



EMPLOYMENT TRIBUNALS

Claimant: Mrs Tina Oliver
Respondent: Erewash Community Transport Limited
Before: Employment Judge Dyal
Date: 8 June 2020

JUDGMENT

1. The application for reconsideration is refused pursuant to rule 72(1): there is no reasonable prospect of the tribunal's judgment and reasons of 9 April 2020 being varied or revoked.

REASONS

1. The tribunal's judgment and reasons dated 9 April 2020 was sent to the parties on 14 April 2020. By an application of 15 May 2020 the Respondent applied for reconsideration.

Law

2. The relevant procedural rules that govern an application for reconsideration appear at rules 71 – 73 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
3. The application itself challenges the tribunal's application of s.98 Employment Rights Act 1996. It provides as follows:

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)-

(a) capability, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) qualifications, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Decision on application

4. The application for reconsideration was made out of time. No explanation has been given as to why. It is in any event, in my judgment, misconceived.
5. The tribunal was well aware that the Respondent relied upon two potentially fair reasons for the dismissal. As the application for reconsideration notes, those reasons were relied upon in the alternative. Firstly, SOSR: in short, the fact the Claimant did not have a driving license that entitled her to drive D1 category vehicle in circumstances in which her job involved driving D1 vehicles. Secondly, capability: her ill-health and sickness absence.
6. It should be noted that in closing submissions on 10 March 2020, whilst the Respondent continued to run the two reasons for dismissal in the alternative, it was the Respondent's positive case that capability (ill-health) was the principal reason for dismissal. My note of the closing submissions records the following:

Employment Judge: "What R say was principal reason?"

Mrs Peckham (Solicitor for the Respondent): "capability"

7. In any event, it was the tribunal's job to make findings about the reason, or if more than one reason, the principal reason for dismissal.
8. It was the tribunal's finding that the reason (the sole reason) was ill-health capability. The tribunal said this:

102. The reason for the Claimant's dismissal was capability (ill-health). In particular the Claimant had been on sick-leave since October 2016, that is a little over two years, by the date of dismissal. Further it was unclear when if at all she would be able to return to work save that it was clear that she would not return in any capacity before August 2019.

9. The fact that the Claimant did not have a D1 driving license clearly required a management response. However, the response did not need to be, and more importantly in the tribunal's judgment, *it in fact was not*, dismissal. As our findings make clear, for its part, the Respondent was essentially content to manage the

driving license issue in one of two other ways: to support the Claimant to undertake the training and test (paying for them once) or to redeploy her to a passenger assistant role which did not require a D1 license. The Claimant's reaction to this was complex and varied over time. But in short, she was prepared to do the training if the Respondent would make reasonable adjustments to her driving role but not otherwise.

10. However, the real issue, the one which in the tribunal's judgment was the *true reason* the Respondent dismissed the Claimant, was her ill-health. Both the historical ill-health that had caused her to be absent for over two years at the point of dismissal and the prospective ill-health. She was sure not to return to work in any capacity until August 2019 and there was only a chance of a return to work then. That in our judgment, having heard all the evidence, was the reason the Claimant was dismissed.
11. The tribunal further noted that at the appeal stage the Claimant indicated that she was willing to accept a passenger assistant role. This was a role that did not require a D1 (or any) driving license. The appeal was dismissed, and the dismissal maintained, because of the Claimant's unfitness for any work or training until at least August 2019. As at the dismissal stage, the critical issue was not that the Claimant lacked a D1 license it was that the Claimant was too unwell to work or to train.
12. In short, the tribunal considered that the lack of a D1 license, though a part of the factual matrix, was not the reason, nor the principal reason for dismissal. The sole reason was ill-health (capability).

Fairness

13. In light of the tribunal's finding as to the reason for the dismissal there was no need to consider the fairness of the dismissal upon the basis that the reason or principal reason or any part of the reason for the dismissal was SOSR (lack of D1 license).
14. However, even if the tribunal had considered that the license issue was the reason, the principal reason or any part of the reason for the dismissal, it would obviously still have found that the dismissal was unfair - *at the least* - for the reasons given at paragraphs 103 – 109. Those reasons would still have applied: the Claimant would still have been materially misled by the terms of the letter of dismissal in respect of important issues and this still would have tainted her ability to fairly challenge the decision upon appeal.
15. The Claimant also indicated at the appeal stage that she would work as a passenger assistant: that answered the D1 license point. The reason her dismissal was maintained was because of her ill-health and inability to do any work. The dismissal could not fairly have been sustained upon the D1 license point.

Conclusion

16. For these reasons I think the application for reconsideration has no reasonable prospect of success and I refuse it.

Employment Judge Dyal

Date 11.06.2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

12/06/2020.....

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FOR EMPLOYMENT TRIBUNALS