



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Mr E Parr- Byrne

Mr Kevin Mason t/a Kevin Mason
Roofing Services

ON 11 May 2023

EMPLOYMENT JUDGE Goraj

JUDGMENT ON APPLICATION FOR RECONSIDERATION **DATED 24 APRIL 2022**

THE JUDGMENT OF THE TRIBUNAL IS THAT:- The claimant's application for reconsideration dated 24 April 2023 is refused as the Tribunal is satisfied that that there is no reasonable prospect of the Judgment dated 7 April 2023 being varied or revoked for the purposes of Rule 72 (1) of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

REASONS

Background

1. The claimant has applied for a reconsideration of the reserved (remedy) judgment with reasons dated 7 April 2023 which was sent to the parties on 12 April 2023 (“the Remedy Judgment”). The Remedy Judgment followed a remote oral hearing on 13 March 2023 before Employment Judge Goraj and Messrs P Bompas and D Stewart. In the Remedy Judgment the Tribunal awarded the claimant damages for breach of contract together with other associated monies and interest totalling £3,012.50.
2. When reviewing the Remedy Judgment for the purposes of this judgment the Tribunal noted 3 typographical errors namely, that the references to the date of the commencement of the claimant’s employment with Watertight in paragraphs 14 and 16 of the Remedy Judgment should be to September 2020 and not to 2021 and also that the reference to respondent in paragraph 48 should be to Watertight rather than to the respondent.
3. The Remedy Judgment was sent to the parties on 12 April 2023 and the claimant’s application for reconsideration dated 24 April 2023 (“the application dated 24 April 2023”) was received by the Tribunals on the same date. The claimant’s application dated 24 April 2023 was therefore received within the requisite time limit for the purposes of Rule 71 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (“the Regulations”).
4. The claimant also lodged on 24 April 2023 an appeal to the Employment Appeal Tribunal (“the EAT”) on the same grounds as those contained in the application dated 24 April 2023.
5. The claimant also has an extant appeal to the EAT (case no EA-2022-000503-AS) in respect of the Tribunal’s dismissal of the claimant’s age discrimination claim in the original reserved liability judgment which was sent to the parties on 4 April 2022 (“the liability judgment”).
6. Further the liability judgment was the subject of a (partially successful) reconsideration application dated 6 April 2022 and subsequent reconsideration Judgment which was sent to the parties on 22 September 2022 (“the reconsideration judgment dated 22 September 2022”) by which the Tribunal decided, for the reasons explained therein, to revoke/ vary its original findings relating to the nature of the claimant’s apprenticeship agreement with the respondent and substitute a finding that the claimant was employed by the respondent

under the terms of a common law apprenticeship with an ascertainable end date of 31 October 2021. The remaining aspects of the reconsideration application dated 6 April 2022 were however dismissed by the Tribunal pursuant to a letter dated 28 April 2022 with attached reasons dated 26 April 2022.

7. The claimant's application dated 24 April 2023 has been considered by Employment Judge Goraj, who was the Employment Judge who chaired the Tribunal Panel at the Hearing on 13 March 2023, in accordance with Rule 72(1) and (2) of the Regulations.
8. The claimant contends that it is in the interests of justice for the Tribunal to revoke/ vary the Remedy Judgment in respect of the Tribunal's decision not to award the claimant any damages for breach of contract or associated alleged costs and expenses in respect of the period after the 15 January 2021 (the date of the termination of the claimant's employment with his successor employer Watertight Roofing).

The claimant's application dated 24 April 2023

9. The claimant's application dated 24 April 2023 is a detailed document with several appendices. In summary, however the claimant's principal grounds for reconsideration appear to be as follows: -
 - (1) Failure by the Tribunal to have proper regard to the evidence / to have proper regard to / apply the relevant law (relating in particular to mitigation and/or break in chain of causation).
 - (2) The alleged bias and/or oppressive conduct of the Employment Judge.
 - (3) The alleged oppressive conduct of the respondent's Counsel.
 - (4) The further information/ submissions contained in the Appendices including relating to dealings with Watertight Roofing ("Watertight") and set up costs/ expenses incurred.

THE LAW AND THE CONCLUSIONS OF THE TRIBUNAL

THE LAW

10. The Tribunal has had regard/ reminded itself in particular of the following: -

- (1) Rules 70 -73 of the Regulations referred to above including, that the grounds for reconsideration are limited to those set out in Rule 70, namely, that it is necessary in the interests of justice to do so. The interests of justice apply to both parties.
- (2) It is in the interests of both parties for there to be finality in litigation and it is not therefore normally in the interests of justice for a Tribunal to permit a party to submit further oral or documentary evidence/ submissions following an oral hearing and issue of a judgment unless :- (a) there is new evidence which comes to light following the hearing/ judgment which could not have been obtained with reasonable diligence for use at the original hearing (b) that the evidence would probably have had an important influence on the hearing and (c) that the evidence is apparently credible **Ladd v Marshall 1954 3 AllER 745 CA** and **Outsight VB Limited v Brown 2015 ICR D11 EAT.** It was recognised in **Brown** that the interests of justice may still allow fresh evidence to be adduced where some additional factor or mitigating circumstance has the effect that the evidence in question could not have been obtained at an earlier stage.
- (3) The guidance contained in the EAT judgment of **Trimble v Supertravel Ltd [1982] ICR 440 EAT,** and in particular, that if a matter has been ventilated and argued at a Tribunal hearing any error of law falls to be corrected on appeal and not by review on reconsideration.

THE CONCLUSIONS OF THE TRIBUNAL

Issue 1 - The alleged failure by the Tribunal to have proper regard to the evidence / to have proper regard to / apply the relevant law (relating in particular to mitigation and/or break in chain of causation).

11. The claimant contends in the application dated 24 April 2023 that the Tribunal failed to act as stated above. Having regard to the guidance contained in the EAT authority of **Trimble** (referred to above) the Tribunal is satisfied that as:- (a) these matters were fully ventilated at the Hearing on 13 March 2023 (b) are addressed in the Remedy Judgment (paragraphs 4-8 (documentation/ statements and Issues), 11- 29 (findings of fact),30 – 34 (law and authorities) and 35 – 57 (conclusions of the Tribunal relating to the contractual issues including the respective submissions of the parties) and (c) further relate to

alleged errors of law on the part of the Tribunal that they fall to be determined by way of an appeal to the EAT rather than by way of reconsideration. The claimant has lodged an appeal with the EAT on the same grounds as those raised in the application dated 24 April 2023. The claimant will therefore have an opportunity to raise such matters with the EAT.

12. This aspect of the reconsideration application dated 24 April 2023 is therefore dismissed on the grounds that it will fall to be determined by the EAT. The Tribunal will send a copy of this judgment to the EAT so that the EAT is aware of the position.

Issue 2 the alleged bias and/or oppressive conduct of the Employment Judge

13. It appears that the alleged bias and/or oppressive conduct of the Employment Judge relates to the following matters in particular :- (a) the conclusions of the Remedy Judgment insofar as the Tribunal did not find in the claimant's favour regarding aspects of the claimant's contractual claim for breach of contract relating to mitigation and chain of causation in respect of his employment with Watertight (b) favouring the respondent over the claimant in respect of the conduct of the proceedings including in respect of the (postponed) hearing on 16 December 2022/ the requirement to provide further documentation and (c) permitting the respondent's Counsel to engage in alleged oppressive conduct in relation to the questioning of the claimant at the hearing on 13 March 2023 relating in particular to the monies claimed in respect of the setting up of his business and associated costs.

(a) Alleged bias by the Employment Judge in respect of outcome of the Remedy Hearing.

14. The Remedy Judgment was a unanimous judgment reached by three panel members after consideration of the oral and written evidence/ submissions referred to in that judgment. Any errors of law (including any perversity on the part of the Tribunal) fall to be determined by the EAT on appeal in accordance with the guidance in **Trimble** as previously referred to above.

(b) Favouring the respondent over the claimant in respect of the conduct of the case including in respect of the postponed hearing on 16 December 2022.

15. The respondent's representative applied to postpone the initial remedy Hearing on 16 December 2022 on the grounds that it had become

apparent that she had not been provided with relevant documentation by her instructing solicitors, including the claimant's spreadsheet of loss. The claimant consented to this application and raised no objections/ concerns at the hearing on 16 December 2022 to the postponement of the remedy hearing or the convening of a case management hearing. When deciding to grant the respondent's postponement application the Tribunal also took into account that the claimant/ his representative were experiencing technical issues which meant that they were unable to connect properly to the remote hearing (after we had tried with both VHS and CVP). In the circumstances, the Tribunal did not consider that it would be in the interests of justice to continue with a contested hearing whereby a claimant with a stated condition of autism (and who was not initially in attendance at the hearing that morning as the Tribunal was informed that he was in bed with flu) to give his evidence/ be cross examined by telephone.

16. The Tribunal decided, with the agreement of the parties, to convert the hearing on 16 December 2022 to a case management hearing particularly as the Tribunal noted that the claimant appeared to have provided little documentary evidence to support his complex spreadsheet of losses / associated costs. As reflected in the subsequent case management order dated 19 December 2022 ("the CMO dated 19 December 2022") (paragraphs 5 and 11), the Tribunal explained to the claimant/ his representative the importance of providing relevant documentation/ oral evidence relating to remedy (which was not limited to evidence from the claimant) in support of his claims including his claims for the startup costs of his business (Rapid Roofing) and any training or associated costs. The claimant/ his representative did not raise any concerns at the time regarding the conduct of the case management hearing on 16 December 2022/ raise any objections to the direction to provide further documentation.
17. Further in respect of the other unspecified allegations that the Employment Judge has favoured the respondent over the claimant, it is apparent from the judgments of the Tribunal in this matter that the Tribunal has on some aspects found in the favour of the respondent and others in favour of the claimant. Whilst for instance, the Tribunal did not initially find in the claimant's favour in respect of his status as a common law apprentice, it subsequently permitted the claimant to submit further documentation on reconsideration and drew to the attention of the parties the authorities of **Flett v Matheson 2006 ICR 673 CA** and **Chassis and Cab Specialists Limited v Lee EAT 0268/10** and in the light of which further documentation/ authorities the Tribunal found in the claimant's favour on this issue for the reasons explained in the reconsideration judgment dated 22 September 2022.

18. The Tribunal has also been mindful during these proceedings of the claimant's stated condition of autism. At the start of the liability hearing at the end of February 2022, the Tribunal enquired whether any adjustments were required to the conduct of the hearing by reason of the claimant's condition and was informed that no adjustments were necessary (paragraph 6 of the Liability Judgment). Further no concerns were raised in the claimant's original reconsideration application dated 6 April 2022 concerning the conduct of the Tribunal in relation to the claimant's evidence at the liability hearing.

19. This aspect of the application dated 24 April 2023 is therefore also dismissed.

(c) The alleged oppressive conduct on the part of the respondent's Counsel

20. This allegation appears to relate to the conduct of the respondent's Counsel in respect of her cross - examination of the claimant at the hearing on 13 March 2023 relating to his claims for compensation in respect of the setting up of his business Rapid Roofing / associated costs together with the alleged failure of the Employment Judge to prevent such alleged conduct. The claimant does not contend that he was prevented from adducing any further relevant information by reason of the alleged conduct of the respondent.

21. By way of background, the claimant relied on two remedy witness statements for the purposes of the remedy hearing namely one from himself and one from his grandmother, Miss Bassett. Miss Bassett did not however attend the remedy hearing. Further, notwithstanding the directions contained in the CMO dated 19 December 2022, the claimant provided little documentary evidence in support of his financial claims including in respect of the costs of setting up his business Rapid Roofing/ its associated profit and loss account. Moreover, the claimant did not provide any documentary evidence from his grandmother relating to any financial support/ any documents relating to the purchase of a motor vehicle (a Skoda) or any associated insurance/costs of equipment.

22. It is against this background, that the claimant's Counsel sought to cross examine the claimant regarding his claims for compensation. The respondent's Counsel conducted her cross – examination in a professional manner. In response, the claimant indicated at times that he was unable to answer her question including as his mother had

dealt with the relevant matters on his behalf. The claimant also indicated during his cross examination that he was feeling anxious.

23. In the circumstances, and in recognition of the claimant's stated condition of autism and indication that he was feeling anxious, the Tribunal agreed with the parties that, notwithstanding that the claimant's mother/ representative, Ms Vuitton had not submitted a witness statement for the purposes of the remedy hearing, she would be allowed to give evidence to the Tribunal. It was agreed that she would be permitted to give evidence regarding any financial matters which the claimant was unable to answer/ which she had dealt with on his behalf including regarding any discrepancies relating to the claimant's schedule/ spreadsheet of loss / any set up costs/ the profit and loss account for Rapid Roofing (paragraph 8 of the Remedy Judgment). The claimant's mother gave evidence accordingly and the claimant/ his representative did not raise any further concerns regarding cross examination by the respondent.
24. This aspect of the application dated 24 April 2023 is therefore dismissed.

Issue 4 – Further information/ submissions contained in the Appendices including with regard to the claimant's recent dealings with Watertight and expenses incurred.

25. The claimant has included a number of Appendices with the application dated 24 April 2023. In summary, these Appendices can be divided into two main areas namely: - (1) further legal and factual submissions including reliance on further legal authorities and (2) further information relating to (a) recent correspondence with Watertight (Appendix 2) (b) evidence of startup costs/regarding the purchase of the Skoda, car insurance and tools (Appendix 5) and (c) pastoral log / information from the College (which the claimant had submitted previously).
26. In this case, the Issues to be determined at the remedy hearing were identified at the postponed Hearing/ converted case management hearing on 16 December 2022 including that the respondent denied that he was responsible for any losses incurred by the claimant following his employment with / resignation from Watertight (paragraph 4 of the CMO dated 19 December 2022). The Tribunal also gave directions for the sequential exchange of written submissions / any legal authorities relied upon by the parties in preparation for the remedy hearing with the respondent going first to assist the claimant (paragraphs 12 and 13 of the CMO dated 19 December 2022). Such

submissions were subsequently exchanged as contained in the remedy Hearing Bundle. The parties were also given a further opportunity to make any further oral submissions at the Remedy Hearing.

27. In the circumstances, the Tribunal is satisfied that the claimant was afforded a proper opportunity to make any relevant submissions / draw to the attention of the Tribunal any relevant legal authorities and that as such matters have already been fully ventilated, any further consideration thereof falls to be considered as appropriate by the EAT in accordance with the guidance contained in Trimble referred to above.

The additional documentation

28. Finally, the Tribunal has had regard to the following additional documents provided by the claimant namely the: - (a) correspondence with Watertight (Appendix 2) on 19 April 2023 and (b) further documentation relating to the set up costs / financing of Rapid Roofing. The Tribunal has further noted that in the correspondence with Watertight that company declined to provide any further information (other than in respect of the dates of the claimant's employment with them and salary) regarding the "reasoning for Elliot handing in his notice (as) we fear that it may bring our company into disrepute".
29. Having given careful consideration to the additional documentation provided by the claimant at Appendices 2 and 5 the Tribunal is not satisfied that it is in the interests of justice to admit the above-mentioned documents (or any further associated factual submissions) at this stage of the proceedings. When reaching this conclusion, the Tribunal has had regard to the guidance contained in the authorities of Ladd v Marshall and Outsight v Brown referred to above together with the matters referred to below.
30. Having given the matter careful consideration the Tribunal is satisfied that the above information, including the refusal by Watertight to provide any information regarding the reasons for the claimant's resignation for fear that it could bring that company into disrepute, could, viewed objectively, have been obtained by the claimant with reasonable diligence pursuant to the guidance in Ladd v Marshall for the purposes of the hearing on 13 March 2023.
31. When reaching this conclusion, the Tribunal is satisfied that the claimant would reasonably have been aware from the CMO dated 19

December 2022 that the respondent contended that it was not responsible for any losses incurred by the claimant following his employment with/ resignation from Watertight together with the requirement to provide any further documents relating to remedy (including in relation to any set up costs)(paragraphs 4 & 5 of the CMO dated 19 December 2022).

32. Further, in the subsequent documents entitled “Points of Agreement and Disagreement on Quantum Schedules” dated 6 February 2023/ the respondent’s written submissions dated 28 February 2023 prepared for the hearing on 13 March 2023, the respondent stated/ contended that:-

(1) It was challenging the claimant’s claims for the set up costs of Rapid Roofing including in the light of the lack of supporting evidence (paragraph 19 of the document dated 6 February 2023 and (paragraphs 19 and 20 of the document dated 28 February 2023).

(2) The claimant had acted unreasonably in leaving his employment with Watertight (paragraphs 9 and 16 of the submissions dated 28 February 2023). Further, this issue was, in any event, addressed in the claimant’s witness statement.

33. The Tribunal is therefore satisfied that the claimant would reasonably have been aware that these were matters in issue for consideration at the hearing on 13 March 2023.

34. In the circumstances, whilst it is possible that Watertight’s refusal to provide information regarding the circumstances of the claimant’s resignation for fear that it may have brought the company into disrepute may have had an influence on the findings of the Tribunal regarding the circumstances of the claimant’s departure from Watertight, the Tribunal is not satisfied, in the light of the matters referred to above, that there is any additional factor or mitigating circumstances whereby it is in the interests of justice to admit such further information following the conclusion of the hearing and issue of the Remedy Judgment.

35. This aspect of the application is therefore also dismissed.

36. In all the circumstances, and having had regard to the provisions of Rule 72 (1) of the Regulations the Tribunal is satisfied, for the reasons explained above that there is no reasonable prospect of the Remedy

Judgment being revoked or varied and the claimant's application dated 24 April 2023 is therefore dismissed.

Employment Judge Goraj
Dated 11 May 2023

Judgment sent to Parties on 23 May 2023

For the Tribunal Office