed.

62. However, regardless of the brief fee issue, the Claimant did not seek to, and did not intend to, reinstruct counsel for the 31 October 2022 hearing. To the extent that the reconsideration application seeks to persuade me to change

that finding of fact, there is no reasonable prospect of that argument being successful.

63. Nothing written in Ground 7 causes me to doubt the findings of fact which I made, or creates any reasonable prospect that I would revoke the strike out decision.

64. For the reasons stated above, having considered the Claimant's application, I am satisfied that there is no reasonable prospect of the original decision being varied or revoked, and the application is refused.

Employment Judge Quill

Date: 5 June 2023

JUDGMENT SENT TO THE PARTIES ON

6 June 2023

FOR THE TRIBUNAL OFFICE