# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| **Mr M Grabowski** | v | **Bradford Swissport Ltd** |

# RECONSIDERATION DECISION

**Heard at:** **Watford** **On:** **13 October 2017**

**Before:** **Employment Judge Bartlett**

# BACKGROUND

1. At a final hearing on 25 & 26 July 2017 I made the following judgement:

> *"1. I find that the claimant was not unfairly dismissed. I find that the respondent dismissed the claimant for the reason of conduct and that this is a potentially fair reason for dismissal. I find that the respondent has discharged the burden of proof to establish that in the circumstances the dismissal was fair. In particular I find that the respondent satisfies the steps set out in British Homes Stores Limited v Burchell [1978] IRLR 379.*
>
> *2. Therefore the claimant's claim is dismissed on all counts."*

2. The judgement was sent to the parties on 18 August 2017.

3. The claimant has applied for a reconsideration of this order. The claimant sent correspondence to this effect to the tribunal on 2 September 2017.

**The rules**

4. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 as amended set out the rules governing reconsiderations. The pertinent rules are as follows:

*"Principles*

*70. 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.*

*Application*

*71. 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.*

*Process*

*72.—(1) An Employment Judge shall 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 (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application. (2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations. (3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part."*

**The claimant's application**

5. The claimant sent through two different versions of his application. One application runs to three A4 pages and identifies extensive grounds for the application. The other application sets out the following:

*"In the view of new photographic evidence which in connection with missing documented evidence on the matter, and failure by the Respondent to adequately communicate to all employee's crucial information about new requirements about particular request of screening method given by order ednotice [sic] of Department for Transport in October 2013 as Mr Young alleges, constitutes to also breach of contract not specifying exacly [sic] what penalty would be expected for such violation, and not giving employee any chance by faing [sic] to provide ACAS mandatory 3 stages of warnings."*

6. I consider that the basis of the application for reconsideration by the claimant can be distilled into the following points:

6.1 the claimant has obtained new evidence since the date of the final hearing which exonerates him;
6.2 the claimant was subject to standards of conduct of which he had not been made aware prior to his dismissal;
6.3 the claimant was not made aware of potential disciplinary penalties to which he may be subject;
6.4 the claimant makes a counterclaim of breach of contract.

**Decision**

7. In accordance with the Employment Tribunal Rules of Procedure I must reconsider any judgement where it is in the interest interests of justice to do so. Further, if I considered that there is no reasonable prospect of the original decision being varied or revoked I must refuse the application for reconsideration.

*The claimant has obtained new evidence since the date of the final hearing which exonerates him*

8. The claimant's first point does not establish that it is in the interests of justice to reconsider the judgement neither does it form the basis on which I can conclude that there is a reasonable prospect of the original decision being varied or revoked. Paragraph 6 of the final judgement following the hearing on 25 & 26 July 2017 (the "Final Judgement") sets out the test which must be applied to misconduct dismissals and that the focus is on what the employer did prior to and leading up to the dismissal. It is not unusual in cases of dismissal for misconduct that new evidence which may even completely exonerate an employee dismissed for misconduct appears sometime after the dismissal process was completed. However new evidence is not relevant to the consideration of the employer's conduct in the period leading up to and the act of dismissal.

9. I recognise that the claimant's first point may, though the claimant has not fully articulated it, encompass a point that the respondent's investigation was flawed and as such undermines the dismissal. I will deal with this point for completeness. As is repeatedly set out in the Final Judgement, the respondent must have carried out a reasonable investigation. This is not a requirement to carry out the most extensive investigation of which an employee can think. The final judgement clearly sets out the basis on which I consider that the respondent carried out a reasonable investigation. The final judgement also sets out the following:

*"65. However the real issue with the claimant's evidence about the scanning is that he did not provide the explanation that he provided at the hearing to the respondent as part of the dismissal meetings. I find that Mr Young asked the appellant a number of questions about how the scanning was completed and how it could have been scanned. The questions were specific and another question was very open-ended. The appellant did not provide an explanation of the sort he provided to the tribunal. He said that it he did not use enhancements but he did not put across the point that enhancements were unnecessary because the milk would not have been opaque and this was because the milk was at such a volume that it was not required."*

*The claimant was subject to standards of conduct of which he had not been made aware prior to his dismissal*

10. I find that the claimant's second point does not establish that it is in the interests of justice to reconsider my judgement neither does it form the basis on which I can conclude that there is a reasonable prospect of the Final Judgement being varied or revoked because the final judgement fully addresses this points. For example:

*"52. I do not find that the unloading/loading CASI belt document dated 29 February 2016 sets out an accurate reflection of the way in which the CASI belt must be operated. This is because Mr Young's own evidence about the requirement that operation must be supervised by a floor manager or shift manager was not a requirement which the respondent enforced and he said this document set out the initial rules when the machines were first used some years ago and they had since been relaxed. Therefore I do not accept that this document sets out a formal procedure that must be used to load the CASI belt.*

*53. I do not accept that the respondent had or communicated a strict policy about how items were loaded onto the CASI belt and how they were x-ray scanned and reviewed.*

*54. This is because Mr Young in his own evidence accepted that x-ray scanners may review items in different ways…*

*56. As a result I find that there was a discretion afforded to employees like the claimant as to how they carried out the tasks. However the overriding requirements that always had to be satisfied was that all the goods were security cleared and work was carried out safely."*

11. I find that the claimant's 2nd point is little more than a disagreement with the findings set out in the Final Judgement.

*The claimant was not made aware of potential disciplinary penalties to which he may be subject*

12. I find that the claimant's third point does not establish that it is in the interests of justice to reconsider my judgement neither does it form the basis on which I can conclude that there is a reasonable prospect of the Final Judgement being varied or revoked. The claimant did not include this claim as part of the claim considered at the final hearing. In any event I find that this claim is unsustainable because the investigation and disciplinary letters sent to the employee as part of the disciplinary process clearly identified that a potential disciplinary sanction was dismissal. Further, the issue about whether the claimant should have been given a final warning rather than be dismissed for gross misconduct is implicitly considered in the Final Judgement and all of the findings set out therein about the reasonableness of the respondent's actions.

*The claimant's counterclaim*

13. The claimant has not raised this point at any time before the application for reconsideration. Therefore it was not and is not part of the issues encompassed in this case.

14. For all of the reasons set out above I find that there is no reasonable prospect of the original decision being varied or revoked and neither is it in the interests of justice to revoke the original decision. Therefore I refuse the claimant's application for reconsideration of the final judgement arising out of the 25 and 26 July 2017 hearing.

15. I make the following order:

# ORDER

1. The Employment Judge considers that there is no reasonable prospect of the original decision being varied or revoked and neither is it in the interests of justice to revoke the original decision. Therefore the claimant's application for reconsideration of the judgement arising out of the 25 and 26 July 2017 hearing is refused in all respects.

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**Employment Judge Bartlett**

Date: 13 October 2017

Sent to the parties on:

……13.10.17…….

For the Tribunal:

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