EMPLOYMENT TRIBUNALS

Claimant: **Ms C Cook**

Respondent: **Dean Close Foundation**

Before: **Employment Judge P Cadney**

Representation:
Claimant: Written Submissions
Respondent:

Reconsideration Judgment

The judgment of the tribunal is that-

i) The claimant's application to revoke or vary the Judgment is dismissed.

Reasons

1. I heard a Preliminary Hearing on 6th August 2024 to determine the issue of whether the claimant was a disabled person within the meaning of s6 Equality Act 2010. I concluded that she was not and the claimant now seeks a reconsideration of that decision.

2. The respondent was given the opportunity comment but has not yet done so. The issue has now become urgent as the case is listed for final hearing in November 2024. As a result I have decided to consider the reconsideration application in the absence of, and before any response from the respondent.

Reconsideration

3. General Power - Rule 70 of the ET Rules gives the tribunal a general power on reconsideration to confirm, vary or revoke the original decision where it is in the interests of justice to do so. However that does not give the tribunal a completely freestanding discretion to reconsider or vary/set aside any judgment

In *Outasight VB Ltd v Brown 2015 ICR D11, EAT*, Her Honour Judge Eady QC accepted that the wording 'necessary in the interests of justice' allows employment tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion 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'.

4. New Evidence - Reconsideration of a judgment may be necessary in the interests of justice if there is new evidence that was not available to the tribunal at the time it made its judgment. The underlying principles to be applied by tribunals were those set out in *Ladd v Marshall 1954 3 All ER 745, CA*. There, the Court of Appeal established that, in order to justify the reception of fresh evidence, it is necessary to show:

   i) that the evidence could not have been obtained with reasonable diligence for use at the original hearing

   ii) that the evidence is relevant and would probably have had an important influence on the hearing; and

   i) that the evidence is apparently credible.

Application

5. The application is based on a number of propositions by reference to paragraphs in the original decision. I will deal with them in the order they are set out in the application.

Paragraphs 21/22

6. Firstly the claimant relies on the findings as set out in paras 21 and 22 of the decision. For ease of comprehension they are:

   21. Conclusions – This is not an easy issue to resolve. If the claimant is accurately and truthfully describing her symptoms, their severity and duration, she clearly satisfies the statutory definition. It is obviously open to me simply to accept her evidence, and having heard it there is nothing to suggest that she was not being entirely honest and frank. However the respondent is, in my view correct that her evidence is irreconcilable with the medical evidence, in that there is no support for the level of symptomatology or impairment she describes, which is very puzzling given that at least from January 2022 when the diagnosis of haemochromatosis was made, and given the potential consequences of it, it would be extremely important for the GP to be told and understand precisely what symptoms she was suffering.

   22. In the final analysis, given the discrepancy between the claimant's evidence and the medical records, I have concluded that on the balance of probabilities, it is not possible to accept the claimant's evidence as an accurate description of her symptoms. Also, and in the light of that, it appears to me that medical

records in and of themselves do not support the conclusion on the balance of probabilities that the claimant has established having symptoms of the underlying condition which had a substantial effect on her normal day to day activities (as defined above); and therefore has not satisfied the burden of demonstrating that she was a disabled person at any point during the relevant period.

7. The claimant contends that the conclusion that there was nothing about the manner of the claimant's evidence to suggest that it was not "entirely honest and frank", and the subsequent finding that on the balance of probabilities I did not accept that evidence because the discrepancy between it and the medical evidence is contradictory. The application goes on to assert that the comparison with the medical evidence is only permissible, or at least necessary, where on its face the credibility of the evidence is "questionable". In summary the claimant contends that if having heard the claimant's evidence there was no obvious or apparent reason to consider it "questionable" that I was bound to accept it.

8. In my judgment this analysis is wrong in principle. There may be witnesses whose evidence, or the manner in which it is given, is on its face lacking in credibility, but which may be bolstered by an analysis of the relevant documentation, or apparently credible witnesses whose evidence is undermined by that comparison. In my judgement I am entitled, indeed required, to look at the totality of the evidence in forming my conclusions and there is nothing in this submission which would cause me to vary or revoke my original decision.

9. Secondly she contends that in any event the comparison with the medical evidence was impermissible and/or simply wrong as there is no requirement for her to attend her GP, or that I should have given greater weight or credence to her evidence that there was no purpose in attending her GP in relation to a condition for which there is no known cure.

10. This reflects the evidence the claimant gave and her submissions at the hearing and I have already considered it and taken it into account in reaching my conclusions. Again this does not, in my judgment, provide any basis for varying or revoking the original judgment.

Paragraph 9

11. Again for ease of comprehension paragraph 9 is set out below:

9. *She attended her GP in August 2021 with blood tests initially showing low levels of vitamin B12. Further testing led to the haemochromatosis diagnosis in January 2022. In April 2023 she had fall fracturing her elbow joint, and tests showed she had developed osteoporosis which is a potential consequence of or linked to haemochromatosis (although there is no medical evidence before me which establishes in the claimant's case that the onset of osteoporosis was causally linked to haemochromatosis). Treatment by means of weekly venesection began in July 2023 and continued until November 2023 which has substantially reduced the symptoms.*

12. The claimant submits that whilst it is correct that there was no medical evidence that the onset of osteoporosis was causally linked to haemochromatosis, there is equally no medical evidence to establish that there was no causal link; and asserts that she would have been able to give further evidence had she been cross-examined on the point, rather than it simply being raised in submissions.

13. In my judgment this is a difficult submission to understand. It does not set out what further evidence the claimant could have given, nor that even if she had that that would alter the fact that there was no medical evidence supporting a causal link. As is stated there was already evidence before the tribunal that osteoporosis was a potential consequence of haemochromatosis, and it is not clear, and is not set out in the submission how, in the absence of medical evidence of any actual causal link, that further evidence from the claimant could establish it. In any event the presence or absence of this causal link was not central to the decision. As is set out above, the central difficulty for the claimant was the striking difference between the constellation of symptoms described by her and their absence from the medical records.

14. For completeness sake, the claimant has also supplied further evidence, a research note from the Haemochromatosis Arthropathy Research Institute on the causal link. This was not before the tribunal at the hearing, and the claimant does not refer to the Ladd criteria (see above) at all in her submissions. There is no assertion or evidence that it could not have been obtained with reasonable diligence for use at the original hearing; and in any event for the reasons given above it my judgement it would not "..probably have had an important influence on the hearing."

15. For those reasons the submissions in relation paragraph 9 do not, in my judgment, provide any basis for varying or revoking the original judgment.

Paragraph 12

16. Again for ease of comprehension paragraph 12 is set out below (together with paragraph 11 to make the point clear):

11. Respondent's Submissions – The respondent contends that it is necessary to disentangle different aspects of the diagnosis and consequences of haemochromatosis. One potential effect is the build-up of iron in the blood which if not treated may lead to excessive levels in various organs leading to organ, and particularly liver, damage. It is clear from the medical evidence that by May 2023 that the claimant had raised ferritin levels which it was decided to treat by means of venesection. However there is fortunately no current evidence that the claimant had by then or later sustained any organ damage. The claimant had weekly venesection between July 31st 2023 and November 2023 which very significantly reduced the ferritin levels from over 500 to under 50. Since then the claimant has been and continues to be regularly monitored, and if her ferritin levels become overly high again she may require further venesection.

12. In terms of disability the respondent contends that this is something of a red herring, particularly in relation to deduced effect, in that it is clear that the

purpose of the treatment (venesection) was precautionary, to prevent or reduce the future risk of organ damage. It is clear from the medical evidence that it was not intended to reduce or affect any existing symptoms of haemochromatosis. In addition the treatment did not begin until 31st July 2023, after the term had ended, after any adjustments could have been put in place and after the claimant had submitted her resignation. Prior to that point, which is in effect the whole of the relevant period the tribunal is only concerned with the actual symptoms as no treatment had taken place. The tribunal does not therefore have to engage in what otherwise might be the process of seeking to assess the deduced effect, the likely level of symptoms without the treatment.

17. The claimant contends that I made a finding that "..*it is clear that the purpose of the treatment (venesection) was precautionary, to prevent or reduce the future risk of organ damage."* This is not strictly accurate as in paragraph 12 I am recording the respondent's submissions, not my conclusions. Whether the respondent's counsel's analysis of the purpose of the treatment is correct or incorrect, the submission that as the treatment began after the relevant period of the complaint of disability discrimination I was not concerned with the issue of deuced effect, but only the one of what were the symptoms exhibited by the claimant during the relevant period is obviously correct.

18. For those reasons the submissions in relation paragraph 12 do not, in my judgment, provide any basis for varying or revoking the original judgment.

19. It follows that in my judgment there is nothing in the reconsideration application which sets out any basis for considering that there is a reasonable prospect of the original decision being varied or revoked (r72(1) Employment Tribunals Rule of Procedure 2013) the application is dismissed.

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Employment Judge P Cadney
Dated: 24th October 2024

Judgment entered into Register
And copies sent to the parties on

07 November 2024

for Secretary of the Tribunals