EMPLOYMENT TRIBUNALS

Claimant: **Mrs Emma Salmon**

Respondent: **Serco Group Limited**

JUDGMENT FOLLOWING RECONSIDERATION

The Claimant's application for reconsideration of the judgment sent to the parties on 7 April 2021 is refused because there is no reasonable prospect of the original decision being varied or revoked.

REASONS

Introduction

1. The Claimant presented a claim for unfair dismissal on 12 June 2020. I heard the claim by CVP on 1 April 2021, at which hearing the Claimant represented herself and the Respondent was represented by Mr Ben Jones of Counsel. I found the Claimant's dismissal was fair and dismissed her claim for reasons given orally at the conclusion of the hearing. The judgment was sent to the parties on 7 April 2021. The Claimant applied for reconsideration of that decision on 21 April 2021.

The applicable legal principles

2. The tribunal's powers concerning reconsideration of judgments are contained in rules 70 to 73 of the Employment Tribunals Rules of Procedure 2013. A judgment may be reconsidered where "*it is necessary in the interests of justice to do so*."

3. Applications are subject to a preliminary consideration. They are to be refused if the judge considers there is no reasonable prospect of the decision being varied or revoked. If not refused, the application may be considered at a hearing or, if the judge considers it in the interests of justice, without a hearing. In that event the parties must have a reasonable opportunity to make further representations. Upon reconsideration the decision may be confirmed, varied or revoked and, if revoked, may be taken again.

4. Under rule 71 an application for reconsideration must be made within 14 days the date on which the judgment (or written reasons, if later) was sent to the parties. I accept that this application was clearly made in time.

5. The approach to be taken to applications for reconsideration was set out in the case of *Liddington v 2Gether NHS Foundation Trust* UKEAT/0002/16/DA in the judgment of Simler P. The tribunal is required to:

   5.1. identify the Rules relating to reconsideration and in particular to the provision in the Rules enabling a Judge who considers that there is no reasonable prospect of the original decision being varied or revoked refusing the application without a hearing at a preliminary stage;

   5.2. address each ground in turn and consider whether is anything in each of the particular grounds relied on that might lead a tribunal to vary or revoke the decision; and

   5.3. if this leads to the conclusion that there is nothing in the grounds advanced by the Claimant that could lead to the decision being varied or revoked, give reasons for that conclusion.

6. In paragraphs 34 and 35 of the judgment Simler P gave the following guidance:

> **"A request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered. Tribunals have a wide discretion whether or not to order reconsideration.**
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> **Where … a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application."**

The Claimant's first ground for reconsideration

7. The Claimant's first ground is that her personal circumstances had not been taken into account. She says that at the time of the incident on 24 March 2020 which gave rise to her dismissal, she was under extreme stress. She adds that she had recently been off sick with stress and was still only on a phased return. She gives details of the effect this illness had on her.

8. The Claimant had referred to factors that put her under stress at the relevant time in her ET1 and in more detail in her witness statement. Within the bundle of documents referred to during the hearing, was an email which the Claimant sent to the disciplinary manager on 19 April 2020 setting out the mitigating circumstances in her case. In it, she wrote:

> **"I went off sick until the beginning of January when I returned on 3 days a week and I am still on as I am not ready mentally to deal with anymore right now."**

9. The disciplinary manager gave evidence on behalf of the Respondent at the 1 April 2021 hearing. The Claimant asked him what mitigating factors had been taken into account in her disciplinary decision. In his answer, he referred to the email I have quoted from in the paragraph above and stated that he did not consider the mitigating factors to be sufficient to downgrade the sanction from dismissal. The Claimant submitted that insufficient consideration had been given to her personal circumstances, although she focussed more on some of the specific factors causing her stress rather than the fact she was on a phased return at the time of the incident.

10. I made a finding of fact that that the time of the incident the Claimant was "*desperately anxious"* and made reference to some of the personal factors which were causing her stress, in conjunction with worry caused by the Covid-19 pandemic. I referred to the 19 April 2020 email and to the mitigation submission the Claimant's trade union representative made at her disciplinary hearing about the stress she was under at the time. I found that the disciplinary manager "*did take into account the Claimant's personal and family situation but did not consider it to be sufficient mitigation to downgrade the sanction to anything less than dismissal*". I referred back to these factual findings in my conclusion, which was as follows:

> **"Another employer might reasonably have considered the Claimant's circumstances which caused her anxiety [*leading to the incident*] as sufficient mitigation to downgrade the sanction to a warning rather than a dismissal. However, I heed the warning in the authorities against the danger of substituting my view of the outcome for the employer's. I conclude that dismissal was within the band of reasonable responses and the Claimant's dismissal was fair."**

11. I do not consider there is a reasonable prospect of the original decision being varied or revoked under this ground. The Claimant's personal circumstances, including the stress she was under and the reasons for it, were considered and given weight in the decision. It is therefore not "*necessary in the interests of justice"* to reconsider the decision in order to take the Claimant's personal circumstances into account.

12. During the hearing, including in the Claimant's statement and oral evidence, her questioning of the Respondent's witness, and her closing submissions, the Claimant did not focus specifically on the fact she was still on a phased return to work at the time of the incident. However, that is not a reason to allow the case to be re-argued; that would amount to a "*second bite at the cherry*", in Simler P's words.

The Claimant's second ground for reconsideration

13. The Claimant's second ground for reconsideration is that "*Serco stated throughout my case that this was a summary only case so to change their mind at the hear[ing] to incorporate a former warning that was [already] spen[t] was moving the goal posts again to suit them*".

14. I understand this ground to refer to a discussion which took place during the Claimant's disciplinary hearing about a previous final written warning. The Claimant's case at the hearing was that although the Respondent purported to

dismiss summarily solely because of the 24 March 2020 incident, in fact (she alleged) the previous warning was wrongly held against her.

15. The Claimant did not at any point suggest she had been given false reassurance of a lesser sanction because it was a *"summary only case".* Further, I note that far from providing the Claimant with such reassurance, the Respondent warned the Claimant in the disciplinary invitation letter dated 14 April 2020 that:

> **"You should be aware that the allegations which will be discussed at the disciplinary hearing are very serious, and could amount to gross misconduct. If these allegations are substantiated as a result of the disciplinary hearing, a potential outcome may be dismissal without notice or pay in lieu of notice."**

16. The issue of the former warning was fully ventilated at the hearing. I made findings that the disciplinary manager considered the 24 March 2020 incident was in and of itself sufficiently grave misconduct to warrant dismissal and therefore did not rely on the prior warning as part of a cumulative reason for dismissal. I further noted his evidence that had the Claimant not received the prior warning, "*he would have been able to take into account as mitigation a clean disciplinary record and this could have made a difference to the outcome*". I referred to the case of *Airbus UK Ltd v Wedd* [2008] ICR 561, in which the Court of Appeal held that the fact a warning has expired does not make the earlier conduct it related to irrelevant when assessing whether a dismissal is fair in all the circumstances. I concluded on this issue:

> **"In relation to the final written warning, had this been what [the disciplinary manager] described as a 'cumulative dismissal', I would have been concerned about the delay in issuing the previous warning meaning that it was mere accident of chance it was still live at the time of the [24 March 2020 incident]. However, the nature of his consideration was that the Claimant did not have a clean disciplinary record to place on the mitigation side of the scales. It was relevant in that regard whether live or expired and it was reasonably open to [the disciplinary manager] to accord it the weight he did."**

17. I do not consider there is a reasonable prospect of the original decision being varied or revoked under this ground because the issue of the warning was properly argued and fully considered at the hearing.

The Claimant's third ground for reconsideration

18. The Claimant's third ground for reconsideration is an allegation that a named colleague committed more serious misconduct, which she describes. The issue of consistency of sanction was considered at the hearing. I noted that there were particular sensibilities around the nature of the 24 March 2020 incident at the time when it occurred and concluded that:

> **"In relation to inconsistency, I do not have enough information to conclude that these cases were truly similar to that of the Claimant, as the law requires."**

19. A reconsideration application is not an opportunity for the Claimant to supply further information about a comparator case. The time to present such evidence

was at the original hearing. Therefore, there is no reasonable prospect of the original decision being varied or revoked under this ground.

The Claimant's fourth ground for reconsideration

20. The Claimant's fourth ground for reconsideration is: "*Given my good history and positive reviews for my work I do not feel it was in the interest of justice for me to be dismissed from my role*".

21. The Claimant's ET1 stated "*I have worked for this company for nearly six years and have received bonuses for my good work over the years*." In her witness statement, she set out further background information about her successful previous employment history with the Respondent. This evidence was not challenged by the Respondent during the hearing.

22. I made the following findings of fact about the Claimant's employment history:

> **"…she was promoted… She was successful and popular in her role. The Respondent has made no criticisms of her work performance and I have seen a petition signed by 15 members of staff at [her workplace] who objected to a proposal that she be transferred…"**

23. I do not consider there is a reasonable prospect of the original decision being varied or revoked under this ground because this excellent record (save for the final written warning noted above) was part of the circumstances which I took into account when assessing whether or not the Respondent's decision to dismiss was reasonable.

The Claimant's fifth ground for reconsideration

24. In her fifth ground, the Claimant makes the point that there have been other employment tribunal judgments featuring similar misconduct where findings of unfair dismissal have been made. She cites two employment tribunal judgments, which were not referred to at the original hearing. I can see they are cases bearing some similarities to the Claimant's and are therefore relevant examples.

25. The legal test for an unfair dismissal set out at s.98 Employment Rights Act 1996 is "*whether in the circumstances… the employer acted reasonably or unreasonably in treating [in this case, the misconduct] as a sufficient reason for dismissing the employee*". The answer to this question is always fact specific. The fact other tribunals have reached a different decision when analysing the full factual circumstances of other cases, does not mean it would be "*necessary in the interests of justice"* to reconsider the outcome of this case. There is no reasonable prospect of the original decision being varied or revoked under this ground either.

Employment Judge Barrett
Date: 14 June 2021