



EMPLOYMENT TRIBUNALS

Claimant: XYZ

Respondent: Midland Red (South) Limited

UPON APPLICATION made by letter dated 10 January 2024 to reconsider the judgment dated 22 December 2023 under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing, the Tribunal panel has reconsidered its judgment.

The Tribunal panel does not believe that there are grounds for its original decision to be altered, and its decision stands in its entirety.

The period of time in which a Respondent has to pay an award is set out in the Industrial Tribunals (Interest) Order 1990. This states that where a Tribunal reviews its decision pursuant to the Rules of Procedure, and the sum of money is confirmed, the relevant decision day is the day of the decision which is the subject of the review. The Tribunal does not therefore have the power to place a stay on the Respondent's obligation to pay the award made in the Tribunal's judgment.

JUDGMENT

1. The Tribunal made a finding of fact that the Claimant had soiled himself as a result of being asked to work shifts which did not meet the terms of the reasonable adjustments requested by the Claimant.
2. The Respondent has challenged this finding of fact on the grounds set out below. The Tribunal has considered each of these grounds and rejected them. Our reasoning is set out below in more detail:

2.1. There is no evidence that the Claimant soiled himself

2.1.1. The Claimant gave evidence to this effect as part of his sworn testimony, and the Tribunal has accepted this evidence. This is a finding of fact that the Tribunal was entitled to make.

2.2. The Respondent's witnesses gave evidence that, had the Claimant soiled himself, his bus would have been temporarily brought out of commission for a

deep clean. The Respondent gave evidence that no such complaints were made not that any such cleaning was required.

2.2.1. The Tribunal considered the evidence of the Respondent's witnesses on this point and preferred the Claimant's evidence, for the reasons set out in paragraphs 4.2.25.1-4.2.25.3

2.3. No consideration was given as to when the Claimant soiled himself and it could have happened outside of the limitation period.

2.3.1. The Tribunal made a clear finding of fact on this point. The Tribunal set out in its judgment which shifts it found were inappropriate, and found that the Claimant had soiled himself as a result of being made to work these shifts.

2.4. The fact that the Claimant had soiled himself was not pleaded in his ET1, nor in his witness statement nor as an issue to be determined at the outset of the hearing when time was taken to identify the issues.

2.4.1. It is correct that the Claimant did not specifically state in his ET1 that he had soiled himself. However, the Claimant's ET1 did not set out a specific disadvantage for the purposes of his reasonable adjustments claim. This happened during the case management hearing on 4 May 2023, when the Claimant confirmed that the disadvantage upon which he relied was issues with continence (paragraph 2.3 of the list of issues). We do not therefore accept that this was not a pleaded issue or that the Claimant raised it at a late stage. We will not therefore draw any adverse inference as requested by the Respondent.

2.4.2. It is correct that this was not an issue that was clarified at the start of the hearing. This is because it was an issue that was clearly set out in the list of issues produced as a result of the case management hearing on 4 May 2023 and so did not require further clarification.

2.4.3. It is correct that the Claimant's witness statement does not specifically state that he soiled himself during the period in question. However, the evidence within that statement is consistent with a finding that he did. He explains in that statement that he needs regular toilet breaks in order to assist with managing his condition, and sets out how he had previously explained to a manager that his condition could result in him soiling himself.

2.4.4. Further the Claimant gave oral evidence to the effect that he had soiled himself. It is the panel's recollection that this occurred during cross-examination and went unchallenged. Whilst the Claimant did give further evidence on this point during re-examination, it was during cross-examination that he stated that he had to carry out wet wipes, toilet paper and clean underwear with him, and also stated that he had "shit himself".

2.5. The Claimant's condition fluctuated over time and so the Claimant would not always be at a substantial disadvantage.

2.5.1. The Tribunal made a finding of fact that the Claimant soiled himself when asked to work inappropriate shifts. For the reasons set out above, this was a finding of fact that the Tribunal was entitled to make. It is clear that this amounts to a substantial disadvantage.

2.5.2. There appears to be a suggestion that the Tribunal should not have relied upon

the contents of an Occupational Health report from 2016 when making this finding, as the Claimant's condition could fluctuate over time. However, the Tribunal did not rely on this report in isolation. The Tribunal accepted the Claimant's evidence given by the Claimant on this point. The Occupational Health report was supportive of this evidence, in that it indicated that issues with continence could be a symptom of the Claimant's condition.

3. **Quantum**

- 3.1. The Respondent has asked that the award be reduced on the basis that it was based on an incorrect finding of fact. For the reasons set out above, the Tribunal does not accept that it made an incorrect finding of fact. The award remains at the level set by the Tribunal in its judgment.

Employment Judge **Routley**
23 January 2024