



EMPLOYMENT TRIBUNALS

Claimant: Mr D Cox

Respondent: Royal Mail Group Ltd

London Central

Employment Judge Goodman

RULE 72 CONSIDERATION OF APPLICATION TO RECONSIDER A JUDGMENT

- 1 At an open preliminary hearing on 11 January 2017 a decision was made that the claimant was not disabled within the meaning of the Equality Act 2010. In consequence his claims of disability discrimination by his former employer failed. Reasons were given at the hearing and recorded. The Judgment was sent to the parties on 11 January 2017 and the written reasons on 31 January 2017.
- 2 The claimant wrote on 10 February 2017 seeking reconsideration of the decision, in particular the conclusion that any substantial impairment was not long-term. The letter points to evidence before the Tribunal hearing on 11 January, and adds that he now has a letter from a treating physiotherapist dated 7 February 2017 and that the decision should be reconsidered in the light of this fresh evidence.
- 3 Under the Employment Tribunal Rules of Procedure 2013 a request for reconsideration may be made within 14 days of the judgment being sent to the parties. By rule 70 a Tribunal “may reconsider any judgment where it is necessary in the interest of justice to do so”, and upon reconsideration the decision may be confirmed varied or revoked.
- 4 Rule 72 provides that an Employment Judge should consider the request to reconsider, and if the judge considers there is no reasonable prospect of the decision being varied or revoked, the application shall be refused. Otherwise it is to be decided, with or without a hearing, by the Tribunal that heard it.

- 5 Under the 2004 rules prescribed grounds were set out, plus a generic “interests of justice” provision, which was to be construed as being of the same type as the other grounds, which were that a party did not receive notice of the hearing, or the decision was made in the absence of a party, or that new evidence had become available since the hearing, provided that its existence could not have been reasonably known of or foreseen at the time. The Employment Appeal Tribunal confirmed in [Outasight VB Ltd v Brown UKEAT/0253/14/LA](#) that the 2013 rules did not broaden the scope of the grounds for reconsideration (formerly called a review).
- 6 The claimant’s concern is that his impairment is (in his view) long-term. Paragraph 2 of schedule 1 to the Equality Act 2010 says: “the effect of an impairment is long-term if (a) it has lasted for at least 12 months or (b) it is likely to last for at least 12 months”. Case law provides that “is likely to last” means “could well happen”, rather than “on the balance of probability”. *Richmond Community College v McDougall* (2008) ICR 431 is authority for the relevant time to examine this issue being the time at which discrimination is said to have occurred.
- 7 The claimant’s injury occurred at work on 24 February 2016. The letter from Mr or Ms Jay Heard, senior musculoskeletal physiotherapist, is addressed to whom it may concern, and says:
- “In response to your request for a summary of symptoms and indication as to whether symptoms are expected to persist beyond 24/02/2017.
- “Mr Cox was referred to physiotherapy with a 10 month history of knee pain following a fall. MRI report suggested chondromalacia patella. Mr Cox has attended two appointments and presents with reduced range of movement and reduced strength likely due to maladaptive movement patterns developed in the months following injury. Given the duration of the symptoms prognosis is difficult to predict. To date, Mr Cox reports an improvement in his walking tolerance but subjective findings such as strength and range of movement remain unchanged, you may therefore require further rehabilitation beyond 24/2/17”.
- 8 There is no indication either in this letter, or in the claimant’s letter, of when the claimant requested this opinion. Certainly the claimant made no mention at the hearing of waiting for further evidence, let alone request a postponement. It seems likely that the claimant only requested an opinion on this point following reasons being given for the decision on 11 January.
- 9 The claimant has not provided any explanation of why this evidence could not have been available at the hearing on 11 January 2017.
- 10 In his letter the claimant reminds me that he is a litigant in person, and that although he did approach the Free Representation Unit, he was not able to gain assistance. He may be suggesting, although it is not spelled

out, that he did not know that his disability had to be long-term, or what this meant precisely, and so did not know to get evidence on this point. I note that there was a preliminary hearing for case management in this case. The claimant will have known that disability was contentious. Information on this is readily available on the internet, as is the statutory guidance on the definition of disability. For example the page on disability on Gov.uk states the 12 month rule briefly and clearly, and has a link to a PDF containing the full text of the statutory guidance. So does the ACAS website. The claimant could readily have found this out ahead of the hearing.

- 11 If there was a rehearing to consider this evidence, the respondent would have to bear the costs of a second hearing on the point, to hear evidence that could have been available at the first hearing if the claimant had considered the point and asked the physiotherapist earlier.
- 12 It is a legal principle of long standing that there should be finality in litigation. To that end, Parliament has provided, in the Employment Tribunals Act 1996 and in the Rules of Procedure 2013, that a Tribunal decision can only be revisited on very limited grounds. Balancing the claimant's knowledge and preparation, and bearing in mind that he had, like many Tribunal litigants, no professional representative to advise, against the respondent's position and the need for finality, rather than retaking decisions as parties obtained further evidence, I cannot see that it could be held to be in the interest of justice in this case to reconsider the decision.
- 13 I should also assess the prospects of success if the decision were reviewed in the light of this additional evidence. The disability issue has to be considered as it was known at the time of the discriminatory acts. These began on 7 June 2016 when the claimant's sick pay was stopped, and ended on 29 October 2016, when he was dismissed. With reference to the written reasons, paragraph 20 refers to 1 July when the claimant had declined hospital referral, which suggests that up to that point he had accepted the advice that the condition should remit before long with physiotherapy alone. Paragraph 23 refers to the consensus view that this condition improved with time. Paragraph 28 shows that as of the end of May 2016 the physiotherapist who had examined him not long before expected him to return to work shortly. The MRI scan in October showed no physical injury, so there was no reason to expect the condition not to recover (22). None of this suggests that at the relevant time it "could well be" that his condition would last 12 months from February 2016, when it began, let alone that any *substantial* symptoms would last that length of time. The finding made at the hearing was that the symptoms reported had fluctuated, had not always been accurately reported, and were at best borderline. All the evidence pointed to the condition not being expected to last 12 months, and the fact that it may well last 12 months is made with the benefit only of hindsight, long after the treatment complained of as discriminatory, and on the basis of a subjective (i.e. the claimant's) assessment. Taking the evidence as a whole, this new report is most

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unlikely to make a difference to the overall picture, and I conclude that reconsideration, if this letter was to be considered as evidence at a reconsideration hearing, has no reasonable prospect of success.

14 In conclusion, for that reason, I refuse the application to reconsider.

Employment Judge Goodman
17 February 2017