EMPLOYMENT TRIBUNALS

Claimant: Mr N O'Hare

Respondent: Q D Services Limited

Heard at: Liverpool (by CVP) **On:** 30 April 2021

Before: Employment Judge Benson

Representation
Claimant: Ms M Kponou, Solicitor
Respondent: Ms J Ferrario, Counsel

UPON APPLICATION made by letter dated 16 July 2020 to reconsider the judgment dated 28 June 2020, and sent to the parties on 3 July 2020, under rule 71 of the Employment Tribunals Rules of Procedure 2013

JUDGMENT

The judgment dated 28 June 2020 is varied as follows.

1. Paragraph numbered 3 is varied by consent and now reads:

   The respondent breached the claimant's contract of employment by failing to follow its contractual disciplinary procedure when dismissing the claimant.

2. Paragraph numbered 4 is revoked.

3. All other parts of the judgment are confirmed.

REASONS

Application and Issues

1. By a letter dated 16 July 2020, the claimant applied for reconsideration of my Judgment dated 28 June 2020. Upon initial consideration, I listed this matter for a hearing to hear representations from the parties. The hearing took place

on 30 April 2021.

2. The basis upon which the claimant seeks to have the judgment reconsidered are summarised as follows:

    (i) That the parties did not contract for the claimant to work under an approved apprenticeship but a framework apprenticeship pursuant to section 32 Apprenticeship, Skills, Children and Learning Act 2009 ("ASCL"). The claimant says that such apprenticeships were in force at the time when the claimant began his apprenticeship in June 2017. The claimant says that at the final hearing there was no focus on whether the apprenticeship was an approved apprenticeship or a framework apprenticeship as there was no issue taken that section 32 applied to the arrangement. The claimant says that the respondent failed to adhere to one of the formalities of section 32 and thus the apprenticeship was not a statutory apprenticeship but one in common law. As such there were no grounds to dismiss on the basis of the claimant's misconduct.

    (ii) That no claim of wrongful dismissal (being a claim for breach of the term relating to notice) was brought as the claimant was paid for a period of notice. The claim of breach of contract which the claimant says was brought was that if the claimant was to be dismissed on grounds of misconduct the claimant was contractually required to follow its disciplinary procedure. The respondent failed and therefore it had no contractual right to terminate the employment on misconduct grounds without following that procedure.

    (iii) That at the meeting on 12 July the claimant had the right to be accompanied, and it was not relevant that the respondent had not intended to dismiss him that day.

    (iv) That the findings in respect of Polkey and contributory conduct, were insufficient grounds upon which to apply deductions under those heads due to the respondent's own failings and omissions.

Submissions and documents

3. The respondent provided written submissions in response to the application of 16 July and both Ms Ferrairo and Ms Kponou provided helpful oral submissions. A bundle of documents was prepared for the hearing.

The Law

4. Rule 70 of the Tribunal rules provides an Employment Tribunal with a general power to reconsider any judgment where it is necessary in the interests of justice to do so. There is an underlying public policy principle in all proceedings of a judicial nature that there should be finality in litigation.

Reconsiderations are therefore best seen as limited exceptions to the general rule that Employment Tribunal decisions should not be reopened and relitigated. It is not a method by which disappointed parties to proceedings can get a second bite of the cherry. **In Stephenson -v- Golden Wonder Limited 1977 IRLR 474 EAT** Lord McDonald said that the review provisions were "not intended to provide the parties with an opportunity of a re-hearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before".

5. A tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases 'fairly and justly' This includes: ensuring that the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay, so far as compatible with proper consideration of the issues; and saving expense. The tribunal should also be guided by the common law principles of natural justice and fairness. Further the interests of justice as a ground for reconsideration relate to the interests of justice to both sides.

Decision on reconsideration

Variation and revocation

6. The finding within my judgment of the 28 June 2020 that the respondent did not breach the claimant's contract of employment by failing to provide him with notice, was not a claim which was made. The claimant's claim of breach of contract was of a failure to follow the respondent's contractual disciplinary procedures when dismissing the claimant. It is accepted by Ms Ferrario on behalf of the respondent that this part of the judgment should be revoked, and as the respondent had a contractual disciplinary procedure and it was not followed, it should be replaced with a judgment that the respondent breached the claimant's contract of employment by failing to follow the contractual disciplinary procedures when it dismissed the claimant on 12 July 2019.

7. It is further accepted by all parties that the claimant did have a fixed term contract when commencing his employment under his apprenticeship agreement on 30 June 2017. There was no separate claim of breach of contract in that regard, and as such paragraph numbered 4 of my judgment of 28 June is revoked.

Right to be accompanied

8. The claimant seeks to have the finding that the respondent did not fail to comply with the claimant's right to be accompanied at the disciplinary hearing revoked. I have considered the points made within the written submissions, and I note that although the claimant has now referred to particular authorities, these were not raised at the final hearing, and her focus at that time was that the conversation on 12 July 2019 between the claimant and the respondent's directors was a hearing, and as such it attracted the right to be

accompanied. She makes the same points again and seeks to widen her argument. These appear to me in any event to not take the matter further. I consider that Ms Kponou on behalf of the claimant is seeking to rehearse the evidence and the points she made previously. As set out above, a reconsideration is not an opportunity to have a second bite of the cherry, and as such, I find no basis upon which it is necessary in the interests of justice to vary or revoke that decision. My previous reasoning stands.

9. The remaining issues upon which the claimant seeks a reconsideration relate to my judgment that the claimant was unfairly dismissed.

10. The particular aspects of that finding with which the claimant takes issue are that I have found that the claimant was employed under a statutory apprenticeship, rather than a common law apprenticeship contract. Further, that I considered that the claimant would have been fairly dismissed some two months later and that his behaviour and attitude were significant factors in his dismissal, and as such his award should be reduced by some 80%.

11. Turning to the first of those

The Apprenticeship Issue

12. I dealt with the apprenticeship issue at paragraphs 74 to 77 of my judgment. At the final hearing before me, and as confirmed in the claimant's written submissions and list of issues, I was asked to decide whether the contract under which the claimant was employed was a common law apprenticeship contract, or a statutory apprenticeship contract. There was no focus at that hearing on the fact that there are different types of statutory apprenticeships, including for the purposes of this Tribunal, an approved apprenticeship contract, and a framework apprenticeship contract.

13. I was referred to section 32 of the ASCL and specifically the provisions at section 32(i) and (iii). These provide:

Section 32 (meaning of "apprenticeship agreement").

> (1) In this chapter "apprenticeship agreement" means an agreement in relation to which each of the conditions in subsection (2) is satisfied.
>
> (2) The conditions are:-
>
> (a) That a person (the apprentice) undertakes to work for another (the employer) under the agreement;
>
> (b) That the agreement is in the prescribed form;
>
> (c) That the agreement states that it is governed by the law of England and Wales;
>
> (d) That the agreement states that it is entered to in connection with a qualifying apprenticeship framework.

14. Ms Kponou referred during the hearing to the regulations which define the prescribed form "as set out at section 32(2)(b)". Those regulations are the Apprenticeship (Forms of Agreement) Regulations 2012 ("the Regulations") specifically regulation 2 which states:

    'Form of the apprenticeship agreement

    > (1) The prescribed form of an apprenticeship agreement for the purposes of section 32(2)(b) of the Act is—
    >
    > (a) a written statement of particulars of employment given to an employee for the purposes of section 1 of the 1996 Act; or
    >
    > (b) a document in writing in the form of a contract of employment or letter of engagement where the employer's duty under section 1 of the 1996 Act is treated as met for the purposes of section 7A(4) of the 1996 Act.
    >
    > (2) An apprenticeship agreement must include a statement of the skill, trade or occupation for which the apprentice is being trained under the apprenticeship framework.
    >
    > (3) This regulation does not apply where regulation 4 applies.'

15. When coming to consider my reserved judgment, I noted that section 32 of the ASCL is headed 'Apprenticeship agreements – Wales' and that at section 32(6) it states that "an apprenticeship framework is "a qualifying apprenticeship framework" for the purposes of this section if it is:-

    > (a) ……..
    >
    > (b) A recognised Welsh framework.

16. As the respondent is, and was at the time, based in England, section 32 did not appear to have relevance, and the only provisions in the ASCL relevant to employers based in England were the replacement provisions set out at Chapter A1. These refer to approved apprenticeship agreements, being a second type of statutory agreement, and it was this section which appeared to relate to statutory apprenticeship agreements in England. I proceeded to make my findings and conclusions based upon Chapter A1 which as stated in my judgment does not have the associated requirements of Regulation 2 of the Apprenticeship (Forms of Agreement) Regulations 2012.

17. Ms Kponou contends as part of this reconsideration, that the claimant was purported to be employed under a framework apprenticeship agreement and not an approved apprenticeship agreement. Further that there are in place transitional arrangements for such agreements in England such that section 32 ASCL continues to apply to such apprenticeship framework contracts, even though they are being phased out. Those provisions are contained within Schedule 1 to the Deregulation Act 2015 (Commencement No. 1 and

Transitional and Saving Provisions) Order 2015/994. Paragraph 3 provides for the continued effect post-26 May 2015 of the 'saved provisions', which paragraph 2 defines to include all of the material provisions of ASCL that governed apprenticeship agreements in England. As such I consider that she is correct in that such framework apprenticeships remain governed by section 32 ASCL.

18. In view of my understanding of section 32 ASCL at that time, I determined that the claimant was employed under an approved apprenticeship agreement. There were no submissions from either party upon the distinction between the two types of statutory apprenticeships, nor indeed that there were two types, but it is clear that section 32 ASCL can apply to either and as such my understanding was incorrect. It is therefore appropriate and necessary in the interests of justice that I reconsider my findings as to the type of apprenticeship agreement the claimant was employed under.

19. Both parties provided representations at the reconsideration hearing upon all relevant aspects of this issue. I am therefore able to consider whether and to what extent this impacts upon my judgment and whether I should vary, revoke or confirm it.

Apprenticeship Issue – Further findings

20. The claimant contends that the apprenticeship agreement under which it was intended he was employed was a framework apprenticeship. Ms Kponou refers me to the claimant's contract of employment which states at paragraph 2:

> "You are employed as an apprentice Electrical Engineer.
>
> The agreement is entered into in connection with a qualifying apprenticeship framework under which you are being trained by the company as an Apprentice Electrical Engineer.
>
> The agreement is governed by the law of England and Wales and is an apprenticeship agreement within the meaning of the Apprentice Skills Children and Learning Act 2009. It is a contract of employment and not a contract of apprenticeship".

21. Ms Kponou says that although the type of statutory apprenticeship agreement applicable to the claimant was not addressed in the final hearing, this was because it was not something which was in dispute between the parties. There was little additional evidence before me either at the final hearing or at the reconsideration hearing to point to what type statutory apprenticeship the claimant says applied to him. Ms Ferrario's submissions are vague on this point and I am left with the statement in the contract which refers to a qualifying apprenticeship framework. As such and as this is the contractual document which defines the relationship between the parties, I find that the claimant was by his contract employed under a framework apprenticeship and not an approved apprenticeship.

22. The relevance to the claimant as to the type of statutory apprenticeship he

was employed under is that section 32 ASCL and Regulation 2 of the Regulations applies to a framework apprenticeship but not to an approved apprenticeship. The requirements contained within those provisions for a framework apprenticeship are more onerous than for an approved apprenticeship and the claimant says that the respondent did not comply with them when entering into the contract with him. As such he says that he was not employed under statutory apprenticeship but under a common law apprenticeship which could not be terminated other than in very specific circumstances, including that the claimant was not teachable.

23. These requirements are set out at section 32 ASCL and are at paragraph 13 above.

24. For the purpose of his claim, the claimant says the respondent did not comply with these requirements in that section 32(2)(a) should be interpreted to mean that the agreement must be in place on the first day of the claimant's apprenticeship, ie 30 June 2017 and that he was not given a copy of the apprenticeship contract. It was not previously necessary for me to consider these issues in my conclusions, however I now do so. Again, both parties have made submissions on these points such that I am able to make findings in respect of them.

25. I have previously found that the claimant was not issued with a written apprenticeship contract on 30 June 2017 and that it was provided to him in early July 2017.

<u>Does a signed copy of the written statement of particulars have to be in place at the start of the apprenticeship contract?</u>

26. There is no express reference in the ASCL to a written agreement having to be in place on the date that the apprenticeship starts. I do not accept Ms Kponou's interpretation of section 32(2)(a) ASCL set out in her submissions at the final hearing that as there was no agreement in the prescribed form as of 30 June 2017, the claimant was unable to give the undertaking to work for the employer under the apprenticeship agreement. The words within section 32 that Ms Kponou relies upon are:

'That the conditions are :

a. That a person (the apprentice) undertakes to work for another (the employer) under the agreement;
b. …'

27. In support of her interpretation of those words, Ms Kponou had referred me at the previous hearing to various funding guidance and at the reconsideration hearing to additional funding guidance and rules and policies which referred to the apprenticeship agreement being in place at the start, and in one document, before the start of the apprenticeship. These points had been made at the final hearing and I have given further consideration to them. Statutory apprenticeships are tripartite arrangements between the training college, the employer and the apprentice. Funding is from the government. The funding documents and rules are to ensure that funding will be provided. They are produced by the Education and Skills Funding Agency.

By way of example, Ms Kponou referred me to a section in the Apprenticeship and Skills Policy 2020 about such agreements being in place prior to the apprenticeship beginning. The introduction to that section states that these are minimum standards to ensure that funding will be provided for an apprentice. I consider therefore that these funding documents have only limited relevance to the interpretation of section 32(2)(a).

28. Although it would always be preferable for a statement of particulars to be in provided before employment commences, sometimes this is not possible. The Employment Rights Act 1996 indeed at the time when the claimant was employed provided for that situation in that such a statement needed only be provided within 2 months of commencement of employment. That does not mean there is not a contract is place. In the claimant's situation, the parties had agreed that he would commence an apprenticeship contract with the respondent on 30 June 2017. The claimant had been sent to the college to enroll. He had signed a Tripartite agreement between himself, the respondent and the college on that date. In early July he was issued with a contract of apprenticeship with a start date of 30 June and which it is accepted included all of the necessary details to comply with Regulation 2, and he asked if he could take it home to look at with his parents. That was agreed and he came back with some queries which were answered by his employer and thereafter it was signed.

29. I am satisfied on the ordinary interpretation of the words of section 32(2)(a) that on 30 June 2017 the claimant had undertaken to work for the respondent under the apprenticeship agreement such that there was a statutory apprenticeship agreement in place. Further that it was not a requirement that the written particulars had to be provided to the claimant on that date for the conditions of section 32 to have been met.

Does the apprentice have to be given a copy of the apprenticeship agreement for him to retain?

30. The claimant had been given a written statement of particulars of employment for the purposes of section 1 of the ERA. He was originally provided with it in early July and he took it home. He was provided with a further copy with the amendments he sought and which he signed on 18 August 2017. Ms Kponou's point is that he wasn't given a copy to keep. It seems to me that the intention of the regulations is to ensure that an apprentice has the opportunity to consider the terms upon which he is being employed, rather than for instance, him being asked to sign and never having the opportunity to read the contract. The claimant had a full opportunity to do and carefully considered it and I am satisfied that the apprenticeship agreement in the prescribed form was given to the claimant as required by Regulation 2.

31. I therefore upon reconsideration find that the respondent had complied with section 32 ASCL.

Fleet v Mattheson CA[2006] IRLR 277

32. There was nothing within the agreed list of issues on this point. There was a brief reference to it within Ms Kponou's submissions but not much more was

made of it. In view of my findings that there was a framework apprenticeship in place which complied with section 32 ASCL, section 35 ASCL provides that an apprenticeship agreement is not to be treated, for common law or statutory purposes, as being a contract of apprenticeship (as recognised at common law) but is instead to be treated as being a contract of service. In any event, there was nothing within the agreement and arrangement with the claimant which was inconsistent with it being a statutory apprenticeship and which led it to being one at common law.

33. I find that the contract between the parties was a statutory apprenticeship and not one at common law.

Polkey and Contributory Fault

34. These aspects of the application for reconsideration rely upon matters which were before me at the final hearing. There has been no new evidence put forward by the claimant and this is an attempt to rehearse the arguments upon which I have already made findings.

35. Dealing with some of the points made by Ms Kponou in her application, by way of example.

36. The claimant was provided with a contract, as discussed above and he took it home to consider (referred to in paragraph 14 of my Judgment). That contract referred to the staff handbook which contained the respondent's disciplinary policy.

37. The claimant was afforded an opportunity to improve/correct his behaviour. My findings at paragraph 101 note that the claimant 'by 8 May 2019 was aware of the seriousness of the issues and did nothing to address his behaviour'.

38. Further at paragraph 100, that 'based upon the claimant's failure to change his behaviour after the hearing on 8 May, his attitude in that hearing and particularly his failure when cross examined by Ms Ferrario to accept that he had done anything wrong, I consider that it is highly unlikely that his behaviour would have changed.'

39. Regardless of whether the claimant thought that the complaints were made only by Mr Hugo, I found at paragraph 85 that 'there was ample evidence of the claimant's poor attitude and misconduct available to Mr Colford. ….The nature of the complaints by Mr Hugo and Mr Hudson are consistent with each other, but are also consistent with those of the respondent's customers……The issues which the customers raised are in the same vein as those raised by Mr Hugo, being the claimant's attitude and behaviour whilst on site.'

40. The allegations were not 'deemed to be true' by me in my judgment. At paragraph 50 of my judgment I noted: 'I accept that the allegations concerning the claimant's behaviour and attitude towards his colleagues and customers, details of which were given during the hearing before me and which are detailed in my findings of fact are, on the balance of probabilities,

true. The nature of the complaints about the claimant from Mr Hugo, Mr Hudson, and from various customers are all very similar and show a pattern of behaviour repeated on different sites and over an 18 month period.' I also found at paragraph 85 as stated above that 'there was ample evidence of the claimant's poor attitude and misconduct available to Mr Colford' and at paragraph 99 that 'there is clear evidence of misconduct of the type which is provided for as examples of gross misconduct within the respondent's own policy, such as serious insubordination, bring the company into disrepute and a failure to follow management instructions'. I found that although Mr Johnstone would probably have given the claimant one further chance to improve, …' the claimant's conduct was so serious as to amount to a fundamental breach of contract such that the claimant was entitled to dismiss summarily (paragraph 99)

41. I do not consider that it is necessary in the interests of justice to revoke or vary my judgment relating to Polkey and contributary and I confirm my findings as set out in my reserved judgment paragraphs 100 and 101.

Employment Judge Benson

8 June 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 June 2021

FOR THE TRIBUNAL OFFICE