Case Number: 1805529/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr J Kariega

Respondent: Waterloo Manor Limited

JUDGMENT

The claimant's application dated 23 June 2025 for reconsideration of the judgment sent to the parties on 18 June 2025 is refused.

REASONS

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

1. The tribunal may reconsider a decision when it is necessary in the interests of justice to do so. This means where it is just for both parties and taking into account the need for finality in litigation. Reconsideration is not an opportunity to re-argue the case.

2. The claimant set out four bases on which he says our judgment should be reconsidered. I address each of the areas by setting out the claimant's case and responding to it.

Victimisation.

3. The claimant says:

   The Claimant submitted clear evidence of having undertaken **protected acts**, including raising a grievance and filing an ET1 for race discrimination. The **NMC referral** followed these actions by several months, **after** a police "no further action" outcome and **shortly after** the employer received notice of tribunal proceedings.

   We respectfully submit that this **timing raised a prima facie case of victimisation**. However, the Tribunal's determination does not directly address this, nor apply the burden-shifting framework under *Igen v Wong* and *Madarassy v Nomura*. Reconsideration is sought to explain how the referral was deemed "neutral" despite its **proximity to a protected act** and **lack of clear safeguarding grounds**.

4. We have considered the reason for the referral to the NMC and we have set out our clear findings of fact about that. EJ Miller accepts that the tribunal

did not spell out the test in respect of whether the claimant had proven facts from which we could conclude that the referral was, but for the respondent proving otherwise, because of the claimant bringing tribunal proceedings. However, we have made findings that the reason for the referral was because Ms Carroll believed she had an obligation to make the referral.

5. We have found that the reason for the referral was not, therefore, in any sense because the claimant had made a claim of race discrimination. Even if, therefore, we had concluded that the claimant had proven a prima facie case that the referral was because the claimant had made a claim of race discrimination, we have found, and it was our judgment, that the reason for the referral was in no sense whatsoever because the claimant brought a claim of race discrimination. We refer, particularly, to paragraph 118 of our judgment.

Unexplained preference for retrospective management evidence

6. The claimant says:

   The Tribunal preferred the accounts of senior management not present on the shift whose statements were written **weeks or months later** over:

   Four contemporaneous statements from **Black and global majority staff** who were directly involved in the incident;

   The Claimant's own contemporaneous entry in the **clinical notes**;

   The **After Action Review** completed on 22 March 2023 by Fred Mutebi and Shillah Moyo, which did **not** identify a kick.

   No reasons were provided for **why the Tribunal favoured retrospective management summaries** over first-hand, contemporaneous accounts. We respectfully request the Tribunal to revisit whether the evidential balance was fairly applied, in accordance with *British Home Stores v Burchell* and *Brent v Fuller*.

7. We have explained in our judgment why we have made the findings of fact that we did. In respect, specifically, of the written statement of Ms Moyo and Mr Mutebi, we explained our findings about that. Neither of them came to give evidence so, in our judgment, their evidence carried less weight than if they had attended. We also note that there was an inconsistency between their contemporaneous written accounts and their subsequent written statements. (See for example, paragraph 38 of our judgment).

New evidence – visual impairment

8. The claimant says

   The Claimant has **only now formally confirmed** a visual impairment: he has sight in one eye only and relies on corrective glasses, which were **pulled off during the incident**.

   This fact was visually obvious at work, yet not made explicit in the hearing due to his unfamiliarity with legal processes and absence of representation.

We submit that under *Ladd v Marshall [1954]*, this qualifies as **new and material evidence**, relevant to assessing his body movement during the restraint not as aggression but disorientation.

9. On the basis that the claimant says that his visual impairment was obvious at work, this information was manifestly in the knowledge of the claimant at the tribunal hearing and before and there is no good reason why it was not presented to the tribunal (if it is relevant).

10. The claimant has not explained how this information is relevant to the claims before the tribunal. It has never been the claimant's case, for example, in the investigation, at the disciplinary hearing, in the appeal or at the tribunal that he could not see the patient or that he was disorientated leading him to kick out four times.

11. In fact, it was the claimant's case that he was trying to kick a shoe out of the way and/or he was putting his foot out to keep his balance because the patient pushed back.

12. To the extent that he says he was trying to keep his balance, that evidence was before the employer and the tribunal. The employer said the video showed, in their opinion, that the claimant was kicking the patient. We have found that the employer genuinely believed that the claimant was trying to kick or did kick the patient and the claimant has not explained how knowledge of his asserted visual impairment could impact on that finding. Particularly in light of the fact that his case has been all along that he was kicking a shoe and/or responding to the claimant pushing into him.

13. The test for admitting new evidence on reconsideration is set out in *Ladd v Marshall* [1954] 1 WLR 1489 CA. In that case, Lord Denning said

    "In order to justify the reception of fresh evidence or a new trial, three conditions mast be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence most be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible".

14. In *Outasight VB Limited v Brown* UKEAT/0253/14/LA HHJ Eady KC held that the same principles apply under the 2013 version of the rules as applied under its predecessor 2004 version and in my judgement, they continue to apply under the 2024 rules.

15. For the reasons already explained, the information (or evidence) about the claimant's eyesight could have been obtained and in any event is unlikely to have impacted on the decision.

Procedural fairness

16. The claimant says

    The Claimant is a litigant-in-person with a disability, yet the Tribunal declined to:

Permit additional time to complete cross-examination and submissions; Facilitate remote testimony from Shillah Moyo, despite early notice of her availability while overseas.

These issues limited the Claimant's ability to present his case fully and may amount to a procedural irregularity under Rule 70(3)(d).

17. The claimant is not a litigant in person. He was represented at the hearing and before.

18. The claimant's representative was given a great deal of latitude, assistance and time to complete cross examination. I recognise that the claimant's representative (not the claimant) said that she had a cognitive impairment and latitude was given to accommodate that. However, the reality is that a great deal of the excessive length of time of the cross examination appeared to be down to a lack of preparation and a significant amount of repetition of questions. The tribunal will accommodate all the people who appear before it (whether litigants or representatives) as far as it can but that must not be at the expense of fairness to other tribunal users (including the respondent in this case).

19. To the extent that the claimant now relies on a failure by the tribunal to make adjustments for his visual impairment, firstly, the claimant had a representative; secondly, he was aware of his impairment at the time and could (and presumably would) have raised any concerns with his representative or the tribunal if it was impacting on his ability to participate in proceedings; and finally he has not now explained what barriers (if any) his visual impairment presented to his ability to participate in proceedings.

20. Ms Moyo was not permitted to give evidence remotely from abroad because neither she nor the claimant had obtained the requisite permission for her to do so.

21. The claimant and his representative addressed, or had an opportunity to address, all these points at the hearing with the possible exception (as discussed above) of the claimant's visual impairment. For the reasons explained, that information was available at the time of the hearing, is not obviously relevant and does not, of itself, make it necessary in the interests of justice to reconsider the decision.

22. For these reasons, there is no reasonable prospect of the decision being varied or revoked on the basis of the claimant's application and the application for reconsideration is refused.

Date: 16 July 2025

Approved by

Employment Judge Miller