RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Mayanja**

Respondent: **Praxis Community Project (A Company Limited by Guarantee)**

RECONSIDERATION JUDGMENT

1. The Claimant's application made on 30 December 2019 for a reconsideration of the judgment dated 29 November 2019 and sent to the parties on 10 December 2019 has no reasonable prospects of success and is dismissed.

REASONS

1. The Claimant has asked for a reconsideration of the judgment dated 29 November 2019 and for full written reasons for that decision at the same time. Any request for reasons or a reconsideration ought to have been made by no later than 24 December 2019. The Claimant says that he did not receive the judgment 'as redirection from old address took time'. He does not say when he received the judgment nor does he give a current address. Despite this I consider it just and equitable to extend time and I have provided full written reasons for the Tribunal's decisions both on the substantive case and in respect of the decision on costs. The reasons have been provided in a separate document.

2. The Claimant's criticisms of the Tribunal's judgment are analyzed below. In summary the Claimant criticizes the Tribunal for proceeding in his absence and states that we have made a costs order on an improper basis. Before setting out the relevant law I should deal with two factual matters raised in the application.

3. In his application the Claimant says that 'no formal determination was made' of his application to transfer the case. That is incorrect. The Case Management order of EJ Warren dated 10 July 2019 make it plain beyond doubt that the Claimant's application for a transfer to Manchester had not been granted. The Claimant knew or ought to have known of this. He knew that the hearing was listed on 7 November 2019 as he had been engaging with the Respondent (belatedly) in exchanging witness statements. He had been

copied in to correspondence from and to the East London hearing Centre. In particular the Claimant had been sent an e-mail on 29 October 2019 enclosing a letter from the East London Tribunal enquiring whether the matter was ready to proceed. He was also copied into the response from the Respondent that confirmed that witness statements had been exchanged and that the parties were ready. He could have been in no doubt that the hearing was in East London.

4. The Claimant says that he made an 'oral application for an adjournment'. That is not consistent with what we were told by our clerk who relayed only that the Claimant claimed to be in the Manchester Tribunal. If he had been at that tribunal it would have been immediately apparent that his case was not listed there. In that tribunal parties are greeted by the security staff who have the daily list. The Claimant did not attempt to contact East London Tribunal at any stage before the hearing was called on. The Tribunal simply assumed that the Claimant would want an adjournment and dealt with the case on that basis.

The rules

5. The Employment Tribunal Rules of Procedure 2013 as amended set out the rules governing reconsiderations. The pertinent rules are as follows:

> *"Principles*
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> *70. - A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.*
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> *Application*
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> *71 - Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.*
>
> *Process*
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> *72.—(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties*

on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

6. The expression 'necessary in the interests of justice' does not give rise to an unfettered discretion to reopen matters. The importance of finality was confirmed by the Court of Appeal in ***Ministry of Justice v Burton and anor*** **[2016] EWCA Civ 714** in July 2016 where Elias LJ said that:

> "the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Ironsides Ray and Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."

7. In ***Liddington v 2Gether NHS Foundation Trust*** **EAT/0002/16** the EAT chaired by Simler P said in paragraph 34 that:

> "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."

8. Any preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity

and importance of the issues, and avoiding delay. That principle militates against permitting a party to reargue matters that have already been considered or referring to evidence which could or should have been considered at the earlier hearing.

9. In accordance with the Employment Tribunal Rules of Procedure I must reconsider any judgement where it is in the interests of justice to do so. Further, if I considered that there is no reasonable prospect of the original decision being varied or revoked I must refuse the application for reconsideration.

Discussion and Conclusions

10. The Claimant criticises the Tribunal for proceeding in his absence. Our full written reasons for taking that course of action will be sent to the Claimant. He suggests that I 'find out the difference' between the words "may" and "will". The Tribunal was aware of the fact that the power to proceed in the absence of a party requires the exercise of a discretion. We concluded that the absence of the Claimant was at best reckless. We weighed up the respective prejudice and decided to proceed.

11. I accept that if a party had a good reason for not attending a hearing that would provide grounds for seeking a reconsideration. The Claimant now appears to accept that he had not been told that his case was transferred to Manchester ('no formal determination'). As such our finding that he ought to have known that the matter had not been transferred is reinforced rather than eroded. The Claimant's application for a reconsideration is full of references to legal principles and case law. He is an experienced immigration advisor. It is incredible to think that he did not know that his case had not been transferred. He had no good reason for not attending the hearing. Nothing the Claimant says has any real prospect of persuading me that there is any proper basis for a reconsideration insofar as it is a challenge to our decision to proceed in absence.

12. The Claimant suggests that we held an 'impromptu trial' and suggested that our actions are to be equated with striking out the case. We did not hold an impromptu trial. The matter had been listed for a final hearing for many months. The parties had belatedly complied with all the directions. There was nothing 'impromptu' about it. The matter was ready for trial and the Claimant deliberately or at best recklessly stayed away.

13. The Tribunal declined to strike out the case but heard evidence and had regard to all the documentation including the evidence in the Claimant's witness statement. This was not an impromptu trial but a trial in absence in circumstances where the Claimant had not attended the hearing with no good reason.

14. The Claimant then moves on to criticise our decision on costs. He had not seen the reasons for our decision at the time he made his application. He has our reasons now. He will see that we are aware of the applicable principles and the fact that there is no discretion to award costs unless and until one of the threshold conditions is met. We found that two of the conditions were met. We then went on to consider whether a costs order ought to be made. We have given our reasons for doing so.

15. We are not obliged to take into account the Claimant's means in making a costs order but may do so. We did have regard to what we knew about the Claimant but accept that we had limited information. We were satisfied that given his qualifications and experience he would be able to pay the sum we ordered in a reasonable period whatever his current circumstances. We could have adjourned the costs application but, given that we proposed to make a relatively small award of costs relating to the conduct immediately before the hearing to do so would have been disproportionate.

16. The Claimant says that he is of limited means but does not provide any evidence together with his application for a reconsideration. He does not say whether he is working or whether he has any assets that could be realised. He asserts that the Respondent is of greater means than him. That is not a relevant consideration. We found that the Claimant behaved unreasonably in two respects the fact that payment of the costs occasioned by that might be difficult for the Claimant is only one of many matters than need to be considered. Nothing the Claimant has said suggests that his application for a reconsideration of our costs order has any reasonable prospects of success.

17. For the reasons set out above, I find that the Claimant's application for a reconsideration has no reasonable prospects of success and dismiss it without a hearing.

18. The effect of the Claimant being sent full written reasons is that it is open to him to make a further application for a reconsideration once he has seen and considered our full written reasons. Clearly, he should do so if he considers that the relevant threshold is passed. If the Claimant relies on his means as being a reason why any costs order should not have been made he should recognise that his application is likely to be refused unless he gives full disclosure of his income and assets together with proper supporting evidence.

Employment Judge Crosfill

Date: 3 March 2020