EMPLOYMENT TRIBUNALS

Claimant: C Woodland

Respondent: Secretary of State for Justice

JUDGMENT

The respondent's application dated 4 June 2021 for reconsideration of part of the judgment of the Tribunal dated 30 April 2021 (sent to the parties on 21 May 2021), is refused.

REASONS

1. In a judgment made on 30 April 2021 I upheld the claimant's complaint of unfair dismissal and dismissed the claimant's claim of wrongful dismissal. The respondent applies, under rule 71, for a reconsideration of the decision that the claimant was unfairly dismissed.

2. The respondent's application must first be considered by me under rule 72(1). If I consider there is no reasonable prospect of the original decision being varied or revoked, I must refuse the application. If I consider that there is some reasonable prospect of the original decision being varied or revoked I must seek a response from the claimant and seek the views of the parties on whether the matter can be determined without a hearing. The application is then to be determined by me, either at a hearing or on the papers.

3. Although I see that the claimant's representative has emailed objecting to the application for reconsideration, I have not taken into account the contents of that email when considering the application under rule 72(1).

4. A tribunal has power to reconsider any judgment where it is necessary in the interests of justice to do so: rule 70. In deciding whether it is necessary to reconsider a judgment in the interests of justice, the tribunal must seek to give effect to the overriding objective to deal with cases fairly and justly. That includes taking into account established principles. Those established principles mean the tribunal must have regard not just to the interests of the

party seeking the review, but also to the fact that a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final and to the public interest requirement that there should, as far as possible, be finality of litigation. As the court stressed in Flint v Eastern Electricity Board [1975] IRLR 277, QBD 'it is very much in the interests of the general public that proceedings of this kind should be as final as possible.'

5. In upholding the claim of unfair dismissal I concluded that the reason the respondent dismissed the claimant was its belief that she had been unfit for duty because she had consumed alcohol; that this was a reason relating to the claimant's conduct and was therefore a potentially fair reason for dismissal within section 98(2) of the Employment Rights Act 1996. However, I concluded that, in all the circumstances, the respondent acted unreasonably in treating that as sufficient reason for dismissing the claimant. At the core of that conclusion was my finding that, in reaching its decision that the claimant was unfit for duty through alcohol on the day in question, the respondent drew an adverse inference from the claimant's refusal to undertake a breath test and that is something that, in the circumstances, was outside the range of reasonable approaches open to a reasonable employer. In reaching my conclusion I took into account the respondent's alcohol policy and, in particular, paragraph 2.14. Material to my conclusion were (a) my finding that the only reasonable conclusions open to a reasonable employer were that, when asked to undergo a breathalyser test, the claimant's core working day had ended notwithstanding that she had not left the site and had returned to the premises when directed, and that she remained outside her core working day notwithstanding that she had initially agreed to undertake a breath test and had subsequently asked for her time off in lieu to be reinstated; and (b) although the respondent's policy provides that an adverse inference may be drawn from an employee's refusal to take a breath test, the policy also says 'Staff will not be required to remain at their place of work beyond their core working day to facilitate a test. If the test is not able to be completed before this time no inference will be drawn from the failure to have a breath test.'

6. The respondent seeks a reconsideration. Its grounds for doing so, in summary, appear to be that:

   a. I misunderstood the policy. The respondent's submission appears to be that, under the terms of the policy, an adverse inference may always be drawn where an employee refuses to take the test (as in this case) but that an inference may not be drawn where an employee is willing to take a test but such a test could not be facilitated before the end of the core working day.
   b. The respondent did not 'highlight' the construction of the policy it now contends for in evidence and submissions because it did not know 'that the tribunal, during the course of the evidence, was minded to conclude that the R had not followed its own policy'.
   c. The respondent was prejudiced because, it says, neither the dismissing officer nor the appeal officer 'were questioned on the wording of the policy and their interpretation and application of it, but simply whether they made an adverse inference'.

7. I consider there is no reasonable prospect of the original decision being varied or revoked on that basis. It has been abundantly clear throughout these proceedings that the claimant was contending that the respondent acted unreasonably in drawing an adverse inference from the claimant's refusal to take a breath test because she was asked to undertake the test outside her core working day and the respondent's policy and, in those circumstances, the respondent's policy provided that an adverse inference would not be drawn. The claimant's position was spelled out clearly in her grounds of claim. The claimant maintained that position throughout the hearing. If it was the respondent's case that that the policy meant something other than that which was contended for by the claimant it had every opportunity to lead evidence on the matter and/or make submissions to that effect. Furthermore, it is wrong to say the respondent's witnesses were not questioned about the policy: they were. Indeed, the claimant's representative specifically put it to Mr Finlay that it was inappropriate to draw an adverse inference given that the claimant was outside her core working hours. Mr Finlay did not suggest that his understanding of the policy was that it was open to him to draw an adverse inference even if the claimant was outside her core hours. Nor was he taken back to that issue on re-examination. In any event, given that the respondent must have known what the claimant's case, it was for the respondent to lead any evidence it considered relevant. If the respondents' witnesses had anything relevant to say on the matter that should have been contained in their witness statements.

8. As an aside, I add that, in any event, it is difficult to see how the respondent could successfully argue that the construction of the policy it now contends for is one that any reasonable employer could have reached. The respondent seems to suggest that the statements that staff will not be required to remain at their place of work beyond their core working day to facilitate a test and that no inference will be drawn from a failure to have a breath test if a test is not able to be completed before the end of an employee's core working day do not qualify or moderate the provision that an adverse inference can be drawn from a refusal to undertake a breath test but instead simply make the point that an inference will not be drawn where an employee is willing to take a test but such a test could not be facilitated before the end of the core working day. It is difficult to envisage any circumstances in which it would be appropriate for an employer to draw an adverse inference from the fact that an employee has not undergone a breath test in circumstances other than the employee refusing to undergo a test (whether that takes the form of a refusal to take a test in working hours or a refusal to stay at work beyond core hours to take a test). However, nothing turns on this as my reasons for saying there is no reasonable prospect of the original decision being varied or revoked on that basis summarised at paragraph 6 a-c above are those set out in the previous paragraph.

9. The respondent also says 'the evidence was overwhelming that the C refused the test at around 10.40am.' Although the respondent does not explain the significance of this, the suggestion appears to be that this was during the claimant's core working day. As noted above, however, on the evidence I made a finding that the only reasonable conclusions open to a reasonable

employer were that, when asked to undergo a breathalyser test (and, by extension, when she refused to undertake the test), the claimant's core working day had ended notwithstanding that she had not left the site and had returned to the premises when directed, and that she remained outside her core working day notwithstanding that she had initially agreed to undertake a breath test and had subsequently asked for her time off in lieu to be reinstated.

10. Finally, the respondent says 'In any event, as the specific finding was that DF acted outside the band of reasonable responses by merely making an adverse inference from a failure to take a test, because it was contrary to the R's own policy, we respectfully suggest that such a finding is in need of review or reconsideration.' This amounts to nothing more than a bald assertion that the respondent does not agree with the conclusion that, in all the circumstances, the respondent acted unreasonably in treating the claimant's alleged misconduct as sufficient reason for dismissing the claimant.

11. For the reasons set out above, I consider there is no reasonable prospect of the original decision being varied or revoked. It follows that I must refuse the application.

Employment Judge Aspden

Date____23 July 2021_____