EMPLOYMENT TRIBUNALS

Claimant: Mark Craven

Respondent: Forrest Fresh Foods Limited

Heard at: Manchester (by CVP) **On:** 12th February 2024

Before: Employment Judge Cline (sitting alone)

Representation
Claimant: Mr Lee Bronze, counsel
Respondent: Mr Scott Redpath, counsel

JUDGMENT ON RECONSIDERATION

The Claimant's application dated 28th August 2023 for reconsideration of the judgment sent to the parties on 30th July 2023 is refused.

REASONS

Background

1. The original reserved judgment in this matter is dated 30th July 2023 and was sent to the parties following a 4-day hearing that took place on 6th and 7th March and 10th and 11th May 2023. The parties, who have both been legally represented throughout, are of course more than familiar with the details of the case and of the original judgment so neither of those will be set out in detail herein. For the sake of brevity, I will assume knowledge of my original decision of 30th July 2023 rather than to repeat its contents.

2. By way of a letter dated 22nd August 2023 from the solicitors acting for him at

the time, the Claimant made an application for the original decision to be reconsidered. Again, for the sake of brevity and because the parties are both very familiar with them, the contents of that letter will not be repeated here; the letter was, of course, considered carefully in advance of the reconsideration hearing and, at the outset of the hearing, it was confirmed that it effectively formed the basis of the application.

3. The reconsideration hearing took place on 12th February 2024. Both parties were represented by the same counsel who appeared at the initial hearing and I am, again, grateful to them for dealing with matters in a sensible and helpful manner. At the outset of the hearing, Mr Bronze confirmed that the letter of 12th February is, in effect, the totality of the application for reconsideration and I confirmed that I would proceed on that basis and hear submissions form both parties accordingly. Each of the issues raised by the Claimant is set out below from paragraph 10 onwards.

The Law on Reconsideration

4. 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, set out at Rule 70 of the Employment Tribunals Rules of Procedure 2013, is whether it is *necessary* in the interests of justice to reconsider the judgment (my emphasis). Rule 72(1) empowers me to refuse the application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked. However, having considered the Claimant's application, I found that there was a reasonable prospect of at least some of the original decision being varied or revoked and listed it for a full hearing accordingly.

5. When approaching the reconsideration exercise, I reminded myself of the importance of finality in litigation as applied in the Employment Tribunals. This was emphasised by the Court of Appeal in *Ministry of Justice v Burton and anor [2016] EWCA Civ 714* , with Elias LJ saying 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.

6. Similarly, in *Liddington v 2Gether NHS Foundation Trust EAT/0002/16* the EAT chaired by Simler P said in paragraph 34 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.*

7. In common with all powers under the 2013 Rules, reconsideration under Rule 70 must be conducted in accordance with the overriding objective set out at 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. Achieving finality in litigation is part of a fair and just adjudication. That said, there is of course no presumption against varying the original decision and, where the Tribunal considers that to be in the interests of justice, it may do so.

8. I also kept in mind throughout the reconsideration process the question of whether new evidence should be permitted, which was considered by the EAT in *Outasight VB Ltd v Brown (Practice and Procedure: Review) [2014] UKEAT 0253/14/LA*. At paragraph 50, having considered the balance between the need for finality and the possibility that fresh evidence may be adduced as part

of a reconsideration hearing, HHJ Eady QC (as she then was) said (with my emphasis):

> *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).*

9. The reconsideration hearing on 12th February 2024 therefore proceeded by way of submissions on the papers. I delivered an oral judgment at the conclusion of the hearing during which I set out my reasons for deciding not to revoke or vary any of the original decision. In drafting these written reasons, I will set out below what each argument was on behalf of the Claimant, what the Respondent's position was and why I declined to vary the original decision on that point. As noted above, the parties' submissions followed and enlarged upon the issues raised in the Claimant's application of 22nd August 2023 and I shall deal with matters in a similar manner.

The Claimant's Employment Status and Entitlement to Wages and Sick Pay

10. At paragraphs 17 of the original decision, I set out my view, with which the parties agreed during the initial hearing as a matter of principle, that the Claimant could be an employee, a shareholder and a director simultaneously. For the purposes of the instant claim, I found it necessary to consider that question in relation to each specific sum being claimed rather than as a general

concept. At paragraphs 18 to 34, I set out my findings in relation to the manner in which the Claimant's status and his relationship with Mr Craven / the Respondent evolved over time; these were findings of fact based on the evidence and the basis upon which those findings were made are set out in that part of the decision. It seemed clear to me that Mr Bronze, quite correctly, was not asking me to vary the findings of fact that I had made but was, in effect, arguing that if (as they did) the Respondent conceded that the Claimant was an employee, then some element of the payment received by the Claimant must represent a wage, albeit that it is accepted that the Claimant could have more than one employment status at any one time. As such, it was argued, it flows automatically that there is a fundamental obligation to pay wages and that the question of how much is owed is a second, separate question.

11. On behalf of the Respondent, Mr Redpath argued that there is no such automatic entitlement. He emphasised that, at paragraph 35 of the initial decision, I found that the Claimant either agreed or, at the very least, acquiesced over time, to a payment structure based not on the contract of August 2015 but on his position as a director. I also found that, as such, once he had ceased to be a director in June 2022, he was not entitled to any further payments from the Respondent. Given that those factual findings were not to be disturbed, I agreed with Mr Redpath's argument that there is no automatic entitlement to wages simply by dint of being an employee as there still needs to be proof that work has been done, as is the case, for example, in a zero-hours contract scenario. For the same reasons, I had found that, once the Claimant had ceased to be a director in June 2022, he did not continue to do any work and, even if he continued to technically be an employee, it did not automatically follow that he was therefore entitled to wages which were then to be calculated on the basis of the apparently arbitrary sums being received by him on a PAYE basis in order to maximise his tax efficiency when both taking a wage and taking shareholder dividends.

12. I have reached this decision on the basis of the findings I made at the original hearing and in the absence of any clear argument on behalf of the Claimant that the Respondent's position is wrong in law. Mr Bronze argued that the national minimum wage framework effectively answers the Respondent's

arguments on this point by importing a minimum income but I was not persuaded that this is the case in the absence of proof that work was actually carried out after the Claimant ceased to be a director. This decision must be taken in the context of the other findings I made to the effect that the Claimant was content to take the benefit of a pay structure that was legally legitimate but whose sole aim was, in effect, to reduce his tax liability. It may be that the Claimant regrets not being more attuned to what was happening and regrets not ensuring that his change in status was dealt with more clearly but that does not replace the evidential gaps that I found when making my original findings and still find now in terms of the Claimant's actual entitlement to pay. He has the burden of proof in this respect and, for these reasons, I still find that it has not been satisfied.

13. For the avoidance of doubt, I found that the argument in relation to entitlement to sick pay must fail for the same reasons. There was a decision by the other directors, which they say they took in accordance with the articles of association, to suspend the Claimant without pay. It may be that the Claimant could seek recourse in this regard in another jurisdiction if he is aggrieved by this decision but that does not, in my view, therefore mean that he is automatically entitled to rely on the framework which applies to employees in order to plug the gap.

The Claimant's Removal as a Director

14. I was asked by Mr Bronze to reconsider my finding that the Claimant had been removed as a director in June 2022. He argued that the removal was invalid as it breached certain requirements of company legislation. This was not an argument that was put forward at all at the original hearing; when I asked Mr Bronze why this was, he said that it was because the Claimant had effectively been ambushed by a new argument on status. To put this in its proper context, it is of course correct that there was a lengthy argument on the first day of the hearing about whether or not the Respondent would be permitted to argue that the Claimant was not an employee throughout the relevant period as this was said to be entirely inconsistent with an admission to that effect in the grounds of response. After hearing submissions on this point, I determined that the Respondent was indeed bound by its concession that the Claimant was an

employee but that this did not preclude them from arguing that, in relation to each individual element of his claim, there was still no entitlement to compensation. This was set out at paragraphs 11 to 15 of my original decision.

15. In this context, it may at first appear superficially attractive for the Claimant to argue that he had not expected to be required to deal with the validity of his removal as a director but I was unable to accept this argument. Taking a step back and considering the claim as a whole, it is clear that the Claimant's status as a director was a fundamental element given that paragraph 2 of the grounds of complaint records that he was a "Companies House director of the Respondent and a shareholder". Paragraph 3 of the grounds goes on to state that the Claimant received monthly interim dividends as a shareholder, which of course is intertwined with his status as a director. Furthermore, once the Respondent's witness evidence had been received by the Claimant, it would have been very clear that his role as a director was central to the arguments being put forward by the Respondent. As such, I deemed this to be a new argument which could and should have been put forward on the Claimant's behalf at the original hearing and did not find that I had been presented with a sufficiently cogent reason as to why it had not been such that I should be willing to consider it anew at this stage.

The New Accountancy Evidence

16. I was invited on behalf of the Claimant to consider a letter from Williams & Co Accountants dated 6th October 2023 (this being, of course, many months after the original hearing and several months after the reserved judgment was sent to the parties). Amongst other points, this letter sets out an entirely new approach to the calculation of the Respondent's profit for the purpose of establishing whether or not the threshold for a bonus was met. It also contains an analysis of the Respondent's accounts for the years ending 2015 to 2022 inclusive; in relation to the accounts for the year ending 2023, it simply says that these are "not yet filed at Companies House". I queried with Mr Bronze why this letter had been produced now when it referred to matters that could and should have been dealt with as part of the original hearing and how this accorded with the principle in *Ladd v Marshall [1954] 3 All E.R. 745* in relation to admitting fresh evidence on appeal (although this is of course a

reconsideration) after a matter has been determined. Mr Bronze reminded me that the company accounts for the year ending 2022 had been requested by the Claimant in January 2023 but that the Respondent had refused to provide them so they had to be obtained from the Companies House website in February 2023. As such, after some discussion, he agreed that there was therefore a window of opportunity from then until the exchange of witness statements in March for the matter to be dealt with and, in any event, that it was always open to the Claimant to make an application for specific disclosure if required. I also noted that the nature of the accounts was fundamental to the Claimant's own claim for a bonus so, in my view, it sat rather ill for him to say after the event that he did not have the evidence that he required in order to bring the claim when this could and should have been apparent throughout. Furthermore, I found that allowing the Claimant to rely on this letter would inevitably lead to an argument as to whether the Respondent should, in turn, be permitted to adduce their own accountancy evidence which, if granted, would lead to further delay.

17. In these circumstances, I found that it was not in the interests of justice to permit the Claimant to rely on the accountancy letter of 6th October 2023 or on the new principles alluded to therein as part of the reconsideration application.

Conclusion

18. For the reasons set out above, I found that it was not in the interests of justice to revoke or vary any of my original decision. Where findings of fact were made, there was no cogent basis put before me to reconsider them. Where new evidence was adduced, I found it to be contrary to the interests of justice to permit reliance upon it. Where the Claimant was, in effect, repeating his original arguments as to the purported entitlement to wages but accepted that the factual findings underpinning my original decision were not to be disturbed, I found no cogent basis upon which to reconsider my approach. Where the Claimant is asserting that the legal approach taken to the argument on wages and sick pay is incorrect, I was not persuaded by those arguments for the same reasons as I gave in my original decision.

19. The original decision therefore stands.

Employment Judge Cline
Date 8th May 2024

JUDGMENT SENT TO THE PARTIES ON
17 May 2024

FOR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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