



EMPLOYMENT TRIBUNALS

Claimant: Mr J Price

Respondents: 1. Creations Hair and Barbering Studio
2. Creations Hairdressers and Barbering Studio Ltd
3. White Label Cosmetics Ltd

Heard at: Manchester

On: 18 April 2024 (in chambers)

Before: Employment Judge McDonald
(sitting alone)

REPRESENTATION:

Claimant: Not in attendance

Respondents: Not in attendance

JUDGMENT ON RECONSIDERATION

1. The claimant's application dated **1 January 2024** for reconsideration of the Strike out Judgment dated **25 January 2023** sent to the parties on **14 February 2023** is refused. The application was received more than 14 days after the date the decision was sent to the parties. It is not in the interests of justice to extend the time for making the application.
2. The claimant's application dated **25 October 2023** for reconsideration of the Costs Judgment dated **5 October 2023** sent to the parties on **13 October 2023** is refused.

REASONS

1. In a claim form presented on 5 July 2022, the claimant complained of unfair dismissal, breach of contract, victimisation, harassment related to disability and various forms of disability discrimination. The claimant's claim was struck out by my judgment dated 25 January 2023 which was sent to the parties on 14 February 2023 ("the Strike Out Judgment").

2. The claimant had brought his claim against the 3 named respondents. The second respondent accepted it was the claimant's employer. On 13 March 2023 it applied for a costs order in favour of the second respondent on the grounds that the claimant had acted vexatiously or otherwise unreasonably in the conduct of proceedings. On 5 October 2023 I granted the application. I ordered the claimant to pay the second respondent costs of £2907 plus VAT, a total amount of £3488.40. My judgment on costs was sent to the parties on 13 October 2023 ("the Costs Judgment").
3. In this judgment when I refer to the respondent, it means the Second Respondent.
4. On 17 October 2023 the claimant wrote to the Tribunal apologising for his non-attendance at the Tribunal hearing and requesting written reasons for the Judgment. He did not specify of which judgment. Both the Strike Out Judgment and the Costs Judgment included written reasons for the judgments.
5. On 25 October 2023 the claimant applied for reconsideration of the Judgment sent on 13 October 2023, i.e. the Costs Judgment. The claimant had not copied his application for reconsideration to the respondent. I directed that the claimant do so and also send the Tribunal and the respondent any documents relied on in support of the application for reconsideration by 5 December 2023. I confirmed I would then consider the reconsideration under rule 72(1) to decide whether it had any reasonable prospects of success.
6. On 4 December 2023 the claimant provided supporting documentation, which I discuss below.
7. On 5 December 2023 the second respondent wrote to the Tribunal attaching copies of social media posts by the claimant which it submitted contradicted the claimant's submissions about his mental health difficulties. I deal with those below.
8. On 13 December 2023 the Tribunal wrote to the parties on my direction confirming that after initial consideration of the application under rule 72(1) of the Employment Tribunal Rules 2013, I had decided that the application should proceed to full consideration. That letter made it clear for the avoidance of doubt that the application being considered was to reconsider the Costs Judgment and that the Tribunal was not aware of an application to reconsider the strike out Judgment. The Tribunal's letter confirmed that even if the Costs Judgment was reconsidered and varied or revoked, the claimant's claim would still be struck out because the Strike Out Judgment had not been challenged.
9. I directed that the respondent write to the Tribunal by 3 January 2024 setting out its reasons why the Judgment should not be reconsidered. I confirmed that I would take into account the respondent's email and attachments of 5 December 2023 and directed that that be copied to the claimant because it was not clear that it had been. I ordered that the parties write to the Tribunal by 3 January 2024 setting out their views on whether the application could be determined without a hearing.
10. On 1 January 2024 the claimant wrote to the Tribunal applying to reconsider the Strike out Judgment.

11. On 3 January 2024 the respondent wrote to confirm that it had no objection to the Tribunal dealing with the application without a hearing. It set out its submissions in response to the application.

12. This Judgment deals with the claimant's application to reconsider the Strike Out Judgment and the application to reconsider the Costs Judgment. I considered both in chambers without the parties on 18 April 2024. I decided it was in the interests of justice to decide the application without a hearing.

Relevant Law

13. An employment tribunal has a power to reconsider a judgment “where it is necessary in the interests of justice”. On reconsideration the decision may be confirmed, varied or revoked and, if revoked, may be taken again (Rules 70-73 of the Employment Tribunal Rules).

14. An application for reconsideration shall be presented within 14 days of the date on which the judgment was sent to the parties or within 14 days of the date that written reasons were sent (if later). It must be copied to the other party (rule 71 of the Employment Tribunal Rules).

15. An application for written reasons of a judgment given orally must be made within 14 days of the sending of the written record of the judgment to the parties (Rule 62(3) of the Employment Tribunal Rules).

16. Applications are subject to a preliminary consideration by an Employment Judge. They are to be refused if the judge considers there is no reasonable prospect of the original decision being varied or revoked (rule 72(1) of the ET Rules). If not refused, the application may be considered at a hearing or, if the judge considers it in the interests of justice, without a hearing (rule 72(2) of the ET Rules).

17. The “interests of justice” allows for a broad discretion. That discretion 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, so far as possible, be finality of litigation (**Outsight VB Ltd v Brown [2015] ICR D11, EAT para 33**).

18. Achieving finality in litigation is part of a fair and just adjudication. The importance of finality was confirmed by the Court of Appeal in **Ministry of Justice v Burton and anor [2016] EWCA Civ 714**. It has also been the subject of comment from the then President of the Employment Appeal Tribunal in **Liddington v 2Gether NHS Foundation Trust EAT/0002/16** (paragraph 34) in the following terms:

“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.”

19. Where the application for reconsideration is based on new evidence the approach laid down by the Court of Appeal in **Ladd v Marshall 1954 3 All ER 745, CA** will, in most cases, encapsulate what is meant by the “interests of justice”. That means that in most cases, in order to justify the reception of fresh evidence, it is necessary to show:

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

20. The interests of justice might on occasion permit evidence to be adduced where the requirements of **Ladd v Marshall** are not met. (**Outsight** at paras 49-50).

Relevant Facts

21. I set out in this section the facts relevant to my decisions. I base them on the Tribunal file and the submissions and evidence provided by the parties.

The Strike out Judgment

22. The Tribunal had listed a preliminary hearing for case management on 2 December 2022. The claimant did not attend that hearing and was not represented. Because the claimant did not attend, Employment Judge Horne issued a strike out warning. That warning was set out in the Case Management Order made by Employment Judge Horne at the preliminary hearing. The warning explained the Tribunal was considering striking out the claimant's case under rule 37 of the Employment Tribunal Rules 2013 because the history of the case tended to suggest that the claimant was not pursuing his claim actively and/or was conducting it unreasonably. The claimant was given 14 days from the date when the Case Management Order was sent to the parties to make representations in writing as to why his claim should not be struck out and/or to ask that the question of striking out be decided at a hearing. That Case Management Order was sent to the parties on 9 December 2022. The claimant did not respond at all. He had not responded to any correspondence from the Tribunal since he issued his claim. As a result, on 25 January 2023 I made the Strike Out Judgment.

23. There is no suggestion by the claimant that he did not receive the Strike out Judgment or any of the other orders or communications from the Tribunal. His postal and email addresses he used for his reconsideration application are the same as those on his claim form. The Tribunal has used those same addresses throughout these proceedings.

The Costs Judgment

24. The second respondent applied for costs by a letter dated 13 March 2023 from its representatives, Hodge Halsall. The application was copied to the claimant by email and by post. On 5 April 2023 Employment Judge Ainscough directed that the claimant provide his comments on the application for costs by no later than 14 April 2023. That letter from the Tribunal dated 5 April 2023 made it clear that if the claimant did not request a hearing the matter would be dealt with on the papers without a hearing. That letter was sent to the claimant by email on 5 April 2023.

25. On 20 July 2023 the Tribunal wrote to the parties by email on my direction confirming that the costs application would be heard in chambers on 7 September 2023. The letter confirmed that if the claimant wanted to make representations to the Judge in person about the costs order he must write to the Tribunal by 24 August 2023 to say so. The letter also directed that if the claimant wanted to make representations in writing about why a costs order should not be made or how much it should be he must send those written representations to the Tribunal, copying the respondents, by 24 August 2023. The letter directed that the respondents send a chronological version of the costs schedule to the Tribunal and the claimant.

26. The respondents complied with the direction to provide a costs schedule by 31 July 2023. They sent a copy of that costs schedule to the claimant.

27. The claimant did not respond at all.

28. On 13 October 2023 the Costs Judgment was sent to the parties. On 1 December 2022 the claimant's then representatives, Stephenson Solicitors, had written to the Tribunal to confirm that they were no longer representing the claimant and asking that they be removed from the Tribunal's records. The Tribunal did so and wrote direct to the claimant from then on. The claimant's letter dated 17 October 2023 requesting written reasons was the first correspondence the Tribunal had had from the claimant or his representative since that communication from Stephenson dated 1 December 2022.

Evidence provided by the claimant in support of his reconsideration applications

29. The claimant's application dated 25 October 2023 to reconsider the Costs Judgment sets out four grounds for seeking reconsideration. The first is a lack of legal representation. I accept, based on the Tribunal's file, that the claimant's legal representatives had ceased to represent him by the time of the preliminary hearing conducted by Employment Judge Horne on 2 December 2022. There was no evidence as to at what point prior to that they had ceased to do so. I find the claimant was not legally represented when he was sent the Strike Out Judgment and during the costs application process.

30. The second point relied on by the claimant is what he referred to as "significant mental health challenges". He referred specifically to cluster headaches which he says are a recognised disability. The claimant said that those debilitating headaches severely impacted his ability to effectively represent himself or attend the Tribunal hearing, by which I understand him to mean the preliminary hearing conducted by Employment Judge Horne on 2 December 2022.

31. The claimant provided medical evidence in support of his submission. They included GP records, fit notes and correspondence with DWP about the award of (and appeals against decisions relating to) Universal Credit and Personal Independence Payments.

32. Based on that evidence I find that the claimant has suffered from debilitating cluster headaches from at least 7 April 2020. The claimant's medical records show that the claimant was still getting cluster headaches in June 2022, sometimes clustering a few at night. The medical records were printed on 15 July 2022. That means they provide no information about the claimant's medical and mental health position as at the time of the case management hearing which he did not attend in December 2022, nor in relation to anything that happened in 2023.

33. The supporting evidence provided by the claimant included two fit notes. The first signed him off as not fit for work due to cluster headaches for four weeks from 7 December 2022. The second signed him off for six weeks due to the same condition from 5 January 2023. Based on the documentation relating to Universal Credit and Personal Independence Payments I find that in 2022 and the first half of 2023 the claimant was involved in claiming and appealing against decisions relating to disability related benefits. I find that in July 2023 the DWP accepted that the claimant has a chronic and painful condition which is debilitating and that it does not appear possible to predict the onset of cluster headaches. I find that the Universal Credit appeal in July 2023 concluded that the cluster headaches affected the claimant's functional ability for the majority of the time and that when affected he is unable to complete the normal activities of daily living due to significant and overwhelming pain. That resulted in the claimant being awarded increased Universal Credit based on his having limited capability for work-related activity rather than the on the basis of his having limited capability for work.

34. The respondent had provided extracts from the claimant's Facebook page with his submissions. They date from May to October 2023. It is difficult to assess the reliability of that evidence given that I do not have the whole of the claimant's posts for the relevant period. That makes it difficult to know to what extent the evidence supplied by the respondent is selective. Even taking that concern into account, I find that the posts do show that at least at times from June to October 2023 the claimant was sufficiently free from the effects of cluster headaches to be pro-actively involved in re-decorating his home and in attending social events with his partner.

35. Based on the evidence provided I do accept that the claimant does suffer from cluster headaches and that they can be debilitating. I accept that they have an impact on his functional abilities such that he was deemed by DWP to have limited capability for work-related activity. I also find that certainly from during 2023 (and certainly from April 2023 onwards) the effects of the cluster headaches did not completely incapacitate the claimant all the time. He was able to pursue an appeal against the original decision about Universal Credit by way of an appeal on 24 April 2023 with the resolution being received on 17 July 2023. He was also from May 2023 able at least at times to be involved in activities such as redecorating his home and in attending social events.

36. The third reason for reconsideration referred to by the claimant is what he referred to as "overwhelming personal circumstances". He referred to the two

Tribunals he was involved in with DWP. He argued that the cumulative effect of these circumstances placed an overwhelming burden on him, making it extremely challenging to adequately represent himself in a legal setting. He also referred to difficult personal circumstances. Based on the supporting evidence provided by the claimant I find that he faced financial difficulties in mid-late 2022. I accept that those difficulties would have been to some extent caused or at least exacerbated by his dismissal in May 2022. The evidence supports the claimant's submission that in mid-late 2022 he was struggling to pay his rent which meant his home was at risk. His financial situation had significantly improved at the very latest by 17 July 2023 when his appeal relating to the rate of Universal Credit was resolved.

37. The fourth reason mentioned in the letter is what he called "lack of evidence". The claimant acknowledged that he had failed to provide evidence to the court to substantiate his grounds for pursuing his claim. The claimant submitted that given the opportunity to present his case with a proper legal representation he could provide the necessary evidence.

Discussion and Conclusion

38. I deal first with the application to reconsider the Strike out Judgment and then with the application to reconsider the Costs Judgment.

Application to reconsider the Strike out Judgment

39. The strike out Judgment was sent to the parties on 14 February 2023. The claimant did not apply to reconsider that Judgment until 1 January 2024. That is significantly outside the 14 day time limit for seeking reconsideration. In fairness to the claimant I have considered whether the position is altered by his request for written reasons dated 17 October 2023. I find it is not. That is because written reasons were included as part of the Strike Out Judgment. The 14 day deadline ran from the 14 February 2023.

40. I have considered whether it would be in the interests of justice to extend that time limit.

41. The reasons given by the claimant for seeking reconsideration of the strike out Judgment are set out in his letter of 1 January 2024. He submits that at the time of the tribunal (i.e. on 2 December 2022) he was signed off work and dealing with overwhelming personal circumstances. His application says that having now had the opportunity to seek advice and review the situation he is keen to proceed with the reconsideration of the Strike out Judgment saying that he believed that "a fair and just resolution could be achieved through an out of court settlement, given the circumstances surrounding the case".

42. The claimant's application explains why he says the Strike Out Judgment should not have been made. It does not provide an explanation for the delay in applying to reconsider the Strike Out Judgment. The application was made some 11 months after the Strike Out Judgment was sent to the parties. I have accepted that the claimant suffers from cluster headaches and that they are debilitating. I also found that they do not affect the claimant all the time. They did not prevent the claimant pursuing advice and lodging appeals against the DWP's decisions on his

benefits in early 2023. The facts do not support a conclusion that the claimant was prevented from applying to reconsider the Strike Out Judgment for the whole of 2023 because he was incapacitated by a combination of his cluster headaches and other pressures. He was signed off sick for 6 weeks from 5 January 2023. Even if I accept that he was unable to make an application to reconsider the Strike Out Judgment until that fit note expired, that would only explain a delay until late February 2023 at the latest. It is clear that by April 2023 the claimant was in a position to pursue an appeal in relation to his Universal Credit. Being the most generous to the claimant I can be, on his own case, his appeal in relation to Universal Credit had been resolved by July 2023. In the circumstances, I do not find that there is reasonable explanation as to why the claimant did not seek to file his reconsideration application in relation to the strike out Judgment before 1 January 2024. Even if I take the date of the reconsideration application for the Strike out Judgment to be 25 October 2023 (on the basis that the claimant was confused about which Judgment he was applying to reconsider), that application would be made some 7-8 months out of time.

43. The lack of legal representation does not provide a sufficient explanation.– the Tribunal deals with many (if not most) of its claims with claimants who are unrepresented. Information about reconsideration is sent to parties with Judgments, and in those circumstances I do not find that the absence of representation is sufficient explanation for the delay in itself or taken with the other matters raised by the claimant.

44. Given the requirement for finality and the need to be fair to both parties in the case, I do not find it is in the interests of justice to extend time for the claimant to apply for reconsideration of the Strike out Judgment.

45. On that basis, I refuse the claimant's application to reconsider the Strike Out Judgment because the application was made out of time and it is not in the interests of justice to extend time.

Reconsideration of the Costs Judgment

46. The reconsideration application in relation to the Costs Judgment was brought in time.

47. When it comes to the substance of the reconsideration application, similar considerations apply as to the Strike out Judgment reconsideration. The question for me is whether the claimant has provided evidence to show that it is in the interests of justice to reconsider the Costs Judgment.

48. The relevant period is from March 2023 when the costs application was made to 7 September 2023 when I made the Costs Judgement. The claimant was directed to provide his response to the application by 14 April 2023 and given another opportunity to do so by 24 August 2023. He did not respond to any of the correspondence from the Tribunal and did not engage with the costs application process at all until after the Costs Judgment was made against him.

49. Based on my findings of facts, I find that the reasons given by the claimant for not engaging with the original Tribunal proceedings had significantly alleviated by April 2023 (and certainly by July 2023 when his Universal Credit appeal was

resolved in his favour). I accept the claimant still suffered from cluster headaches and their effects could be debilitating. However, the other factors (financial issues, ongoing benefits appeals) had been resolved at the latest by 17 July 2023. By then he was able at least at times to socialise and was proactively redecorating his home. At the very least, there is no explanation for the claimant not responding to the cost application by 24 August 2023. This is not a case where reconsideration is required in the interests of justice because the claimant was incapacitated from taking part in the process resulting in the Costs Judgment. There is no suggestion that he was not receiving the communications from the Tribunal.

50. When it comes to the medical evidence provided by the claimant in support of his reconsideration application, none of that medical evidence has come to light since the Costs Judgment was made. There would have been nothing to prevent the claimant from sending in his medical notes and his fit notes and other evidence in response to the respondent's costs application to support an argument that a costs order should not be made. He did not do so. Applying the approach in **Ladd v Marshall**, I find that while the evidence might potentially be relevant there is no explanation as to why it could not have been obtained with reasonable diligence for use during the costs proceedings. In those circumstances I do not consider that that new evidence should be allowed, nor do I find that the application for reconsideration based on it should be allowed.

51. The importance of finality in litigation means that the claimant should not be given a "second bite at the cherry" by running his case in response to the costs application now when he failed to do so without good reason in 2023. Given the absence of an explanation for the claimant's non-engagement with the costs process, the importance of finality and the need to be fair to both parties, I have decided it is not in the interests of justice to reconsider the Costs Judgment. The application to do so is refused.

Employment Judge McDonald

Date: 19 April 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
26 APRIL 2024

FOR THE TRIBUNAL OFFICE

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