EMPLOYMENT TRIBUNALS

Claimant: Ms L O'Donnell

First Respondent: The Cambridge City Foodbank

Second Respondent: Mr S Thornton

Third Respondent: Ms M Edney

Fourth Respondent: Mr J Edney

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Watford Employment Tribunal (by CVP)

On: 9 August 2023 and in chambers on 22 August 2023

Before: Employment Judge Kelly (sitting alone)

Appearances
For the claimant: In person
For the respondent: Ms Bradbury, barrister

JUDGMENT

1. This was a hearing to determine whether to reconsider our Judgment of 13 December 2022 ('December Judgment'), further to the claimant's application of 3 January 2023. The Judgment related to a hearing on 6 December 2022 ('the December Hearing'). Effectively, the claimant was seeking a review of paragraphs 36 to 42 of the December Judgment. Below, we use defined terms from the December Judgment.

2. We were provided with a bundle of documents. The respondent provided a skeleton argument which did not refer to any authorities and a set of authorities which the respondent only referred to in the vaguest terms in submissions. We have reviewed them and referred to relevant ones below. The claimant said she had not had time to consider the authorities despite the fact they were supplied to her three weeks prior to the hearing in compliance with a Tribunal order. However, she did not seek an adjournment, and we consider that she had ample opportunity to consider them. Therefore, we proceeded with the hearing.

3. The claimant produced a letter from Woodlands surgery of 2 August 2023 ('GP Letter'). This was sent to the respondent on 2 Aug 2023, although the Tribunal's order of 14 Mar 2023 required it to be supplied within 8 weeks of 14 Mar 2023. The respondent objected to allowing the letter in as evidence on the basis that it considered it was not relevant and it was late. The respondent said allowing the GP Letter would be prejudicial to it, but without pointing to any particular prejudice. The respondent confirmed it had had time to consider the GP Letter. We allowed the GP Letter in as evidence because it appeared to us to have some relevance and therefore it would be potentially prejudicial to the claimant if it were not considered, whereas the respondent could not point to any particular prejudice if we considered it.

4. We heard oral evidence from the claimant.

5. The claimant brought a companion to the hearing as an adjustment for her disability. She also asked that

    a. the respondent minimised its combativeness, which in our view the respondent did;

    b. things were explained clearly and concisely, and she would tell us if she was confused. We checked with the claimant her understanding during the hearing and explained matters if she requested;

    c. She would tell us if she was struggling. We took breaks when the claimant did this.

6. Further, we took multiple short breaks throughout the hearing as well as a one hour lunch break, and checked with the claimant before each part of the hearing whether she was ready to continue and took a break if required.

7. The claimant's reconsideration application was headed 'request for reconsideration of Judgment regarding long-term significant adverse effect in relation to cognitive functions and other.' The first four paragraphs of the application contained submissions which the claimant could have made at the original hearing; and quoted from her claim form and impact statement which matters had already been taken into account in making the original judgment.

8. The claimant then went on to say that '*I struggled to adequately convey the breadth, longevity and variability of the cognitive impairment I experience as a result of my conditions during the preliminary hearing on 6 December 2022. It's difficult to describe the intricacies of my disability so thoroughly and comprehensively without having the relevant medical expertise, and especially under such anxiety-inducing circumstances. By the time we got to discussing my cognitive functions towards the end of the hearing, I was struggling with my cognitive functions.'*

9. The GP Letter stated, among other things that:

    a. *Both anxiety and depression can have a significant impact on cognitive functions, affecting various aspects of an individual's thinking and mental processes. In the claimant's case, the more severe the episode of either anxiety or depression, the greater the impact on her cognitive functions.*

    b. *From February 2022, the claimant was unable to concentrate and her cognitive processing speed lowered down to the point where she struggled to get out of bed most days. While there has been some improvement, the claimant still suffers from the effects of this traumatic life event and still experiences*

cognitive impairment such as poor concentration, difficulty in planning activities and new information retention.

10. The claimant gave evidence that she had been experiencing intense anxiety from the start of the December Hearing and that, when this happened, her 'brain shut down' so that she struggled to explain the intricacies. She said her ability to explain herself and give evidence was impacted by her mental state. She struggled to understand what she needed to say. She said that mental and cognitive impairment were intricately entwined. By mental impairment, she was referring to her disability of mixed anxiety and depression. She said that she misunderstood the intricacies of cognitive impairment as it related to mental impairment. She did not have the knowledge which she now had about cognitive functions.

11. The claimant said that the examples which she gave of SAE were all due to cognitive impairment, she just had not made that clear because she did not realise she had to. She said she had not raised in the December hearing that she was cognitively impaired because she did not realise she was allowed to. She said she was not expecting to have to explain the difference between mental impairment and cognitive impairment. She thought she had explained it in her medical evidence. She did not have time to think about it. It was difficult for her to think 'on the hoof'.

Relevant law

12. Rule 70 of the Employment Tribunal Ruled of Procedure 2013 states that:

    a. 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.

13. In Phipps v Priory Education Services Ltd [2023] EWCA Civ 652, the Court of Appeal relied on the following principles which are relevant to this case:

    a. *The interests of justice test is broad-textured and should not be so encrusted with case law that decisions are made by resort to phrases or labels drawn from the authorities rather than on a careful assessment of what justice requires. The ET has a wide discretion in such cases. But dealing with cases justly requires that they be dealt with in accordance with recognised principles.*

    b. *Failings of a party's representative, professional or otherwise will not generally constitute a ground for review where the disappointed party has had an opportunity to argue the case and wishes to reargue it. This is because considerable weight must be given to the public interest in the finality of judicial decisions, both to protect the opposing party and to avoid over-burdening the employment tribunal system. A typical example of this is a case where a full hearing has been conducted but an argument was not put, or a witness was not called. In most such cases reconsideration will be refused on the grounds that the claimant has had a fair opportunity to put her case.*

14. The Court of Appeal in this case also gave guidance that:

    a. *An application for reconsideration under Rule 70 must include a weighing of the injustice to the Applicant if reconsideration is refused against the injustice to the*

Respondent if it is granted, also giving weight to the public interest in the finality of litigation.

15. Although the Phipps case concerned the failings of a party's representative, we consider that the same considerations apply to where the party is unrepresented but has had an opportunity to argue their case. This is confirmed by Ebury Partners UK Ltd v Mr M Action Davis [2023] EAT 40 where the EAT stated:

    a. *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.*

16. In *Trimble v Supertravel 1982 ICR 440,* the appeal tribunal said it was not appropriate for a Tribunal to review its decision because there was an error of law. However, if a party had not had a fair opportunity to present their case, that is a procedural shortcoming that can be corrected on review. The review process would not normally be appropriate when both parties have had a fair opportunity to present their case. In *Lindsay v Ironsides Ray & Vials 1994 ICR 384*, Mummary J held that the failure of a party's representative to draw attention to a particular argument will not generally justify a review. HHJ Eady in *Outasight VB v Brown UKEAT/0253/14* said that it will only be in the interests of justice to allow fresh evidence on review if the principles in *Ladd v Marshall* have been satisfied, the first of which is that the evidence could not have been obtained for the original hearing.

17. However, in *Newcastle Upon Tyne City Council v Marsdon UKEAT/0393/09*, the EAT emphasised the importance of the overriding objective to deal with cases justly, including ensuring that the parties are on an equal footing. Tribunals should not apply restrictive formulae in deciding whether to grant a review, even though the overriding objective has not made established principles irrelevant. In this case, there were exceptional circumstances warranting a review that the claimant's counsel had misled him by advising him he should not attend a hearing; and the Council suffered no prejudice from a review beyond the fact that a case it believed to be over would have to be re-opened.

Parties' submissions

18. The respondent argued that the claimant managed to explain her case in the December hearing, except for the discrete area of cognitive impairment. The GP Letter was vague as to the period if time to which it related and merely regurgitated information given by the claimant to her GP. The claimant had not in fact given her evidence on SAE at the end of the December Hearing, as the claimant said, but at the start. The claimant had every opportunity to put her case prior to the December hearing, in her claim form and impact statement. It had largely been a non combative hearing with the Judge asking the claimant most of the questions put to her. The claimant had the opportunity to bring medical evidence to the December hearing, and she did so, and was able to redact it. It relied on *Hasan Tesco Stores UKEAT/0098/16*

which state that a Tribunal can expect even unrepresented parties to read and digest information sent to them or to seek assistance if they do not understand what the document conveys. Relying on a cognitive impairment to explain why evidence had not been given about cognitive impairment was a cyclical argument. The claimant had not put forward any evidence to support her argument for an SAE based on cognitive impairment.

19. The claimant had a tendency to give fresh evidence in her submissions. She said that she did not go into detail in the December Hearing about her cognitive impairment because she assumed this would be implied. She said if she was mentally impaired with anxiety, she struggled to understand things clearly and could not comprehend. She said that when she could not cook for herself, she was cognitively impaired and so could not follow the processes. She thought she had already highlighted her cognitive impairment in her impact statement. If she was impaired, she did not understand and answer questions.

Conclusions

20. The issue for us to determine is whether it is necessary in the interests of justice to reconsider the December Judgment. We consider this is essentially a question of whether, on the one hand, the claimant did not have a fair opportunity to present her case or, on the other hand, whether in fact she had such an opportunity and is now seeking to have a 'second bite at the cherry' IE a further attempt to convince the Tribunal of her case.

21. Pointing to the claimant not having a fair opportunity to put her case:

    a. The claimant stated in her application in broad terms that her medical conditions meant that she struggled to convey the necessary information in the December Hearing and her anxiety during the hearing inhibited this.

    b. The claimant gave evidence that she was very anxious in the December Hearing so that her brain shut down and she was unable to explain herself and she struggled to understand what she needed to say. It was difficult for her to think 'on the hoof'.

    c. The GP Letter confirmed that between February 2022 and August 2023, the claimant experienced cognitive impairment such as poor concentration and new information retention.

22. There are a number of aspects of this case which point to the claimant merely wanting a second bite of the cherry:

    a. In her application, she said that it was difficult to describe the intricacies of her disability without the relevant medical expertise, which suggests it is the lack of medical expertise which was the issue, not her disability.

    b. In her evidence, she said that she misunderstood the intricacies of cognitive impairment as it related to mental impairment; and she did not have the knowledge which she now had about cognitive functions; and she did not realise she had to explain that the examples she gave of SAE were all due to cognitive function; and she was not expecting to have to explain the difference between mental and cognitive impairment; she did not have the knowledge which she now had about cognitive impairment; she thought she had put the necessary evidence in her impact statement. All of these points relate to the

claimant's level of knowledge and understanding, not to her difficulty understanding and communicating in the December Hearing.

c. The claimant did manage to explain her case sufficiently in the December Hearing to mean that the Tribunal made a finding that she had a disability. When asked direct questions about SAE, she was able to give examples. In particular, we refer to paragraphs 16 to 18 of the December Judgment.

d. The claimant had every opportunity to make her case for SAE in a possible medical statement (which she did not take the opportunity to produce) and in the impact statement which she did produce. The fact that she failed effectively to do so was apparently because, as an unrepresented party, she did not understand the process and legal issues. The claimant was afforded leniency by the Tribunal in the December Hearing to have another go at giving the evidence which she needed to prove her case because the Tribunal recognised the difficulties faced by unrepresented parties. However, if the claimant had had some level of skilled professional input to her case, she could have included all the relevant information in her impact statement. It cannot be right that an unrepresented party should have the benefit of a reconsideration because they do not understand the process and issues and realise their error after going through the hearing and receiving the judgment. If it were right to give them this benefit, the other party and tax payer would be put to disproportionate expense through repeated hearings about the same point.

23. On balance, we consider that the reason the claimant did not prove the parts of the case which she wished to prove at the December Hearing was because, as an unrepresented party, she did not understand the processes and legal issues. We consider that she did have a fair opportunity to present her case in the documents which she prepared prior to the hearing and in the hearing itself. She was able to give detailed evidence on SAE in answer to the Tribunal's questions. We consider that if her brain had shut down to the point that she could not explain herself, she would not have been able to do this. It is a constant challenge for unrepresented parties in the Employment Tribunals to win their cases because they do not understand the processes and legal issues, but this is not a legitimate reason for reconsideration of a judgment.

24. Therefore, we reject the claimant's reconsideration application.

25. We will now arrange a preliminary hearing which, subject to the discretion of the Judge, will be to determine the issues in the case, consider whether there should be a hearing to consider whether it would be appropriate to consider an application from the respondent to strike out some or all of the claims or to order a deposit to be paid as a pre-condition of continuing with some or all of the claims; and if appropriate to make orders for preparation of the final hearing and list the final hearing.

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Employment Judge Kelly

Signed electronically by me
22 August 2023

Sent to the parties on:

12 September 2023

For the Tribunal: