Neutral Citation Number: [2023] EAT 40

Case Nos: EA-2021-000987-OO
EA-2021-000988-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29 March 2023

Before :

HIS HONOUR JUDGE SHANKS

- -

Between :

EBURY PARTNERS UK LIMITED	**Appellant**
- and -	
MR M ACTON DAVIS	**Respondent**

- -
- -

Paul Skinner (instructed by EMW Law LLP) for the **Appellant**

Mr M Acton Davis the **Respondent** in person (assisted by Lindsay Boswell KC)

Hearing date: 13 December 2022

- -

JUDGMENT

SUMMARY

CONTRACT OF EMPLOYMENT AND PRACTICE AND PROCEDURE

The claimant was employed by the respondent company as Head of Sales UK under a contract of employment. From October 2017 he was seconded to Canada as Country Manager under the terms of a side letter which supplemented and varied the contract of employment. His remuneration comprised a large element of commission which was expressed to be discretionary under the contract of employment but which was arguably the subject of a contractual entitlement under the terms of the side letter.

In May 2019 the claimant was informed that the commission element of his remuneration would no longer be paid. After receiving his June pay slip which showed nil commission he resigned claiming that he had been constructively dismissed by virtue of a breach of his express contractual terms and/or the implied term of trust and confidence and brought claims of unfair and wrongful dismissal in the ET.

Following a final hearing at which he heard evidence and received written and oral submissions the EJ decided that on the proper interpretation of the side letter and the contract any entitlement to commission under the side letter had ceased after 12 months so that there was no breach of an express term and in all the circumstances there was also no breach of the implied term of trust and confidence.

The claimant applied for a reconsideration of that decision on the basis that neither party had argued that the relevant provision in the side letter only applied for 12 months and that, properly construed, he had still been entitled to receive commission payments in May 2019.

The EJ decided to reconsider the decision and held a hearing. He rejected the claimant's contention as to the proper interpretation of the side letter but went on to reconsider the case generally and

reached the view that, contrary to his original judgment, the company had breached the implied term of trust and confidence in the way they had withdrawn the commission payments to the claimant.

The company appealed on the basis the EJ should not have carried out a reconsideration at all and should not have concluded as he did; the claimant cross-appealed saying that the EJ's conclusion on the proper interpretation of the contract was wrong.

The EAT allowed the appeal and dismissed the cross-appeal concluding that:

(a) The EJ had failed properly to consider whether the interests of justice required a reconsideration and should not have reconsidered the judgement at all given the public interest in finality and the fact that the Claimant could and should have presented arguments on the proper construction at the original hearing;

(b) Although the proper contractual interpretation was an arguable issue it should have been raised if at all by way of an appeal to the EAT;

(c) On no basis had it been appropriate for the EJ to reconsider whether there was a breach of the implied term; this was not part of the application for reconsideration; the EJ had gone on a "frolic of his own" re-deciding the case on a new basis for which no one had argued on the reconsideration.

HIS HONOUR JUDGE SHANKS

Introduction

1 I heard this appeal and cross-appeal arising out of a reconsideration judgment of EJ Nicolle sitting at the London Central Employment Tribunal promulgated on 4 October 2021 remotely by Teams on 13 December 2022. The Appellant, Ebury Partners UK Ltd, which I shall refer to as Ebury Partners, was represented by Mr Skinner as in the employment tribunal. The Respondent, Mr Acton Davies, was accompanied by his mother Lindsay Boswell KC as in the employment tribunal; in practice she represented him on the appeal.

Background facts

2 Ebury Partners was founded by Juan Lobato in 2009. It provides a global banking platform for foreign exchange transactions. It grew rapidly and employed 1,000 people by 2020. Mr Acton Davis, started working for the company on 15 April 2013. He was promoted and became a partner in 2016 and Head of Sales UK in May 2017. He was seconded to Canada as Country Manager on a short term basis in October 2017, arriving in Toronto on or about 2 November 2017.

3 Although he had taken the post in May 2017, Mr Acton Davis's formal contract as Head of Sales UK was dated 1 November 2017 and expressed to come into effect on 26 October 2017. It was expressed to be valid for an indeterminate period of time (cl 1.7), though subject to four weeks' written notice. It provided for a salary of £60,000 pa at cl 1.10.1. Cl 1.12 provided for commission as follows:

> **1.12.1.1 At the Employer's discretion you may earn commission that may be notified to you from time to time.**
> **1.12.1.2 Any previous payments or payments to you of commission will not act to establish a right for you to be paid commissions. No commission will be paid or earned after your employment has terminated.**
> **1.12.1.3 All commissions will be paid monthly in arrears by credit transfer to you in accordance with clause 1.11 [which dealt with the details of payment of salary]**
> **1.12.1.4 The Employer reserves the right to amend their commission policy from time to time.**

Cl 1.40 provided that the terms and conditions in the contract could only be varied by a written instrument signed by both parties.

4 By a side letter dated 29 November 2017 provision was made for the secondment to Canada. So far as relevant the letter provided:

> **The contents of this Side Letter … are subject to and governed by your Contract of Employment**
>
> **…**
>
> **2. The Parties accept that you shall be Interim County Manager for Ebury Partners Canada Ltd … which shall commence on 26 October 2017 … and after 12 months, shall continue on a rolling basis until the parties agree otherwise, hereinafter referred to as "the Appointment".**
>
> **3. The parties agree that this Agreement can be terminated at any time in accordance with … your Contract of Employment.**
>
> **4. The parties agree that the following clauses are to be amended and read alongside your Contract of Employment.**
>
> **…**
>
> **c. Clause 1.7 – This clause shall be amended to read as follows:**
> **"The terms of this Side Letter shall apply for 12 months and will continue on a rolling basis until the parties agree otherwise. Upon the terms of this Side Letter ceasing to apply, the terms of the Contract of Employment shall apply instead.**
>
> **e. Clause 1.10.1 – This clause shall be amended and during the Appointment you shall not receive the salary stated … and instead, you shall receive an annual salary of $170,000 (CAD equivalent to £100k per annum) …**
>
> **You will continue to receive commission due to you on UK accounts and receive 10% commissions on all new business from Canada for the duration of this one year secondment.**
>
> **f. Clause 1.17.1 – This clause shall be amended …**
>
> **…**

Paragraph 9 of the side letter also provided that no variation would be effective unless in writing and signed by the parties.

5. As I understand paras 29-33 of the original judgment of EJ Nicolle (promulgated on 16

February 2021), commission payments were made by Ebury Partners in accordance with an SOP (Standard Operating Procedure). The judge quoted a disclaimer in the SOP dated 1 May 2019 (which I take to be standard) which said:

> **Commissions by nature are considered variable compensation and therefore, commission payouts remain discretionary and subject to managerial approval at all times. SOP document is subject to change based on managerial decisions.**

It seems that under the relevant SOP(s), commission was paid to employees who obtained sales at defined rates for up to five years after the first trade was booked. The effect of this was that if things had stayed the same after his secondment, Mr Acton Davis would have received a gradually diminishing commission based on UK sales and commission attributable to Canadian clients would progressively have increased.

6. There is no doubt that a large part of Mr Acton Davis's remuneration comprised commission. For the year to April 2016 he received a total of £147,463 of which only £40,000 was base salary; for the year to April 2017 his total earnings were £164,684 of which only £50,000 was base salary. More relevantly, for the first five months of 2019 he received over $87,000 CAD in commission, the majority of which related to UK trades (see para 55 of original judgment).

7. In 2019 a decision was made to stop paying Country Managers any commission as from 1 May. The judge found on the basis of various exchanges between senior managers that this change represented a change in Ebury Partners' policy (see para 39 of original judgment).

8. Mr Acton Davis was informed of this decision in a 15 minute meeting in London with Mr Lobato on 10 May 2019. He was also told that he would be compensated by an increased basic salary, a discretionary bonus and eligibility for equity. After the meeting he told Mr Giabardo (the Chief Commercial Officer) that he was not very happy with his compensation but he did not take the matter any further at that stage.

9. By a letter dated 17 June 2019 the HR department advised Mr Acton Davis that his salary was being increased to $202,800 CAN with effect from 1 May 2019 and that all other terms would remain unchanged. On 27 June 2019 he received a payslip indicating a nil commission payment for the previous month (as I understand his skeleton argument for this appeal he says he should have received a payment of $21,575 in commission for the relevant month).

10. On 1 July 2019 Mr Acton Davis spoke to and emailed Mr Lobato. He said there had been a fundamental breach of his contract in that the company had unilaterally forced through a decision to withdraw commission which represented 50% of his remuneration. After some "toing and froing" Mr Acton-Davis wrote again on 3 July 2019 stating that he was resigning because of the company's fundamental breach of contract. In due course he brought claims for unfair and wrongful constructive dismissal.

The proceedings below

11. Mr Acton Davis's particulars of claim recited the terms of para 4e of the side letter and the events of May to July 2019 and stated that Ebury Partners' unilateral change to the terms of the side letter amounted to a fundamental breach of his contract and the implied term of trust and confidence. Ebury Partners' response stated that the side letter was expressed to be for a fixed period because "… it was always envisaged that after a period of time in post, the Claimant's remuneration package would change" (para 8). It asserted that Mr Acton Davis had agreed to the revised terms proposed at the meeting with Mr Lobato. There was a general denial of any breach of the express or implied terms of the contract or entitlement to any further payments.

12. The case was heard by EJ Nicolle on 9-11 December 2020. Although the submissions were

not as clear as they might have been on the point, it seems to me that Mr Acton Davis's position as put forward in his written closing submissions was that the removal of his UK commission payments amounted to a breach of clause 1.10.1 of his contract of employment as amended by para 4e of the side letter. Ebury Partners position as set out in their submissions was that commission was entirely discretionary and that para 4e of the side letter was subject to and governed by the contract of employment. There was no express reliance on the fact that the provision relating to commissions in para 4e ended with the words "… for the duration of this one year secondment". It was submitted that Mr Acton Davis's case was entirely based on a breach of the implied term of trust and confidence: that does not seem to me a submission that was justified by the pleadings or final submissions and the judge appears not to have accepted it (see para 4a of the original judgment).

13. EJ Nicolle rejected Mr Acton Davis's claim in his original judgment promulgated on 16 February 2021. It is implicit in the judgment that the judge rejected the suggestion that Mr Acton Davis had agreed to the change in his remuneration proposed at the meeting with Mr Lobato. But the judge found at paras 97-102 that the cessation of commission payments did not amount to a breach of Mr Acton Davis's express contractual terms. He noted that the main contract provided that commission was discretionary. He then considered whether the terms of the side letter varied this position. He stated at para 99 that the terms of the side letter had contractual effect and continued to do so until Mr Acton Davis's resignation. But he said at para 100 that he considered it was significant that "clause 4(e)" of the side letter referred to "this one year secondment" and, whilst acknowledging that the inclusion of the limitation of entitlement to commission to "the duration of this one year secondment" may have resulted from an oversight on the part of Mr Acton Davis he (the judge) still needed " … to interpret the terms of the contractual arrangements between the parties as written." At para 101 he referred to evidence of a practice by Ebury Partners of paying Country Managers commission only for a period of a year or two and then said this at para 102:

> **I therefore find that when read in totality the terms of the Contract, the SOP Commission and the Side Letter did not provide for an ongoing entitlement to the payment of commission for the duration of the Claimant's secondment to Canada as Country Manager. I therefore find that the proposed cessation and then implementation of the cessation of commission, did not constitute a breach of an express term of the Contract and other contractual documents relating to his employment and secondment.**

14. EJ Nicolle then considered a case based on a breach of the implied term of trust and confidence arising from the company's actions in the communication and timing of the change to Mr Acton Davis's remuneration. At para 103 he rejected such a claim. In the course of his reasoning he referred to Mr Acton Davis's failure to put forward any counter-proposal after his meeting with Mr Lobato on 10 May 2019, to the fact that he was being moved to "what the Respondent says was a standard Country Manager package" and, at para 103(d), to his "findings that the Respondent had the contractual discretion to vary, or cease, the payment of commission".

15. Although it was therefore unnecessary to do so the judge then considered whether Mr Acton Davis had affirmed the contract after 10 May 2019 and whether he had resigned in response to the alleged breach. He concluded that he would have decided both those issues in Mr Acton Davis's favour.

The reconsideration application

16. By a document dated 1 March 2020, Mr Acton Davis applied for a reconsideration. Under the heading "The relevant Reasons" the application referred to and recited parts of paras 97-102 and 103(d) of the judgment. It then referred to the pleaded cases and stated that Ebury Partners had not pleaded that they were contractually entitled to stop payments of commission 12 months after the start of the secondment but that they had rather relied on a factual case that Mr Acton Davis had agreed to the changes to his remuneration at the meeting on 10 May 2019 (which as I say was implicitly rejected by the judge) and that this was the only issue that properly arose. It then referred

to the proper interpretation of the contract and side letter (para 4e in particular) and maintained that during his secondment Mr Acton Davis was entitled to commission on UK accounts as part of his salary under cl 1.10 and that any one year limitation in time was only referrable to the 10% commission on new Canadian business or that the words "this one year secondment" should be interpreted "to roll in accordance with the Appointment" (see para 32 of the application for reconsideration). On this basis the tribunal should have found that the failure to pay commission on 28 June 2019 was a clear repudiatory breach of an express contractual term. In the document there was also reference to the fact that Ebury Partners had continued to pay commission earned after the first year of his secondment had expired (ie from October 2018 to May 2019) (para 32e) and the point was made that there was no evidence that they had exercised any discretion in relation to the UK sales team, including the Head of Sales (which remained Mr Acton Davis's formal position) (para 31d).

17. By letter dated 29 March 2021 Ebury Partners referred to the public interest in finality of litigation and maintained that it was not in the interests of justice for there to be a reconsideration and that Mr Acton Davis was in reality trying to have a "second bite at the cherry". Ebury Partners had denied that stopping commission payments to Mr Acton Davis involved any breach of contract (express or implied) and it had been for him to establish such a breach by reference to the relevant contractual provisions.

18. The EJ decided to hold a hearing which took place on 10 September 2021. He received written and oral submissions. By a judgment issued on 4 October 2021 he decided to reconsider the judgment of 10 February 2021 and to revoke it and re-promulgate it as varied. For ease of reference I refer hereafter only to the reconsideration judgment itself rather than the re-promulgated judgment. At paras 12-19 the judge set out the legal principles relevant to reconsideration. He then turned immediately to consider the points made in the reconsideration application. At paras 34-43 the judge

reconsidered his decision on the proper interpretation of the contract and the side letter and upheld his previous decision that any entitlement to commission expired after 12 months, so that it was open to the company to exercise its discretion to vary or cease to pay commission from November 2018.

19. However, having reached that conclusion, the EJ then stated at para 52 that he had decided that "… it would be appropriate to consider certain elements of the judgment with the effect that the outcome is varied". He then set out the approach that he had taken. He said he had considered the relevant authorities on re-consideration and had reviewed the case "… based on the totality of the material before [him] and the arguments advanced" (para 55). At para 56 he acknowledged that this review would involve considerable prejudice to Ebury Partners but stated that he had decided the judgment was not sustainable and that findings of wrongful and unfair dismissal should be substituted.

20. The EJ's main conclusion was then set out at para 59 as follows:

> **Whilst I retain my conclusion that [Ebury Partners] had the express contractual right under the Contract to make variations to the commission arrangements, I nevertheless consider that given the parties' conduct in connection with the Side Letter, and specifically the continuing payment of UK based commission … after the initial 12 months of the secondment was such [as] to give rise to an expectation of [Mr Acton Davis] that the existing terms would continue unless varied by consent. It was incumbent upon [Ebury Partners], pursuant to the implied term of trust and confidence, to replace such arrangements with terms which looked at overall were no less favourable to an individual employee. In other words, a change, albeit one pursuant to a retained discretion, would nevertheless require either the consent of the employee or the change would be so obviously no less favourable that looked at objectively it would not breach the implied term of trust and confidence.**

The judge then effectively rewrote paras 102-108 of the original judgment and made a finding that Mr Acton Davis had been constructively dismissed and that his claims for unfair and wrongful dismissal succeeded.

The appeal and cross-appeal

21. By their appeal Ebury Partners say that the EJ should not have reconsidered his judgment at

all and in any event should not have found for Mr Acton Davis on the basis that he did. By the cross-appeal Mr Acton Davis says that it was appropriate for the EJ to reconsider the proper interpretation of the contract between the parties but that he reached the wrong conclusion on that issue.

22. It seems to me that the issues are as follows:

(1) Was the EJ right to reconsider his judgment at all?

(2) If so, was his conclusion on the proper interpretation of the contract wrong as Mr Acton Davis maintains?

(3) In any event, was it open to the EJ to decide the case in Mr Acton Davis's favour in the way he did (ie on the basis of a breach of the implied term of trust and confidence) on reconsideration?

Relevant legal principles

23. The power to reconsider a judgment is given by rule 70 of the Employment Tribunals Rules of Procedure which provides:

> **A Tribunal may … on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so …**
>
> Rule 71 provides:
>
> **Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) … and shall set out why reconsideration of the original decision is necessary.**

24. The employment tribunal can therefore only reconsider a decision if it is necessary to do so "in the interests of justice." A central aspect of the interests of justice is that there should be finality in litigation. It is therefore unusual for a litigant to be allowed a "second bite of the cherry" and the jurisdiction to reconsider should be exercised with caution. In general, while it may be appropriate to reconsider a decision where there has been some procedural mishap such that a party had been denied a fair and proper opportunity to present his case, the jurisdiction should not be invoked to correct a supposed error made by the ET after the parties have had a fair opportunity to present their cases on

the relevant issue. This is particularly the case where the error alleged is one of law which is more appropriately corrected by the EAT.

(1) Was the EJ right to reconsider his judgment at all?

25. It is clear that the basis for the application for reconsideration was the contention that the EJ had decided the main contractual issue against Mr Acton Davis on a basis (namely that any entitlement to commission given by para 4e of the side letter was limited to one year) which had not been pleaded or argued for by either party.

26. It is fair to say that Ebury Partners do not seem to have relied expressly on the words in para 4e on which the EJ focused (" … for the duration of this one year secondment"): their case was that there was never any entitlement to receive commission payments and that the contract of employment rather than the side letter governed the position and made any commission discretionary at all times (although they had maintained in general terms at para 8 in the response that the side letter was expressed to be for a fixed period because " … it was always envisaged that after a period of time in post, the Claimant's remuneration package would change"). However, it was for Mr Acton Davis to prove his case and it seems to me that in so far as that case was based on para 4e of the side letter, it was for him to put forward any arguments he relied on in relation to the proper interpretation of the paragraph, given that it included words which on the face of it could plainly be construed as limiting any entitlement to one year; and I can see nothing wrong with the judge reaching his own view on the proper interpretation of the contractual documents presented to him in the absence of such arguments. In those circumstances it does not seem to me that any procedural mishap, if there was one, meant that Mr Acton Davis was deprived of a fair opportunity to present his case in the employment tribunal. It is also relevant that the issue which he was asking to have reconsidered (namely the proper interpretation of contractual provisions) is traditionally regarded as one of law and that it would have been open to him to bring an appeal in the EAT on the issue.

27. Further, it is significant that at no stage in his reconsideration judgment did the EJ address the point made in Ebury Partners' solicitors' letter of 29 March 2021 about the public interest in finality and the fact that Mr Acton Davis was seeking "a second bite at the cherry" (though he does refer to it in reciting the relevant law). Rather, he made no assessment of the interests of justice at all before proceeding to reconsider the construction point at para 34. Then, when considering whether to carry out the wider reconsideration of the case, he referred only to prejudice to Ebury Partners, recognizing that it would be considerable, but concluding at para 56 of the reconsideration judgment:

> **… in circumstances where I have concluded that there is no evidence of the Claimant's agreement to a variation of his terms as they existed as of 30 April 2019, and the subsequent unilateral imposition of remuneration payments substantially to the Claimant's disadvantage without alternative remuneration proposals being documented, the Judgment is no longer sustainable and should therefore be substituted with a finding that the Claimant's dismissal was both unfair and wrongful.**

It is notable that in this passage the judge appears to have decided to carry out a reconsideration because he had reached a new conclusion based entirely on material which was before him at the time of his original judgment, which is certainly not generally considered a good ground for reconsidering a judgment.

28. For those reasons I think that it was inappropriate for the judge to reconsider his original decision in response to Mr Acton Davis's application and that he made an error of law in so doing.

(2) Was the EJ's conclusion on the proper interpretation of the contract wrong?

29. It is fair to say that the provision about commission at para 4e of the side letter is ambiguous. The way it was read by the EJ was arguable. But as a matter of textual analysis it could also be argued that the limitation of a year only applied to the commissions on new business from Canada (as Mr Acton Davis has maintained in his application for reconsideration and on the appeal). It could also have been argued that the words "one year" were merely descriptive of the secondment and that since

the secondment was to continue on rolling basis the entitlement to commissions continued in the same way.

30. However, in light of my conclusion on issue (1), issue (2) does not arise for my decision. As I have indicated the proper way to have challenged the decision on the interpretation of the contract would have been by way of a timeous appeal to the EAT on a point of law. On that appeal it would have been open to the EAT to consider the proper interpretation of the contractual documents in the light of the factual matrix as found by the judge and to reach a firm conclusion on the interpretation issue.

(3) Was it open to the EJ to decide the case in the way he did on reconsideration?

31. Again, in light of my conclusion on issue (1), this issue does not really arise: it was not appropriate for the judge to carry out any reconsideration at all. But even if it had been open to him to carry out a reconsideration in relation to the interpretation of the contractual documents, there was no proper basis in my view for him to carry out the general reconsideration which he did.

32. It is plain that the application for reconsideration was inviting the tribunal to reconsider the proper interpretation of the contract between the parties and that it was based on the fact that it was decided against Mr Acton Davis on a basis which had not been argued by Ebury Partners. In my view it was simply not open to the judge to undertake a complete review of the case and to decide it on a basis (ie breach of the implied term of trust and confidence) which (it was not disputed) had not been argued for by Mr Acton Davies at the reconsideration hearing. For obvious reasons, rule 71 requires a party seeking a reconsideration to indicate why he does so and it seems to me that an application should also necessarily include an indication of which decisions within a judgment a party is inviting the tribunal to reconsider. It cannot be right for the tribunal of its own accord to reconsider a different

aspect of a judgment, particularly when neither party has presented any argument about it. I therefore agree with Ebury Partners that it was not open to the judge, having rejected Mr Acton Davis's position on the proper contractual interpretation, to undertake a "frolic of his own" and rewrite his original decision. It was notable that Ms Boswell did not really suggest otherwise.

33. In light of that conclusion, I have not considered the interesting submissions relating to Ebury Partners' grounds of appeal 3 and 4: the re-promulgated judgment cannot stand regardless of the merits of any arguments on breach of the implied term of trust and confidence that might have been advanced at the original hearing.

Disposal

34. For all those reasons, I allow Ebury Partner's appeal and dismiss the cross-appeal. It follows that the judgment promulgated on 16 February 2021 is re-instated and the judgments of 4 October 2021 are set aside.

35. I should make clear that in considering the appeal and cross-appeal I have not overlooked that in the reconsideration application there is reference to two matters which Ms Boswell was particularly keen to emphasise during her submissions: (a) the fact that her son had in fact been paid commission between November 2018 and May 2019 and (b) the lack of evidence about a change of policy in relation to payment of UK commission. Both these matters were before the judge when he originally decided the case and would not have provided any proper basis for reconsideration: see paras 39 and 55 of the original judgment.