EMPLOYMENT TRIBUNALS

Claimant: Mr Benham

Respondent: Boots Management Services Limited

UPON THE CLAIMANTS' APPLICATION pursuant to rule 71 of the Employment Tribunals Rules of Procedure 2013 for reconsideration of the Judgment dated 29 April 2024 and sent in writing to the parties on 12 June 2024.

JUDGMENT on RECONSIDERATION APPLICATION

The Claimant's reconsideration application is refused.

REASONS

There is no reasonable prospect of the original decision being varied or revoked for the following reasons:

1. The Tribunal gave an oral judgment at the hearing on 24 April 2024, and a Judgment was sent to the parties on 12 June 2024 ("the Judgment") following a one day hearing to determine whether the Claimant was disabled in accordance with s.6 of the Equality Act 2010 ('EQA'). In that Judgment it was determined that the Claimant's condition of Dyslexia did not satisfy the definition of a disability as set out in s.6 of the EQA and accordingly his claims for disability discrimination were dismissed with the remainder of his claims then listed for a final hearing on the 7-14 April 2025.

2. In an email dated 20 May 2024 the Claimant applied for reconsideration of the Judgment. The Tribunal sent a copy of this application to the Respondent on the 3 July 2024 and the Respondent responded by the 12 July 2024.

3. Rule 70 of the Employment Tribunal Rules of Procedure 2013 empowers the Tribunal, either on its own initiative or on the application of a party, to reconsider any judgment where it is necessary in the interests of justice to do so. Under Rule 72(1), an Employment Judge may determine an application on their own and without a hearing if they consider that there is no reasonable prospect of the original decision being varied or revoked.

4. Rule 71 requires that any application for reconsideration must be presented in writing within 14 days of the date on which the written record, or other written communication, of the original decision is sent to the parties. The Judgement given on the 24 April 2024 was sent to the parties on 12 June 2024 and accordingly the Claimants' application (20 May 2024) has been made in time.

5. I am satisfied that the interests of justice do not require that there is a hearing to determine the Claimants' application for reconsideration and that I can deal with these matters fairly and justly on the strength of what is a detailed written application.

The reconsideration application

6. Turning then to the application for reconsideration, the starting point has to be the decision the Tribunal reached after the preliminary hearing which took place on the 24 April 2024.

7. I was not asked to provide detailed written reasons for my Judgment, despite the right to do so being provided in the Judgment sent to the parties on the 12 June 2024.

8. It would be for the Employment Appeal Tribunal or other appellate court to say whether my decision can stand. Any suggestion that I erred in Law is generally a matter for appeal; there seems to be a suggestion in relation to the application by me of the test as to whether the Claimant is disabled that it contains an error of law and the Claimant refers to the cases of **Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763 and Charles v British Telecommunications [2017].** Incorrect application of any legal test is a matter for appeal, not for reconsideration.

9. In **Outasight VB Ltd. v Brown UK EAT/0253/14,** the Employment Appeal Tribunal considered the Tribunals' powers under Rule 70 of the Employment Tribunal Rules of Procedure 2013. At paragraphs 27 – 38 of her Judgment Her Honour Judge Eady QC, as she then was, set out the legal principles which govern reconsideration applications, and observed,

> *"The interests of justice have thus long allowed for broad discretion, albeit one that 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."*

These principles were affirmed by His Honour Judge Shanks in **Ebury Partners.**

10. Similarly, should the Judgment be examined on appeal, it will be for the Employment Appeal Tribunal or other appellate court to say whether the Tribunal's findings, analysis and conclusions ("the Reasons") and the resulting Judgment can stand. Any suggestion that our findings or conclusions were perverse is generally a matter for appeal rather than reconsideration.

11. In **Outasight,** the Employment Appeal Tribunal was referred to the EAT's Judgment in **Redding v EMI Leisure Ltd.** EAT/262/81 in which the EAT had observed:

> *"…When you boil down what is said on* [the Claimant's] *behalf, it really comes to this: that she did not do herself justice at the hearing so justice requires that there should be a second hearing so that she may. Now, "justice" means justice to both parties. It is not said, and, as we see, cannot be said that any conduct of the case by the employers here caused [the Claimant] not to do herself justice. It was, we are afraid, her own experience in the situation…"*

12. The Claimant says in effect in their application for reconsideration that he felt he did not do himself justice at the hearing, but he was afforded a reasonable opportunity to state his position at the hearing. I had the benefit of witness statement from the Claimant and I permitted a late witness statement from his wife Dr Benham, filed just before the hearing, both of whom gave sworn evidence at the hearing; they were cross examined by the Respondent, I had the opportunity to ask them questions, and he had the opportunity to make full submissions to me at the end of the evidence.

13. The overall impression given by the application is that the Claimant is dissatisfied with the Tribunal's decision, in particular my findings of fact, given orally at the hearing, and the Claimant is now seeking a *'second bite of the cherry'.* The Claimant's interests are not the only consideration here. Justice has to be done to both parties and there are broader policy considerations including the need for finality in litigation. Litigation has to be kept within sensible bounds. The Claimant was afforded a reasonable opportunity to make representations, and his wife Dr Benham did so.

14. Indeed, the challenges made by the Claimant in the request for reconsideration seeks to re-assert the case made by him at the hearing, and where I have not accepted the Claimant's version of events. I have not accepted what the Claimant alleges about his disability and its effect upon him. That the Claimant does not agree with my findings of fact is not a reason for me to reconsider my decision. In my judgment, it is not necessary in the interests of justice that the Claimant should be afforded an opportunity to revisit the evidence despite him now adducing new evidence he says was not available at the time of the hearing before me; the fact I disagreed with the Claimant's version of events is not a ground for reconsideration.

15. It should also be noted that part of the grounds for the application are that I did not apply the provisions of the Equal Treatment Bench Book in my findings at the hearing. In essence Dr Benham stated that my conclusions about his evidence could not stand as I had not taken into account that the evidence he gave at the hearing was impacted by his disability and that I failed to make reasonable adjustments for him during the hearing. In particular it was said that his ability to answer questions when he was cross-examined was impacted by his disability and I had somehow failed to factor this into my conclusions about his evidence.

16. It was also said as follows:-

The Claimant's wife further testified that he was experiencing severe anxiety at the hearing. The Claimant's anxiety made his blood pressure rise dangerously; measured after his testimony as 166/101 (heart rate: 130) at 12:32, and as 152/98 (heart rate: 125) at 13:08. The effect of these symptoms impeded the Claimant's answers to the questions. His wife, who is also his representative as well as his main carer, had her attention diverted away from what was happening at the hearing and the thrust of the arguments being made.

The Claimant was hence not on equal footing with the Respondent at the hearing.

17. During the hearing I was advised by Dr Benham after the Claimant concluded his evidence that she was concerned about his health and asked if he may leave the hearing before her cross examination commenced and I stated that he may. Following giving my oral decision I stated that I was not happy to continue to deal with the remaining preliminary issues of the application for a strike out and a deposit order, as in effect that would require the Claimant to give instructions and/or return to the hearing and my concerns were based on the fact I had been told that his blood pressure had increased. In the event the Respondents withdrew those applications. However I did make adjustments for the Claimant during the hearing and he was offered breaks should he need them. I reject the contention that the Claimant was not on an equal footing with the Respondent at the hearing and all adjustments possible were offered to him. I also reject the contention that the quality of his evidence and the conclusions I drew about that were contrary to the provisions of the Equal Treatment Bench book and I find this is simply the Claimant attempting to have a *'second bite of the cherry.'*

18. In relation to the new evidence provided by the Claimant in support of this reconsideration application the Respondents said as follows:-

a. New evidence having come to light which was not available and could not have been foreseen at the time of the hearing

The Reconsideration Application states that the consultant who had diagnosed the Claimant's sleep apnoea considered his dyslexia with regards to remedies and referred to the Claimant's inability to read and his reliance on audio. The application goes on to say that the Claimant's medical notes for the period "01.01.22-20.04.22" were unavailable because of an administrative error but that records for "20.06.23-11.08.23" were therefore available.

The evidence attached to the Reconsideration Application is, in fact, a letter from 26 April 2023. The bottom of page 1 records "does not read as he has dyslexia". This is not inconsistent with the evidence which was already before the Tribunal (see paragraphs 11, 13 and 14 of the Disability Impact Statement). The Reconsideration Application says (unless it is a typo) that records from "01.01.22-20.04.22" were unavailable but this letter is dated 26 April 2023 and, therefore, would have been available. In any event, even if it had been

unavailable and now, on the Claimant's case, should be considered by the Tribunal, the Respondent submits it does not change the evidence which was previously presented. Indeed, the Tribunal did not, for example, find the Claimant did not even have a mental impairment (in which case contemporaneous evidence of reporting to a medical professional would be important) but rather found that his dyslexia didn't have a substantial adverse impact on his ability to carry out day to day activities.

19. As set out at paragraph 17 above my finding was that whilst I found the Claimant did have a mental impairment I found it did not go above the effect on him of being more than 'minor or trivial' and as such he did not meet the test of his mental impairment having a substantial adverse effect on his ability to carry out day to day activities.

20. Accordingly, in my judgement, the Claimant has no reasonable prospect of persuading me that it is necessary in the interests of justice for him to be afforded a second opportunity to put his case on his disability.

21. For these reasons, the Claimant's application for reconsideration of the Judgment has no reasonable prospect of success and is refused.

Employment Judge Brown

Date: 31 July 2024

Judgment sent to the parties on
1 August 2024

For the Tribunal office