



EMPLOYMENT TRIBUNALS

Claimant: Ms C Langtry

Respondent: Thomas Roofing (NW) Ltd

The claimant has made an application dated 20 August 2020 for reconsideration of the judgment sent to the parties on 6 August 2020.

JUDGMENT

The claimant's application is dismissed. This means that the judgment still stands.

REASONS

The judgment and reasons

1. By a claim form presented on 14 January 2019, the claimant raised a number of complaints which depended for their success on the claimant establishing that she was either a worker for or an employee of the respondent. I had to decide on the claimant's employment status. The claimant and respondent subsequently made reciprocal strike-out applications which I also considered.
2. In a reserved judgment sent to the parties on 6 August 2020, I decided, amongst other things:
 - 2.1. that the claimant had been an employee of the respondent under a contract of employment for at least the period 26 September 2018 to 31 October 2018; but
 - 2.2. that the claim should be struck out for the claimant's unreasonable conduct in forging an important document (which I called "the Disputed Document") and attempting to cover up the forgery.
3. The judgment was accompanied by written reasons ("Reasons"). At paragraph 151 of the Reasons, I recorded my finding that the claimant had forged the Disputed Document. I explained the rationale for my finding in a series of subparagraphs.
4. One point I made at paragraph 151.6 related to a video called *CL CT1.mp4*. The video was significant. It showed a visual image of the Disputed Document. Mr Thomas was not shown on the video, but the transcript of the video included words from Mr Thomas, which would tend to support the claimant's contention

that the Disputed Document existed at a time when the claimant and Mr Thomas were in a relationship. If that contention were true, it would have had some force in relation to the question of the Disputed Document's authenticity. This was partly because, whilst they were still in a relationship, it is less likely that they would have been concerned with obtaining evidence to support future tribunal claims. It is also partly because some of the respondent's arguments in relation to forgery stemmed from the fact that the claimant did not mention the existence of the Disputed Document until a late stage in the proceedings. The respondent asked me to infer that the reason why the claimant did not mention the Disputed Document when she presented her claim because it did not exist at that time. That inference would be impossible if there were video evidence establishing that, by the time of presentation of the claim, the Disputed Document had in fact existed for many months.

5. At paragraph 130 of the Reasons I found that the video did not match the transcript. Mr Thomas could not be heard speaking. Without Mr Thomas' voice, the visual image of the Disputed Document could not be placed reliably into the timeline in the way that the claimant would have had me believe. At paragraph 151.6, I mentioned this discrepancy as a factor in support of my finding of forgery.

The application

6. On 20 August 2020, the claimant applied for reconsideration of the judgment. Her application ran to 33 pages.

The video

7. Separately she posted a memory stick to the tribunal with a covering e-mail explaining that the memory stick contained a video. In her reconsideration application she explained that the new video was an enhanced version of *CL CT1.mp4*. The tribunal administrative staff replied to her that they were not permitted to insert memory sticks into the tribunal's computer systems. The claimant was asked to upload the video onto a shared platform, but the claimant replied that she could not do so. Unfortunately, the sticking point over the playing of the video caused the reconsideration application to be delayed.

The hearing on 23 March 2021

8. Ultimately, in order to break the deadlock, I listed the reconsideration application for a hearing. This was not a reconsideration hearing under rule 72(2). The hearing was solely for the purpose of enabling the claimant to play the video to me on her own equipment, so I could then give preliminary consideration to the application under rule 72(1). The respondent was not required to attend and did not do so.
9. In advance of the hearing, the claimant sent a number of e-mails to the tribunal. Attached to the e-mails were the following documents:
 - 9.1. A document headed "Reconsideration Hearing Applicant 2nd Statement" and dated 19 March 2021;
 - 9.2. A written application to rely on the contents of the bundle used in the Family Court proceedings, with the Family Court's permission attached; and
 - 9.3. The index to the bundle used in the Family Court.

10. The claimant brought to the hearing a large black lever-arch file marked, "Reconsideration Bundle". After some initial confusion about what had happened to it (for which I ought to apologise on behalf of the tribunal administration), the bundle was delivered to me. The Reconsideration Bundle ran to over 400 pages, of which the main bulk was the Family Court bundle.
11. At the hearing, the claimant opened an audio file on her laptop and allowed me to play it out loud in the tribunal room. I cannot remember the file name, but the sound recording corresponded to the *CL CT1.mp4* video.
12. I listened to the recording three times. I paid particular attention to the end of the recording, where (on the claimant's case) Mr Thomas said the words, "Yeah, I know." During most of the recording there was loud music playing in the background. At the end of the recording, the music suddenly stopped and an indistinct voice said something inaudible. It was not possible for me to tell from the recording alone whose voice it was, or, indeed, whether or not the voice belonged to someone other than the claimant.
13. At the conclusion of the hearing, the claimant indicated that she wished to rely on some further evidence in the form of bank statements. I set a deadline for that evidence to be delivered to the tribunal. My written case management order made it clear that my imposition of that deadline would not in any way alter the operation of the *Ladd v. Marshall* principle (see below).

Further evidence

14. After the hearing, the claimant submitted a further witness statement dated 29 March 2021 and headed, "Applicant Statement & Additional Evidence". Accompanying that statement were 43 pages of additional evidence.

Preliminary consideration on 4 May 2021

15. I gave preliminary consideration to the application on 4 May 2021. I took into account all the material that the claimant had provided so far.
16. Unfortunately, due to a further administrative error, the parties were wrongly informed that there would be a hearing on 4 May 2021 and were given a link to join the hearing on the Cloud Video Platform. The claimant connected to the hearing. When it was brought to my attention that the claimant was in the virtual tribunal room, I asked the clerk to inform her that there would be no hearing that day. The clerk passed on that information, whereupon the claimant told the clerk that she had further evidence. She asked, via the clerk, whether it would be possible for that evidence to be taken into account. I declined. The claimant has already submitted evidence and written representations in support of her reconsideration application on three separate occasions. Waiting for further evidence would risk delaying my preliminary consideration to this application which is already long overdue.
17. If the claimant considers that her latest evidence would make a significant difference to the prospect of the original judgment being reconsidered, she can make a further reconsideration application. I would suggest, however, that she reads these reasons carefully before embarking on that course.

Grounds for reconsideration

18. The claimant has made a great many points in support of her reconsideration application. Many are overlapping and, in some cases, pure repetition. In my

view it would not be proportionate to list each and every argument. I hope that the following list fairly captures the claimant's essential reconsideration grounds. I have drawn them from the application itself and from the supplemental statements that the claimant has submitted.

Forgery

- 18.1. The enhanced version of *CL CT1.mp4* captures Mr Thomas talking at a time when Disputed Document was in existence. This is "powerful evidence" (to quote Reasons paragraph 151.6) that the Disputed Document existed whilst the claimant and Mr Thomas were in a relationship, and therefore less likely to have been a forgery.
- 18.2. The original bundle shows that *CL CT1.mp4* was time stamped 24 May 2018, which establishes that the Disputed Document existed at that time.
- 18.3. Evidence in the Family Court bundle, together with the size of the bundle itself, shows that the claimant did not send a black file to Levins and that Levins are therefore lying when they deny that the claimant sent them her phone.
- 18.4. The claimant alleges that she hand-delivered two other documents (Appendices 2 & 3) to Levins, yet they were not included in the bundle. This is further evidence, she says, of Levins' practice of untruthfully denying having received evidence from the claimant.
- 18.5. The claimant has produced evidence of money having been paid to Mr Thomas out of the bank account of C&C Roofing (NW) Ltd. The amounts paid to Mr Thomas are, the claimant says, substantially in excess of Mr Thomas PAYE salary. The claimant argues that this evidence undermines my finding (Reasons paragraph 151.1) that Mr Thomas is unlikely to have agreed to the terms in the Disputed Document. He could have agreed to pay the claimant £400 per week plus half the profits and still been financially better off than the claimant.
- 18.6. At roughly the same time that the claimant first revealed the existence of the Disputed Document, she pointed out a data breach to Levins which, she says, is an indicator that she was acting honestly at that time.
- 18.7. Levins ignored the claimant's offer to re-send documents.
- 18.8. The timing of the respondent's strike-out application is suspicious, because it was only 46 minutes after the claimant had delivered a bundle to Levins' offices.
- 18.9. Mr Heath's stated that, on receipt of the green sheets of paper, he "immediately suspected that it had something to do with the claimant" – that statement lacked credibility because the claimant had not written a return address on the envelope in which the green sheets were allegedly delivered.
- 18.10. The claimant challenges my finding (Reasons paragraph 151.7) that Mr Heath had less to gain from lying than the claimant. Her argument is that Levins acted for Mr Thomas in a drugs investigation and the firm was therefore involved with Mr Thomas sufficiently closely to give Mr Heath an incentive to lie.

- 18.11. Levins wrongly accused the claimant of not complying with court orders in the Family Court.
- 18.12. The respondent had refused to include in the Family Court bundle the claimant's investigation report into Royale Scaffolding and C&C Roofing. This indicated that the respondent was concealing damaging evidence.

Employment status

- 18.13. I found that there was an implied contract of employment from 26 September 2018 onwards. There was evidence of the claimant receiving money from the respondent earlier than that date. Therefore, the claimant argues, I should also have found an implied contract existed at that time, too.
- 18.14. I found (Reasons paragraph 52) that there had been a transfer of an undertaking from C&C Roofing Limited to the respondent. I ought therefore to have found that the implied contract transferred.
- 18.15. With regard to the claimant's employment status after 26 September 2018, I referred to the fact that no tax or national insurance was paid on the claimant's wages. (The claimant singles out paragraph 218 of the Reasons, although I suspect she meant paragraph 219.) The claimant, essentially, argues that I misunderstood the evidence about why the claimant's wages were not put through the payroll.
- 18.16. The claimant drew my attention to evidence of the claimant working late on some occasions prior to 26 September 2018. I should, the claimant argues, therefore have been able to make findings about the claimant's working hours.
- 18.17. The claimant says that a passage of one of her secret recordings undermines my findings about the claimant's employment status prior to September 2018. In reply to the claimant saying that she had left her money in the respondent's account, Mr Thomas can be heard saying, "Whose fault's that, then?" The claimant's argument is that my findings must have overlooked this remark.
- 18.18. The claimant also drew my attention to a point that she made on one of her recordings that it was the respondent who "wanted to grow something", as an indicator that it was the respondent, and not the claimant, who was looking to expand the business.
- 18.19. The claimant gave a more detailed account of what happened at and immediately following the Directors' meeting. As I understand it, the purpose of this account was to explain why I should have regarded her notes of the meeting as reliable.

Mr Thomas' conduct and credibility

- 18.20. The claimant says that Mr Thomas lied about only using subcontractors. The PAYE records show at least one employee being paid through the payroll.
- 18.21. The claimant drew my attention to evidence of Mr Thomas reneging on previous oral and written agreements. In particular, she reminded me of Mr Thomas' evidence that Mr R was an employee, when contemporaneous documents showed that he was a sole trader or a director.
- 18.22. Appendix 37 shows the claimant complaining at the time about how badly Mr Thomas was treating her. Appendices 41-44 show the claimant's

interaction with domestic abuse support services. These show that Mr Thomas was engaging in the domestic abuse about which I was unable to make a definitive finding of fact (Reasons paragraph 152).

- 18.23. Evidence in the Family Court bundle links Mr Thomas to one of his alleged blackmailing messages. In one of the messages the sender mentions that Mr Thomas was not going to marry the claimant. This matches what Mr Thomas said whilst giving oral evidence to me.
- 18.24. Mr Thomas attempted to mislead the tribunal and the Family Court by relying on the claimant withdrawing her complaint to the police, without explaining why the claimant had withdrawn her complaint.
- 18.25. Mr Thomas, in the Family Court proceedings, made a false allegation that the claimant had deleted important banking information from his computer. The claimant draws my attention to a perceived inconsistency between this position and Mr Thomas' reason for not disclosing information on from his personal computer.
- 18.26. Mr Thomas gave inconsistent evidence about when his relationship with the claimant started.
- 18.27. Mr Thomas breached the claimant's data protection rights whilst purporting to demonstrate to the Family Court that it was possible for the claimant to have falsified text messages.
- 18.28. The Family Court bundle contained evidence which tended to show that the respondent would intimidate people into making witness statements on his behalf. The witness was Mr Thomas' neighbour, Ms A. The claimant highlights the inconsistency between Ms A's statement and Ms A's contemporaneous messages.
- 18.29. Mr Thomas alleged in the Family Court proceedings that the claimant had engaged in coercive controlling behaviour against him, yet the respondent did not mention this in its response to the claimant's employment tribunal claim.
- 18.30. Mr Thomas told the Family Court that the claimant was a "known trouble causer", but told the employment tribunal that the claimant "communicated brilliantly with everyone".

Relevant law

19. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides the tribunal with a general power to reconsider any judgment "where it is necessary in the interests of justice to do so". The making of reconsideration applications is governed by rule 71.
20. Rule 72(1) states that an employment judge must consider any application made under rule 71. If the judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application must be refused. If the application is not refused under rule 72(1), the tribunal must then set a time limit for any response to the application and must seek the parties' views on whether the application can be determined without a hearing. Rule 72(2) then lays down further procedural requirements for the reconsideration of the original decision.

21. The rule 72(1) preliminary consideration is a mandatory step and must take place before the respondent is asked to respond and before the reconsideration hearing is listed: *T W White & Sons Ltd v. White* UKEAT 0022/21.
22. The overriding objective of the 2013 Rules is to enable the tribunal to deal with cases fairly and justly. By rule 2, dealing with cases fairly and justly includes putting the parties on an equal footing, avoiding delay, saving expense, and dealing with cases in ways that are proportionate to the complexity and importance of the issues.
23. The old Employment Tribunal Rules of Procedure 2004 required that judgments could be “reviewed”, but only on one of a prescribed list of grounds. One of those grounds was that “new evidence [had become] available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time.” This proviso reflected the well-known principle applicable to civil appeals derived from *Ladd v. Marshall* [1954] 3 All ER 745, CA.
24. The current 2013 Employment Tribunal Rules of Procedure replaced the old list of grounds with a single test: a judgment will be reconsidered where it is “necessary in the interests of justice to do so”. There is no specific provision for fresh evidence. Nor is there any express prohibition a party relying on evidence about which he knew or ought to have known before the judgment was given. Nevertheless, the “interests of justice” test must, in my view, incorporate a strong public interest in the finality of litigation, even if it is not as inflexible as the proviso in the 2004 Rules. Where a party could reasonably have been expected to rely on the evidence first time around, it would take a particularly good reason to give that party a fresh opportunity to rely on it.

Conclusions

Admissibility of new evidence

Family Court bundle

25. I accept the claimant’s argument that she could not reasonably have been expected to rely on the contents of the Family Court bundle at the time of the original hearing. At that time, the parties were prohibited by the rules of the Family Court from referring to the documents in that bundle outside the injunction proceedings. It was only when the claimant obtained the specific permission of the Family Court that she could then rely on them.
26. I therefore considered the documents in the Family Court bundle when giving preliminary consideration to the claimant’s application.

Documents relating to Mr Thomas’ injunction applications

27. For the same reason I accept that the claimant could not reasonably have referred to documents relating to Mr Thomas’ applications against the claimant.

Retraction statement to the police

28. I consider the claimant’s retraction statement to be admissible. Although there is nothing to suggest that she was prohibited from making use of it at the original hearing, I accept that she is only seeking to refer to it by way of cross-reference to an assertion made by Mr Thomas to the Family Court.

Further bank statements

29. In my view, the *Ladd v. Marshall* criteria are not satisfied in relation to the further bank statements of C&C Roofing (NW) Ltd. The claimant has not explained why she could not have referred to those bank statements at the original hearing.

The claimant's new account of the directors' meeting

30. To the extent that the claimant's version of the directors' meeting contains any new evidence, I do not think that the *Ladd v. Marshall* criteria are satisfied. The claimant could have given a more detailed account of the directors' meeting in her original witness statement had she wished to do so. In any event, I do not think the claimant's account avoids my essential finding that neither record of the meeting is particularly reliable.

31. I now address the claimant's reconsideration grounds in turn. I have grouped them into headings relevant to the parts of my original judgment which the claimant asks me to reconsider.

Forgery

Enhanced audio from CL CT1.mp4

32. The audio file to which I listened on 23 March 2021 does not provide the support for the claimant's reconsideration application that the claimant says it does. At best, from the claimant's point of view, it shows that somebody was saying something after the music stopped. I could not tell whether that person was the claimant or not and I could not tell what they were saying. That is *consistent* with the claimant's case as to what was going on in the video, but it is of only marginal value in establishing whether that version is in fact *correct*. In my view it does not significantly undermine the other points I made at paragraph 151 of the Reasons.

Time stamp

33. In a case where there were so many allegations of fabrication of entire electronic files, it was hard for me to place significant weight on the time stamp *CL CT1.mp4* purported to show.

The black file

34. I dealt with the black file in my original judgment. I always understood the claimant's case to be that the envelope that Levins received on 13 May 2019 did not contain the black file. In paragraph 116 of the Reasons paragraph I agreed with her. Where I disagreed with the claimant, and still do, is about the significance of this finding when it comes to the genuineness or otherwise of the Disputed Document. As I explained, it did not follow that Mr Heath was lying about what was in the envelope received on 23 September 2019, just because Levins were wrong about what was in the envelope that they received on 13 May 2019. The significance of the allegedly-disappearing phone was that it made it harder for the claimant to explain her actions in sending her best copy of the Disputed Document to a firm whom she believed guilty of disposing of her evidence. This was the point I made in Reasons 151.5.

Other points about Mr Heath's honesty

35. When making my assessment of Mr Heath's evidence I was already aware that Levins were acting for Mr Thomas in relation to proceedings in two different jurisdictions. The fact that they were also acting for him in relation to a potential

third branch of the law would not change my view of Mr Heath's alleged motivation to lie.

36. I did not find the reliability of Mr Heath's evidence to have been undermined by his assertion of immediate suspicion of the claimant on receiving the green sheets of paper. Levins had already accused the claimant of fabricating the Disputed Document. The mysterious envelope arrived 6 days after the SRA had written to Levins accusing them of disposing of evidence that had been posted to them. Seven days after discovering the green sheets Levins pointed the finger of suspicion at the claimant in their e-mail to the tribunal (see Reasons paragraph 123).
37. It is not surprising that Levins turned down the claimant's offer to resend documents after 23 September 2019. Any mutual trust and cooperation between the claimant and Levins had broken down.
38. It appears that the respondent had already prepared its strike-out application before the claimant had delivered her bundle to Levins. This does not cause me to doubt Mr Heath's evidence.
39. As for Levins' conduct of the Family Court proceedings, my reading of the Family Court bundle is that there were mutual allegations of failure to provide disclosure and failure to comply with orders. I would not be able to make findings about whether or not Levins' position was justified without a much more detailed investigation into the facts. Such an exercise would be disproportionate in relation to a satellite issue such as this.

Plausibility of Mr Thomas agreeing to the Disputed Document

40. I have rejected the bank statements as inadmissible, so the claimant is stuck with my finding that Mr Thomas' salary was £162.00 per week.
41. If I am wrong about that, and I should take into account evidence that Mr Thomas was separately drawing other sums of money out of the company, I would still conclude that Mr Thomas would have been unlikely to have agreed to the terms in the Disputed Document. At least one of the substantial withdrawals from the company bank account appears to be attributed to a misspelling of "dividends". If the Disputed Document were genuine, Mr Thomas would have been agreeing to pay half of the dividend to the claimant. As for the regular withdrawals, if they did represent a wage to Mr Thomas, that wage would still have been less than the £400 per week that the Disputed Document purported to promise to the claimant on top of her half-share of the profits.

Employment status

Implied contract and transfer of undertaking

42. I found (Reasons paragraph 216) that there was an implied contract after 26 September 2018 because, on the common ground, there was no other explanation for the reciprocal agreement to pay wages and to work in return. Prior to 26 September 2018 there was an insufficient basis for an implied contract. Not least, because the parties' arrangements could have been explained by the claimant wanting to do her best to build up her fiance's business in the misplaced expectation that they would get married.
43. My finding that there was a transfer of an undertaking is neither here nor there. I did not find that the claimant had a contract of employment that transferred.

No tax or national insurance

44. The claimant's argument here appears to be engaging with my analysis of whether or not the unusual tax arrangements were consistent with a contract of employment. The period under scrutiny was from 26 September to 31 October 2018. I found that, despite the non-payment of any tax or national insurance under the PAYE scheme, the claimant was nevertheless an employee. If I were to accept the argument that the claimant now makes, my conclusion on employment status could be no more favourable to her than it was already.

Working hours

45. I found (Reasons paragraphs 83 and 231) that the claimant had worked hard for the business and her typical tasks would have taken up considerably more time than 9 hours per week. Beyond that, I was not able to find precisely what hours the claimant worked. Examples of evenings worked here and there would still not have enabled me to make such a finding. Even if I had been able to quantify the claimant's hours, I would still have been left with disputes of fact about the nature of the payments the claimant received and the purpose for which they were made.

Secret recordings

46. In general terms I found it difficult to rely on self-serving statements made by the claimant in conversations that she knew she was audio-recording.

47. As for Mr Thomas' remark, "Whose fault's that then?" I was aware of that comment at the time of reaching my original decision. It seemed to be a sarcastic comment in the middle of an argument, and did not appear to be particularly illuminating about the claimant's employment status.

The directors' meeting

48. See my conclusion under the heading "Admissibility".

Mr Thomas' conduct and credibility

49. I can deal with the claimant's points about Mr Thomas collectively. I already found (Reasons paragraph 150) that Mr Thomas' oral evidence was unreliable. One of my reasons for coming to that conclusion was in fact a point that the claimant has repeated in her reconsideration application (namely Mr Thomas' inconsistent evidence about when the relationship started). My conclusion that the claimant had forged the Disputed Document did not depend on my believing what Mr Thomas had to say about it.

50. I have considered the claimant's communications with domestic abuse support networks. This is evidence of claimant's communications at a time when the relationship had broken down, she was already engaged in parallel proceedings in the employment tribunal and Family Court, and the claimant was accused by Mr Thomas of fabricating evidence. In fact the subject matter of her messages is the ongoing court proceedings. I do not find that it reliably tells me what Mr Thomas' behaviour was actually like whilst they were in a relationship, or whether Mr Thomas made the threats on which the claimant relied in support of her strike-out application.

51. The other points that the claimant makes about Mr Thomas' behaviour towards her all depend, to some extent, on my accepting the claimant's evidence about what Mr

Thomas did. Because of my finding in relation to the Disputed Document, it is very difficult for me to rely on that evidence.

Overall conclusion

52. Having considered the claimant's arguments on reconsideration, I consider that there is no reasonable prospect of my original decision being varied or revoked. I must therefore refuse the reconsideration application.

Employment Judge Horne

5 May 2021

SENT TO THE PARTIES ON

11 May 2021

FOR THE TRIBUNAL OFFICE