Case Number: 3314016/2021

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~~ MIGRAINES 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 timed at 01.41. However, later that day, the claimant sought to amplify it and/or substitute it (email of 15 October 2022 timed at 09.41) and made further representations on 17 October 2022 in response to the respondent's objections of the same date (email of 17 October 2022 timed at 22:37). On 1 November 2022 (email timed at 16.14), the claimant made further representations and added further information, including about the reasons why the application was late.

2. 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 (the first stage). 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 (the second stage).

3. 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:

   3.1. 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.

   3.2. The delay does not cause prejudice to the respondent.

   3.3. 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 asserts that a medical condition is the reason for any delay in compliance with a rule or order or as the basis for an application that assertion must be backed up with medical evidence.

   3.4. 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.

4. 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.

5. The procedural history of this claim has since become somewhat involved, in part due to an administrative error of my own. After the applications for reconsideration, the Tribunal received some correspondence from the parties about alleged compliance by the respondent with case management orders. On 22 November 2022 the respondent applied for orders striking out some or all of the claims and for deposit orders, including on the basis that some of the disability claims had no reasonable prospects of success because the claimant had been found not to be disabled by reason of the conditions relied on. They suggested that the open preliminary hearing to hear those application should take place after the reconsideration application had been determined.

6. Unfortunately, when these application were referred to me, the reconsideration application and supporting evidence had not been attached to the file. Pending the full application being referred to me, I therefore directed that a 2 day preliminary hearing be listed with the intention that sufficient time would be available were the claimant's application to pass the first stage of the

reconsideration process for the judgment on the issue of disability to be reconsidered. In the letter by which this was communicated, there was an error in that it was recorded that the claimant had been found to be disabled by reason of asthma when in fact she had been found to be disabled by reason of migraines. That hearing was listed for 16 and 17 March 2023.

7. There was then a delay in the reconsideration application being dealt with. The reconsideration judgment was sent to the parties on 2 March 2023 by which the application was rejected and the hearing was reduced to one day to consider the respondent's applications for strike out and deposit orders only. That judgment repeated the error and therefore did not consider the arguments in favour of reconsidering the judgment in full. The claimant had pointed out the error in the letter of 1 December 2022 and also in the reconsideration judgment. When that correspondence came to my attention, I revoked the reconsideration judgment because it seemed to me to be just and equitable that it be taken again in light of the aforementioned error.

8. In the meantime, the claimant had applied for a reconsideration of the reconsideration judgment, including on the basis that it had not considered the full arguments she relied on. That second reconsideration application is dealt with by a separate judgment. However, the claimant states in that second reconsideration application dated 15 March 2023 that it should be taken to replace the previous application.

9. That seems to me to be an attempt by the claimant to take a further opportunity to amplify her arguments in support of reconsideration five months after the deadline by which an application for reconsideration should be made. I decline to consider matters referred to in the application and supporting documents supplied on 15 March 2023: the deadlines in the Employment Tribunal Rules of Procedure 2013 are there to ensure that challenges to orders are made in good time and that there is finality in decision making. It is quite possible, as this claimant has shown, for the key arguments why it is in the interests of justice for a judgment to be varied or revoked to be set out within 14 days of the date on which the order is sent despite any disadvantages caused by ill health or change in representation status. The interests of justice include fairness to both sides and it would not be fair to the respondent for the claimant to be permitted to replace the grounds for the reconsideration application essentially because an administrative error has meant that that application was not dealt with finally as quickly as it should have been.

10. 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.

    10.1. 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. At the preliminary hearing on 16 March 2023, the claimant pointed out an error in LOI para.z (see box 4.1 of her agenda for that hearing) and that

has been corrected in the List of Issues appended to the Record of Preliminary Hearing on 16 March 2023 which is sent to the parties at the same time as this reconsideration judgment. Subject to the respondent's application for strike out or deposit orders, that List of Issues is definitive.

10.2. The application seeks a reconsideration of my judgment that the claimant was disabled by reason of migraines 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.

10.3. Therefore, the application seeks to reconsider my judgment that the claimant was not disabled by reason of asthma, joint pain and anxiety. Oral reasons having been given at the preliminary hearing in public, they were not automatically provide 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.

10.4. The basis of the application appears to be:

10.4.1. That the conditions are fluctuating health conditions;

10.4.2. That the medical evidence had not been fully considered;

10.4.3. That additional medical evidence is now available and the claimant also indicated that more would become available when her DSAR had been complied with;

10.4.4. That the lack of the relevant evidence in the file of documents for the preliminary hearing on 15 September 2022 is due to alleged failures by her then representatives adequately or competently to put forward the arguments/evidence to support her claim.

10.5. 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)

10.6. In oral evidence on 15 September 2022, 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.

10.7. 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. What was relied on (see claimant's skeleton argument para.21 and 22) was the argument that the combination of impairments with "different effects to different extents over periods of time which overlapped" meant that she could be regarded as disabled, that the focus needed to be on the deduced effects and that the length of medical treatment showed the effect of the conditions to have lasted 12 months or, in the case of anxiety to be likely to last 12 months as at the relevant period.

10.8. 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. That supplementary disability witness statement put forward the following information:

10.8.1. In relation to asthma, that the claimant was diagnosed as a child; she relied on more than 100 pages of medical evidence pre-dating her employment and gave evidence about the medication she was on and the alleged effects on her ability to carry out day to day activities were she not to be on the medication (see Supplementary Impact Statement para.4).

10.8.2. In relation to joint pain, her impact statement evidence was set out in paras.13 to 16 and it is clear that there was evidence before me that the claimant alleged that she had experienced joint pain since March 2016 (see para.13 of the supplementary impact statement) although she had most recently been

suffering from it since December 2020 (para.15 of the supplementary impact statement).

10.8.3. She alleged that she had suffered from anxiety and depression since December 2020 (in other words from the same time as the start of the period relevant for the claim) and described alleged impacts of those conditions in paras.18 to 24. Her argument that she was disabled by reason of this condition therefore depended upon a finding that any substantial adverse impacts were likely to continue for more than 12 months from December 2020 onwards.

10.9. Comparing the details in that supplementary impact statement to the claimant's reconsideration application, I do not consider that the evidence before me at the open preliminary hearing failed materially to set out her case on the impacts of these conditions either individually or cumulatively.

10.10. 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. In the absence of written reasons, I have reviewed my notes from which the oral judgment was given.

10.11. I was not persuaded by the evidence before me that I should infer from the mere fact that she was on maintenance medication for asthma that she would be likely to have the effects alleged in para.4 of her supplementary impact statement. I can see that I considered the medical evidence in the joint bundle and analysed the references within that evidence to focus on the extent to which she was using bronchodilators or reporting to her GP that she experienced symptoms. She gave evidence that the symptoms of asthma were well controlled before November/December 2020 and she started long term sick leave in May 2021 and that impacted on my judgment on whether the impacts were long term as that is defined in the EQA. The claimant made clear at the hearing in September 2022 that she experienced breathing difficulties, wheezing and coughing from December 2020 but still relied on the deduced effects to argue that the impact was both substantial and long term. I analysed medical evidence about the extent to which the medication had been used to reach the conclusion that she had not shown that the impact of asthma on her ability to carry out day to day activities was both substantial and long term.

10.12. Taking the above into account, the arguments put forward by the claimant now do not appear to be materially different to those which I considered at the hearing in September 2022 and therefore there is no reasonable prospect of the matters relied on in the reconsideration application causing me to vary or revoke that judgment in relation to asthma.

10.13. In relation to joint pain, my conclusion based upon my findings on the evidence before me was that the joint problems which she described flaring up in February 2021, which were a reason for absence from 8 February 2021 onwards, were described in the GP records as a new episode. That and the claimant's evidence caused me to conclude that this was a separate matter to the meniscal tear and a separate matter to historic episodes. If she now alleges that the joint pain was a past disability as at November 2020 or that the impacts should be regarded as continuing because they were likely to recur, first, there is no satisfactory explanation for any failure to argue that previously and secondly, in reality the claimant seeks to overturn my finding, based on her oral evidence, that the historic joint pain had settled, and that she didn't expect it to recur otherwise she would have declared it on her application form. This is not the purpose of a reconsideration application.

10.14. In relation to anxiety and depression, I was not satisfied that the claimant had shown that the impacts relied on were long term in that they could well last 12 months rather than that they were a reaction to adverse life events. There is nothing in the reconsideration application which is likely to cause me to vary that conclusion, if anything, the reverse. She may, in due course, argue that there were psychological effects of the alleged acts of the respondent and that compensation for any successful discrimination claims should take that into account but that does not affect my judgment on whether the claimant was disabled by reason of anxiety at the relevant time.

10.15. 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 complaint.

10.16. 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.

10.17. 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 until after the preliminary hearing in public on 15 & 16 September 2022.

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.

10.18. 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. To permit the claimant to reopen the issue would potentially cause injustice to the respondent.

11. 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.

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Employment Judge George

Date: 28 March 2023
Corrected on 19 June 2023

Sent to the parties on: 19 June 2023

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For the Tribunal Office