



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4100315/2019 Reconsideration of Judgment per Written Submissions

Employment Judge: M A Macleod

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Elaine McArthur

Claimant
Represented by
Mr M Hamilton
Solicitor

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The Board of Management of Edinburgh College

Respondent
Represented by
Mr A Brown
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent's application for reconsideration of the Employment Tribunal's Judgment of 5 August 2019 is refused.

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REASONS

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1. Following the Tribunal's Judgment issued on 5 August 2019 in this case, the respondent submitted an application for reconsideration of that Judgment. The claimant opposes that application.
2. The application was not rejected by the Employment Judge, and therefore parties were offered the opportunity to make submissions on the application and its opposition.

3. In correspondence between the parties and the Tribunal, it was agreed and determined that the reconsideration should take place by way of written submissions.

4. I propose to summarise, briefly, the application; the objections to that application; and the respondent's further comments; and then to set out the Tribunal's decisions and its reasons.

The Application

5. By email dated 19 August 2019 (that is, within 14 days of the date of the Judgment), the respondent made an application for reconsideration of the Judgment, which had found that the claimant had been unfairly dismissed by the respondent, but that no compensation was payable to her as a result.

6. It was said by the respondent that the Tribunal had made a finding in fact for which there was no evidence in support, and that the Tribunal had "misunderstood" the terms of the dismissal letter. The misunderstanding was said to relate to the wording of a letter which can be identified and resolved quickly. They submitted that the Tribunal "will identify that its current interpretation of the dismissal letter is not 'a permissible option' and that, upon 'a proper appreciation of the evidence' dismissal was fair."

7. Reference was made to the terms of the letter of dismissal, and to the findings and conclusions reached in paragraphs 154 and 156 by the Tribunal, that it was not fair for an employer to take into account matters which were not relevant in reaching its conclusions on the facts. This is the misunderstanding said by the respondent to have been made by the Tribunal. What they say is that the respondent did not rely upon the pattern of withholding information when concluding "on the facts" that the claimant was guilty of gross misconduct. At the highest, they submit, the dismissing officer took it into account as a consideration separate to whether the claimant was guilty of allegation 3 and after he had decided that she should be dismissed for her guilt of that allegation alone.

8. The respondent submits that “the only possible interpretation” of the letter is one which shows that Mr Pearson, the dismissing officer, was dealing with two separate matters:

1. What his view was in relation to allegation 3 taken alone. The claimant’s behaviour in relation to that matter caused him to dismiss; her guilt of allegation 3 alone caused him to dismiss.

2. What his view would have been had he not dismissed for allegation 3 alone. The second paragraph explained that he would have dismissed for lack of trust, or some other substantial reason, had he not dismissed for allegation 3 alone. It was a “separate and hypothetical” observation.

9. The respondent submits that the Tribunal’s interpretation of the paragraph was “materially flawed” for a number of reasons:

- The second paragraph deals with a hypothetical matter;
- It is a separate and additional conclusion;
- What follows the word “Separately” is “merely an additional separate observation”;
- The word “bolsters” demonstrates that he had already come to his view and that he did not rely upon the pattern incoming to that view. The already formed view that dismissal should be the outcome was simply strengthened or bolstered by this additional separate conclusion;
- All that is bolstered is his view that dismissal was appropriate, not his view that gross misconduct has occurred;
- While Mr Pearson has concluded that the pattern of withholding information has resulted in the College not trusting the individual, that is not a conclusion that there has been a pattern of misconduct; he had been clear that such a pattern was not misconduct. The breakdown in trust does not arise solely from culpable behaviour.

10. The respondent submits that it would be in the interests of justice to revoke the Judgment on the basis that the Tribunal has fallen into error in concluding that the two paragraphs address the same issue, that is, the guilt under allegation 3. The only thing which has caused the Tribunal to reach the conclusion that dismissal was unfair was its misunderstanding of one paragraph in the decision letter.
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11. Reconsideration, it is said, would save time and expense for both parties as well as public time and expense by avoiding a hearing at the Employment Appeal Tribunal which can be addressed swiftly by reconsidering the Judgment on the basis of the points made in this application.
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12. The application went on to suggest that if the Tribunal were unwilling to overturn its decision the respondent would be grateful for the opportunity to be heard on the matter.
13. Subsequently, the respondent confirmed to the Tribunal that the matter could be dealt with without a hearing (email dated 2 September 2019).
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The Claimant's Objections

14. For the claimant, Mr Hamilton opposed the application for reconsideration and submitted that the Tribunal's decision that the claimant's dismissal was unfair was supported by the evidence in the case and by the reasons given by the Tribunal. He submitted that the respondent's analysis was selective and misleading.
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15. He submitted that the Tribunal's interpretation of the two paragraphs quoted in the decision is one that is open to the Tribunal, even if those two paragraphs were the only basis for that interpretation, which, he said, they were not.
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16. A key element in any unfair dismissal claim, he submitted, is the employer's reason for dismissing the employee, that is, selecting that particular sanction. It is the combination of factors – whether the employee has committed an act of gross misconduct, and the sanction therefore to be

applied – which constitutes the reason for dismissal. The Tribunal's focus on the reasons for the decision to dismiss was entirely appropriate.

17. He argued that the Tribunal's view that these two paragraphs indicate that the dismissing officer took into account inappropriate factors is a reasonable interpretation that is open to it, even if that view was solely basis on those paragraphs.

18. In particular, he submitted, it is clear from these two paragraphs that Mr Pearson did have regard to the alleged "dishonesty" in reaching his decision to dismiss. The Tribunal found that the alleged "dishonesty" was nothing of the sort and should not have been taken into account at all. The Tribunal was therefore entitled to conclude that Mr Pearson had taken account of impermissible factors in reaching his decision on the sanction of dismissal and therefore that the decision was unfair.

19. Mr Hamilton points to paragraphs 147-152 of the Judgment as making reference to the full terms of the letter, in which the comments made relating to allegations 1 and 2 support the Tribunal's interpretation of the letter and of Mr Pearson's reasons for deciding to dismiss.

20. The respondent, he said, is incorrect in stating that the conclusion paragraph of the decision letter is separate and hypothetical. That is another interpretation of the letter, but it is not the only interpretation. That means that the Tribunal had to decide what it meant, and in their submission it was entitled to adopt the interpretation it did of Mr Pearson's reasons to dismiss.

21. Mr Hamilton submitted that the application was an attempt to re-litigate the issue of unfair dismissal by a narrow focus on two paragraphs of the respondent's own decision letter. The mere fact that a disciplining manager says that one allegation was the only reason for dismissal does not compel a Tribunal to accept that statement. The Tribunal was fully entitled, in the claimant's submission, to conclude, having heard and considered all of the evidence, that the respondent took into account two allegations which should not have been considered and that this made the dismissal unfair.

22. The claimant therefore invited the Tribunal to find that there is no basis for the application and that the decision should not be reconsidered.

The Respondent's Further Comments

5 23. Mr Brown noted the terms of the claimant's opposition, and submitted further comments to the Tribunal on 23 September 2019.

24. He suggested that a hearing on the reconsideration application may be helpful, principally because they were concerned that the word "bolster" has been misunderstood.

10 25. The quotation from the letter, he submitted, does not demonstrate that the dismissing manager had regard to the alleged "dishonesty" when deciding to dismiss. If anything, it demonstrates the opposite. The fact that he considered that the dishonesty made his view stronger does not mean that he relied upon it when forming his view. His view that dismissal was appropriate was formed

15 26. The claimant's representative having conceded that the respondent's interpretation was a possible interpretation, Mr Brown then insisted that given the assertion by the disciplining manager about his only reason for dismissal, there is no evidential basis for any other interpretation of the paragraph. The only permissible interpretation was that this was a separate
20 observation.

27. Mr Brown said that they remained of the view that the matter could be dealt with without a hearing, but that if a misunderstanding persisted it would be better to have a hearing to discuss it.

25 28. Following the Tribunal's confirmation that there would be no change in the arrangements for dealing with this matter, parties were given a further opportunity to make submissions. The claimant's solicitor did so, relatively briefly, reaffirming their interpretation of the Judgment.

29. Mr Brown took the opportunity to make further submissions, while seeking to avoid repeating what was said in their previous submissions. Those

further submissions are noted and taken into account, but essentially reiterate the focus of the Tribunal upon the terms of the letter of dismissal. He suggested that the pattern of withholding information was not something on which the respondent relied when deciding that the claimant was guilty of allegation 3 or that dismissal was the appropriate outcome. He reiterated his submission that this was a separate observation.

30. Mr Brown went on to say: *“Even if Mr Pearson’s separate observations on the Claimant’s honesty are not justified, ultimately they had no bearing on his decision to dismiss.”* The observations, he stressed again, were separate.

Discussion and Decision

31. Rule 71 of the Employment Tribunals Rules of Procedure 2013 provides that a Tribunal may reconsider a Judgment “where it is necessary in the interests of justice to do so”.

32. Rule 72 sets out the process to be followed. If the Employment Judge, having heard from the parties, considers that a hearing is not necessary in the interests of justice, the reconsideration may proceed without a hearing so long as parties are given a reasonable opportunity to make further written submissions.

33. In this case, the Tribunal concluded that the dismissal of the claimant by the respondent was unfair, but awarded no compensation to the claimant on the basis that she had contributed so significantly to her own dismissal by her culpable and blameworthy conduct.

34. The application for reconsideration is developed in the various submissions made on behalf of the respondent, though the fundamental theme of the application is that the Tribunal was not entitled to come to the interpretation of the letter of dismissal which it did, on the basis that there was no evidence sufficient to found the conclusions reached by the Tribunal.

35. The application stresses – to the point of repetitiveness – that the comments in relation to the previous allegations were separate to the conclusion of misconduct.

5 36. The application seeks to place certain interpretations on the conclusions reached by Mr Pearson in his letter of dismissal, and to emphasize that the word “Separately” is crucial in exonerating him from the finding that he took into account matters which were not appropriate in reaching his decision to dismiss. By setting out their interpretation on the terms of the letter, it is plain that the respondent seeks to persuade the Tribunal, in this application,
10 that no other possible interpretation could be reached on the evidence led.

37. It is said that the second paragraph of the conclusion of allegation 3 deals with a hypothetical matter (“would also justify”). This is not an accurate representation of the letter, and is too general to be helpful. It was not a hypothetical “matter”. The letter was conveying, at this point, a very strong
15 conclusion about the claimant’s honesty, which would justify dismissal.

38. Mr Brown suggests that the language is clear in that it refers to “separately”, “also”, and “this further conclusion”. The Tribunal found, on the contrary, that language was “rather ambiguous”. What the application seems to assert is that it is not for the Tribunal to interpret the language of the letter of
20 dismissal, a conclusion with which I cannot agree. The whole purpose of considering the evidence led by the respondent about the terms of the letter of dismissal was to allow the Tribunal to adjudicate upon the fairness of the reasoning followed.

39. Mr Brown’s interpretation of the word “bolsters” is that this demonstrates
25 that the respondent had already reached his conclusion and that he did not rely upon this “separate consideration”. In my judgment, it is straightforward to interpret the word “bolsters” as meaning that it strengthened the conclusion which was being reached by the respondent. It cannot be said to be entirely separate, because the respondent has not treated it as
30 entirely separate.

40. The letter expresses the respondent's thinking in reaching the decision to dismiss. The Tribunal's Judgment analysed that thinking, not just in relation to that conclusion on allegation 3 but on the other allegations as well, not because the Tribunal wished to stray into irrelevant areas but because the respondent's thinking directed the Tribunal to consider them. It is plain, in my judgment, that the conclusion that Mr Pearson took into account a view that the claimant had behaved dishonestly in relation to allegations 1 and 2 is entirely justified by his own language.

41. To suggest that this is "merely an additional separate observation" is pure sophistry, in my judgment, and does nothing to undermine the Tribunal's conclusion that Mr Pearson was persuaded to dismiss the claimant for reasons other than and in addition to the findings made in allegation 3.

42. The Tribunal has dealt with that by concluding that no compensation should be awarded to the claimant but the application in no way undermines the Tribunal's conclusion that the decision to dismiss was tainted by the factors which Mr Pearson inappropriately took into consideration.

43. It is noted that in a further submission, Mr Brown appears to concede that the point is at least open to interpretation by saying: *"Even if Mr Pearson's separate observations on the Claimant's honesty are not justified, ultimately they had no bearing on his decision to dismiss."*

44. It appears to me that the application is seeking to place an entirely artificial interpretation of the language of the letter of dismissal before the Tribunal, by suggesting that the decision was made irrespective of the paragraph under consideration. It is for the Tribunal to discern from the actions and language of the respondent the reasoning for their decision. That reasoning did not stop, for whatever reason, at the point where he said that the claimant's conduct in allegation 3 justified dismissal. The Tribunal is entitled to take account of what he says, in the section dealing with this decision to dismiss, as indicative of his reasoning.

45. If Mr Pearson did not intend that matter to be taken into account in his decision – and since he said that his decision was bolstered by this

reasoning he can hardly suggest that that was his intention – he should not have recorded it. The application appears to imply that this section should not be considered in determining the fairness or otherwise of the dismissal. I respectfully disagree. It is my judgment that the statement made in the paragraph starting “Separately” must be taken to be integral to the interpretation of the respondent’s reasoning, and cannot be drawn away from that reasoning.

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46. There is therefore no basis in the application which persuades me to find that it is necessary in the interests of justice to revoke the Judgment, and accordingly the application is refused.

Date of Judgement: 29th October 2019
Employment Judge: M MacLeod
Date Entered in Register: 4th November 2019
And Copied to Parties

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