



EMPLOYMENT TRIBUNALS

Claimant: Mr. C Mallon

Respondent: KPMG LLP

UPON APPLICATION by the Claimant, made by two emails dated 15 June 2023, to reconsider the judgment given orally on that date and sent to the parties on 20 June 2023, under rule 71 of the Employment Tribunals Rules of Procedure 2013,

JUDGMENT

The Claimant's application for reconsideration is refused on the basis that there is no reasonable prospect of the original decision being varied or revoked.

REASONS

1. This case was heard over two days, on 14 and 15 June 2023. Judgment, with Reasons, was given orally at the end of the second day, dismissing the Claimant's single complaint of failure to make reasonable adjustments.

2. In summary, whilst the Claimant's disabilities (autism being the one which was relevant to his Claim), knowledge of those disabilities and the application of a PCP of not providing technical questions in advance of interview were all conceded by the Respondent, the Tribunal concluded that the Claimant:

2.1. Had not established that the PCP put him at a substantial disadvantage (which he defined as nervousness, anxiety and lack of clear thinking during the interview) compared with persons who are not disabled.

2.2. In any event had not established that the Respondent knew or should reasonably have known that he was put to that disadvantage.

2.3. Further and in any event had not established that it would have been a reasonable step to avoid the disadvantage to provide the technical questions in advance.

3. Neither party has requested written Reasons for the Judgment given orally on 15 June 2023. In fact, the Claimant's application for reconsideration of the Judgment was made before written confirmation of it was issued. The application was nevertheless plainly made within the 14-day time limit set by rule 71 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules").

4. In accordance with rule 72(1) of the Rules, the first step is for me to consider the Claimant's application, to determine whether there is any reasonable prospect of the original decision being varied or revoked. This decision is mine alone. It would only have been had the application not been refused at this first stage that I would have consulted the other members of the Tribunal panel, Mrs. Pelter and Mrs. Keene. I should make clear however, that the original Judgment to which the Claimant's application relates was a unanimous judgment of all three Tribunal members.

5. As rule 72(1) makes clear therefore, the first task is for me to decide whether there is any reasonable prospect of the original decision being varied or revoked. I have decided that there is not, for the reasons that now follow.

6. The Claimant's application is summarised in his emails of 15 June and is supported by a number of documents provided with those emails. The emails themselves state that the Claimant "lacked specific information trying to prove my case", "did not prove the barrier" (which I take to be the substantial disadvantage) and that he did not know that he had to prove that being sent interview questions in advance was a reasonable adjustment. He adds that he could not afford the services of a medical expert in bringing his Claim. His purpose in providing the various documents is to show that providing questions in advance of an interview is a reasonable adjustment.

7. Pausing there, I note four things:

7.1. First, the Claimant appears to acknowledge that he lacked the evidence to establish his case. That is what the Tribunal found, specifically on the questions of substantial disadvantage and the Respondent's knowledge, recognising that the reasonableness of a particular step was a matter for the Tribunal to take its own view about rather than something that depended on provision of evidence from the Claimant as such. As we made clear in giving oral judgment, we could only decide the case based on the evidence presented. That is the only way of ensuring orderly and fair litigation.

7.2. Secondly, the Claimant does not say why the evidence he has now provided could not have been provided at the Hearing, though as I will come to below, I find that it provides no basis for varying or revoking our decision.

7.3. Thirdly, the Tribunal made clear in its oral judgment that it was not necessarily saying that a medical expert was required to give evidence on the substantial disadvantage question. What was notable was that there was no

evidence from the Claimant's GP, for example, to indicate that the Claimant was put to the substantial disadvantage he relied upon, and in particular that his autism coach in her written statement did not refer to it either. As we also noted, the autism coach effectively indicated that it may not be appropriate for specific test questions for a role-related assessment to be provided.

7.4. Fourthly, the Claimant is quite obviously an intelligent man, with very high-level academic qualifications and, notably, substantial experience of employment tribunal litigation. It is not unreasonable to expect that he would know that he was required to prove his case and that he would require evidence to do so.

8. In short, stating that he did not provide sufficient evidence, providing it now when it could have been provided before, and stating that he could not afford to engage a medical expert is in no sense a basis on which our original decision could in any sense be said to require variation or revocation.

9. I have considered all of the attachments to the Claimant's emails and summarise them as follows.

10. The first is the Equalities and Human Rights Commission Guide to the duty to make reasonable adjustments. This is a very helpful document generally, but does not add anything to the matters considered by the Tribunal already.

11. The second is produced by Autism Open Access and appears to be an academic paper entitled, "Similarities in Dyspraxia and Autism". It provides a general description of behaviours associated with both. I note that, as the Tribunal observed in giving judgment, it underlines that autism is a spectrum and thus not everyone with autism experiences it in the same ways.

12. The third is a short document produced by the University of Bath entitled, "What to do when interviewing an autistic person for a job". This document too recognises that people with autism are not the same as each other. I do not read it as saying that people with autism are more prone than others to anxiety, nervousness or lack of clear thinking, though it does state that a person with autism may find an in-person interview overwhelming. That was not however the Claimant's case. Indeed, his evidence was that he is far better communicating orally than in writing, that he was able to answer some of the technical questions at the interview and that in his view he answered some of them well, or at least satisfactorily. The document does suggest providing questions in advance of interviews, stating that the reason for this is that an autistic person may find it difficult to process questions and formulate a response at speed, though again that was not the substantial disadvantage the Claimant's case depended upon.

13. The fourth document is produced by the National Autistic Society. It says that "face to face interviews could be difficult" and says that it is "useful to provide questions five to seven days in advance".

14. The final document is produced by the National Autistic Society Scotland and is entitled, "Supporting people with autism". It says autistic people can be anxious about social interaction, and that not knowing what will happen next can cause anxiety. It recommends at interview allowing time for the person to process a question and says it is worth asking for questions in advance, though

adding that some employers would see that as an unfair advantage over other candidates.

15. There are a number of points to make about the documents the Claimant has provided with this application:

15.1. Most obviously, of course, none comment on the Claimant. Further, more than one emphasises that each person with autism is different. The question we had to answer was whether the Claimant – not people with autism generally – was put to a substantial disadvantage by not knowing questions in advance. I repeat that we were not taken to any evidence that he was. The documents now provided do not plug that forensic gap.

15.2. Some of the documents recommend provision of questions in advance, but it is notable that they do not all speak with one voice on the point.

15.3. Again obviously, they do not comment whether and when it would be reasonable to provide questions in advance in relation to any specific type of role that an autistic person may apply for.

16. We made clear that our judgment does not mean that it will never be a reasonable adjustment to provide questions in advance for an autistic person. Noting that in relation to other sections of the interview, that is effectively what the it did, we were satisfied that the Respondent could reasonably, in relation to the role of Tax Manager – R&D Tax, seek to test during the application and interview process the crucial question of whether a candidate genuinely had sufficient knowledge of the issues on which he would be asked to give advice to clients and to junior colleagues, and also to test the crucial skill of being able to deal with questions from clients that they did not know the answers to. In our judgment, providing the technical questions in advance would have undermined that process, as the Claimant's autism coach basically recognised.

17. On the basis of what is set out above, I see no reasonable prospect of the Tribunal changing the decision it has already reached in relation to the Claimant's complaint. Nothing that he has said or submitted in his reconsideration application provides any reasonable ground for varying or revoking our conclusions on the questions of substantial disadvantage or the reasonableness of the step the Claimant says the Respondent should have taken. In any event, and just as importantly, nothing in the application goes to the question of the Respondent's knowledge of the disadvantage, which was one of the three grounds on which the Claim failed.

17. The Claimant's application for reconsideration is therefore refused.

Employment Judge Faulkner
23 June 2023

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.