EMPLOYMENT TRIBUNALS

Claimant: Mr Dhiren Ludhra

Respondent: Morgan Sindall Construction Infrastructure Ltd

Heard at: Watford Employment Tribunal **On:** 22 March 2024

Before: Employment Judge Young

Representation
Claimant: Ms A Sharma (Claimant's mother)
Respondent: Ms K Barry (Counsel)

RESERVED RECONSIDERATION JUDGMENT

The Claimant's application dated 2 December for reconsideration of the judgment sent to the parties on 30 June 2023 is refused.

REASONS

Introduction

1. The judgment was given orally at the hearing, with reasons, on 26 May 2023. Judgment was sent to the parties on 30 June 2023. Written reasons were requested by the Claimant on 1 July 2023. Written reasons were sent to the parties on 27 July 2023.

2. The Claimant's claim for wrongful dismissal was successful. The Claimant was found to be a common law apprentice and was dismissed in breach of contract, but the Claimant would have been made redundant lawfully.

3. The Claimant emailed the Employment Tribunal on 9 August 2023 applying for a reconsideration of the judgment. That reconsideration application failed and, the reconsideration judgment dated 16 August 2023 with reasons was sent to the parties on 31 August 2023.

4. References in square brackets are references to paragraph numbers from the Respondent's reconsideration bundle. References to the original trial bundle are contained in round brackets in bold.

5. I undertook preliminary consideration of the Claimant's application for reconsideration of the judgment of his claim. That application is contained [241-243] in a 27 page document attached to an email dated 2 December 2023 [216]. I have also considered comments from the Respondent dated 21 December 2023 [244-245]. Having considered the application and the comments, the Tribunal considered that the application should not be refused at that stage without a hearing. Notice of a reconsideration hearing was sent to the parties on 6 February 2024 [246-247] and the parties were asked if a hearing was necessary. Whilst the Claimant considered that a hearing was not necessary [256], the Respondent considered that a hearing was necessary [257]. The Tribunal relisted the reconsideration hearing for 3 hours on 22 March 2024.

Hearing

6. The hearing was conducted by CVP with the Claimant's mother and representative Ms Sharma in attendance and Ms Barry of counsel attended on behalf of the Respondent. Both representatives were the same representatives before me at the trial hearing. Initially the Claimant attended. Ms Sharma asked the Tribunal if the Claimant's attendance was required. The Tribunal informed Ms Sharma that it was a matter for her, but she may require instructions from the Claimant on matters. Ms Sharma decided that the Claimant did not need to attend, and he left the room.

7. The Claimant complained that the Respondent provided their skeleton argument 2 days late. However, the Claimant's representative was not able to explain the prejudice to the Claimant. Ms Sharma said that she would have liked to have fine-tuned her submissions but was not able to explain why she could not do that in her oral submissions to the Tribunal. The Tribunal ruled that there was no prejudice to the Claimant in respect of the lateness of the skeleton argument. Ms Barry explained that she sent the skeleton argument to the Respondent's solicitor on the Friday when it was due. The Respondent's solicitor was not able to review it on the Friday and so needed the weekend to review it. The Respondent's skeleton argument was then exchanged with the Claimant on the Monday.

8. I had before me the Respondent's reconsideration bundle of 273 pages and the trial bundle of 1081. In addition, I also had the Claimant's written submissions and the accompanying attachments of the Respondent's EAT submissions dated 15/12/23 in response to the Claimant's amended grounds of appeal, Respondent's solicitor's email dated 29/02/24, emails dated 03/05/23 & 04/05/23 regarding without prejudice offers with offer amounts redacted between the parties' representatives, an email from the Claimant's representative dated 01/05/23. The Respondent also provided written submissions in respect of the Claimant's application.

The Law

Reconsideration

9. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70 of the 2013 Rules of Tribunal Procedure).

10. Rule 72(1) of the 2013 Rules of Tribunal Procedure empowers me to refuse the application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked.

11. Rule 71 of the 2013 Rules of Tribunal Procedure says "*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) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary."*

12. In *Outasight VB Ltd v Brown [2015] ICR D11, EAT*, the EAT confirmed that the law regarding the reconsideration of a judgment in light of new evidence did not change with the introduction of the 2013 Tribunal Rules. The interests of justice test includes the conditions set out in Ladd v Marshall [1954] 3 ALL ER 745. in summary: 1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, 2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, 3) the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

13. The EAT's decision in Wileman v Minilec Engineering Ltd [1988] IRLR 144 expands on the application of the Ladd v Marshall conditions. In Wileman, the EAT said that the evidence must not only be relevant, but it must be probable that it would have had an important influence on the case as Tribunal hearings are designed to be speedy, informal, and decisive. It is not necessary that the new evidence be shown to be likely to be decisive. The question for the tribunal on reconsideration *is "in the light of what we know about this case, has it been shown to us that the evidence is relevant and probative, and likely to have an important influence on the result of the case?"* (paragraph 15 of Wileman v Minilec)

14. The approach to be taken to applications for reconsideration was considered in the case of Liddington v 2Gether NHS Foundation Trust UKEAT/0002/16/DA. In paragraph 34 of that decision, Simler P stated that: *"a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or by adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered."*

15. The importance of finality was confirmed by the Court of Appeal in Ministry of Justice v Burton and anor [2016] EWCA Civ 714 where Elias LJ said that: *"the*

discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Ironsides Ray and Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."

16. As is the case with all powers under the 2013 Tribunal Rules of Procedure, any preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely, to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues and avoiding delay. Achieving finality in litigation is part of a fair and just adjudication.

Preparation Time Orders & Wasted Costs

17. Rule 76 of the 2013 Tribunal Rules of Procedure states:

"*When a cost order or a preparation time order may or shall be made.*

(1) a Tribunal may make a cost order or a time preparation order, and shall consider whether to do so, where it considers that

(a) a party (all that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted…

(2) A Tribunal may also make such an order where a party has been in breach of any order or practise direction or where a hearing has been postponed or adjourned on the application of a party."

18. Rule 80 of the 2013 Tribunal Rules of Procedure states:

"When a wasted costs order may be made

(1) a Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs

(a) as a result of any improper unreasonable or negligent act or omission on the part of the representative or

(b) which, in light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay. Costs so incurred are described as "wasted costs".

(2) "Representative" means a parties legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. The person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.

(3) a wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a

representative where that representative is representing a party in his or her capacity as an employee of that party."

The Application

19. The grounds for the Claimant's second reconsideration application which was before me was that on 30 November 2023, the Claimant's mother viewed the Respondent's website and came upon a webpage that stated that "*in 2019 the Q6 framework agreement was extended for a further 2 years, Q6 +1, ending in December 2021."* At the top of the page, it states *"customer: Heathrow Airport Ltd Location: London Completion: 2021"* [222]. The Claimant's primary oral submission was that this was new evidence because when the Claimant's representative Ms Sharma looked at the Respondent's website in December 2023 because her 2 EAT appeals on 27 November 2023 had failed it said something different to what it said when she viewed the same webpage on page 222 in 2020. Ms Sharma said at the top of the page in 2020 where it now states *"completion: 2021*", it said 'expected to be completed'. The Claimant says that this is fresh evidence and calls into question the date that the Claimant could have been made redundant.

20. The Claimant argued that the conditions set out in Ladd v Marshall in deciding whether or not to allow this reconsideration because of new evidence were fulfilled. However, the Respondent pointed out that in the Claimant's first reconsideration application the Claimant referred to *"the Respondent's grounds of resistance dated 1st March 2023 stated that the redundancy process was still ongoing in early 2022".* That the Employment Judge Young found that the application did not present any new evidence or matters that had not been considered at the hearing [214-215].

21. The Claimant relied upon the case of SQR Security Solutions Ltd v Badu UKEAT/0329/15/DA to support the Claimant's assertion that the Respondent's credibility was called into question regarding when the Respondent's aviation business was closed. The Claimant said that the Respondent misled the Tribunal because their grounds of resistance dated 30 December 2020 stated that there would be no employees left on the Heathrow site by March 2021. But in their 29/02/24 email the Respondent admitted that the aviation site was operational until December 2021. In SQR Security Solutions Ltd v Badu the EAT found that the Employment Judge failed to have regard to the wider impact of the fresh evidence on the Claimant's credibility. The Claimant said that the Respondent confirmed in their email of 29/02/24 to the EAT that the fresh evidence had been available at the time of the hearing in May 2023. The Claimant argued that the Respondent had a legal obligation to disclose documents whether they adversely affect or support their case that meant there was a failure to disclose which also applied to the Respondent's duty to the ET under rule 2 to assist the ET to ensure that the case is dealt with fairly and justly. The Respondent said that they did not mislead the Employment Tribunal and their pleaded case and their evidence of Ms Graham is consistent with the position that there were ongoing redundancies throughout 2020 to 2021 until beginning of 2022.

22. The Claimant also argued that the Respondent's email of 29/02/24 also confirms that the BA Premia aviation project did continue throughout Covid, 'as it was classed as essential infrastructure by the government,' their email also

confirms that this aviation project did run to December 2021, and that contrary to the Respondent's statement, the Claimant was part of the BA Premia project. The Respondent argued that this was not new information, the Respondent had referred to this in their grounds of resistance and Ms Graham's evidence. There was a reference in Ms Graham's evidence at paragraph 61 to the essential security nature of repairs to a fence [176] regarding the BA Premia project and that the Claimant was not part of the BA premia project but worked for Heathrow Airport Ltd. The Respondent was upfront.

23. The Claimant said that the new information was relevant and would change the Tribunal's decision because it meant that the Claimant could still be taught a trade. The Claimant would not have been dismissed because the aviation site where he worked did not close prior to the term of his contract. The Claimant could still attend college. The Claimant said that the 29/02/24 confirmed that that demobilization continued until December 2021, but the apprentices were brought back from furlough to demobilize the site. The Respondent's position was this information was contained within Ms Graham's evidence.

24. Ms Sharma stated in her written submissions that the application for reconsideration was casually linked to the Claimant's application for preparation time order and wasted costs and so I also considered the Claimant's application for a preparation time order and wasted costs order with the reconsideration application.

25. Ms Barry pointed out in her oral submissions on behalf of the Respondent that the application was 4 ½ months out of time and that there was prejudice to the Respondent as there must be finality of proceedings.

Analysis and Conclusions

26. The Claimant's reconsideration application dated 2 December 2023 was made approximately 16 weeks out of time as written reasons were sent to the parties 27 July 2023.

27. Although the Claimant's reconsideration application was out of time, the Tribunal considered the issue of time with the issue of whether the Claimant obtained the 'new evidence' with reasonable diligence, under Ladd v Marshall.

28. Whilst the Claimant referred to Ladd v Marshall, the Claimant's arguments did not meet the conditions required by Ladd v Marshall that would allow an Employment Tribunal to reconsider a decision in light of new evidence. Firstly, the Claimant did not explain why it was not possible for the Claimant to have obtained the new evidence the Claimant now relies upon with reasonable diligence. The Claimant said that the information on the website in July 2020 said that the project was to be completed. There was nothing to stop Ms Sharma checking the website in May 2023 for trial to see if the project had been completed or not. In any event Ms Sharma had the information she needed when she checked the website in July 2020 when the ET1 was presented at stated that the project would be finished in December 2021. The Claimant did not present this evidence at trial and there are no mitigating factors as to why not. Ms Sharma explained in her oral submissions that she was prompted to look at the Respondent's website again in November 2023 when her appeals had failed and the Tribunal's reconsideration judgment in July 2023 had referred

to new evidence. However, the Claimant received the Tribunal's refusal of the Claimant's first reconsideration application which indicated that there was no new evidence months prior to November 2023. In my judgment there is no good reason for the delay and a delay of 3 ½ months is not insubstantial. There is no prejudice to the Claimant, the Claimant was successful in his claim notwithstanding the Claimant did not obtain as much compensation as he would have liked. In those circumstances, the Tribunal does not exercise discretion to extend time.

29. Notwithstanding the application is out of time, I address the Claimant's other arguments in Ms Sharma's submissions. Ms Sharma simply did not make the argument at the May 2023 hearing that the Claimant worked on the BA premia contract and that continued and there was work that he could have done. By Ms Sharma's own admission, she knew and therefore the Claimant knew what the Respondent's website said in July 2020 about where they were regarding their outstanding projects. Secondly the Claimant did argue at trial that the Claimant could continue his apprenticeship and that the Claimant could do any work in order to achieve this. The Tribunal simply did not accept the Claimant's argument as there was no evidence to support the argument. The Claimant did not explain what it was he could do. The role of groundworker was specific to the Respondent's aviation business and there were no groundworker apprenticeships in the rest of the Respondent's business. The Claimant is seeking to argue something that was open for the Claimant to argue at the trial. The Claimant simply didn't argue it and it is not now open to the Claimant to argue it now.

30. I put to the Claimant's representative multiple times, that she had argued before the ET at the hearing on 24- 26 May 2023 that the site closed not that the business changed its nature and that she repeated this point at hearing on 22 March 2024. The Claimant argued at the hearing in May 2023 that the business of the Respondent Morgan Sindall continued to trade and so that meant that there could not be a redundancy situation and there was no fundamental change. [119] The Claimant did not argue that the Claimant could continue to train as an apprentice because of a particular contract. The Claimant's argument specifically was that the Claimant could continue to train as he could do any work. It was not argued by the Claimant at trial that demobilisation was training for the apprentices or the Claimant in particular. At the trial the Claimant did not address the fundamental issue that Covid had made the aviation business untenable for the Respondent and that the Claimant's apprenticeship was in the aviation business. The finding made in paragraph 20 of the judgment remains unchallenged by the 'new evidence' the Claimant seeks to present. It was not argued that the winding down of the aviation business included the Claimant's groundworker apprenticeship. It is worth noting that the Claimant gave evidence that he did not want to do a groundworker apprenticeship and Ms Sharma argued that the groundworker apprenticeship was not what she wanted her son to do and what he signed up for. Ms Sharma argued that the Claimant should be doing civil engineering apprenticeship and training commensurate with that.

31. The majority of the points raised by the Claimant are attempts to re-open issues of fact on which the Tribunal heard evidence from both sides and made a determination. In essence, Ms Sharma was seeking a "second bite at the cherry" for the Claimant which undermines the principle of finality. Such

attempts have a reasonable prospect of resulting in the decision being varied or revoked only if the Tribunal has missed something important, or if there is new evidence available which could not reasonably have been put forward at the hearing. A Tribunal will not reconsider a finding of fact just because the Claimant wishes he had obtained more compensation than he was awarded.

32. I considered whether SQR Security Solutions Ltd v Badu was applicable and considered that it was not. The duty to disclose relevant information did not mean that the Respondent had to disclose every single piece of evidence that might demonstrate a particular argument in the Claimant's favour. Ms Graham's witness statement states at paragraph 61 that "*Heathrow Airport was immediately impacted (both operationally and financially) and they had to cut costs quickly. HAL reviewed all of their capital works and frameworks and urgently stopped all but essential projects. For example, a project involving repairing the secure perimeter fence had to continue due to security risk however others such as car park repair were stopped immediately.*" [176] The Respondent stated in their pleadings that the redundancy process was ongoing throughout 2021 [89]. There was no breach of the Employment Tribunal's order for disclosure by the Respondent **(72)**. Furthermore, the evidence that the Claimant presented was not new evidence at all and would not be decisive in influencing the result of the case. The Claimant did not make a distinction between the closing of the site which was not a finding of the Tribunal and the closing of the business. However, the Tribunal's finding was in relation to the closing of the aviation business. The Claimant worked from the Heathrow site, and whilst Heathrow closed during the pandemic, it did not close indefinitely. All the information about demobilisation and the winding down of the aviation business which resulted in BA Premia contract not tailing off until 2021 and the last redundancies not taking place until 2022 was information before the Tribunal at trial. The information was considered and there was no misleading by the Respondent. The Tribunal found that demobilisation activity with the run off of an existing contract contributed to the fundamental change of the Respondent's aviation business. In coming to my determination, I have had regard to the overriding objective, to consider the case fairly and justly and I have done so in respect of the Claimant's application.

33. Having considered all the points made by the Claimant I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The points of significance were considered and addressed at the hearing. The application for reconsideration is refused. As the application for reconsideration is refused, and the Claimant put forward the preparation time order and wasted costs order as causally linked to the Claimant's reconsideration application, there are no grounds for granting the Claimant's preparation time order and wasted costs application on the basis put forward by the Claimant. The Claimant's application for preparation time order and wasted costs fails.

34. I must also have regard to the public interest requirement so far as is possible there be finality of litigation. In the circumstances, the Claimant's application for reconsideration is refused.

Employment Judge Young

Date: 3 April 2024

JUDGMENT SENT TO THE PARTIES ON

25 April 2024

FOR THE TRIBUNAL OFFICE