EMPLOYMENT TRIBUNALS

Claimant: Mrs S Aleem

Respondent: E-Act Academy Trust Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Watford **On:** 16 & 17 October 2019

Before: Employment Judge Manley (sitting alone)

Appearances
For the claimant: Mr Suhail, Claimant's brother
For the respondent: Mr R Powell, Counsel

RESERVED JUDGMENT ON RECONSIDERATION

1. The application for reconsideration has no reasonable prospect of success. The proposed new evidence could have been made available at the original hearing and would not, in any event, have led to the original decision being varied or revoked.

2. Even if I was to consider the new evidence proposed by the claimant, and reconsidered the relevant parts of the judgment, as it is suggested that I might in the EAT Order of 30 January 2019, the judgment would be confirmed rather than varied or revoked. For completeness the judgment is confirmed.

REASONS

Introduction and issues

1. This is a case that has taken up considerable time in the employment tribunal. The hearing of the claimant's case took place between 17 and 24 May 2018. The judgment was given orally, and reasons were then sent on 22 August 2018, there having been a delay before the request was referred to the Judge. The written judgment is some 25 pages long and contains 88 paragraphs.

2. The EAT Order of 30 January 2019 gives reasons for the Employment Appeal Tribunal Judge's decision to stay the appeal pending the claimant making an application for reconsideration. This reads as follows:

> **"Reasons**
>
> 1. One aspect of the appeal relates to the finding of the ET in paragraph 12 that there were significant financial pressures and that the academy was running with a deficit of over £2.5 million. This finding may lay behind the conclusion in paragraph 71 that the respondent was a publicly funded education establishment already facing financial difficulties; or paragraph 71, maybe an independent finding.
>
> 2. The claimant asserts that there was no evidence to support the finding that the academy was running with a deficit of £2.5 million or that the respondent was facing financial difficulties. Moreover the claimant seeks to adduce the respondent's accounts for the relevant years to show that all material times it had substantial net current assets (and I would add, very substantial reserves). If this is so, it <u>may</u> impact on the reasoning of the ET on the question of maintaining the claimant's pay.
>
> 3. General applications to adduce furnished evidence are best considered by the ET; see paragraph 9 of the EAT's 2018 Practice Direction, which is essentially in the same terms as its predecessor. I will therefore give the claimant an opportunity to apply to the ET for reconsideration, essentially in the terms of his application to the EAT to adduce further evidence. He should append the reports and financial statements on which he relies. If the ET or the EJ rejects the application it will particularly assist the EAT if it indicates what evidence it had for the findings in paragraphs 12 and 71 and why it has taken the view it has taken about the financial statements."

3. The claimant then made an application to the employment tribunal for reconsideration. As many of the submissions have been in this case, this was a substantial document running to almost nine pages, with several appendices, including balance sheets of the respondent, annual reports and so-on running to over 230 pages. This hearing was listed to consider the application for reconsideration which is opposed by the respondent.

4. At a short telephone hearing, it was agreed that a bundle of documents for this application would be produced as well as skeleton arguments from both parties. I also had before me a copy of the original bundle and the tribunal file with my notes of evidence.

5. The respondent had sent brief outline submissions running to 34 paragraphs and the claimant had prepared a further detailed document running to 25 pages and 172 paragraphs. This required some time to be spent in pre-reading. There was also an 'authorities' bundle which included some of the cases referred to in the substantive hearings - <u>Hanlon v Commissions for HM Revenue & Customers</u> (2007) EWCA SIV8283 and <u>G4S Cash Solutions (UK) Limited v Powell</u> UK EAT/0243/15. There were also further cases on new evidence and reconsideration - <u>Outasight BV Limited v Brown</u> UK EAT/0253/14, <u>Ladd v Marshall</u> (1954) 1WLR1489, Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4 and <u>Denton & Others v TH White Limited & Another</u> 2014 EWCA SIV 906.

6. The extent of the issue before me was much more limited than the extent of the documentation and the length of this hearing suggests. I needed to look at paragraphs 12 and 71 of the Reasons from the May hearing but also some of the other paragraphs for context. I might also need to consider my notes of any oral evidence given as well as any documentary evidence in that hearing which touches directly on this point. The parties had agreed that the reconsideration application could be dealt with by the Judge alone without the need for members.

The tribunal's reasons

Evidence of the deficit of £2.5 million and financial difficulties– paragraphs 12 and 71

7. Because the EAT order states that the claimant was asserting there was no evidence about this point, I have checked my notes of the oral evidence given. It is accepted that the reference to £2.5 million was not contained within witness statements. The first time that it appears to have been mentioned in the hearing is when Mr Cahill was answering questions from the claimant where my note reads:

   "if there had been roles non-teaching, £2.5 million 'deficit' trying to reduce"

8. The next time that it came up in the hearing was when Mr Hatchett was giving his evidence in supplementary questions from Mr Powell. My notes reads:

   "budget deficit £2.5 million, academy – fixed costs – variable costs – primary way to reduce – advising schools restructure / reorganisation - staffing 70% budget."

9. There was then cross-examination immediately by the claimant's representative who pointed out that the named respondent was E-Act Limited. He then asked: "*how many organisations under E-Act Limited?"* and the answer was "*24*". Mr Hatchett said: "*turnover in millions, aware of any deficit*?" and the reply: "*significant financial pressures - can't recall if a deficit*". There then seemed to be no further questions on that point.

10. The third time £2.5 million was mentioned was when Mr Ojja was asked supplementary questions by Mr Powell. He says:

   "*finances of academy – in that year – started Jan 2015 – over £2.5 million deficit. Actions to reduce – special measures – leadership – restructure leadership and reorganise*".

11. Mr Ojja had moved into a regional role after being Head at Crest Academy and he was asked a question about that and my note reads: "*at the time not aware of partic. diffs - Crest was one of biggest challenges*". When he was then cross-examined about that, he was asked whether there was evidence in the bundle and he replied: "*not that I am aware of*". He then went on to say: "*Crest not in deficit now – budgetary zero – trust allocates*".

12. When considering the words used in paragraphs 12 and 71, I have done my best to remind myself of the case (which of course now took place some 18 months ago) and the overall context.

13. Paragraph 12 records a fact about the Crest Academy. It is a reference to Mr Ojja's evidence about when he started as Head and his oral evidence that there was "*a deficit of over £2.5 million*". This is a factual finding based on that oral evidence. There was no other evidence either to substantiate that or to call it into question. Nor is there anything in the new "evidence" that might help with that point. In any event, it seems to me that that is not relevant for the later finding at paragraph 71 which I now come to.

14. One of the difficulties with this case is that several relatively complex arguments were raised which took the tribunal a considerable time to go through. This will be obvious from the list of issues and the findings we had to make. The findings which paragraph 71 relate to, are those which go to the allegations of a failure to make reasonable adjustments. It therefore seemed to me that I should consider what has been set out between paragraphs 60 to 72. The first three paragraphs, 60 to 62 relate to the question of whether there was a provision, criterion or practice (PCP). We found that there was such a PCP even though the respondent had argued that there was not. This meant that we went on to consider the adjustments which it was argued by the claimant should have been made, but were not.

15. At paragraphs 63 and 64, we determined the first reasonable adjustment, indicating it was the most difficult for us to determine. Paragraph 65 sets out the test with respect to assessing whether an adjustment would be reasonable. Although this is put into the context of deciding the first reasonable adjustment, the principles set out there apply to any consideration of whether an adjustment was reasonable.

16. Paragraph 67 deals with a different reasonable adjustment and then paragraphs 68 to 71 relate to two reasonable adjustments taken together. We found that the respondent had made a reasonable adjustment paying the claimant at teacher's rate while she was carrying out the cover supervisor role between March and November 2016. We also set out there that it was reasonable adjustment because it was designed "*in part, particularly in the early stages as a way of getting the claimant back to work, and perhaps to her substantive post of four days' a week science teaching*".

17. Paragraph 70 deals with an argument that the claimant's representative which does not take us any further.

18. At paragraph 71, there is a summary of why we found that suggested adjustment not to be reasonable. That paragraph does, on the face of it, appear to concentrate on financial considerations which would face the respondent if the claimant was paid indefinitely at a teacher's salary when carrying out a cover supervisor role. I accept that the words used in the middle of that paragraph "*the respondent is a publicly funded education establishment already financial difficulties*" differ from the words actually used by Mr Hatchett in

evidence which were that "*there were financial pressures*". However, financial pressures might also be argued to amount to financial difficulties.

19. That forms the background for this reconsideration application.

What new evidence does the claimant seek to bring?

20. As indicated, I was not particularly helped by the detailed evidence which the claimant's representative sought to adduce. However, Mr Suhail was extremely helpful in taking me immediately to those parts of the 230 pages which he believed I should look consider allowing in as new evidence. He asked me to look at two aspects of the respondent's balance sheets, the money in the bank and net assets. The balance sheets were as follows:

    Page 276, 2013/2014
    Page 334, 2015;
    Page 339, 2016;
    Page 452, 2017.

21. He also asked me to look at page 314 and 335 which was identical wording in part of the accountant's report under "*Going Concern*", which reads as follows:

    "E-Act has considerable financial resources, together with long-term contracts under the master funding agreement with the Dfe"

    and later

    "the trustees have a reasonable expectation that the company has adequate resources to continue in operational existence for the foreseeable future."

22. This phrase is repeated in other annual reports at the relevant time.

23. I was also asked to look at where the report named those academies within the respondent trust which had had bad debts written off in the period ending 31 August 2016. These did not include the Crest Academy, nor at page 345 was there any mention of Crest Academy having a deficit even though other academies were mentioned there.

24. Finally, Mr Suhail asked me to consider page 250 which showed, he said, that Mr Hatchett should have been aware of these accounts.

The law and submissions

25. The first question is whether I should reconsider the earlier judgment under rule 72 of the Employment Tribunal Rules of Procedure. The question arises as to whether it is in the interests of justice to do so and, indeed, whether the principals as set out in Ladd v Marshall about introducing new evidence should be applied. The questions raised by Ladd v Marshall are as follows:

    25.1 Could the evidence have been obtained with reasonable diligence for use at the trial?

25.2 Will it probably have an important influence on the result of the case, though it need not be decisive?

25.3 Is the evidence presumably to be believed?

26. Korashi v Abertawe Bro Morgannwg suggests a further test with respect to admission of evidence which is whether allowing the new evidence to be considered would be proportionate to the importance and complexity of the issue.

27. Mr Suhail for the claimant asked me to consider the case of Outasight BV Limited v Brown which dealt with the question of whether to allow new evidence. The claimant's representative might have slightly misunderstood what that case said because he suggested the case stated that the position had changed under the 2013 rules. However, Outasight actually states that the employment tribunal had erred in believing that to be the case and reminds me that the principles in Ladd v Marshall do still apply, even if they are not set out in the 2013 rules. I therefore apply those tests when considering whether to allow the new evidence on reconsideration. I should still consider the interests of justice and, of course, the principle of proportionality and the overriding objective.

28. Rule 72 makes it clear that I may either confirm, vary or revoke the judgment if I do decide that it should be reconsidered.

29. The claimant's representative argues that the new evidence indicates that the respondent had sufficient funds and could therefore have continued to pay the claimant at a teacher's rate whilst she was working as cover supervisor. He encourages me to consider the best evidence available and that revoking the judgment on that reasonable adjustment would mean an end to the litigation.

30. The respondent's case is that the respondent never suggested that it could not **afford** the adjustment to continue to pay the claimant at the higher rate. Rather, those considering it did not believe it was reasonable to continue the adjustment beyond the time they had already paid for it. The respondent submitted that the £2.5 million deficit, which was Crest Academy's deficit in the oral evidence, was not relevant to the later reasonable adjustment question which was in November 2016 whereas the reference to a deficit was by Mr Ojja when he started in January 2015.

31. Both representatives strayed into other aspects of the decision with respect to whether this was or was not a reasonable adjustment, including such factors as whether such a reasonable adjustment was necessary given that the claimant had indicated in July 2017 that she was able to return to science teaching and that had been supported by an occupational health report. I was referred to documents in the original bundle of pages 441a, 441c and 441j. I do not think that evidence necessarily takes me anywhere in relation to a suggested reasonable adjustment in late 2016.

32. In summary, I heard oral and detailed submissions from both parties as well as reading fairly lengthy written submissions. It is simply not possible to answer each and every point made by them. It is not proportionate to go through each matter in as detailed a way as the representatives have suggested, not least because there is a considerable repetition in what was said to me in writing and orally.

Conclusions

33. I consider matters in two stages as required by rule 72.

34. The first is whether it is in the interests of justice to reconsider this matter. I take the view that it is not. The finances of the respondent (the Trust) was raised in the claimant's very lengthy skeleton argument for the May 2018 hearing and the Crest Academy's deficit by the respondent's representatve's in his. Mr Suhail is not legally qualified, but he clearly has a good grasp of legal principals and appears to carry out considerable research to maintain his arguments. I find that when he asked questions of the respondent's witnesses directly on questions of a) Crest Academy's stated deficit and b) any finances of the Trust, he could have asked for them to produce the documentary evidence which he now produces. He made the point in his closing submissions that those documents were not in front of the tribunal and that is correct. They were not and we therefore relied on the oral evidence as given to us which was not directly challenged.

35. Considering the tests in Ladd v Marshall, I take the view that the evidence could have been obtained with reasonable diligence. These are public documents and a small amount of research on the internet would have made them available to the claimant's representative to ask questions and/or make submissions.

36. I am also not convinced that the new evidence would have an important influence on the case but I can see an argument that it might, given that there was some reference to the Crest Academy's deficit and financial of the Trust. There is no issue about the credibility of the new evidence. I do not believe that allowing the new evidence would be proportionate to the complexity or importance of the issue. Upon reading the judgment, paragraph 12 is clearly referring to the Crest Academy's deficit, and was not a factor that was taken forward into paragraph 71 which related to the Trust as a whole. I refuse to allow the new evidence and the application for reconsideration.

37. However, I have decided to it might be helpful to provide an alternative answer, in case that decision is wrong and also to assist the EAT should the matter continue there.

38. Now I have looked at the documents that the claimant relies upon, I can see that the respondent in the years which preceded and included the decision not to continue paying the claimant at a higher rate, had substantial cash at the bank. There were also considerable net assets. This was suggested by Mr Suhail to be evidence that the respondent had a surplus, but I have no evidence of a surplus before me. As I pointed out in this hearing, the mere fact of the

balance sheets showing substantial money in the bank does not mean, on its own, that it is available to be spent on anything over and above what it might already be earmarked for and which might amount to legal obligations. I have no evidence about what responsibilities or outgoings the respondent would have to meet, but common-sense dictates that an educational trust including 24 state schools would be likely to have to meet substantial ongoing liabilities. The fact that the respondent has "*considerable financial resources*", does not indicate anything over and above the money received from the Department of Education to run the 24 or 25 academies providing state education. Whilst it might have been better put around paragraph 71, we heard evidence that the Trust had financial pressures, and the balance sheets do not show that that was not the case.

39. The financial statements show a solvent trust running a charitable educational institution on public funds. I was not taken by either representative to any other part of the voluminous documentation to indicate anything other than a perfectly ordinary stable financial situation. If I had allowed the new evidence and reconsidered the judgment, it would simply have been confirmed on all the available evidence.

40. The question of the deficit for the Crest Academy upon which heard oral evidence, was not relevant for the question of the later reasonable adjustment relied upon in 2016. The evidence that we heard was that the respondent had financial pressures. The extent of the potential financial investment if the claimant was paid at the teacher's salary indefinitely, as set out in paragraph 71, as "*many thousands of pounds*", is not in dispute.

41. Although we did not repeat our observations at paragraph 65 about matters to be taken into account when considering whether an adjustment was reasonable in paragraph 71, it was the case that those were the sorts of balancing questions which we applied to each of the reasonable adjustments relied upon.

42. The application to reconsider is refused. If there had been a reconsideration the judgment would have been confirmed.

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Employment Judge Manley

Date:…22.10.19……………..……

Sent to the parties on:

…………23.10.19……..…..…….

For the Tribunal:

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