EMPLOYMENT TRIBUNALS

Claimant: Miss Sullivan

Respondent: Ascensos Limited

JUDGMENT

The claimant's application emailed to the Tribunal on 9 March 2023 and 18 April 2023 for reconsideration of the judgment and reasons sent to the parties on 5 April 2023 is refused.

REASONS

Background and the application

1. On 8 March 2023 as part of a two-day preliminary hearing ('the PH') I determined that the Claimant did not have a disability at the relevant time within the meaning of s.6 Equality Act 2010 and reasons were given orally.

2. By an email to the Tribunal at 11.15 am on 9 March 2023 (day 2 of the PH), the Claimant made an application for reconsideration of the decision on disability.

3. The Claimant appeared to be applying for reconsideration on the following grounds:

    a. The Tribunal had misdirected itself as to whether it could 'substitute its own opinion' for the assessment by the Claimant's GP and an independent assessment by a Disabled Students Allowance assessor in July 2017 (bullet point 1 of the Claimant's email).

    b. The Respondent had not undertaken any risk assessment (bullet point 1).

    c. The Tribunal had 'Misdirected as to the EA 2010 Section 06 and Schedule 01 in liaison with the EA 2010 Guidance' in various ways (bullet points 2 – 11);

d. The Case Management Order requiring the Claimant to disclose relevant GP records was only made because the Respondent was, at that time, making an argument that the question of disability was *res judicata* which was a position that they then later abandoned (bullet point 12).

4. There was not sufficient time to consider that application at the PH.

5. It was agreed that the application should be dealt with by making the following orders: Within 14 days of the written reasons for the decision in respect of disability being sent to the parties, the Claimant was required to write to the Tribunal and the Respondent:

    a. confirming if she wished to pursue her application for reconsideration submitted at 11.15am on 9 March 2023; and,

    b. if so, setting out any additional reasons she wished to rely on as to why reconsideration of the original decision is necessary.

6. Written reasons for the decision were sent to the parties on 5 April 2023.

7. On 18 April 2023 the Claimant wrote to the Tribunal stating 'Further to your Judgement, sent to parties on 05 April 2023, I wish to make an application for the reconsideration of the findings of disability status for the category of 'Discrimination arising from a disability'. She went on to outline that on 11 March 2023 she had written to her GP in the following terms:

> This letter is to 'whom it may concern'. In 2017 a Disabled Student Allowance form was completed by Grove House Surgery and an independent assessment was undertaken by a Student Assessor on the basis of my asthma and arrhythmia. Following both these processes, I was awarded adapted equipment and additional rest break for the academic examination to assist with the completion of my studies.
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> As the GP surgery is aware, both my arrhythmia and asthma fluctuate and there have been times when I have required steroid tablets and/or when I have been back and forth to the hospital due to the symptoms of these conditions (both asthma and heart related).
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> I am also presently continuing to socially distance myself, and I continue to constantly wear an FFP3 mask when outdoors at all times. I am finding the FFP3 mask very helpful in eliminating my asthmatic windpipe constriction caused by the cold weather and the FFP3 mask is also removing the problems caused by viral/cold infections. Although, it is more difficult to breathe in an FFP3 mask. In addition, working fully remotely from home means that I can keep the room temperature constantly warm. I am finding that all these measures have significantly reduced my requirements overall for asthma medication. Although there are still sometimes, it seems, when I need to take it, generally, I am much improved. I am finding some (work from home) employment roles are triggering either my asthma, my arrhythmia, or both conditions, but I am taking additional steps to try and minimise the effects.

> For example, my present full remote role has chunky gaps in-between calls and I have a hold button I use frequently, but I have been experiencing arrhythmia episodes with some breathlessness. I am keeping a diary note of these episodes. I am finding that they can be triggered by the nature of the call, some dehydration, and also random. I am keeping more hydrated and politely terminate any distressing calls and I am taking any additional odd rest breaks where necessary.
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> Before (in a similar role working fully remotely) I was not able to terminate the distressing calls, I was told to fill in the call gaps, and no mention of an on-hold button, and I found, due to acute shortness of breath, I had to increase my asthma inhaler requirement. I was still getting chest inflammation and some sleep disturbance with the asthma medication increased. I could not tell at the time whether there was any arrhythmia also occurring.
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> I require a GP (doctor's) letter to state that, in your medical opinion, an employment role that involves call centre work (talking for extended periods of time and also taking into account the general nature of some of these phone calls) would be likely to cause me to suffer from a disabling effect significant enough to adversely affect with my ability to undertake the employment role, which would require additional adjustments to be made for me. For example, adaptions such as letting me work in a controlled environment (constantly warm temperature at home without commuting in the adverse weather) and using an on-hold button, and ensure hydration (being allowed to keep water near me), and taking additional rest breaks where required.

8. Her application outlined that despite phoning her GP for an update, she had not received a response and that she was therefore making her reconsideration application within the 14 day time limit but that the additional information from her GP would follow afterwards. She did not confirm that she was still seeking to pursue the application made on 9 March 2023.

9. On 10 May 2023 the Tribunal wrote to the Claimant asking her to confirm by 17 May 2023 whether:

    a. she is still pursuing her application for reconsideration submitted by email at 11.15amon 9 March 2023, in which case the letter on 18 April 2023 will be treated as setting out additional reasons for why reconsideration of the original decision is necessary;

    OR, alternatively,

    b. she is only pursuing her application for reconsideration made on 18 April 2023 and is no longer pursuing the application submitted by email on 11.15am on 9 March 2023.

10. The Claimant replied the same day saying she was still chasing her GP for the requested letter and saying more time was required to provide it. She did not confirm whether she was still pursuing her application to reconsider dated 9 March 2023.

11. On 19 May 2023 the Claimant wrote to the Tribunal saying that she was still awaiting a response from her GP surgery.

12. On 28 May 2023 the Claimant wrote to the Tribunal attaching her application for reconsideration dated 18 April 2023 and notice of an appeal to the Employment Appeal Tribunal. She said that she was still chasing her GP and asked 'would the Employment Tribunal provide an update or outcome of my Reconsideration application asap'.

Law

13. Rules 70-72 of the Tribunal Rules provide 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.
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> 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.
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> 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.
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> (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. (3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint

> another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

14. There is one ground for reconsideration under Rule 70: where it is necessary in the interests of justice.

15. In ***Outasight VB Ltd v Brown [2015] ICR D11***, EAT, Her Honour Judge Eady QC accepted that the wording 'necessary in the interests of justice' in rule 70 allows employment tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances.

16. In ***Ebury Partners UK Ltd v Acton Davis [2023] IRLR 486***, HHJ Shanks said:

> 24. 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. In general, while it may be appropriate to reconsider a decision where there has been some procedural mishap such that a party had been denied a fair and proper opportunity to present his case, the jurisdiction should not be invoked to correct a supposed error made by the ET after the parties have had a fair opportunity to present their cases on the relevant issue. This is particularly the case where the error alleged is one of law which is more appropriately corrected by the EAT.

17. Where an application for reconsideration is made on the basis of there being new evidence available which was not available to the tribunal at the time, the principles set out in ***Ladd v Marshall [1954] 3 All ER 745*** apply and it is necessary to show:

    a. that the evidence could not have been obtained with reasonable diligence for use at the original hearing;

    b. that the evidence is relevant and would probably have had an important influence on the hearing; and

    c. that the evidence is apparently credible.

<u>Decision – grounds for reconsideration set out in email of 9 March 2023</u>

18. In the absence of the Claimant withdrawing the grounds for reconsideration set out in her email of 9 March 2023, I have considered them all. I do not find it is in the interests of justice to reconsider my decision in respect of disability for any of the reasons the Claimant has advanced in that email. In particular, I note:

    a. In deciding whether the Claimant was disabled between May 2021 and July 2021, the Tribunal is not bound by the assessment of her

GP and / or an independent assessment by a Disabled Students Allowance assessor in July 2017.

b. The question of whether the Respondent had undertaken a risk assessment was not raised by the Claimant at the PH and in any event is not relevant to whether she was disabled at the relevant time.

c. By the points the Claimant makes starting 'Misdirected as to the EA 2010 Section 06 and Schedule 01 in liaison with the EA 2010 Guidance', the Claimant either:

    i. refers to law also referenced in the Reasons and already taken into account (eg., the need to take account of cumulative effects);

    ii. seeks to re-make or emphasise points already made and considered at the PH (eg., that she suffered from fatigue);

    iii. raises new points (eg., that she struggled to take an educational exam) that were not raised, but could have been raised at the PH; and / or

    iv. the Claimant also argues the Tribunal misdirected itself by not considering that she used an FFP3 mask and worked from home to avoid 'windpipe constriction and inflammation from viral and low temperature'. In the PH the Claimant mainly referred to use of FFP3 mask and working from home as result of Covid-19 (see the Reasons at 20-22 in respect of Covid-19). She also referred, in passing, to seeking to insulate herself from cold weather by working from home and using an FFP3 mask so as not to aggravate her asthma. However, she provided no medical evidence to support that there was a recurring need for her to work from home or wear an FFP3 mask due to her physical impairments and she accepted that she had not been so instructed by her GP or specialist.

d. While the Case Management Orders of Employment Judge Cadney dated 12 August 2022 at para 14 make reference to the respondent arguing that medical evidence disclosed in earlier litigation was discoverable, there is no suggestion that disclosure of records was contingent on the Respondent arguing the issues of disability is *res judicata*. Employment Judge Cadney ordered:

> In addition the respondent contends that any earlier medical evidence relating to the same conditions which was disclosed in the earlier litigation is still discoverable in this litigation if and to the extent that it relates to the same conditions. The disclosure obligation relates to all medical records relating to the conditions said to amount to a disability. In my judgment this is correct and the claimant is directed no later than 8th February 2023:

i) To disclose any further medical evidence in her possession relating to either of the conditions said to amount to a disability.

In any event the Respondent did not indicate that it was abandoning the '*res judicata'* argument until the start of the hearing and so this does not explain why the Claimant failed to disclose her medical records.

19. In those circumstances there is no reasonable prospect of my varying my decision on disability nor would it be in the interests of justice to allow the Claimant to re-argue points already considered at the PH or raise new arguments at this stage, which could have been raised at the PH.

Decision – grounds for reconsideration set out in application of 18 April 2023

20. The Claimant has not provided any additional evidence by way of her application dated 18 April 2023, she has merely indicated that she is seeking a further letter from her GP.

21. In any event, she has given no reason why she could not have sought such a letter prior to the PH.

22. Detailed directions were given by Employment Judge Cadney on 12 August 2022 in respect of what matters would be considered at the hearing on 8 March 2022. Prior to that date, the Claimant had obtained a letter from her GP dated 20 January 2022, which she relied on in respect of her argument that she was disabled within the meaning of s.6 Equality Act 2010. Had she considered that further information was required from her GP, there is nothing to suggest that this could not have been obtained ahead of the preliminary hearing on 8 March 2023.

Employment Judge Danvers
12 June 2023

Judgment & reasons sent to the Parties on 13 June 2023

For the Tribunal Office