EMPLOYMENT TRIBUNALS

Claimant: **Mr K Sangar**

Respondent: **East Village Dental Limited**

JUDGMENT

The respondent's application dated 2 November 2021 for reconsideration of the costs judgment sent to the parties on 20 October 2021 is refused.

REASONS

1. On 11 October 2021, I heard the Respondent's costs application and reserved my decision. On 20 October 2021, my decision was sent to the parties, in which I refused the Respondent's application. There is no reasonable prospect of that original decision being varied or revoked.

2. I have considered all of the matters raised in the Respondent's 11-page long application. Failure to refer to a particular point in these Reasons for refusing to reconsider the decision sent to the parties on 20 October 2021 does not indicate that the point has not been taken into account. It is not necessary for me to provide reasons in relation to all those matters in order to comply with the correct approach to determining a reconsideration application, as set out by the EAT in the cases referred to below.

3. Although the decision on the costs issue was expressed as an Order, it ought to have been issued as a Judgment. This is because, a Judgment is defined as a "decision, made at any stage of the proceedings which finally determines a claim or part of a claim as regards liability, remedy or costs … " (Employment Tribunal Rules 2013, Rule 1(3)(b)). This labelling error will need to be corrected under Rule 69 of the same Rules. The consequence is that the Tribunal's conclusion on the costs issue and the reasons for so concluding, will be entered in the Register, in accordance with Rule 67.

4. The process I must apply in considering the Respondent's reconsideration application is set out in Rule 72(1) of the Rules. If I decide 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. If this is not my decision, then the Rules set out further steps that should be taken to deal with the reconsideration application.

5. In Rule 70 of the Rules, a Tribunal may reconsider any judgment "where it is necessary in the interests of justice to do so". I do not consider that there is any reasonable prospect of the original decision being varied or revoked, because it is necessary to do so in the interests of justice.

6. In *AB v The Home Office* UKEAT/0363/13/JOJ His Honour Judge Richardson gave the following guidance on the approach to be taken to an application for reconsideration of a Judgment:

> **43. An EJ who, upon receiving an application for reconsideration, appreciates that the ET has altogether overlooked deciding an issue can and usually should arrange for the ET to reconsider its judgment. The ET will have failed to decide an issue which was for before it for determination: it will be necessary in the interests of justice for the ET to determine that issue. This happens rarely, but it can occur in cases where there are many issues. The ET may hold a further hearing or (in a case where a hearing is not necessary in the interests of justice) may give the parties a reasonable opportunity to make further representations.**
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> **44. On the other hand, if the EJ considers that that the ET did decide the issue, and at most the reasons might be considered incomplete or inadequate, but there are no reasonable prospects of the judgment being varied or revoked, the EJ must not order reconsideration. Neither the 2004 nor the 2013 Rules permit the re-opening of a judgment in such circumstances.**

7. In *Ameyaw v Pricewaterhousecooopers* Matthew Gullick QC, having cited these paragraphs went on to find as follows (at paragraph 46):

> **In my judgment, the claimant's application for reconsideration of Employment Judge Morton's decision to refuse the respondent's strike-out application is a clear example of the situation described by His Honour Judge Richardson in which a judgment cannot be re-opened simply to address alleged errors in the Employment Tribunal's reasoning.**

8. In *Outasight VB Limited v Brown* [2015] ICR D11, HHJ Eady QC stated that the broad discretion to decide whether a reconsideration of a judgment is appropriate 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 is possible, be finality of litigation"**

9. Many of the points raised in the Respondent's extensive written reconsideration application were not clearly made in either the original written costs application or the Respondent's Note for the hearing on 11 October 2021. This is an example of an attempt to re-open the costs decision because of alleged errors in the Tribunal's reasoning.

<u>Extent of non-compliance with earlier orders</u>

10. In my Reasons for refusing to make a costs order, I was correctly considering the extent to which there had been partial compliance with earlier orders, and the consequences of non-compliance.

Employment Judge Burgher's directions on 5 November 2020

11. In relation to Employment Judge Burgher's orders made on 5 November 2020, I was not making a finding that there had been full compliance with that order, as is clear from line 4-5 of paragraph 14 of the Reasons. My failure to spell out the particular respects in which the Claimant had failed to comply with other aspects of that Order does not provide a reasonable prospect of the costs decision being varied in the Respondent's favour.

12. Although Respondent's counsel now alleges that there was non-compliance with orders in relation to provision of medical evidence and a disability impact statement, these were not points made either in counsel's written note prepared in advance of the hearing, or orally in submissions (having checked my notes on this point). Mr Payne's focus was on non-compliance with paragraphs 5 and 6 of Judge Burgher's orders, in relation to disclosure and preparation of a hearing bundle. It is true that there is reference in general terms to non-compliance with orders in Ms Payne's witness statement dated 1 October 2021 at paragraph 10, which cross refers to page 154 of the Tribunal bundle. Page 154 sets out these further alleged failures to comply with EJ Burgher's order but does not indicate that these particular failures led to additional costs in communicating with the Claimant. It appears that the focus of the correspondence – as with Mr Payne's submissions – was on alleged non-compliance in relation to documents.

13. Judge Burgher's direction for disclosure of documents by the Respondent by 21 December 2020 was not limited to the disclosure of documents not already seen by the Claimant or in the Claimant's possession. The Respondent and the Claimant were required to send copies documents in their possession or control relevant to the preliminary issues by 21 December 2020. There was no evidence that the Respondent's solicitor had purported to comply with this by notifying the Claimant on or before 21 December 2020 that there would be no further copies provided because copies of all relevant documents had already been provided. Therefore, the Tribunal was entitled to conclude that the Respondent was in breach of the Tribunal Order. In any event, I note that the Respondent's solicitor sent the Claimant electronic copies of further documents attached to its email of 11 May 2021 [50]. At least some of these documents would have been in existence as at 21 December 2020. That is further confirmation that the Respondent had not fully complied with the disclosure order as at 21 December 2020.

14. Criticisms of the Respondent's solicitor's failure to put all potentially relevant emails before the Tribunal were fair criticisms, given the wording of the Respondent's solicitor's email on page 136 of the bundle (*"I have received 6 emails from you this afternoon/evening with documents attached"*), and the absence of six such emails attaching documents within the costs hearing bundle. The Claimant's emails in the bundle from the

same date appeared to be different from the emails to which Ms Payne was referring. It was not necessary for the Tribunal to ask counsel to comment on this point before having regard to this feature as a factor in deciding whether to make a costs order. Further, an application for reconsideration should not be a vehicle to challenge a Tribunal's reasons or, insofar as they do not form part of the essential reasoning upon which a decision is based, other things said by the Tribunal in arriving at its decision (*Ameyaw)*.

15. In any case where a costs order is sought for non-compliance with a Tribunal Order, it is obviously relevant for the Tribunal to consider whether there has been non-compliance with the same order by the party seeking the Order. The Reconsideration application accepts as much at paragraphs 19 and 32. It was therefore a point that was properly open to the Tribunal to consider whether or not it was addressed in submissions.

Employment Judge Jones' directions made on 10 March 2021

16. The Respondent's case as to the significance of the Claimant's non-compliance with Judge Jones' order made on 10 March 2021 is set out much more fully in the reconsideration application than it was in written and oral submissions at the costs hearing.

17. I have looked at the various specific respects in which it is now said that there was non-compliance with this order. These were not points which were made expressly in the Respondent's Note prepared in advance of the costs hearing nor, criticisms of the Claimant's approach to documents apart, were they made during oral submissions. That is why I recorded, at paragraph 19, that the focus of the Respondent's criticism is the way that the Claimant responded to the Order concerning documents.

18. So far as the holiday pay claim is concerned, the only relevant record in my notes of the hearing is a general cross reference to pages 42-54 of the costs hearing bundle, when dealing with the issue of non-compliance in general terms. I accept that the Respondent's solicitor referred to this issue repeatedly in correspondence, seemingly without any answer from the Claimant. However, given the form in which the relevant Order was expressed, in a document headed "Acknowledgement of Correspondence", I do not consider that this non-compliance forms a sufficiently arguable basis for making a costs order.

19. So far as disclosure of documents was concerned, I have found that the Claimant purported to comply with this Order on 19 April 2021, one week outside the required timescale (see Reasons, paragraph 19). I have also noted that "it is quite normal that parties will request further categories of documents which need to be provided as part of the ongoing duty of disclosure" (paragraph 19). The Respondent puts particular focus on the Claimant's alleged failure to disclose the original version of his email to the CQC (as requested by email dated 8 June 2021 [54]). There was no Tribunal order requiring the Claimant to disclose the original version. Both the Orders of Employment Judge Burgher and of Employment Judge Jones required the Claimant to disclose copies of documents. If the

Respondent was contending that it ought to be permitted to inspect the original email or the Claimant ought to provide disclosure of further communications with the CQC then it ought to have made an application for a specific disclosure order. It did not do so.

Fabrication of documents

20. So far as this aspect of the application is concerned, my note of Mr Payne's submission on this issue is as follows:

> "Not seeking to argue that C fabricated the email at this point but would have put this case at trial. [The email] was never provided and this was [in] default of Tribunal order"

21. In circumstances where the Respondent's counsel stated in terms during the costs hearing that he was not seeking to argue that the email was fabricated, it would not be appropriate for the Tribunal to make such a finding on a reconsideration application.

Claimant's unreasonable and vexatious behaviour

22. I characterised the Claimant's behaviour as engaging in "prolonged unreasonable and abusive correspondence" (paragraph 26). That characterisation is not inconsistent with the wording used at paragraph 28(a). I note that whilst the Reconsideration application refers to Claimant reporting the Respondent's solicitor to the complaints partner at the Respondent's firm, the Legal Ombudsman, the Kent Police and the West Midlands police, the basis of the costs application was seemingly limited to correspondence with the Respondent's solicitor and with the Tribunal (see the wording of Respondent's counsel's note at paragraphs 33 and 36). There is no reference in the Respondent's counsel's note to the Claimant reporting the Respondent's solicitor to third parties. My notes do not record Mr Payne making this point when making his submissions orally.

23. As a result, this aspect of the reconsideration application is an attempt to reargue points which could and should have been made at the original costs hearing. That is not an appropriate basis for reconsidering the original costs decision.

24. I note that paragraph 38 of Reconsideration application misquotes paragraph 28(a) of the Reasons, by omitting the word "significant". The basis for concluding that the correspondence did not put the Respondent to "significant additional expense" does not need further explanation.

Financial means

25. It was well within my discretion to accept the Claimant's position as to his lack of financial means to pay any costs order, notwithstanding the lack of any documentary evidence in support of that position. Whilst the Respondent had asked the Claimant to provide mitigation evidence of his attempts to secure suitable alternative employment [50], it had not asked him to disclose evidence as to his current income and assets. The

Respondent had not carried out its own investigations into the Claimant's financial assets, nor had it asked for the Tribunal to order the Claimant to provide disclosure of documentary evidence of those assets. Mr Payne chose not to cross examine the Claimant as to what he told the Tribunal as to his finances.

Significance of deposit order

26. I have checked the wording of Mr Payne's Written Note and my notes of the hearing. Mr Payne had not argued either in his Written Note or orally – as he does now - that the Tribunal should take into account the deposit order of £400 "which could have been considered as part of the Claimant's means and awarded to the Respondent". There was no reference to the interplay between the Claimant's withdrawal of his remaining complaints, including those the subject of a deposit order, and Rule 39(5) of the ET Rules (consequences of Tribunal deciding the specific allegation or argument against the paying party for substantially the reasons given in the deposit order); or any reference to the implication of Rule 39(6) of the ET Rules (amount of deposit forfeited under Rule 39(5) counts towards the settlement of a costs order) to the present case.

27. Indeed, in framing his costs application, Mr Payne made no reference to the significance of the Deposit Orders previously made, as stated in paragraph 11 of my Reasons. The Respondent's application seeks to excuse this on the basis that there "was insufficient time to make an application to the Tribunal to consider the existing deposits as part of the Respondent's costs following the withdrawal of the Claimant's claims only a short time before the scheduled hearing" (paragraph 45). I do not consider that this is correct. Having made the application on 15 June 2021, from that date onwards the Respondent ought to have been expecting to argue all relevant costs points at the hearing scheduled to consider that application, subsequently listed for 11 October 2021. Whilst the factors supporting a costs order may have evolved following the Claimant's withdrawal, there was still sufficient time to prepare properly for the hearing. If there was insufficient time, it was open to the Respondent's solicitor or counsel to ask for a postponement to enable the Respondent to be properly prepared. I note in reviewing the papers to decide the Respondent's reconsideration application – although I did not note this at the time of the hearing – that in their letter to the Tribunal of 6 October 2021 the Respondent's solicitor had stated this:

"Further the Claimant has paid a deposit into the Tribunal in respect of some of his claims which also needs to be addressed"

28. It was not addressed by the Respondent's counsel and therefore was not addressed by the Tribunal in its decision on the costs issue. It is well established that a failure of a party's representative would not usually constitute a ground for reconsideration.

Exercise of discretion

29. I had in mind the fact that the Claimant had previously been ordered to pay costs of £500, which I took into account in the balancing exercise when considering whether to make a costs order in these proceedings, at paragraph 27(a). Whilst it was a relevant factor, it did not set a precedent that I was bound to follow in these proceedings.

30. The principal costs saving as a result of the Claimant withdrawing the proceedings was in relation to the costs of the Final Hearing in November 2021. It also narrowed the scope of the hearing on 11 October 2021, which was only considering the issue of costs.

31. For all these Reasons, as well as the original Reasons for rejecting the Respondent's costs application sent to the parties on 20 October 2021, the Respondent's reconsideration application is refused.

Employment Judge Gardiner
Dated: 16 December 2021