EMPLOYMENT TRIBUNALS

Claimant: **Mr C Dlamini**

Respondent: **Teesside University**

UPON APPLICATION made by email dated 27 June 2023 to reconsider the judgment dated 23 June 2023 under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing.

JUDGMENT

The judgment is confirmed.

Reasons

Background

1. In January 2023, the claimant who had been employed as a Senior Lecturer with the respondent, attempted to present a claim form in which he complained of unfair dismissal and race discrimination. He provided his own email address at box 1.9 and at box 11 of the claim form, he provided details of his union representative, Zoulika Lamarra ('ZL').

2. The claim form was initially rejected because it had failed to provide an ACAS EC certificate number; the reasons for the rejection were sent to ZL at her address as provided on the claim form. The claimant contacted the Tribunal to provide the missing information.

3. In February 2023, the claim form was again rejected, this time because the ACAS certificate did not match the respondent's name on the claim form; again those reasons were provided by the Tribunal to ZL only. On 14 February 2023, the claimant wrote to the Tribunal asking to amend the name of the respondent as set out in the claim form to that set out in the ACAS certificate.

4. On 15 February 2023, the Tribunal wrote to both ZL on the claimant to state the application for reconsideration had been accepted.

5. On 20 February 2023, the Tribunal wrote to ZL only, confirming that after reconsideration the whole of the claim was now accepted.

6. Also on 20 February 2023, the Tribunal sent to ZL and the respondent Notice of a Preliminary Hearing to take place on 4 May at 10am.

7. On 3 May 2023, the Tribunal wrote to ZL and the respondent notifying them that the hearing time was postponed to 2pm on the same day. The Tribunal asked the claimant's representative to confirm that she had received the message and provide a telephone contact number. It appears no response was received to that email.

8. At 2pm on 4 May 2023, a Preliminary Hearing was conducted by EJ Morris. There was no appearance on behalf of, or by, the claimant. The respondent informed EJ Morris that they have had no contact with the claimant's representative but that their agenda had been sent to ZL.

9. On 5 May 2023, the Tribunal sent an order prepared by EJ Morris by email to both the claimant's address and that of ZL. Having set out the background, EJ Morris stated that there had been no appearance by either ZL or the claimant at the hearing the previous day. ZL was ordered to state whether she was the claimant's representative, why she had not responded to the Tribunal's correspondence and why she did not attend the preliminary hearing. In a separate paragraph. The claimant was ordered to write to the Tribunal by the same date to state whether he considered ZL to be his representative, alternatively to provide the name of his new representative or to confirm he was to conduct the proceedings without a representative. He was directed to ensure that the response he sent to the Tribunal was copied to a particular email address, being that of the respondent's representative.

10. On 9 May 2023, ZL wrote to the Tribunal copying in the respondent and the claimant. She stated that the claimant was represented by a regional officer as he was no longer employed by the respondent. She stated that the claimant had not responded to multiple requests for information made of him by the regional officer; she added that the claimant *'should have attended the hearing even if his rep didn't'*. She confirmed that the claimant did not have a legal representative because the union was not in receipt of a *'legal view'*. She suggested another hearing be rescheduled *'until we get a legal opinion on the matter'.*

11. The claimant did not respond to the order of EJ Morris.

12. On 22 May 2023, the respondent wrote to the Tribunal seeking an order striking out the claim on the basis that it was not being actively pursued, alternatively unless order. The application was copied to ZL and, separately, to the claimant.

13. The claimant did not respond to the application.

14. On 15 June 2023, two pieces of correspondence were sent by the Tribunal to the claimant via email. The first item of correspondence was to inform the claimant that the letter of 9 May 2023 sent by ZL had been treated as a change of address for correspondence, so that future correspondence would be directed to the claimant only.

15. Also on 15 June 2023, the claimant was sent a strike out warning made by EJ Arullendran who warned the claimant that she was considering striking out the claim because the claimant had not complied with the order of 5 May 2023 and because it had not been actively pursued. The claimant was given until 22 June 2023 to object to the proposal or to request a hearing.

16. On 23 June 2023 EJ Jeram struck out the claim, noting that the claimant had failed to make any representations or request a hearing. The strike out judgment was emailed to the claimant on the same day.

17. On 27 June 2023 the claimant emailed the Tribunal, from a different email address to that provided to the Tribunal, in which he referred to the Tribunal's correspondence of 5 May *stating 'I believe there was an opportunity to make representations or ask for a hearing as to why my claim should not be struck out'*. The claimant stated that he had paid subscription fees to his union to represent him and that he was therefore *'unaware I needed to be representing myself at any hearing or during phone calls. It may have been a misunderstanding on my part but I now need to seek further advice about what happens to my fees I pay the union if I'm not represented by them'* adding that *'it would appear that I may now have to represent myself*'. He stated he had only opened his emails that day, having been preoccupied by his own exams. He asked for advice. He did not copy his correspondence to the respondent.

18. On 17 July 2023, EJ Jeram wrote to the parties stating that the claimant's email of 27 June was treated as an application for reconsideration in accordance with rules 70 and 71 and furthermore, given the low threshold of the test rule 72(1), it could not be said that the application had no reasonable prospects of success.

19. The application was not refused and, in accordance with rule72(1), the parties were given until 24 July to provide a response to the application together and seeking their views as to whether a hearing was necessary in the interests of justice.

20. On 24 July 2023, the respondent wrote providing objections to the email been treated as an application for reconsideration and confirming that it did not require hearing. The claimant did not reply.

21. On 13 September 2023, EJ Jeram wrote to the parties stating that the matter would be reconsidered without a hearing. Any further representations from the parties must be received by 20 September 2023. The respondent confirmed that it sought to rely only upon those representations contained in its email of 24 July 2023. The claimant did not reply.

Discussion and Conclusion

22. There is a single ground upon which a judgment can be reconsidered, that being that it is in the interests of justice to do so; rule 70. If it is reconsidered, a judgment can be confirmed, varied or revoked.

23. Although the power to reconsider a judgment is a broad discretion, it is one that must be exercised judicially. As with any power under the Tribunal Rules of Procedure, judges must seek to give effect to the overriding objective when exercising their discretion. Regard must be had not only to the applicant, but also to the other party to the ligation. Furthermore, a central aspect of the interests of justice is that there is, so far as possible, finality of litigation. A reconsideration is not an opportunity for the applicant to have a second bite of the cherry, without there being some compelling reason, and nor is it an opportunity for a Tribunal to review and amend its original decision if it has changed its mind; recently affirmed in Ebury Partners UK Ltd v Davies [2023] EAT 40.

24. There is limited information provided by the claimant before me, but it is evident from that which was provided that the email address used by the Tribunal to attempt to reach the claimant was correct.

25. The claimant accepts that he received the order of EJ Morris dated 5 May 2023, albeit he contends he became aware of it belatedly. Notable in its absence is any expression of surprise about, or ignorance of, the hearing of 4 May 2023, which was the subject matter of that correspondence.

26. The claimant also refers to his ability to make representations or seek a hearing, a reference to the exact words contained in the judgment sent on 23 June 2023, although the claimant does not, explicitly, acknowledge that his claim has been struck out. Since he received the email of 5 May and that of 23 June, it is more likely than not that he was also aware of the email correspondence from ZL dated 9 May 2023; if he were not, it would be all the more surprising that he had not expressed surprise about her failure to comply with the order of EJ Morris, given his expressed belief that he was represented by his union.

27. Various assertions were made in the email written by ZL about the claimant's lack of engagement with the union regional officer. The claimant does not in his email to the Tribunal dated 27 June 2023 address those assertions at all,

or deny them. I consider it more likely than not that if what was contained in that email did not broadly represent the true position, the claimant would have said so.

28. I accept, as the claimant contends, that there *'may have been'* a misunderstanding between the claimant and his union; if the union had withdrawn representation, it was for the union to notify the Tribunal and the respondent. However, by allowing his email to be treated as an application for reconsideration of the judgment, the claimant was given an opportunity to explain that misunderstanding. He did not seek a hearing, and he did not provide any further written representations. There are therefore no details before me of the nature of the misunderstanding, how and why it arose, and how it led to the claimant's own inaction.

29. Even if the claimant believed that he was represented by his trade union throughout, the fact remains that it was his claim and therefore his responsibility to pursue, whatever other demands he had on his time outside the context of this litigation. The claimant has provided no information about the steps he took, if any, to engage with his union or to ensure that his claim was actively pursued - no steps were taken by him directly with the Tribunal after 14 February 2023 until after the claim was struck out.

30. Drawing the above together, I am satisfied that the claimant knew that his Tribunal claim had been accepted, since he has not suggested otherwise, and that at that time, he was to be represented by his union. I am satisfied that thereafter, there was further communication between the claimant and his union, and that there was a lack of clarity about the union's role. That ambiguity could and should have been addressed by the union notifying the Tribunal of its lack of involvement.

31. In any event, whether he believed he was represented or not, the claim and the responsibility for advancing it, rested with the claimant. It was his responsibility to ensure that he was appraised of the litigation, and to ensure steps were taken to pursue his claim. I consider it more likely than not that the claimant knew of the hearing on 4 May but that he failed to ensure that that hearing was attended by his representative or by himself.

32. The claimant having provided no information about what steps he did take to inform himself about the litigation, the union's role in it, or to otherwise advance his claim, I am not satisfied that he took any or any adequate steps.

33. Whether something is in the interests of justice requires consideration of the interests of both sides. It is not enough to say that there *'may have been'* a misunderstanding between the claimant and his union, or that the claimant's resources were, perhaps understandably, directed elsewhere; those are not reasons, in my view, to deprive a respondent of a judgment that was properly entered. Nor can it be said that to set aside the judgment in those

circumstances would be in accordance with the overriding objective to deal with matters fairly and justly.

34. There is no compelling basis to revoke or vary the judgment.

Employment Judge Jeram

Date: 2 November 2023