



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Mr E Parr- Byrne

Mr Kevin Mason t/a Kevin Mason
Roofing Services

ON 5 June 2023

EMPLOYMENT JUDGE Goraj

JUDGMENT ON APPLICATION FOR RECONSIDERATION **DATED 23 MAY 2023**

THE JUDGMENT OF THE TRIBUNAL IS THAT: - The claimant's application for reconsideration dated 23 May 2023 is refused as the Tribunal is satisfied that there is no reasonable prospect of the Judgment dated 23 March 2022 (relating to the claimant's complaint of age discrimination) 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 (liability) judgment with reasons dated 23 March 2022 which was sent to the parties on 4 April 2022 (“the Liability Judgment”) dismissing the claimant’s claims (including the claimant’s complaint of age discrimination). The Liability Judgment followed a remote oral hearing on 28 February and 1 and 2 March 2022 before Employment Judge Goraj and Messrs P Bompas and D Stewart. The claimant’s application for reconsideration dated 23 May 2023 (“the application dated 23 May 2023”) relates only to the claimant’s complaint of age discrimination.
2. Although the application dated 23 May 2023 was received outside 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”) it has been considered by the Tribunal pursuant to the Order of the Employment Appeal Tribunal (“the EAT”) dated 1 May 2023 for the purposes of the claimant’s extant appeal to the EAT(case no EA- 2022-000503-AS) concerning the dismissal of the claimant’s age discrimination claim in the Liability Judgment
3. The claimant’s application dated 23 May 2023 has been considered by Employment Judge Goraj in accordance with Rule 72(1) and (2) of the Regulations as she was the Employment Judge who chaired the Tribunal Panel at the Liability Hearing (on 28 February and 1 and 2 March 2022).
4. The claimant’s complaint of age discrimination (direct age discrimination) was dismissed in the Liability Judgment for the reasons explained at paragraphs 42 – 56 thereof.
5. On 6 April 2022, the claimant submitted to the Tribunal an application for reconsideration of/ appeal against the Liability Judgment (“the application dated 6 April 2022”). An appeal was also presented to the EAT on similar grounds. In the claimant’s email dated 6 April 2022 he stated that the application dated 6 April 2022 related in particular to the Tribunal’s decision in relation to his wrongful dismissal claim. Further, the matters raised in the accompanying document dated 4 April 2022 related to the claimant’s breach of contract/ wrongful dismissal claim (in particular, the claimant’s contended status as a common law apprentice). There was no reference in either document to the claimant’s complaint of age discrimination/ any suggestion that the claimant considered that the outcome of the claimant’s breach of

contract/ wrongful dismissal claim was in anyway linked to the outcome of the claimant's complaint of age discrimination.

6. The application dated 6 April 2022 was partially successful and in the subsequent reconsideration Judgment which was sent to the parties on 22 September 2022 ("the reconsideration Judgment dated 22 September 2022") the Tribunal decided, for the reasons explained therein, to revoke/ vary its original findings relating to the claimant's breach of contract/ wrongful dismissal claim in respect of 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 during the specified periods with an ascertainable end date of 31 October 2021. The application dated 6 April 2022 had however otherwise previously been dismissed by the Tribunal on 28 April 2022 for the reasons set out in the accompanying letter dated 26 April 2022. No further application was made by the claimant in respect of his age discrimination claim following the issue of the reconsideration Judgment on 22 September 2022.

The Order of the EAT dated 1 May 2023

7. The Tribunal subsequently received from the EAT an Order dated 1 May 2023 ("the Order dated 1 May 2023") in which it is recorded that the claimant was seeking to pursue an appeal against the dismissal by the Tribunal of his complaint of age discrimination. It is further recorded in the Order dated 1 May 2023 that the claimant was seeking to pursue his appeal on the grounds that the claimant's breach of contract claim and age discrimination claims are closely linked and that the Tribunal had failed to revisit the Liability judgment relating to the age discrimination claim after determining the claimant's breach of contract claim in the claimant's favour on reconsideration.
8. The EAT noted in the Order dated 1 May 2023 that the claimant's grounds of appeal did not appear to raise (at least expressly) any issue about the age discrimination claim and/or explain why the claimant's breach of contract and age discrimination claims were linked and/or why the successful reconsideration of the claimant's breach of contract claim meant that the Tribunal's original findings on the age discrimination claim could no longer stand/ should be set aside.
9. The EAT further stated that if the claimant considered that the consequence of the successful reconsideration of the breach of contract claim was that the age discrimination claim should succeed the claimant should be given an opportunity to pursue this with the

Tribunal by way of a further (albeit out of time) application for reconsideration. The claimant's associated appeal to the EAT was accordingly stayed to permit such application.

The claimant's application dated 23 May 2023

10. The Tribunal subsequently received the claimant's application dated 23 May 2023 together with an attached Skeleton Argument in support of the reconsideration of the claimant's age discrimination claim.
11. The Tribunal has therefore considered the matters raised in the Skeleton Argument as appropriate as addressed below.

THE LAW AND THE CONCLUSIONS OF THE TRIBUNAL

THE LAW

12. 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.**
 - (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

Paragraph D of the Skeleton Argument

- 13.** The claimant contends at Paragraph D of the Skeleton Argument that he was not aware, as the Employment Judge did not confirm until reviewing the claimant's schedule of loss at the postponed remedy/ case management hearing on 16 December 2022, that the age discrimination element of the claim had not been reconsidered and as such would need to be " independent and claimed separately". The claimant's application dated 6 April 2022 was however dismissed by the Tribunal on 28 April 2022 (for the reasons explained in the accompanying letter dated 26 April 2022) save in respect of one aspect relating to the claimant's breach of contract/ wrongful dismissal claim (as identified above) which was subsequently upheld in the reconsideration Judgment dated 22 September 2022.
- 14.** Further, the Employment Judge noted when reviewing with the parties the claimant's schedule of loss at the case management discussion on 16 December 2022 (following the postponement of the remedy hearing that day) that the claimant had included claims for compensation for unfair dismissal (as opposed to his breach of contract/ wrongful dismissal in breach of contract claim) and age discrimination. The Employment Judge explained to the claimant during the case management discussion that the Tribunal did not have the power to award the claimant any compensation for unfair dismissal (as the claimant did not have the necessary qualifying service) or for age discrimination as the latter complaint had been dismissed by the Tribunal. The position was subsequently confirmed (at paragraph 4) in the Case Management Order dated 19 December 2022.

Paragraph E of the Skeleton Argument

- 15.** The claimant contends at paragraph E of the Skeleton Argument that it was the claimant's understanding that the age discrimination element of the claimant's claims had automatically failed due to the dismissal of the claimant's breach of contract and unfair dismissal claims including having had regard to paragraph 87 of the Liability Judgment. The claimant has not previously raised any such contention / made any associated application to the Tribunal.

- 16.** The Tribunal is satisfied that it is clear on the face of the Liability Judgment that the age discrimination (the Conclusions at paragraphs 42 – 56 of the Liability Judgment) and breach of contract/wrongful dismissal claims (the Conclusions at paragraphs 76 – 89 of Liability Judgment as considered further in the reconsideration Judgment dated 22 September 2022) were treated as discrete claims with reasons given for the success/ failure of such claims. The Tribunal is further satisfied that it is clear on the face of the Liability Judgment that the Tribunal’s findings at paragraph 87 of the Liability Judgment related to the claimant’s breach of contract/ wrongful dismissal claim and are not linked to the outcome of the claimant’s complaint of age discrimination.
- 17.** In the circumstances, the Tribunal is not satisfied that the claimant could reasonably have concluded that the claimant’s age discrimination claim had automatically failed due to the dismissal of the breach of contract/ wrongful dismissal claim.
- 18.** Further, the Tribunal is not, in any event, satisfied on the facts that the Tribunal’s reconsideration Judgment dated 22 September 2022, whereby it revoked and varied the Liability Judgment relating to the claimant’s breach of contract/ wrongful dismissal claim and held instead that the claimant was engaged by the respondent on a common law contract of apprenticeship, has any bearing on the Tribunal’s Conclusions (at paragraphs 42- 56 of the Liability Judgment) relating to the claimant’s age discrimination / provides any grounds for revoking or varying the Tribunal’s findings relating to the claimant’s age discrimination claim. The fact that the Tribunal did not consider that the respondent’s concerns relating to the claimant’s conduct/ capability (as identified at paragraphs 25, 26, 27, 32, 33 and 37 of the Liability Judgment) were viewed objectively sufficiently serious to justify the summary termination of a common law contract of apprenticeship does not mean that the respondent, who believed at the time of the claimant’s dismissal that he was lawfully entitled to terminate the claimant’s employment on one week’s notice, did not have genuine /legitimate concerns regarding such matters/ that the claimant was therefore dismissed because of his age. The Tribunal explained at paragraphs 42 – 56 of the Liability Judgment why it dismissed the allegations of age discrimination and such Conclusions are unaffected by the reconsideration Judgment dated 22 September 2022.
- 19.** The principal reason for the claimant’s successful application for reconsideration relating to his breach of contract / wrongful dismissal claim was that the claimant provided, after the promulgation of the Liability Judgment, a signed document relating to the training arrangements between the parties. The claimant was permitted to rely

upon such document and which, for the reasons explained in the reconsideration Judgment dated 22 September 2022, led the Tribunal to conclude, on the balance of probabilities in the light of such further evidence and associated legal authorities, that the claimant had been engaged on a common law apprenticeship. This was not related to the claimant's complaint of age discrimination/ the reasons for its dismissal.

Paragraphs F – I of the Skeleton Argument

- 20.** The claimant was represented at the Liability Hearing by his mother who was a strong advocate on his behalf. The claimant/ his representative were given a proper opportunity to raise any matters which they wished to raise with regard to the claimant's age discrimination (and all other claims) and did so accordingly. The Tribunal reserved its Judgment in order to ensure that it had a proper opportunity to consider the evidence and submissions of the parties on all matters.
- 21.** Further, the "facts"/ submissions subsequently referred to/ contained at paragraphs 1- 23 of the Skeleton Argument relate to matters which were previously raised at the Liability Hearing and are addressed at paragraphs 42- 56 of the Liability Judgment (or are, in any event, matters which could reasonably have been raised at that time). The application dated 23 May 2023 does not contain any new evidence requiring the reconsideration of the Tribunal's findings in respect of the age discrimination claim in the interests of justice.
- 22.** Moreover, having regard to the guidance contained in the EAT authority of **Trimble** (referred to above) the Tribunal is satisfied that as the matters referred to at paragraphs 1- 23 of the Skeleton Argument above were ventilated at the Liability Hearing / are addressed in the Conclusions of the Tribunal at paragraphs 42 – 56 of the Liability Judgment and the associated findings of facts, any alleged failings on the part of the Tribunal with regard to the outcome of the claimant's age discrimination claim fall to be determined by way of the claimant's appeal to the EAT rather than by way of reconsideration.
- 23.** The Tribunal will send a copy of this judgment to the EAT in order to assist in the expedition of the consideration of the claimant's appeal relating to the dismissal of his complaint of age discrimination.
- 24.** 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 Liability Judgment relating to the claimant's complaint of age discrimination

being revoked or varied in the interests of justice and the claimant's application dated 23 May 2023 is therefore dismissed.

Employment Judge Goraj
Date: 5 June 2023

Judgment sent to Parties: 14 June 2023

FOR THE TRIBUNAL OFFICE

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