EMPLOYMENT TRIBUNALS

Claimant: Mrs J Garner

Respondent: Cheshire Autism Practical Support Limited

Refusal of Reconsideration Request

Background to this application for reconsideration

1. A preliminary hearing to determine the claimant's disabled status for the purposes of section 6 Equality Act 2010 was heard on 2 October 2023. The claimant was supported at that hearing by Dr Sillitoe, who was presented to the Tribunal as an expert support in autism, and the respondent was represented by Mr Flood, Counsel.

2. The decision of the Tribunal was that the claimant, who had autism, was not disabled by her condition at the relevant time. On 13 November 2023 the claimant made an application for Reconsideration of that decision.

The Relevant Law

3. Rule 70 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 provides that a Tribunal may reconsider any judgment where it is necessary in the interests of justice to do so.

4. Rule 71 provides that an application for reconsideration shall be presented in writing and copied to all the other parties within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision as necessary.

4. Rule 72 provides that an Employment Judge shall consider any application made under Rule 71. Where practicable the consideration shall be made by the Employment Judge who made the original decision or who chaired the full Tribunal which made it. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked the application shall be refused.

5. A Tribunal dealing with an application for reconsideration must seek to give effect to the overriding objective to deal with cases fairly and justly contained within Rule 2 of the Regulations. This includes ensuring that the parties are an equal footing, dealing with cases in ways which are proportionate to the complexity and

importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay, so far as compatible with proper consideration of the issues, and saving expense.

6. Consideration of whether reconsideration is "necessary in the interests of justice" allows the Tribunal a broad discretion which must be exercised judicially which means having regard not only to the interests of the party seeking the reconsideration but also to the interests of the other party to the litigation, and to the public interest requirement that there should be so far as possible finality in litigation.

7. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70).

8. The importance of finality was confirmed by the Court of Appeal in **Ministry of Justice v Burton and anor [2016] EWCA Civ 714** in July 2016 where Elias LJ said that:

> **"The discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Ironsides Ray and Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."**

9. Similarly in **Liddington v 2Gether NHS Foundation Trust EAT/0002/16** the EAT chaired by Simler P said in paragraph 34 that:

> **"A request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or by adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered."**

Application of law on reconsideration

9. The application was made on 13 November 2023 in writing and copied to the respondent. The claimant had made an application for written reasons on 23 October in response to a judgment sent to the parties on 9 October 2023. The Reasons were provided on 5 January 2024. The application was made prior to provision of the Reasons.

10. No representations on reconsideration have been received from the respondent.

11. The majority of the points raised by the claimant are **attempts to re-open issues of fact** on which the Tribunal heard evidence from both sides and made a

determination. In that sense they represent a "second bite at the cherry" which undermines the principle of finality. Such attempts have a reasonable prospect of resulting in the decision being varied or revoked only if the Tribunal has missed something important, or if there is new evidence available which could not reasonably have been put forward at the hearing. One such example of this, in the claimant's submission is her failure to provide her original diagnostic report. In her 13 November 2023 letter the claimant says she did not realise that she should have provided the original report and she attaches the report of Ian Davidson Consultant Psychiatrist diagnosis 1 May 2014. Failure to provide this made no difference. The Tribunal accepted and it is specifically recorded in the Reasons at paragraph 33 that the claimant was diagnosed with autism prior to 2018.

12. In particular the claimant seeks to re-open findings about the impact of her autism on her ability to carry out normal day to day activities during the relevant period of the acts of alleged discrimination. Having read the application and all ancillary correspondences from the claimant from 13 November 2023 to today's date including the Davidson report, the letters of support from Dr Fallon and the Reasons the Tribunal finds that there is nothing new that could not reasonably have been put forward at the hearing in relation to any of the matters raised in the application. The claimant said in her 13 November 2023 letter "my impact statement was dated 9 February 2023 so a lot has changed since then". The Tribunal was considering the impact of her autism on her ability to carry out her normal day to day activities at the time of the acts of discrimination complained of, and not in the period after she brought her claim.

13. The principle that the claimant cannot seek reconsideration in order to relitigate disposes of almost all the points made by the claimant. However, there are some points that relate to **the fairness of the hearing itself** that she makes which the Tribunal takes care to address specifically. The Tribunal has gathered them up from her 13 November 2023 letter and subsequent correspondences because she had not put all of what might be considered to be her grounds for seeking reconsideration, in one place.

14. In her letter of 13 November 2023 the claimant described herself as in "*autistic burnout*" since June 2021. The claimant had provided an impact statement which was considered and was cross-examined on it against the timeline of alleged acts of discrimination. The implication for reconsideration is that she may still have been in "autistic burnout" on 2 October 2023. She says she was "*so stressed I did not sleep for the week leading up to the hearing… was sick the night before and on the morning of the hearing …was in panic mode…. didn't know I would be interrogated or that I would have to prepare a summation for the court …can't remember any of the questions I was asked…. couldn't process the questions…not able to consider the implications of my answers…felt like I had daggers in my back*.

15. Litigation is stressful for everyone, and it is not uncommon for those without autism to describe feeling as the claimant says she felt in the run up to a hearing. The Tribunal has considered was the claimant so unwell that she could not give best evidence and on those grounds would it be in the interests of justice to reconsider the disabled status decision. The Tribunal finds it would not for the following reasons:

Support and consultation

16. The claimant was supported by Dr Sillitoe and consulted as to how she was feeling, how her autism impacted her ability to participate and what adjustments would be needed.

Adjustments

17. Paragraphs 4 and 5 of the Reasons refer to the adjustments that were consulted on and agreed with the claimant at both a ground rules hearing before EJ Howard on 28 June 2023 and at the outset of the 2 October hearing 2023.

Equal Treatment Bench Book

18. At the hearing reference was made to the Equal Treatment Bench Book, the claimant was asked how her autism affects her and adjustments were put in place to support her with agreement of Dr Sillitoe. The Reasons record at paragraph 4 the detail of that discussion.

Advocate's Gateway

19. Specific reference was made at the hearing to the Advocate's Gateway and Mr Flood agreed to signpost areas of questioning clearly, use short, non-tag questions, allow time for consideration of documents, which he did.

Processing time

20. The claimant said in her letter of 13 November 2023 "*I need time to process and consider my responses / the consideration of time was not given to me"*. The Tribunal rejects her suggestion that time was not given to her in cross-examination. The claimant was given time in cross-examination to answer slowly and take time to think, consult her Impact Statement and consult documents if she wished to. The Tribunal recalls assisting her to feel comfortable about these quiet gaps by saying that it gave the judge time to catch up her note taking.

Adjournment to look at documents

21. The claimant was given an hour at the start of the hearing, by agreement to look at documents that Mr Flood brought to the hearing. They were all her own Facebook entries, were not new to her and having had an hour, and been offered an adjournment, the claimant and Dr Sillitoe said that the claimant was ready to give evidence. This is dealt with in detail at paragraphs 7 to 10 of the Reasons.

Advance notice of areas of cross-examination

22. Mr Flood for the respondent alluded to the Advocate's Gateway. There was discussion of the appropriate preparation of the individual and in particular he made it clear to the claimant before she went out for an hour to look at the papers, that he was going to question her on the basis that she was exaggerating the impact of her condition on her ability to do normal day to day activities and that he

was going to be saying that she hadn't been wholly truthful in her application for benefits. The relevant factual findings are at paragraph 21 of the Reasons. The key point is that Mr Flood signalled to the claimant in advance of her break for an hour that this would be part of his questioning in cross-examination. The claimant knew before she gave evidence what was going to be asked of her and she had a break and agreed she was able to proceed.

Flexibility in questioning

23. Mr Flood adopted a flexible approach to questioning, in breaking questions down into short questions, in allowing time for the claimant to find a document and read it, though there was little need to refer to documents in the cross examination, and in adapting questions. The Tribunal checked with the claimant during cross-examination that she was OK and slowed the process by reference to the judge's note taking. Dr Sillitoe did not at any point interrupt the cross-examination or interject to request a break or any more support for the claimant.

Needed assistance

24. The claimant said, for the first time, in her letter of 13 November 2023 *"I am incapable of providing testimony without assistance…unable to function adequately to comply with disability laws*". The Tribunal rejects this assertion. There was a ground rules hearing, discussion on ability to give best evidence and adjustment at the outset of the preliminary hearing on 2 October 2023 and this was kept under review throughout the hearing. At no point did the claimant say she could not give evidence without assistance or even that she was struggling. The Tribunal found her to be a capable witness. The Reasons record that she was a witness who was able to give relevant answers, to put her case in response to questions and to deflect the thrust of a question with an additional piece of information.

Did not give my best output in my application for reconsideration

25. By an email dated 19 January 2024, relating to case management matters in the claimant's ongoing unfair dismissal and other money claims, the claimant said:

> *"I don't consider I gave my best output (in the application for reconsideration dated 19 November) due to my illnesses. I was very stressed the week before this date.*
>
> *Considering what I needed to say; spent several days working on the submission, and relapsed following the submission. It took another week of neglecting myself, family and the house before I was able to function adequately...I have hundreds of documents in evidence which are intertwined with the issues of disability discrimination and cannot be separated [from the UDL claim]".*

26. The Tribunal, in so far as the claimant says that her 13 November 2023 letter was not her best attempt at submissions in support of a reconsideration application, rejects the submission that a different or better put, reconsideration

request would have resulted in reconsideration. For the reasons set out above the claimant is not entitled to re-litigate a point that went against her just because she thinks she could have put that request better.

27. Further, there was a hearing before EJ Benson on 22 March 2024 at which the claimant agreed that she does not and did not need an intermediary, said that she had complied with most of the case management orders in that part of her case made on 2 October 2023 and is ready to proceed to final hearing in her unfair dismissal complaint.

The letters in support of the claimant

28. The Tribunal has had regard to the letter from Kathy Fallon a GP who is a friend of the claimant dated 23 January 2024. It is in effect a character reference and submission in support of reconsideration. Dr Fallon says, "*I am very concerned that you have formed the opinion that her autism was not a substantial contributory factor to her anxiety and depression given all the information available about Jo personally and people on the autism spectrum in general".* The Tribunal had regard to the previous letter from Dr Fallon dated 24 July 2022, herself a former chair of trustees of the respondent charity and someone who had support from the claimant and the respondent for her own son. None of the content of either of these letters amounts to a reason to reconsider the decision. The claimant was not relying on anxiety and depression as a disability. Dr Fallon's opinion, however helpfully volunteered, is not sufficient to overturn findings of fact made on oral evidence before the Tribunal.

Absence of further medical evidence

29. The claimant said in a chase up letter dated 12 February 2024 "*I wasn't aware I needed to provide further medical evidence to substantiate my disability*" Whilst medical evidence is relevant to a determination on disabled status the Tribunal notes that 1) the claimant adduced medical records and they were considered, her diagnosis was accepted and 2) her own oral evidence carried more weight as to the impact of her autism on her ability to carry out her normal day to day activities than those medical records.

30. In so far as there may be some overarching submission on reconsideration that all of the above taken together mean that the claimant was in any way incapacitated or not able to participate in the hearing on 2 October 2023 that contention is rejected. The claimant was identified as vulnerable in the sense of being a person with autism, anxiety and depression and adjustments were made with her consent and that of Dr Sillitoe.

Conclusion

31. The claimant's grounds for reconsideration amount to matters that were before the Tribunal and have been determined. It was for the claimant to tell the Tribunal how her autism affected her. She did that, the Tribunal listened carefully to her, read her impact statement and looked at the contemporaneous records, and the medical notes. From all of those it was found that the effect of the autism was not substantial at the relevant time. There is nothing new here that would

affect or have affected the outcome.

32. In reaching the decision not to reconsider the Tribunal has had regard to the importance of finality in litigation for both parties and has considered the impact of a reconsideration determination either on paper or in person for the parties and the cost to which that would put both parties.

33. The Tribunal rejects the request for reconsideration on the ground that it is not necessary in the interests of justice as there is no reasonable prospect that any one of the grounds set out in the claimant's application, or all of them taken together, could lead to the original decision being varied or revoked.

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Employment Judge Aspinall

Date: 27 March 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON

4 April 2024

FOR THE TRIBUNAL OFFICE