EMPLOYMENT TRIBUNALS

Claimant: Paul Bocij

Respondent: QAHE Ltd

JUDGMENT ON AN APPLICATION FOR RECONSIDERATION

The claimant's application for reconsideration is refused because there is no reasonable prospect of the original decision being varied or revoked.

REASONS

Introduction and the issue

1. The claimant made an application to have the decision on costs reconsidered on 9 June 2023. The issue for me at this stage is whether there is a reasonable prospect of the original decision being varied or revoked.

Background facts

2. I conducted an open preliminary hearing on 26 May 2023 which was listed to determine the issue of whether the claimant was disabled at material times. The hearing had been listed by EJ McCluggage at a preliminary hearing for case management held on 13 March 2023.

3. The hearing had to be postponed because the claimant had not provided a supplemental impact statement about the effects of his disability as he had been ordered to by EJ McCluggage. The hearing was ineffective due to the claimant's conduct in not complying with EJ McCluggage's order.

4. The respondent applied for an order that the claimant pay the costs they had incurred in attending the hearing, limited to counsel's brief fee for the hearing.

5. The costs application was made under Rule 76 of the Tribunal's rules of procedure. Under Rule 76(1) it was said that the claimant's conduct of the proceedings in terms of not providing the impact statement was unreasonable. Under Rule 76(2) it was said that the claimant had been in

breach of EJ McCluggage's order and as a result the hearing had been postponed on the respondent's application.

6. It was not disputed that the claimant had been in breach of EJ McCluggage's order and as a result the hearing had been postponed on the respondent's application.

7. I decided that:

   a. the claimant had behaved in a manner proscribed by the rules as he had failed to comply with an order of the tribunal and had conducted part of the proceedings unreasonably in failing to provide a supplemental impact statement,
   b. I should exercise discretion to make a costs order in the respondent's favour and,
   c. the amount of costs the claimant should pay should be £1000.

<u>Law</u>

8. Rule 70 of the Tribunal's rules of procedure provides as follows: *"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."*

9. The power to reconsider only applies to judgments as defined in Rule 1(3)(b), namely:

> *"..a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines—*
> *(i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs); . . ."*

10. My decision was a final determination of the respondent's costs application and it therefore seems to me it should have been in the format of a judgment applying Rule 1(3)(b) above and the claimant should be able to apply to have it reconsidered. I will therefore reissue my decision in the format of a judgment.

11. Rule 71 sets out the procedure for applying for reconsideration. It includes that any reconsideration application shall set out why reconsideration of the original decision is necessary.

12. Rule 72(1) then provides as follows: "*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…"*.

13. When dealing with the question of reconsideration I must seek to give effect to the overriding objective to deal with cases 'fairly and justly' (Rule 2). This includes:

    a. ensuring that the parties are on an equal footing
    b. dealing with cases in ways which are proportionate to the complexity and importance of the issues
    c. avoiding unnecessary formality and seeking flexibility in the proceedings
    d. avoiding delay, so far as compatible with proper consideration of the issues; and
    e. saving expense.

14. I should also be guided by the common law principles of natural justice and fairness and the importance of finality in litigation.

15. In Outasight VB Ltd v Brown 2015 ICR D11, EAT, Her Honour Judge Eady QC explained 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. However, this discretion must be exercised judicially, *'which means having regard not only to the interests of the party seeking the review or 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'.*

16. Reconsideration of a judgment may be necessary in the interests of justice if there is new evidence that was not available to the tribunal at the time it made its judgment. It is incumbent on the party applying for reconsideration to explain why the new evidence was not produced beforehand and why it is now in the interests of justice to consider that evidence.

17. The principles to be applied in this scenario come from the case of Ladd v Marshall 1954 3 All ER 745, CA. In summary, it is necessary to show:

    (i) that the evidence could not have been obtained with reasonable diligence for use at the original hearing,
    (ii) that the evidence is relevant and would probably have had an important influence on the hearing; and
    (iii) that the evidence is apparently credible.

18. The EAT has confirmed that the tribunal should refuse an application for reconsideration unless the new evidence is likely to have an important bearing on the result of the case (Wileman v Minilec Engineering Ltd 1988 ICR 318, EAT).

19. The EAT in Outasight also held that the interests of justice may allow fresh evidence to be adduced where some additional factor or mitigating circumstance has the effect that the evidence in question could not have been obtained with reasonable diligence at an earlier stage. This might apply where, for example, a party was 'ambushed' by the introduction of evidence at the hearing or was

incorrectly refused an adjournment. However, it is not generally in the interests of justice that parties in litigation should be given a second bite of the cherry simply because they have failed as a result of oversight to provide all the evidence available in support of their cases at the original hearing.

Analysis and conclusion

20. The claimant's reconsideration application presents five grounds. I will set out each ground followed by my analysis of whether it contains any basis for considering that there is a reasonable prospect of the original decision being varied or revoked.

21. The first ground is as follows:

"I am unable to make handwritten notes properly due to disability. I had permission to record the case management meeting so that I could produce a transcript afterwards. A little after the meeting began, an error meant that I was expelled from the video conference and had to re-join. This interrupted recording so it was not possible to produce a transcript. In turn, this meant that I had no record of the rather complex instructions given. Until the case management hearing held on 13 March 2023, the Tribunal had referred to "the disability question". However, the written instructions received on 10 May 2023 referred to six questions of sufficient complexity that I felt it necessary to employ an occupational health specialist to advise. The point is that I had no record (written or otherwise) of the six questions and other conditions I needed to meet until 10 May 2023. Upon receipt of the Tribunal's written instructions I immediately booked an appointment with an occupational health specialist. The earliest appointment was on 31 May 2023. This was 3 weeks after receiving the written instructions from the Tribunal whereas the original instruction gave approximately 6 weeks to fulfil the requirements. I believe I acted reasonably given that the Tribunal's instructions were two months late."

22. I was aware of the claimant's health and the fact that he says he cannot take notes when I made my decision. This was part of the reason why I considered that it may have been difficult for the claimant to comply with EJ McCluggage's order in time. Equally however, it was relevant that EJ McCluggage recorded that he explained the orders he was making to the parties at the preliminary hearing and he stipulated that they must be complied with even if the written record of the hearing arrives after the date given in an order to do something. Furthermore, I am aware that the claimant recorded the hearing before EJ McCluggage. He says there was an interruption in the recording when he exited the virtual hearing room. It is unclear how this could have prevented the claimant from producing a transcript and in any event he could simply have listened to the recording if he was unsure over what he needed to do.

23. There is no record in EJ McCluggage's order of the claimant saying he would have difficulty completing an impact statement. All the claimant had been asked to do was complete the relatively straightforward task of completing an impact statement and it was in fact not the first time he had been asked to do that. This is a standard direction in cases where disability is alleged. Such a statement can

be quite brief (2 to 3 pages is usually fine) and all the claimant had to do was answer the questions posed. Litigants in person from all walks of life routinely prepare these statements for the tribunal and it is not clear to me why the claimant, who is a highly qualified academic currently working in a senior position, apparently found the task so complex that he could not attempt to produce a statement even after the receipt of EJ McCluggage's order and he instead felt he had to take advice from an occupational health specialist. Furthermore, even taking into account the further correspondence which the claimant has referred to in his reconsideration application the claimant did not explain to the tribunal the difficulty he now says he was having with completing the statement or the fact he thought it was necessary to take advice from an occupational health specialist.

24. For these reasons I am still of the view that the claimant has conducted the proceedings unreasonably and I see nothing in this ground that gives rise to a reasonable prospect of the original decision being varied or revoked.

25. The second ground is as follows:

"I contend that the questions asked were impossible for me to answer. At the very least, I needed to consult others for advice. Question (e)4, for instance stated: What would the effects of the impairment have been without any treatment or other measures? The Claimant should give clear day-to-day examples, if possible. This effectively asked for me, a non-medical specialist, to speculate about circumstances that never occurred. I was concerned that I could be sanctioned for offering suppositions, hence my need to consult an occupational health specialist."

26. The suggestion that the questions asked in respect of the impact statement were "impossible" for the claimant to answer is being raised for the first time now. It was not raised at the hearing before me. There is no record of the claimant having said he thought it was impossible for him to answer when EJ McCluggage made the order and explained it to him. The claimant did not write to the tribunal at any stage prior to the hearing on 26 May to say he thought the order was impossible to comply with. I do not accept that the order was impossible to comply with. Again litigants in person from all walks of life routinely comply with orders in the same or very similar terms and it is not clear to me why the claimant would have a particular difficulty.

27. There is no reason for the claimant to think he would be sanctioned for offering suppositions. All he had to do was answer the questions posed as best he could. In fact the claimant was warned he could face sanctions if he did not comply with the tribunal's order (including strike out and costs) but he appears to have ignored that.

28. For these reasons I am still of the view that the claimant has conducted the proceedings unreasonably and I see nothing in this ground that gives rise to a reasonable prospect of the original decision being varied or revoked.

29. The third ground is as follows:

"I also contend that the instructions were impossible to comply with. Instruction (9) states I should provide an impact statement covering "…the consequences of his stroke and its effect on day-to-day activities covering the period January 2019 to May 2022". Since the stroke under discussion occurred in October 2019, it was not possible to discuss events from an earlier period."

30. The suggestion that the instructions given in respect of the impact statement were "impossible" for the claimant to answer is being raised for the first time now. It was not raised at the hearing before me. There is no record of the claimant having said he thought it was impossible for him to follow the instructions when EJ McCluggage made the order. The claimant did not write to the tribunal at any stage prior to the hearing on 26 May to say he thought the order was impossible to comply with. In any event I do not accept that the order was impossible to comply with. Again litigants in person from all walks of life routinely comply with orders in the same or very similar terms and it is not clear to me why the claimant would have a particular difficulty. The only example given by the claimant does not come close to showing that the instructions were impossible to comply with; all the claimant needed to do was explain in his statement that the stroke happened in October 2019 and so its effect began from then. For these reasons I am still of the view that the claimant has conducted the proceedings unreasonably and I see nothing in this ground that gives rise to a reasonable prospect of the original decision being varied or revoked.

31. The fourth ground is as follows:

"The Tribunal was aware that I was unable to provide the documentation required ahead of the preliminary hearing. I requested that the hearing be postponed on two occasions; 13 May 2023 and 18 May 2023. I contend that it was the Tribunal's decision not to reschedule the hearing so was therefore responsible for the costs incurred by the Respondent. The Tribunal had full knowledge that I had not been able to comply with the instructions given so know ahead of time that the hearing would not be productive. I also maintain that rescheduling the hearing would not have resulted in such significant losses on the part of the Respondent. This should be considered as new information since it was not discussed during the preliminary hearing."

32. The claimant's correspondence of 13 and 18 May 2023 was not brought to my attention at the hearing on 26 May. It was plainly available to the claimant if he wished to refer to it. However, I am going to consider the evidence now because the claimant is a litigant in person who may not have anticipated the potential relevance of the correspondence. I think it may be helpful to clarify the relevant chronology of events in order to put the new documents in context:

32.1 On 10 May 2023 EJ McCluggage's order was sent to the parties.

32.2 On 13 May the claimant wrote to the tribunal as follows: *"MWET has taken almost two months to send me the case management order and notice of hearing. The deadlines for some events have already passed. Without the written instructions from the WMET it has not been possible to comply with*

deadlines and the requests made. In view of this, can you please set new deadlines for all events up to and including the open preliminary hearing scheduled for Friday, 26 May 2023? Can you also inform me of the new dates in good time? Thank you." This letter was not copied to the respondent, despite the fact that EJ McCluggage specifically reminded the parties at paragraph 32 of his order that all correspondence should be copied to the other side.

32.3 The claimant's letter of 13 May does not appear to have prompted the Tribunal's administrative staff to refer the file to a Judge. This is probably because it was not very clear from his letter that the claimant was seeking a postponement.

32.4 On 17 May the Tribunal wrote to the parties asking for a bundle for the hearing on 26 May.

32.5 On 18 May the claimant responded to the Tribunal as follows: *"I have requested that this hearing be rescheduled as I did not receive the WMET written instructions until 10/05/2023. Without the written instructions from the WMET it has not been possible to comply with deadlines and the requests made. I requested that this hearing be rescheduled on 13/05/2023 but have yet to receive a reply."* Again the claimant failed to copy in the respondent.

32.6 On 19 May the claimant's correspondence of 18 May was referred to a duty judge. The claimant's correspondence was copied to the respondent so that they could provide their comments. The respondent responded as follows: *"This was the first time we have had sight of the Claimant's correspondence to the Tribunal requesting a postponement of the hearing. As previously requested, would the Claimant kindly ensure that all correspondence is copied to [respondent's solicitor's email address] on behalf of the Respondent. We note the Claimant's assertion that he has been unable to comply with the Tribunal's case management orders as he did not receive the written orders until 10 May 2023. However, at the case management hearing on 13 March 2023, permission was granted for the Claimant to record the hearing in order to then make a transcript. We fail to see therefore why the Claimant was not aware of the relevant deadlines a) from the hearing itself and/or b) from the recording of the hearing which he was permitted to make."*

32.7 There was then a further email exchange between the parties on 19 May, which the tribunal was copied in to. First, the claimant replied to the respondent as follows: *"With reference to the reply from the Respondent, what is said verbally may not match what is eventually provided in written form. In this case, it was necessary to wait for WMET's written instructions in order to ensure that the documentation requested will match the written requirements of the Tribunal. I should also point out that recordings are prone to interference and technical problems, and that automated transcription is not a completely reliable process. I repeat my request to*

reschedule the hearing. Should this be refused, please take this message as notice of my intent to appeal and/or issue a formal complaint."

32.8 The respondent's solicitor then responded as follows: *"I apologise for involving the Tribunal in email correspondence of this nature. I would not ordinarily do so but feel it is appropriate to respond on this occasion. The Claimant made a special request for permission to record the preliminary hearing in March, which was granted. In the event that he had no intention of relying on the recording or the transcription service due to concerns about reliability or otherwise, then such a request to record would have been completely unnecessary. The Claimant was clearly aware that it was incumbent on him to provide any further medical evidence upon which he intends to rely on the issue of disability, together with a revised impact statement. He has provided neither – notwithstanding that he has now had the written summary of the case management orders since 10 May 2023".*

32.9 The parties then received a response to the claimant's application to postpone the hearing on 22 May 2023 as follows: *"Employment Judge Wedderspoon has considered your request to postpone the hearing and has refused it. The Judge's reasons for refusing the request are: The Claimant attended the Preliminary hearing on the 13th March 2023 and therefore was aware of the all the directions and dates agreed by Judge McCluggage. The case remains listed for hearing on Friday 26th May 2023."*

32.10 As I mentioned the claimant provided further medical records on 24 May 2023. His covering email said as follows: *"In reference to the preliminary hearing listed for Friday at 10am, please find attached the documents I would like to have considered. I am aware that these documents are being submitted late but still wish the ET to make a decision on whether or not they can be considered. I confirm that the Respondent is included in this message and will receive an electronic copy of these documents. I respectfully remind the ET that I wish to appeal the decision not to reschedule the hearing and would like further details on how to do so."*

33. I observe that in his correspondence with the Tribunal leading up to 26 May the claimant did not mention any of the following points which he now relies upon:

33.1 That his recording of the hearing before EJ McCluggage was interrupted so that it could not be transcribed. He instead seemed to suggest that the transcript he had may not be reliable.
33.2 That he could not understand the instructions or questions asked in respect of the impact statement or that it was impossible for him to comply. The claimant's postponement request was made only on the basis of the delay in receiving EJ McCluggage's order.
33.3 That he needed to take advice from an occupational health therapist to complete an impact statement and that he was unable to get an appointment until 30 May.
33.4 That he would be unable to provide an impact statement by 26 May even after having had the order since 10 May. In fact when he provided the

further medical records on 24 May the claimant did not attempt to explain or even mention that he was not providing a statement as he had been ordered to.

34. I disagree with the claimant's suggestion in his ground for reconsideration that the tribunal was fully aware that he had been unable to provide a statement; the correspondence shows that the claimant did not refer to any specific difficulty with providing the statement. He did not in fact mention the statement specifically at all in his correspondence with the tribunal. I mentioned in my order that if the claimant was having any difficulties with producing the statement in time he could have let the tribunal know. This was not what led to my decision to award costs but in any event the observation is still correct because the claimant did not inform the tribunal that he was having difficulty with the statement specifically.

35. When the correspondence that the claimant seeks to rely on is looked at in context it clearly shows that the claimant did act unreasonably. I am not without sympathy for the difficulties the claimant may have faced in completing the statement before he had EJ McCluggage's order. This is essentially why I reduced the amount of costs payable by the claimant and why I did not opt for the more severe sanction of striking out the disability discrimination claim. Arguably this was generous as it is clear in my view that the claimant behaved unreasonably; he was present at the hearing on 10 May, he had previously been ordered to provide an impact statement and he had that order in writing, he recorded the hearing of 10 March and may have had a transcript yet he still failed to complete the statement even after he received the order on 10 May. There was still time to produce the statement before the hearing on 26 May but the claimant did not even attempt to do so and he did not explain any specific difficulty he was having with producing an impact statement.

36. It seems to me that the claimant was aggrieved about the hearing not being postponed as he had requested but it was incumbent on him to comply with the order unless the tribunal decided otherwise. This is particularly the case as EJ McCluggage had ordered that the parties must comply with his order even if it arrived late. A party cannot just ignore orders if they do not get a postponement which they wanted. It remains in my view plainly unreasonable of the claimant not to complete the statement even in the period from 10 May onwards and it was unreasonable of him not to even inform the tribunal of the specific difficulties which he now says he was having.

37. For these reasons I am still of the view that the claimant has conducted the proceedings unreasonably and I see nothing in this ground that gives rise to a reasonable prospect of the original decision being varied or revoked. The new evidence (i.e. the claimant's correspondence of 13 and 18 May) is not likely to have an important bearing on the result of the case because when looked at in context and contrasting what the claimant said then with what he says now it only strengthens my view that the claimant has conducted the proceedings unreasonably.

38. The fifth ground is as follows:

"I believe that the amount of the "fine", £1,000, is also unreasonable. Even offences related to Covid rule breaches only attracted fines of £50 (for Boris Johnson) - £100 (for others)."

39. This is misconceived. The claimant was not fined and a comparison with fines for covid rule breaches is completely inapt. I have already given my reasons for the amount of the costs that the claimant should pay and there is no cogent basis presented for that to be reconsidered. For these reasons, I see nothing in this ground that gives rise to a reasonable prospect of the original decision being varied or revoked.

40. In addition to the five above grounds the claimant also referred to potential defences to the point that he had failed to comply with the tribunal's order. These essentially repeated his arguments made in support of the grounds relied upon. I do not see anything in there that gives rise to a reasonable prospect of the original decision being varied or revoked. I remain of the view that there is no reasonable explanation for the claimant's wholesale failure to comply with the order to provide a supplemental impact statement.

41. I have therefore considered all of the matters raised by the claimant and none of them are such that they would give any reasonable prospect of the original decision being varied or revoked. I shall therefore refuse the claimant's application for reconsideration.

Employment Judge Meichen
19 July 2023