EMPLOYMENT TRIBUNALS

Claimant: **Mr D Carpenter**

Respondent: **Complex Logistics Ltd**

Judgment

(varied upon reconsideration)

UPON APPLICATION by the respondent made by a letter dated **2 October 2023** to reconsider the Judgment dated 18 September 2023 ("**the Judgment**") under rule 71 Employment Tribunals Rules of Procedure 2013, and without a hearing, the Judgment is varied as follows:

1. The Respondent has made unlawful deductions from the Claimant's wages and is ordered to pay to the Claimant the gross sum of ~~**£10,431.03**~~ **£7,384.65**, with respect to the wages unlawfully deducted.

2. The Respondent has unreasonably failed to comply with Acas Code of Practice on Disciplinary and Grievance Procedures, and it is just and equitable to increase the award by 25% (~~**£2,607.76**~~ **£1,846.16**).

3. Therefore, the Respondent must pay to the Claimant the total gross sum of ~~**£13,038.79** (£10,431.03 + £2,607.76)~~ **£9,230.81** (£7,384.65 + £1,846.16), less any deductions for tax and National Insurance, for which the Respondent must account to the HMRC.

REASONS

The relevant background

1. This reconsidered and varied judgment and reasons must be read together with the original Judgment dated 18 September 2023 ("**the Judgment**") and the Reasons dated 27 September 2023 ("**the Reasons**") to understand the reasoning in full.

2. On 2 October 2023, the respondent applied for a reconsideration of the Judgment under Rule 71 of the Employment Tribunals Rule of Procedure 2013 ("**the ET Rules**") on the grounds that it had obtained evidence, which directly contradicted the claimant's evidence he gave at the hearing on 18

September 2023 that he had not received any communication from the respondent terminating his employment. The respondent submitted that the new evidence showed that the claimant had been sent the dismissal letter by email on 10 August 2022, which had also been uploaded on the respondent's HR system (Quest). The respondent stated that it had obtained evidence showing that the claimant had accessed the Quest system on 18 August 2022 and therefore would have seen the dismissal letter.

3. The second ground is that the Tribunal erred in calculating the amount of compensation due to the claimant because it incorrectly computed the number of working days between 11 July 2022 and 31 October 2022. The Tribunal used the figure of 113 days, when in fact the correct number of working days in that period is 81.

4. On 2 October 2023, the claimant sent two emails to the Tribunal refuting that he had received the dismissal letter by email, or that he had logged into the respondent's HR system on 18 August 2022. He also stated that the money award was correct because the weekends and overtime were included in his job role.

5. On 3 October 2023, the Tribunal wrote to the parties, setting out my provisional view that the application for reconsideration should be granted, inviting the claimant to provide reasons if he thought the Judgment should not be reconsidered, and both parties to set out their views whether the application could be determined without a hearing.

6. On 9 October 2023, the claimant submitted his representations. The claimant said that he was in agreement that the Judgment should be reconsidered "*based on the miscalculation days*". The claimant stated that the correct period of his employment with the respondent was between 11 July 2022 and 7 December 2022, because it was on that later date when he had decided to consider himself discharged from the contract. The claimant repeated his rebuttal of receiving any dismissal letter or logging into the respondent's HR system on 18 August 2022.

7. The claimant said that whilst he considered that the application can be determined without a hearing, since the respondent wished to present new evidence, a hearing would be appropriate.

8. On 10 October 2023, the respondent wrote to the Tribunal stating that given the difference of opinion on the facts a further hearing would be required to determine the application.

9. On 16 October 2023, having determined that the application can be decided without a hearing (for the reasons explained below), the Tribunal wrote to the parties inviting to submit any further representations.

10. On 23 October 2023, the parties sent their further representations. These were largely the respondent's new evidence it wished to rely upon and the claimant challenging the authenticity of the respondent's new evidence.

For the reasons explained below I declined to consider the respondent's new evidence.

The Law

11. Rule 70 of the ET Rules states:

> *"70. Principles*
>
> *A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again."*

12. The test for reconsideration, therefore, is whether such reconsideration is in the interests of justice.

13. In *Outasight VB Ltd v Brown* 2015 ICR D11, EAT, at [33] the EAT held that although the wording "*necessary in the interests of justice*" gives employment tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate, having regard to all the circumstances, this discretion must be exercised judicially, "*which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation*".

14. The EAT also held at [49] that in so far as adducing new evidence as the basis for reconsideration, the principles set out in *Ladd v Marshall* 1954 3 All ER 745 CA apply. There the Court of Appeal established that, in order to justify the reception of new evidence, it is necessary for the party seeking to adduce such fresh evidence to show:

    a. that the evidence could not have been obtained with reasonable diligence for use at the original hearing
    b. that the evidence is relevant and would probably have had an important influence on the hearing; and
    c. that the evidence is apparently credible.

15. The EAT held that even if the principles in ***Ladd v Marshall*** were not strictly met, there might "*some special additional circumstance or mitigating factor*" dictating that it is in the interests of justice to allow fresh evidence to be adduced. The EAT went on to review the authorities on what such special additional circumstances might be, concluding at [50]:

> "*… As to what circumstances might lead an ET to allow an application to admit fresh evidence, that will inevitably be case-specific. It is, of course, always dangerous to try to lay down any general principles when dealing with specific facts, particularly where - as here - one party is not represented and where the point was not fully argued below. That said, it might be in the interests of justice to allow fresh evidence to be adduced where there is some additional factor or mitigating circumstance which meant that the evidence in question could not be obtained with reasonable diligence at an earlier stage (**Deria**). This might arise where there are issues as to whether there was a fair hearing below; perhaps where a party was genuinely ambushed by what took place or, as in **Marsden**, where circumstances meant that an adjournment was not allowed to a party when otherwise it would have been (there apparently because of an error on the part of that party's Counsel).*"

16. More recently, in <u>*Ebury Partners Ltd v Acton Davis*</u> 2023 EAT 40, the EAT reaffirmed the public interest in finality of litigation. It said at [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.*"

Analysis and conclusions

Should the respondent's new evidence be allowed?

17. I accept that the respondent's new evidence might well have had an important influence if had been presented at the hearing. Equally, I am prepared to accept that the new evidence are credible. Therefore, the last two limbs of the ***Ladd v Marchall*** test are satisfied. However, I am not persuaded that the evidence in question could not have been obtained by the respondent with reasonable diligence for use at the hearing.

18. In its reconsideration application the respondent states:

> "*After searching through their email servers, they have located an email that was sent to the Claimant on Wednesday 10th August 2022 at 3.02 p.m. which is titled "dismissal." This email is from Rachel Robson, HR Administrator attaching a number of documents including the letter of dismissal and confirming that this concluded the investigation and outcome of the case. This was sent to the correct email address of the Claimant. Rachel Robson has left the Respondent business and when the email was sent it earlier from a different email address info@complexlogistics.co.uk rather than from Ms Robson's Complex Logistics email which is why it was not located earlier and they were unable to speak to her as she had left the business in October 2022.*
> *Secondly the Respondents have looked at their internal HR System (Quest) and it shows that the last time the Claimant logged into the system was on 18th August 2022. If that is correct, then the Claimant would have been able to see his Letter of Dismissal.*
> *These items of evidence directly contradict the oral testimony of the Claimant in that he stated he had no contact from the Respondent after his Zoom meeting on 4th August 2022 and that he did not log onto the internal HR System at all. It also goes to the question of quantum as the Claimant was awarded compensation on the basis that he was unaware of his dismissal until the end of October 2022.*"

19. What the respondent does not explain is why such a thorough search could not have reasonably been undertaken before the hearing. It states that the email was sent to the correct email address of the claimant. It appears it remained on the respondent's IT server. I do not see why the fact that it was sent from info@complexlogistics.co.uk as opposed to from Ms Robson's email address would make any difference with respect to the respondent's ability to locate it before the hearing, assuming it searched for it with reasonable diligence. The respondent was able to locate it shortly after the hearing.

20. Furthermore, the respondent states that after the hearing it checked its HR system and discovered that the claimant had logged into the system on 18 August 2022 and accordingly would have seen the dismissal letter. If so, I do not see any valid reason (and the respondent does not offer any in its

application or subsequent representations) why it could not have reasonably checked the HR system before the hearing to find this evidence.

21. The question of the correct termination date of the claimant's employment was always one of, if not, the key issue in the claim. That would have been reasonably apparent to the respondent from the start. The claimant's pleaded case was that at the time of presenting his ET1 on 27 September 2022 his employment with the respondent was continuing. The respondent's response stated that the claimant had resigned on 27 July 2022. Later the respondent changed its position, pleading that the claimant was dismissed on 9 August 2022 with effect from 31 July 2022. The claimant's response to the respondent's further and better particulars and his witness statements also made it abandonly clear that the claimant's contention was that he never received any correspondence from the respondent following his grievance meeting on 4 August 2022. Accordingly, the respondent was far from being "ambushed" by the claimant's position on the termination date. Yet, the respondent presented no evidence for the hearing in support of its case on the date of termination.

22. I am equally unpersuaded by the respondent's submission that it was unable to speak with Ms Robson because she had left the respondent's employment in October 2022. The respondent does not explain what attempts (if any) it made to speak with her. The respondent does not explain why, if she was such a key witness for the respondent, it did not seek to call her as a witness at the hearing, and if necessary, by applying to the Tribunal for a witness order.

23. The respondent has been represented in these proceedings by a professional HR consultant from the start. Therefore, I do not find any mitigating factors in the respondent's favour in it not preparing its case for the hearing with all reasonable diligence.

24. For all these reasons, I find that it will not be in the interests of justice to allow the respondent to adduce fresh evidence about the claimant's termination date. This will essentially be giving the respondent a "second bite of the cherry" and offending the important principle of finality in litigation.

The claimant's new contention re the end date of his employment

25. The claimant did not apply for a reconsideration of the Judgment himself. However, to the extent his representations of 9 October 2023 on the respondent's application are to be taken as a separate application for reconsideration of the Judgment, I find it must be rejected because there is no reasonable prospect of the Judgment being varied in the way the claimant asks me to do.

26. I reject the claimant's contention that the actual end date of his employment was 7 December 2022, and not 31 October 2022. This was never his case. His evidence to the Tribunal was clear that he considered himself as discharged from the contract at the end of October 2022 when he had given up on his attempts to engage with the respondent (see paragraphs 48 and 49 of the Reasons). This appears to be no more than a speculative attempt

by the claimant to increase his compensation, devoid of any proper grounds. I have no hesitation in rejecting it.

Overall conclusion on the end date

27. Therefore, I find there are no proper grounds for the Judgment to be varied or revoked with respect to the end date of the claimant's employment.

Miscalculation of working days

28. Turning to the respondent's second ground, namely the miscalculation of working days between 11 July 2022 and 31 October 2022. I accept that it was a clear mistake on my part, for which I apologise to the parties. 113 is the number of total days between these two dates, not the number of working days.

29. I reject the claimant's contention that the money award was correct because the weekends and overtime was included in his job role. His contract of employment clearly states that his annual salary of £24,000 "*will be broken down into 12 equal monthly payments and will be payable on or around the 16th working day of each month by bacs and in arrears*". His "*normal days of work are Monday to Friday*", and overtime is paid separately "*at a rate of £11 per hour for any worked incurred for a 6th working day*".

30. Therefore, the claimant was due £2,000 salary for August, September and October 2022 and for 15 working days (between 11 and 31 July 2022) at £92.31 = £1,384.65, i.e., the total of **7,384.65**.

31. Considering that it was a pure calculation error and not an error of law on my part, I do not see any reason why I should not correct it myself on reconsideration.

Is a hearing necessary in the interests of justice?

32. Finally, considering my conclusions on the admissibility of fresh evidence and on the claimant's attempt to change his case and extend the end date of his employment, I find that a hearing is not necessary in the interests of justice. There is no need for me to hear from the parties to properly deal with the computation error. Since I am not admitting fresh evidence on the termination date issue, there are no reasonable prospects for the Judgment to be varied or revoked with respect to this issue.

Employment Judge **Klimov**
24 October 2023