Case Number: 2301840/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**
(Sitting alone)

BETWEEN:

Mr R Bowman **Claimant**

AND

Virgin Atlantic Airways Ltd **Respondent**

JUDGMENT ON RECONSIDERATION

The Claimant's application for reconsideration of the judgment sent to the parties on 24 October 2017 is refused.

Reasons

1. My judgment in this case was that Mr Bowman's claim of unfair dismissal had no reasonable prospect of success and should therefore be struck out. In addition, as Mr Bowman had conceded that his outstanding notice pay and expenses had been paid by the Respondent I dismissed his claim of breach of contract.

2. Mr Bowman made an application for written reasons on 7 November 2017, following which he made an application for a reconsideration of my judgment, which he described as an "appeal". I accept that Mr Bowman made his application for reconsideration within the time limit set out in the Tribunal Rules, There were various delays in the process, but these were outside his control.

3. The application was not referred to me for some considerable time, but because Mr Bowman had described his application as an "appeal" I did not appreciate that he had also intended to apply for a reconsideration. I therefore apologise

for the very long delay in dealing with the application.

4. I considered the application in accordance with Rule 70 , which provides:

> **"A Tribunal may, either on its own initiative .... or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so."**

5. I considered the application in accordance with the procedure set out in Rule 72 (1) which provides:

> **"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."**

6. I read Mr Bowman's application carefully. In my view it discloses no grounds on which it would be in the interests of justice to reconsider my original decision. Mr Bowman was basing his case on a reasonably complex legal argument and I will therefore explain in more detail why I have arrived at that view.

    a. Mr Bowman begins by suggesting that his breach of contract claim should proceed because the Respondent did not follow its own disciplinary procedure. At the preliminary hearing I accepted the submission by the Respondent that its disciplinary and sickness management policies are non-contractual – that is consistent with how most private sector organisations operate. There cannot therefore be a claim of breach of contract arising from a failure to follow the procedures. Mr Bowman has not produced any evidence to show that this view was wrong and should be reconsidered (such as a copy of the Respondent's disciplinary policy that clearly shows that it was contractual). The point Mr Bowman makes would in my view be more relevant to a claim of "ordinary" unfair dismissal under s 94 Employment Rights Act 1996 ("ERA") because it is really a point about fairness and fair procedures. But Mr Bowman cannot bring a claim of ordinary unfair dismissal because at the time of his dismissal he did not have two years' service with the Respondent as required by s108 ERA.

    b. Some of Mr Bowman's other arguments, such as his point about the level of his sickness absence, and the wording of the crew manual, might also be relevant if he was entitled to bring a complaint of ordinary unfair dismissal, but this he cannot do.

    c. Mr Bowman's main argument is really a repetition of the argument he made at the preliminary hearing, that in reality he was dismissed for a health and safety reason as he was not safe to fly with an ear infection. Section 100(1) ERA is the only part of s100 that is potentially relevant to Mr Bowman. Section 100(1) says this:

> **"Health and safety cases.**
>
> **(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—**
>
> **(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,…."**

d. Section 100(1) therefore requires more than a connection between health and safety considerations and the dismissal before an employee can claim protection under it. The carrying out of health and safety activities itself has to be the reason or main reason for the dismissal. All Mr Bowman can show is that there is a general background of health and safety considerations contributing to his dismissal, but in my judgment he has no reasonable prospect of showing that the reason or principal reason for his dismissal was the fact that he was carrying out health and safety activities.

e. This was what I said in my written reasons about Mr Bowman's argument that he was protected by s100:

> "**The argument Mr Bowman wishes to run is that by dismissing him for taking sick leave when he had an ear infection, the Respondent dismissed him because he was carrying out activities in connection with preventing or reducing risks to health and safety at work. I have considered this submission carefully, but in my view this is stretching the meaning of the legislation beyond that which Parliament intended. It also has the consequence I have already noted – that no person whose illness made it unsafe for them to fly would ever be able to be lawfully dismissed, regardless of the length of their absence. I also think that "activities" does not mean remaining at home on sick leave. That is stretching a definition too far. Activities connotes taking active steps to manage health and safety risks, in the manner Mr Bowman described himself as potentially being required to do whilst carrying out his duties on board an aircraft**."

f. Mr Bowman has not explained why that reasoning is wrong. He does not agree with it, but that does not mean that it would be in the interests of justice for me to reconsider it and substitute different reasoning.

7. There is therefore nothing in Mr Bowman's application that suggests that there is any reasonable prospect of my original decision being revoked.

8. The application is therefore refused.

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Employment Judge Morton

Date: 27 October 2018