Appeal No. UKEAT/0127/18/OO

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 9 January 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MR D SCANLON — APPELLANT

YOUNG ENGINEERS LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID SCANLON (The Appellant in Person)
For the Respondent	MR RAJIU BHATT (of Counsel) Instructed by: Fletcher Day 110 Cannon Street London EC4N 6EU

SUMMARY

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

The Claimant was retained by the Respondent in 2015 to work as a web developer and then to work on an associated membership database. The number of days' work was to be as agreed. The daily rate was £150. The relationship ended early in 2017. The Claimant claimed that since 2016 he had put in 158.5 days' work for which he had not been paid, and was owed wages of £23,775. The Respondent's case was that only 23.5 days' work had been agreed in that period, and that the Claimant was only owed £3525. The Employment Tribunal ("ET") accepted the Respondent's case and awarded £3525. The Claimant appealed.

The overarching ground of appeal was that the Tribunal's Decision was not compliant with **Meek v City of Birmingham District Council** [1987] IRLR 250, in particular because there was no clear finding as to what was agreed about the work for which the Claimant would or would not be paid, and how, in the relevant period. He also argued that the ET wrongly rejected his case as to the number of days that he had actually worked in the relevant period. The Respondent's case was that, reading the Decision as a whole, the ET had clearly found that, as from a meeting on 27 April 2016, it was agreed that the Claimant had to complete the project, but had no right to any further payment; and the ET was entitled to take the view that it did about how many days he had actually worked after that, though that was strictly irrelevant.

Held: Whilst recognising the difficulties it faced, in light of the nature of the evidence available to it, and its overall task, the ET had not made sufficiently reasoned or clear findings, as to (a) the agreement or understanding, following a meeting on 27 April 2016, about what, if any, further payment the Claimant would receive or how it would be calculated thereafter; (b) the significance of the fact that, on the Respondent's own case, accepted by the ET, payment for *some* further

days' work, at the daily rate, had, in any event, been agreed after that meeting; and (c) its reasons for rejecting the Claimant's case as to the number of days he had actually worked, given the evidence that he put before the ET.

HIS HONOUR JUDGE AUERBACH

Introduction

1. The Respondent to the claim in the Employment Tribunal ("ET"), and now to this appeal, is a charity. In June 2015 it entered into a contract with the Claimant before the ET (now the Appellant in this appeal), employing him as a web developer.

2. The contract was before the ET and was signed by the Claimant and by the Respondent's then Chief Executive, Rod Edwards. It contained the following provisions:

> **"*SALARY***
>
> **You will be remunerated monthly based on a daily rate of *£150.00*, calculated against approved time recording. Payment, subject to normal PAYE and National Insurance, will be made in arrears into your bank or building society account, before the last day of each month.**
>
> **…**
>
> ***HOURS***
>
> **Your remuneration is based on the hourly rate, the hours worked will be as agreed between you and the Chief Executive, who is also your Line Manager."**

That reference to the Chief Executive and Line Manager was plainly a reference to Mr Edwards.

3. In May 2017 the Claimant presented a claim to the ET for unlawful deduction from wages. In the claim form he gave no details, save that he identified that he was claiming £23,775, which he stated amounted to "*158.5 Days at the contract daily rate of £150*".

4. The claim was defended. The grounds of resistance asserted that the Claimant completed work on the Respondent's website, for which he was paid in 2015, and then began work on a membership database, for which he received further payments in November 2015 and March 2016. However, it was the Respondent's case that this work was not yet completed and that there was a meeting on 27 April 2016 with Mr Edwards, at which it was mutually agreed that no further

payments would be made until the previously agreed work was completed, and that payment would then be made in a lump sum at the completion of that work.

5. The response went on to set out what the Respondent said happened subsequent to that meeting including, in summary, that events culminated in a falling out. In particular, the response asserted that there were discussions between the Claimant and a new CEO, Heather Williams, in the course of which the Claimant resigned, claiming 141.5 days' back pay. It asserted that Ms Williams then concluded, following a review, that 53.4 days' work had been agreed, of which the Claimant had been paid for 30 days. Therefore, she offered to pay him for a further 23.4 days. However, no agreement was reached, and the ET claim had followed.

6. The matter came to a Merits Hearing on 3 November 2017 before Employment Judge Kolanko, sitting alone. His Reserved Judgment and Reasons were promulgated on 23 November 2017. By the time of that hearing the Respondent had gone into voluntary liquidation and, although the Judge had before him statements from Mr Edwards and Ms Williams, they did not attend to give live evidence. He had a statement from the Claimant who did attend, both to give evidence and to represent himself, as he did at this hearing in the EAT. The Respondent, both at the ET hearing and before me, was represented by Mr Bhatt of counsel.

The Employment Tribunal's Decision

7. The Judge observed that his task was made challenging by reason of the absence of the Respondent's witnesses, although he drew some assistance from the email correspondence. He observed also that the Claimant's statement did not fully address the contractual terms agreed between the parties with regard to remuneration.

8. In paragraph 6 of the reasons, which is divided into sub-numbered paragraphs, the Judge set out what he described as basic outline facts. After referring to the terms of the contract and the initial work, and making some findings about work done and for which the Claimant was paid in 2015, the Judge continued:

> **"6.4. On 16 December 2015 Joanne Mitchell (Competitions Manager) who was reliant upon the new data base and website to undertake her work, emailed the claimant copying in Mr Edwards (bundle page 49) in which she indicated that the claimant appreciated the database was a major component of the website and at [sic] it was key to the respondent's operations "*please can you provide Rod and myself with a full update of your work to date your intended plan for taking the project forward*."**
>
> **6.5. In response Mr Edwards emailed Miss Mitchell and the claimant (bundle page 51) he indicated to Miss Mitchell that he expected the claimant would continue on the project and bring it to completion and would be paid appropriately. He then addressed the claimant:-**
>
> > **"With your MoD commercial hat on, you will be appreciate [sic] that we can't keep supporting a "time and materials" contract with no agreed timelines. Now that we have a clear agreed specification, we should be treating this more like a fixed-price contract with you as our prime contractor …**
> >
> > **I was disappointed to see Joe's note. I had hoped that following the recent discussions we had a much clearer way ahead. Hopefully we can get this show back on the road again soon? …"**
>
> **6.6. Following Mr Edwards[']email the claimant appears to have indicated that another 14.4 days was required to complete the database. This appears to have been fully understood by Mr Edwards who in an email to the claimant on 18 December 2015 (bundle page 57) noted:-**
>
> > **"I note your 14.4 days estimate, not including the requirements work.**
> >
> > **Obviously I would like to keep you financially lubricated, whilst not being completely exposed on an uncapped unspecified T & M basis.**
> >
> > **… I'm suggesting we review progress on Thursday 14th by which time we should have a reasonable view-then agree a sum to be deposited into your bank account the following week.**
> >
> > **Does this make sense?**
> >
> > **Rod"**
>
> **6.7. The claimant in evidence referred to a document (bundle page 118), which he described as an updated specification for the database project, which was prepared in January 2016, and which under the heading "*Timing*" stated "*total hours estimated 100.5 (14.4 days) without group work with Young Engineers staff to clarify detailed requirements, column headings in reports et cetera*.".**
>
> **6.8. On 23 February 2016 Miss Mitchell emailed the claimant indicating the need to move the database on and bring it to operational status within the next week "*I've discussed this with Rod and we accept that this may take a further day or 2 of your time, please advise if this is not the case*." It appears her clear [sic] that the job had not been completed and certainly not within the 14.4 days initially envisaged.**
>
> **6.9. On 13 April 2006 [sic] Mr Edwards emailed to the claimant (bundle page 65) requesting an update "*as you will recall, the last time we reviewed progress you assured us that the project would be complete "the following Wednesday", i.e. in early March*." Enquiring as to when he will be able to complete the handover of the project.**
>
> **6.10. It appears that on 27 April 2016 the claimant had a meeting with Mr Edwards in which Mr Edwards expressed his dissatisfaction with the lack of progress, and it was agreed that no further payment would be made. The respondent contends that no more money was payable**

and that the work had to be completed as originally promised. The claimant contends that he was continuing to work and would be paid for the work undertaken on completion of the project. I address this dispute in my conclusions.

6.11. It appears that notwithstanding the lack of progress, and the apparent refusal to make any further payments, Mr Edwards on 8 July agreed to the claimant undertaking a further 10 days work on the project.

6.12. On 28 September 2016 Joanne Mitchell emailed the claimant regarding the database, expressing her frustration and disappointment at the lack of progress (bundle page 86) "*the project is now well over a year old and is 9 months beyond the completion date*." She requested that the claimant contact Mr Edwards within the next 24 hours in order to resolve matters. On the same day the claimant emailed Mr Edwards (bundle page 88) expressing his frustration but noting "*it is worth mentioning that I'm not beholden to anyone regarding completing this work. I have been working on goodwill and on my side it's running out*." The claimant indicated that it had been difficult working with Miss Mitchell over the previous 6 months and understood this was a nasty situation for Mr Edwards. He concluded by indicating he was taking a couple days to think about matters and had an interview the following week.

6.13. Mr Edwards responded the same day by email to the claimant (bundle page 88) indicating that he had missed all his deadlines and that it was not surprising therefore that Miss Mitchell had reached the end of her tether, and concluded by raising concerns over his commitment. The following day Mr Edwards wrote a follow-up email to the claimant (bundle page 91) taking issue with the claimant's comments, and concluded by stating:-

> **"My suggestion is that you take days out you need next week, concentrate on your interview. Good luck with it. Return ready to pick this up on 7 October, concentrate, focus and crack on, then perhaps we can have project completed, pay you some extra, and move on with our lives!"**

6.14. The evidence I heard in respect of events thereafter was quite unsatisfactory. Heather Williams took over as chief executive in November 2016. It appears that there were discussions between Mrs Williams and the claimant with regard to completion of the database, and following a deadline of 27 January 2017 being missed, she asked the claimant to stop working on the project on 1 February 2017 pending a further meeting. It appears that at a meeting on 10 February 2017, the claimant resigned forthwith, and presented Mrs Williams with his claim to be paid 141.5 days in respect of alleged back pay. The claimant in evidence was asked as [sic] to explain the difference between this number of days, and the 158.5 days claimed within these proceedings. He indicated that the remaining hours were referable to additional work on web development and maintenance. It is proper to record that in a summary prepared by the claimant (bundle page 224) on 9 February 2017 under a heading summary of web development work he claimed 141.5 hours "*total of days spent working for Young Engineers*." In another document prepared by the claimant (bundle page 155 it is a diary printout reciting weeks worked from 1 February 2016 to 6 February 2017 totalling 162.5 days."

9. The Judge then reviewed the competing submissions. In the course of doing so he noted that, in his closing submissions, the Claimant had indicated "*contrary to what had been said by him in evidence*" that he did not remember agreeing specifically that he would not be paid for any subsequent work at the (disputed) April meeting (paragraph 9). After reviewing the submissions, the Judge set out his conclusions in paragraphs 11, 12 and 13 of the Judgment, as follows:

> **"*Conclusions***
>
> **11. I have highlighted at the outset the difficulties encountered in resolving the issues in this case. Central to this dispute is what took place at the meeting between the claimant and Mr Edwards on 27 April 2016. It is clear from the correspondence that I have been shown that Mr Edwards was becoming frustrated with the failure of the claimant to complete the project as**

promised within various timeframes. The preceding correspondence reveals that he was not prepared to give carte blanche to the claimant to expend as many days as he wished in completing the project. I note that the claimant had been paid for the agreed extension of days put forward by the claimant. It would, I judge have missed the point which Mr Edwards was seeking to avoid if, as contended by the claimant, he was allowed to expend as many further days as he wished on the project but that payment would simply be delayed until the end of the project. Mr Edwards I discern was prepared at the end of the project [to] consider some payment to the claimant, how that was to be calculated is not at all clear, but was certainly not on the basis of a daily rate for future working days that Mr Edwards had not and was not intending to agree to.

12. On this disputed issue I prefer the case presented by the respondent. I also prefer the respondent's assessment of sums due in contrast to the claimant's bald recital of days worked, which is not supported by any corroborative evidence. I agree with Mr Bhatt's observations that the claimant appears to have changed his case from a claim for monies expended in working on the database as recited in his claim form and statement, to a wider claim for other work as well.

13. For the above reasons I determine that the claimant is entitled unpaid wages in the sum of £3,525.00."

The Grounds of Appeal

10. An application for reconsideration of the ET's Decision was unsuccessful and the Claimant appealed to the Employment Appeal Tribunal ("EAT"). Upon initial consideration of the Notice of Appeal, Her Honour Judge Eady QC directed that there be a Preliminary Hearing and this took place in September 2018 before His Honour Judge Barklem. The Claimant was given permission to amend his grounds of appeal in terms drafted by his ELAAS representative, Ms Rebecca Tuck of counsel. These were, therefore, the live terms of appeal before me.

11. Ground 1 asserts that the Judgment overall was not compliant with the standards set out in **Meek v City of Birmingham City Council** [1987] IRLR 250.

12. Ground 2 asserts that the ET failed to apply properly or at all section 13(3) of the **Employment Rights Act 1996** ("ERA") to determine what was properly payable to the Claimant, whether prior to or after any alleged variation of the contract on 27 April 2016, by making findings of fact as to (1) how the parties determined what was "approved time recording" and (2) how the parties set out what was "agreed" between the Claimant and the Chief Executive as to required hours or days of work. There then follows, but in parenthesis, an assertion that the ET's

findings of fact as to the number of days worked and paid for in 2015 is at odds with the payslips. However, it was common ground before me that, as this relates to 2015, it is really a background assertion and not central to the issues in this appeal.

13. Ground 3 asserts that the ET erred in paragraph 11 in failing to set out properly or at all whether a variation of contract occurred at the meeting on 27 April 2016. It asserts that, in addition, in circumstances where the Respondent did not issue any notice of variation, contrary to section 4 of the **ERA**, the burden of proving a variation must lie on the Respondent.

14. Finally, ground 4 asserts that the ET failed to make findings to support its conclusion that the Claimant was entitled to only 23.5 days' payment, in circumstances where it appeared not to be disputed that he had in fact worked some 162.5 days (for four of which he was paid).

15. The Respondent put in an Answer in which it set out its case that: the ET's Decision was **Meek**-compliant; the questions identified in ground 2 were addressed in the findings of fact in paragraph 6 of the ET's Decision; the EAT should not be over-critical of the ET's reasoning, bearing in mind the guidance in **London Borough of Brent v Fuller** [2011] ICR 806; payslips were not referred to before the ET but, rather, respective spreadsheets tabled by the parties; and that the upshot of the meeting on 27 April 2016 was that the Claimant did not have a carte blanche right to work as many days as he wished and then to be paid for the time; and the ET had set out sufficient findings accepting that case. The Respondent also did not accept that the burden of proof point in relation to section 4 of the **ERA** assisted the Claimant. Its case was also that the criticism of the ET's finding that the Claimant was only entitled to 23.5 days' payment was misplaced, as it was made on the assumption that he had *some* entitlement to be paid for the days actually worked, notwithstanding the fact that such days were not authorised.

Submissions on the Appeal

16. For the hearing before me, in the usual way, the parties prepared written skeleton arguments and I heard oral submissions from them both as well. I can address first some points which arose about the scope of the issues raised by the appeal.

17. Mr Bhatt suggested that the Claimant's written skeleton strayed somewhat beyond the permitted amended grounds of appeal in some respects. In particular, the Claimant asserted that the meeting on 27 April 2016 referred to in the ET's decision did not in fact take place at all. However, Mr Bhatt said that was not a live ground or point of appeal. It was not open to the Claimant now to seek to reopen or challenge the Tribunal's finding that there *was* such a meeting, as opposed to the issues raised about its handling of what did or did not happen at that meeting and what was or was not its significance for the relationship going forward. The Claimant, during the course of discussion, if somewhat reluctantly, accepted this; but in any event Mr Bhatt was right. The finding that the meeting did occur, as such, was not the subject of challenge on appeal. It was, however, indeed open to the Claimant to pursue, as he did, issues about the Tribunal's findings in relation to that meeting, but on the footing that it is a given that the Tribunal found that a review meeting of some sort did occur on that date.

18. Secondly, there was some discussion about an email, referred to in paragraph 6.5 of the ET's Decision, sent by Mr Edwards on or around 16 December 2015. Ultimately, I concluded that there was no live issue on appeal about the significance of this email. The Claimant's concern was that the Respondent might be contending that the ET had relied on that email, or should have treated it, as evidence that, in or around December 2015, it had been agreed that thereafter the Claimant would be paid a fixed price for any work done in the future (and not a daily rate),

regardless of how much time it took. Were that to be argued, it would be the Claimant's case that that would have been an erroneous reading of that email.

19. However, Mr Bhatt confirmed in the course of argument that it was *not* the Respondent's case either that the ET had found that there was a specific identified fixed price agreed in or around December 2015 in respect of any remaining work to be done after that date, nor indeed that it should have made such a finding. What the Respondent *did* argue, is that the ET can be taken to have drawn on that email as part of the background correspondence to which it referred later in its decision, as informing its findings about what happened on 27 April 2016, because it can be taken to have relied on such material as informing its view that Mr Edwards' frame of mind at that meeting was that he was not prepared to give the Claimant carte blanche. The significance of *that* finding and its robustness *was* a live issue in this appeal.

20. Finally, in terms of points about the scope of this appeal, Mr Bhatt initially objected to the Claimant seeking to assert that the ET had erred in paragraph 12 of its Decision in finding that he, the Claimant, had made a bald recital of days worked which was not supported by corroborative evidence, given, said the Claimant, that the Tribunal had before it the corroborative evidence of his spreadsheet. I do not agree with Mr Bhatt that this line of argument was off limits, given that the amended grounds of appeal at point 4 challenged the robustness of the Tribunal's conclusion that the Claimant was only entitled to 23.5 days' payment by reference to the fact that it appeared not to have been disputed before the ET that he had in fact worked some 162.5 days in the relevant period (for four of which he was paid). Indeed, Mr Bhatt, I think it is fair to say, somewhat rode back from this objection in the course of discussion; and, in any event, he addressed this point both in his written and his oral submissions.

21. The pertinent principles of law were not really in dispute. Under section 13, and in particular section 13(3), of the **ERA**, the entitlement of a worker or an employee to claim unlawful deduction from wages arises if they have not received the wages "properly payable" to them on some particular occasion. The definition of wages in section 27(1) includes, at (a), a reference to fees and other items "payable under his contract or otherwise." That means that they must have done work for which they have an entitlement to be paid the wages claimed as a matter, through some route or another, of contractual right, or if not, then some other *legal* basis of entitlement. See **New Century Cleaning Co Ltd v Church** [2000] IRLR 27.

22. The **Meek** and **Fuller** cases were also, as I have indicated, referred to. Certainly, it was part of the Claimant's general challenge on appeal, that the Tribunal's reasoning was not sufficiently clear to ground and explain its stated conclusions; and it was part of the Respondent's defence to that challenge that, read overall, the Tribunal's substantive conclusions, and how it had drawn on its more detailed findings of fact to reach them, could be sufficiently discerned; and that the Claimant's critique of its reasoning was over-zealous.

23. Section 4 of the **ERA** confers a right on an employee to a written statement of material changes to any of the particulars of the terms of employment which should be included in an initial statement provided under section 1. However, that right is only enjoyed by employees (as opposed to those workers who are not also employees).

Discussion and Conclusions

24. It is convenient to consider, first, the point concerning section 4 of the **ERA** (which was a sub-argument within ground 3 of the amended grounds of appeal). The Claimant argued that the Tribunal should have found that, if the terms of the original agreement were varied at the 27

April 2016 meeting, then the Respondent should then have issued a section 4 statement; but that, since it had not done so, the presumption should be that the terms continued unchanged, unless the Respondent could show that they had changed, and what the new terms were.

25. Mr Bhatt submitted that, whether or not the Respondent was under a duty, after the meeting on 27 April 2016, to issue a section 4 statement, had not been a live issue before the ET. Indeed, there had been no determination as to whether the Claimant was an employee, as opposed to merely a worker. He was correct about that. Of course, the Tribunal did not need to determine specifically whether the Claimant was an employee, for the purposes of his wages claim as such, because a worker is entitled to bring such a claim, whether or not they are also an employee.

26. In any case I do not think this particular point advances the appeal as such. The substantive task of the Tribunal in this case was to decide what was the express or implied agreement from time to time as to the Claimant's entitlement to remuneration, and how it would be calculated, and what were the underlying facts to which that agreement then had to be applied, so as to ascertain whether or not he had received the full amount that he had, contractually, earned.

27. Even if it were right that, had some variation to those terms been agreed between the parties on 27 April 2016, then it should have been documented, the Judge still had to decide, doing the best he could, whether there was such an agreement, and in any event what the terms thereafter were. It may be said, of course, that the burden starts with the Claimant. He had to make good his claim that he had done a certain number of days' work, in the relevant period or periods, and that either prospectively, or retrospectively, it was agreed that he would be paid at a daily rate, in respect of those days. However, ultimately, the task of the Tribunal was to come to some conclusion about that, on the basis of all the evidence and the "hard" facts found, in the

round. I do not think this is a case where, if the Claimant had been found to be an employee, the absence of a section 4 notice should have made a material difference.

28. Turning, then, back to the substantive issues, this appeal was allowed to proceed to a Full Hearing on the basis that there were two critical aspects with which the Judge had to engage, and about which it was arguable that he did not make sufficient, or sufficiently clear, findings.

29. The first concerns what was the agreement or understanding between the parties, as at the end of the meeting on 27 April 2016, about the basis on which the Claimant was to do further work and/or receive further payment (if at all). The second concerns how many days' work the Claimant in fact did, in particular, after that date, but also insofar as he had not yet been paid anything for any days of work done earlier in 2016 and leading up to that date. Linking these two aspects is a general question as to the relationship between these two issues. Was payment, in future, to be calculated by reference to a daily rate at all? If not, how was it to be calculated? Or was there no *entitlement* to a further payment at all? There was also, it seems to me, a third important issue, namely as to what may have been, one way or another, agreed in the period subsequent to that meeting (whether or not effectively varying any agreement at the meeting).

30. Mr Bhatt submitted that, reading the Tribunal's Decision as a whole, it had made a clear finding as to the understanding or agreement going forward as at the end of the meeting on 27 April 2016. That finding, he said, was to the effect that it was agreed that the Claimant would not be *entitled* to any further payment at all, although it was also agreed that he would do more work, because his work on the database aspect of the project was not yet completed, and he accepted that he was obliged to finish the job.

31. Mr Bhatt submitted that it could be deduced from a reading of its Decision as a whole, that the ET found that the *possibility* was (or may have been) held out by Mr Edwards, of the Claimant receiving *some* further payment at the end of the project, but that no promise was made as to whether he would receive such a payment, or how the amount would be arrived at if he did. Mr Bhatt submitted that the conclusion could be drawn, that this what the Tribunal had found, from a careful reading in particular of paragraph 6.10 of its Decision, together with the whole of paragraph 11 and including, for these purposes, the first sentence of paragraph 12 which is effectively, he said, the ET's conclusion on the first of the foregoing two aspects.

32. If I accepted that the Tribunal had made a clear finding that *this* was the agreement and understanding reached as of the end of the 27 April 2016 meeting, then, said Mr Bhatt, the second issue – how many more days' work the Claimant actually did after that date – became irrelevant, because how much the Claimant was entitled to be paid thereafter was not dependent on how many further days he actually worked. On this view of the Tribunal's Decision, it had properly concluded that he was simply not entitled, as of right, to any further payment at all. That was something, thereafter, that it had found to be entirely in the Respondent's gift.

33. Alternatively, if, contrary to that primary position, the Tribunal had found (or should have found) that the number of days' work put in by the Claimant after the date of that meeting was for some reason relevant to how much he was entitled to be paid, then, said Mr Bhatt, the ET was entitled to take the view (which it did), that it did not accept what it described as the Claimant's bald recital of the number of days he had actually worked. That was given also that he had given different figures for the number of days he had worked, in exchanges with the Respondent around the time of his resignation, then in his claim form and then finally in his evidence to the ET.

34. Mr Bhatt said it was perhaps unfortunate that the ET had gone on to refer to this aspect in paragraph 12 in the way that it did, given that, if his primary case as to the correct reading of its Decision was accepted, it was indeed irrelevant. However, the fact that the Tribunal had gone on to address something which (on this reading of its Decision) was in fact irrelevant to the claim, did not vitiate its primary conclusion.

35. Similarly, submitted Mr Bhatt, it did not matter that the Tribunal had simply made a finding that the Claimant was entitled to be paid (at the daily rate) for 23.5 days, on the basis that the Respondent had put forward a schedule conceding that much (but no more), but without making any more specific finding of its own about that. That, said Mr Bhatt, was, once again, because, if I accepted that on a fair reading the ET had (properly) found that the Claimant had no *entitlement* to a further payment after the day of that meeting, then it was only to his benefit that the Respondent had nevertheless conceded that he should be paid for 23.5 days at the daily rate; and there was no error in the ET simply adopting that concession.

36. The Claimant submitted that the Tribunal's reasoning was inadequate because there was no clear or sufficient finding as to what was the agreement or understanding coming out of the meeting on 27 April 2016, in relation to what further work he was to do, or how that was to be agreed, or the basis on which it was to be remunerated. Further, it was not a proper finding, or a sufficiently reasoned finding, for the ET to reject the Claimant's assertion of the number of days he had actually worked subsequent to that meeting, as a bald recital not supported by any corroborative evidence, when it *was* corroborated by a schedule that he had put before the ET.

37. Further, he said, the difference in the calculation of days put forward by him at different stages was more apparent than real, as there was a straightforward reconciliation. The full

number of days he had worked was 162.5 days. The 141.5 days claimed around the time of his resignation reflected his allowance for the original offer (on his case) of 21 days' payment made to him at that time. The later reduction by him of the total figure of 162.5 days to 158.5 days, during the course of the ET proceedings, reflected his acceptance of evidence by way of payslips disclosed during the litigation, that showed that four of those days had been paid.

38. In summary, given, submitted the Claimant, the lack of a clear finding by the Tribunal as to the outcome of the meeting on 27 April 2016, in terms of the agreement going forward, coupled with the clear evidence - which ought to have been accepted - that he had worked 162.5 days as opposed to merely 23.5 days, it was not a sufficiently reasoned Decision for the Tribunal simply to conclude without further analysis that only 23.5 days' work and pay had been agreed.

39. My conclusions are these.

40. Firstly, I am mindful of the difficulties which this Judge faced, given that the two witnesses for the Respondent did not give live oral evidence, and so he did not have the benefit of hearing them cross-examined, or any further live clarification of their evidence; and given also that the Claimant's witness statement, and indeed his original claim form, did not set forth a detailed analysis of how he had arrived at his own figures. The Judge also had to do his best, to make sense of the legal implications of how the relationship between the parties evolved and was affected by changing dynamics, developments and informal exchanges, over a period of months, both before and after the 27 April 2016 meeting. That was no easy task.

41. In such cases, it is sometimes particularly difficult for the Tribunal to come to a view as to what it should infer or conclude was the agreement between the parties from time to time,

because that agreement may change through a mixture of exchanges that may be oral or by email, or through a further element in the mixture, of simply an inferred change to the agreement by conduct. Furthermore, in this case, critical factual issues for the Tribunal were not merely what was the overarching agreement coming out of the April meeting, and what work was actually done after that date, but also what work was actually approved for payment, later, and on what basis. The approval or not, of some or all of the days actually put in, was potentially something that the Tribunal might conclude had occurred by express agreement - written or oral, prospective or retrospective – or by conduct. The Judge had to do the best he could to make findings about all these matters, notwithstanding the limitations and difficulties of the evidence available to him.

42. However, ultimately, what I had to decide is whether the ET's decision contained sufficiently clear and identifiable conclusions on these key questions, supported by sufficiently clear reasoning, to be **Meek**-compliant. After some hesitation, my considered conclusion is that there were not sufficiently clear and reasoned findings in this Decision on the crucial issues.

43. As to the question of what the agreement or understanding was as of the end of the meeting on 27 April 2016, as I have said Mr Bhatt points in particular to paragraphs 6.10 and 11. However, paragraph 6.10, by itself, does not present a definitive finding of fact on this question. It states: "*It appears that on 27 April 2016 the claimant had a meeting with Mr Edwards in which Mr Edwards expressed his dissatisfaction with the lack of progress, and it was agreed that no further payment would be made*". The Judge seems at first to be saying that it appears, to him, that what happened was that Mr Edwards expressed his dissatisfaction and it was agreed that no further payment would be made. But he then goes on to say "*The respondent contends that no more money was payable and that the work had to be completed as originally promised. The*

claimant contends that he was continuing to work and would be paid for the work undertaken on completion of the project". He then adds: "*I address this dispute in my conclusions*".

44. Pausing there, reading that paragraph as a whole, the Judge is not, there, coming to a firm finding about what was agreed. Rather, he is setting out the rival submissions and what it appears, on one view, happened, but indicating in terms that he is going to state later what his own conclusion is.

45. Furthermore, in paragraph 6.11 he says, "*It appears that notwithstanding the lack of progress, and the apparent refusal to make any further payments, Mr Edwards on 8 July agreed to the claimant undertaking a further 10 days work on the project*". That, it is apparent from the materials in my bundle, draws on Mr Edwards' witness statement as well as on the Respondent's spreadsheet that was before him. This shows that the Judge was alive to the possibility that, whatever was the outcome of the 27 April meeting, further specific payments for further days' work (at the daily rate) might have been agreed thereafter, and at least were agreed to some extent on 8 July. That reflects the fact that the Judge needed to consider not only how matters stood at the end of the 27 April meeting but what, if any, further payments for work in fact done, were in fact agreed on subsequent occasions, and on what basis, whether prospectively or retroactively, right up to the point of termination. But I do not think he sufficiently engaged with that.

46. Turning to paragraph 11, much of the content of that paragraph sets out the Judge's conclusion, drawing also on the background correspondence, that Mr Edwards' clear position at the meeting on 27 April 2016 was that he was not prepared to agree to give the Claimant carte blanche to expend as many days as he wished in completing the project, on the basis that actual payment would be delayed until the end of the project. However, this is, as such, no more than a

finding about what was *not* agreed at that point, namely that what Mr Edwards did not say to the Claimant in so many words was "you can put in as many days as it takes without limit and I will pay you at the daily rate for however many days it takes you".

47. That is a finding which I think the Judge was perfectly entitled to make, and was hardly a surprising finding. However, what it does not address is what was positively agreed, either expressly or impliedly, about whether the Claimant had any expectation of being paid for his further work at all, and, if so, what that was, and how any question of future or ongoing authorisation was to be handled. Nor does it address what was or was not agreed later on.

48. I do not think I can spell out of that part of paragraph 11 the conclusion that the Judge found that Mr Edwards told the Claimant in terms (and that the Claimant agreed) that he had no expectation or right to be paid for any more days at all. The last four lines read:

> **"11. … Mr Edwards I discern was prepared at the end of the project [to] consider some payment to the claimant, how that was to be calculated is not at all clear, but was certainly not on the basis of a daily rate for future working days that Mr Edwards had not and was not intending to agree to."**

49. As to the opening words, Mr Bhatt submitted that the Judge was here jumping forward in time, to refer to what he discerned was Mr Edwards' state of mind at the end of the project. I think Mr Bhatt is probably wrong about that, and that what the Judge meant was that, at the 27 April 2016 meeting, Mr Edwards was prepared to contemplate considering making a further payment as and when the end of the project was reached. But the fact that Mr Bhatt interpreted it differently, reinforces my view that what the Judge did mean is not unambiguously clear.

50. Secondly, even if the Judge was referring here (as I think he probably was, and contrary to Mr Bhatt's submission), to Mr Edwards' state of mind at the April meeting, in adding: "*how*

that was to be calculated is not at all clear", it appears that the Judge was (probably) saying that, on the evidence before him, he felt able to infer that Mr Edwards had ruled out such a payment being based on a daily rate; but, beyond that, he was not able to form any clear view about whether anything more had been said, or agreed, about how any such payment would be calculated.

51. Whichever way one reads it, what I do not think I can sufficiently spell out of this passage is that the Judge was finding in terms that Mr Edwards conveyed something to the effect of "I may consider giving you some payment at the end, but I am not promising anything, nor have I thought about how I would calculate that if I did" – *and* that the Claimant *agreed* to move forward on that basis.

52. Finally, on this aspect, there is the first sentence of paragraph 12: "*On this disputed issue I prefer the case presented by the respondent*". That might be said to be a reference back to paragraph 6.10. That may be what the Judge meant. However, given the ambiguities in paragraph 11, if so, I do not think he has made that sufficiently clear. There is no firm finding here, to the effect that it was *agreed* that the Claimant would have to finish the job, but without having the right to receive any further payment on any basis.

53. While the Judge is firm, in paragraph 11, in saying that Mr Edwards certainly did *not* agree, at the April meeting, that any future payment would be based on a daily rate, for days that Mr Edwards had not agreed to "and was not intending to agree to", as I have noted, the Respondent conceded that the Claimant was, by the end of the relationship, entitled to be paid for a further 23.5 days, and entitled to be paid for those days *by reference to the daily rate*. But, while adopting that concession, the Tribunal does not engage with how that is to be reconciled

with how it considered matters stood at the end of the April meeting (or whether, for example, it is to be inferred that there was a later further change of approach by the Respondent).

54. It is also not wholly clear why the Judge went on to say, in paragraph 12: "*I also prefer the respondent's assessment of sums due in contrast to the claimant's bald recital of days worked, which is not supported by any corroborative evidence*", if it was his concluded view that this was, after the April meeting (and remained at all times thereafter) irrelevant. It also potentially muddies the position by mixing two questions together. The reference to the Claimant's bald recital of days worked touches upon the factual issue of how many days' work the Claimant actually did in the period after that meeting. But the reference to the Respondent's assessment of *sums due* points to the wider issue of whether the Claimant had any entitlement to be paid, for the work he in fact did, going forward, and if so, on what basis.

55. I also accept the Claimant's submission that the Judge's description of his case as to the number of days he in fact worked as a "*bald recital ... not supported by any corroborative evidence*" is problematic, given that it was common ground that the Judge had in front of him a schedule put in by the Claimant showing, week by week, which days he said that he had worked. Indeed, the Claimant's figures were reflected (although clearly his analysis was not accepted by them) by the Respondent in their own counter-schedule that was also in the Tribunal's bundle. In order for its Decision in this respect to be **Meek**-compliant, it was, I think, incumbent on the ET to say something more about this evidence, to explain why it rejected the Claimant's case. I do not think that the observation that the Claimant appeared to have changed his case "*to a wider claim for other work as well*" is sufficient to explain that.

56. Putting it all together, recognising as I do the considerable difficulties which this Judge faced, I have reflected carefully before coming to the conclusion that this Decision is not sufficiently reasoned to be allowed to stand. Mr Bhatt skilfully sought to put together a case as to how it could be inferred what the Judge must have found or thought, reading the various parts of his Decision together. However, I do not think that I can be sure, reading this Decision as a whole, that Mr Bhatt's reading of it is correct, or that the Judge has sufficiently spelled out the reasons for his conclusion, at the end, that the Claimant was entitled to, but to no more than, the amount of wages conceded by the Respondent.

57. The matter, therefore, does have to be remitted for a rehearing. I should be clear that I express no view as to what the conclusions of the ET may or may not be next time around. That will be a matter entirely for it. It requires fresh consideration and a freshly reasoned decision.

58. Should the matter be remitted to the same Tribunal (if possible) or should I direct that it return to a differently constituted Tribunal? Mr Bhatt's view was that it is desirable that the matter be remitted back to EJ Kolanko, if possible, as he would not need to start entirely from scratch. I was, however, also made aware by the Claimant that he had made a complaint, although I should say at once that that complaint was not upheld. Nevertheless, it might be said that if the Claimant had lost faith in EJ Kolanko (and though he had no good ground to complain), this might be an argument in favour of not remitting to the same Judge.

59. As to that, however, I do not attach any weight to the fact of the complaint. It was not upheld, and it would not in my view be a good reason for ruling out remission to EJ Kolanko (if possible) if other considerations pointed to it. However, this is a case which really all turns on the making of findings of fact and the drawing, as necessary, of proper inferences. What is needed

A now is a completely fresh look at the evidence and fresh findings of fact. I think it is a tall ask for the same Judge to be expected to come to the evidence with a completely fresh eye, having been involved, as he was, in hearing the matter once previously.

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60. Therefore, I am going to direct that it be remitted for rehearing to any other Judge.

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