EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107972/2021 (P)

Held on 14 October 2021

Employment Judge Campbell

Mr G Petrie	**Claimant** **Represented by** **Ms Rhona Patterson**
Starrs Contracting Limited	**Respondent** **Represented by** **Mr Robin Falconer,** **Solicitor**

JUDGMENT ON RECONSIDERATION

Following the claimant's application dated 7 September 2021 seeking reconsideration of the tribunal's judgment dated 24 August 2021:

1. Employment Judge Campbell has decided that the application should succeed in part; and

2. The judgment shall therefore be amended as follows:

    a. Paragraph 40 should now read as follows:

    '40. On the conclusion of the meeting it was agreed that the claimant would go home until matters had been progressed

further. He was paid in full for the days he remained at home.'; and

b. Paragraph 44 should now read as follows:

'44. Mr Starrs brought the call to an end. The call lasted around five minutes.'

REASONS

Background

1. The claimant raised a complaint of constructive unfair dismissal after resigning from employment with the respondent on 8 January 2021. A hearing took place on 27 to 29 July and 9 August 2021 by CVP. He was represented by Ms Rhona Patterson, his wife. The respondent was represented by Mr Robin Falconer, solicitor.

2. A written judgment with reasons dated 24 August 2021 (the **'Judgment'**) was issued to the parties. The claim was refused.

3. Ms Patterson submitted an email application for reconsideration of the Judgment to the employment tribunal on 7 September 2021. This has been treated as an application validly made under rule 71 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

4. The substance of the application was contained in a document attached to Ms Patterson's email titled **'Tribunal Judgment Response / Request for Reconsideration'** (the **'Application'**). It is three pages long. She set out two main grounds for seeking reconsideration, although each is divided into a number of further points. Those are dealt with below.

5. I decided that it was in the interests of justice to reconsider the Judgment to a limited extent.

6. As required by rule 72(1) a notice was sent to the parties asking for the respondent's response to the Application and seeking both parties' views on whether the Application could be determined without a hearing.

7. Mr Falconer for the respondent submitted a note outlining the respondent's position in relation to the Application. This is titled **'Respondents Response to Claimant Request for Reconsideration'** and is nine pages long (the **'Response'**). In brief, the Application was contested save for one discrete aspect, dealt with in more detail below.

8. Both parties were content for the Application to be dealt with on the basis of their written submissions and without a further hearing.

Substantive decision

9. The specific grounds for reconsideration and the respondent's reply to them are discussed in sequence below. I have taken into account the contents of the Application and the Response.

Ground 1

10. The claimant's first ground for seeking reconsideration relates to a conversation which took place between the parties, also attended by Ms Patterson, on 6 November 2020. Ms Patterson covertly recorded the conversation and a transcript of it was included in the tribunal joint bundle. The conversation was referred to by the parties at certain points in their evidence.

11. In the Judgment I found that the conversation was a protected communication within the scope of section 111A of the Employment Rights Act 1996, and that neither party had acted improperly so as to justify removal of the confidentiality which would apply to it. I therefore decided that, whilst it was appropriate to consider details of the conversation in order to decide if either party had acted improperly, having reached the view that they had not, the conversation should not form part of the evidence considered in deciding the claim.

12. The claimant's submission on why the Judgment in relation to these findings should be reconsidered were, in summary:

12.1. The conversation was never labelled as a protected conversation by the respondent at the time it was held;

12.2. Both parties considered the transcript of the conversation to be admissible as evidence, and referred to it in their evidence;

12.3. The tribunal was not asked to determine the status of the conversation;

12.4. The purpose of the meeting was to discuss the allegations against the claimant (i.e. that he had damaged an item of plant belonging to the respondent's main client) and only at the end of the meeting was there discussion of 'making any payment' (in return for the claimant agreeing to leave the respondent's employment); and

12.5. No settlement offer was made or discussed at this meeting.

13. In the final paragraphs of the Application, after grounds 1 and 2 are set out, Ms Patterson also argues that the respondent made threats towards the claimant during the conversation. She contends that the respondent insinuated that the claimant would be dismissed after a disciplinary process if he did not leave by mutual consent. She says that this was improper behaviour on the respondent's part and should lead to any confidentiality being removed.

14. I do not agree that the Judgment should be reconsidered on any of the submissions put forward under ground 1. It is not necessary for an employer to explain to an employee that a conversation they are about to have is protected under section 111A, even though it will usually be good practice to do so. There is no requirement under section 111A that an employer do so. The test of whether a conversation is protected is that it involves 'pre-termination negotiations' as defined in subsection (2) of section 111A. Those are:

> *'any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.'*

It is possible that one or even both parties have a protected conversation without knowing it at the time. Provided that it takes the form of pre-termination negotiations then the protection will still apply.

15. The definition of pre-termination negotiations explicitly covers discussions held with a view to termination of employment even if no offer is made in detail. That is a practical necessity as an employer will often wish to explore the option in principle with an employee before going to the effort of preparing specific termination terms. The whole nature of the conversation on 6 November 2020 was a discussion of options to deal with a difficult situation created by the respondent's client complaining about the claimant. One of those options was the claimant agreeing to leave his role by consent rather than the initiation of a disciplinary process, which was being considered by the respondent as the default option. It was not practically possible to divide the conversation into protected and non-protected parts.

16. Therefore I do not accept that the conversation should be treated as admissible because the respondent did not explain to the claimant it was protected, or because no detailed offer was made. Similarly I do not accept that only part of the conversation was protected.

17. Whilst it is true that both parties appeared content for the transcript to be considered as part of the evidence in the hearing, and referred to aspects of it in their evidence, that does not detract from the point that an employment tribunal is not permitted – whether the parties would wish it or not – to take into account the content of a protected conversation if the definition within section 111A(2) is satisfied and none of the permitted exceptions apply – see ***Faithorn Farrell Timms LLP v Bailey UKEAT/0025/16***.

18. This point also applies to the claimant's argument that the tribunal was not explicitly requested to rule on whether the conversation was protected – there is duty on the tribunal to conform with the terms of section 111A regardless.

19. Finally, on consideration of the content of the conversation on 6 November 2020 I did not reach a conclusion that the respondent had made threats to the claimant to the extent that it acted improperly and confidentiality in the conversation should be removed. My view on that is unchanged now. Mr Starrs, representing the respondent at the meeting, referred to one of the courses of action as a disciplinary process and raises the possibility of dismissal – e.g. *'…wi' what's*

happened wi' Willie Donald there's enough there its enough that you could be actually be fired.' [p52 of the hearing bundle]. Ms Patterson sought and obtained the confirmation of Mr Starrs that the options were essentially to go through a disciplinary process or resign [p53, lines 3-6]. When she asked if there is enough evidence to dismiss the claimant Mr Starrs replied *'no, there is stuff comin' in for him to go doon the disciplinary route…'* [p53]. These exchanges are illustrative of the discussion as a whole, which boiled down to two alternatives. The first was the operation of a disciplinary process but Mr Starrs did not go so far as to say that the claimant would necessarily be dismissed, even when invited to do so. He was entitled to make the claimant aware that he would need to take some form of disciplinary action in response to the complaint from the client if things stayed as they were. His understanding of the situation as reported to him by the client justified his intention to follow such a process. As such he stopped short of improper conduct.

20. Furthermore, and as I found in the Judgment, by the end of the meeting Mr Starrs agreed that he would seek to make available to the claimant a payment which would be equivalent to his redundancy entitlement, or at least based on that, were he to agree to resign [p59]. This was in addition to a positive reference which he had already agreed he would provide. This is the position the parties reached before the meeting ended. Thus, I remain of the view that had there been any instance of Mr Starrs presenting choices to the claimant in a different and less reasonable way at an earlier point in the discussion – and I did not find that there was - it was at least clear by the end what the options were, which were reasonable enough not to amount to impropriety and which both parties understood and agreed on.

21. I therefore do not consider it to be in the interests of justice to alter the Judgment with respect to the treatment of the parties' conversation on 6 November 2020.

Ground 2

22. This ground of the Application raises alleged 'inaccuracies and omissions in the recording of the evidence'. Ms Patterson recognises that it is not the role of the

tribunal to record all of the evidence, but suggests that some important evidence has not been considered or given adequate weight.

Issue (a)

23. My finding on page 7, line 27 of the Judgment as follows is challenged:

> *'…and neither understood or expected that William Donald would have any significant or ongoing opposition to the claimant working on their sites.'*

24. This finding is in the context of an early meeting the claimant had with Mr Starrs of the respondent. It took place on 31 October 2020 and so before the more detailed protected conversation of 6 November 2020. Neither of them knew at the time the full details of the allegation made against the claimant or the degree of seriousness being attached to the claimant's alleged conduct by the client.

25. I do not agree that the finding was made in error. It reflected the evidence of both the claimant and Mr Starrs, which was that at that early stage both expected the issue to be resolved or simply dissipate quickly, so that the claimant could go back to working on the client's site from which he had been sent home. Although it came to light the following week that the client was treating the matter more seriously, neither party expected that at the time of the meeting referred to.

Issue (b)

26. The following passage at page 8, line 5 in the Judgment is referred to:

> *'Mr Starrs asked the claimant to take a couple of days of paid leave while he spoke to Mr Brown about the claimant being allowed to return to the Inverness site. He still expected to be able to smooth things over.'*

27. This finding is based on the evidence of Mr Starrs given orally at the tribunal and I do not agree it was made in error. The claimant agrees he was asked to take holidays to allow Mr Starrs to deal with the situation of his being sent home from the client's site. This was because Mr Starrs had no other work for the claimant to do at that time. The challenges to my findings are that (i) the claimant believed Mr Starrs was going to try to find him work elsewhere rather than get agreement for him to return to the same site, and (ii) Mr Starrs never told the claimant at the time he was hoping to smooth things over with the client.

28. As regards (i), this is what Mr Starrs said in evidence was his intention, whatever he may have told the claimant at the time, and I accepted it as unchallenged. In any event, it makes no difference to any issue in the claim whether the claimant's understanding or my finding correctly reflects what Mr Starrs was trying to do.

29. In relation to (ii), again this was the evidence of Mr Starrs which I accepted. If he did not say so to the claimant at the time then that does not detract from the fact.

30. Additionally the findings at page 8, line 15 are referred to:

'The claimant was content to go along with Mr Starrs' request and went home, expecting to hear further about the situation by the middle of the following week.'

31. The point made is that the claimant was not waiting to hear about 'the situation' but to await information on a new hire. Again I see this as a semantic point. My reference to 'the situation' was in relation to the whole situation of the claimant not being able to work at the Slackbuie site and that needing to be resolved or other work therefore needing to be found for him. As such it incorporates the claimant's point to the extent relevant and necessary.

Issue (c)

32. The claimant takes issue with the findings at page 11, line 28:

'On the conclusion of the meeting it was agreed that the claimant would go back home and take two days of paid leave.'

33. The meeting in question was that on 6 November 2020. The claimant's point is that he was not asked to take paid leave when waiting at home on this occasion, and I have confused what was agreed at this time with the arrangement agreed following the earlier meeting of 31 October 2020.

34. This is the only aspect of the Application which the respondent agrees to in its Response.

35. What is clear and uncontested by way of the evidence is that the claimant was asked to go home while the matter progressed, and that he received his full rate of pay while doing so.

36. I accept that it may not have been expressly agreed between the claimant and Mr Starrs that the claimant would be on holiday during that time. I therefore agree that paragraph 41 of the Judgment should read as follows:

'40. On the conclusion of the meeting it was agreed that the claimant would go home until matters had been progressed further. He was paid in full for the days he remained at home.'

37. I do not however agree with the claimant that this was the misreporting of a crucial piece of evidence, or that it 'makes a fundamental change to the facts or how they affect the decision.' They have no material bearing on the issues in the unfair dismissal claim and the claimant was not, for example, making a separate complaint in respect of deduction from wages or accrued holiday pay.

Issue (d)

38. The claimant refers to findings at page 12, which are said to omit a critical matter, namely that when telephoning the claimant, Mr Starrs wished to know if he had decided to leave or go down the disciplinary route. I recognised that was the essence of the question asked by Mr Starrs in making my findings at lines 3 to 5:

'Mr Starrs telephoned the claimant at home on Tuesday 10 November 2020. He asked if the claimant had decided what he was going to do. This was a reference to the meeting the Friday before.'

39. I consciously omitted further details as to do so would have disclosed the content of the protected conversation of 6 November 2020. For the reasons given in the Judgment and in response to ground 1 above, I consider that it is inappropriate for me to provide further details of the telephone conversation as the claimant has requested.

Issue (e)

40. The claimant takes issue with the findings on page 12, line 11 where they say that:

'44. Mr Starrs concluded by saying he would be back in touch with the claimant. The call lasted around five minutes.'

41. It is the first sentence which is disputed. In the Response, Mr Falconer remarks that he had no note of Mr Starrs agreeing to be back in touch with the claimant.

42. I am prepared to agree to revision of paragraph 44 of the Judgment so that it will read as follows:

'44. Mr Starrs brought the call to an end. The call lasted around five minutes.'

43. What remains is that Mr Starrs telephoned the claimant back around 20 minutes later with an offer of work, as narrated in paragraph 45 of the Judgment. This variation has no material effect on the issues that required to be decided in the claim.

Issue (f)

44. Reference is made to the findings on page 13, paragraph 47 which are said to be a misinterpretation of the evidence as it was given. The claimant again seeks to bring into consideration the protected conversation and the transcript when it is not permissible to do so.

45. The findings made on page 13 of the Judgment are my record of how both parties viewed the position reached in the ongoing situation, and what their preferences and priorities were for the way forward. They were based on the evidence provided.

46. It is suggested that I should not have made a finding that Mr Starrs was trying to protect the claimant from the full extent of the criticism being made of him by the client. That finding is consistent with the evidence which was heard and I see no reason to change it. It is not explained by the claimant why a different finding would have made any difference to the issues in his claim, and I cannot see how that would be the case.

47. I do not agree that it is in the interests of justice to vary any aspect of these findings.

Issue (g)

48. The claimant next refers to paragraph 94 on page 23 of the Judgment. This is part of my consideration of the reasons for the claimant resigning. It is simply a repeated appeal to refer to the protected conversation and related transcript, which for the reasons above I cannot do.

49. In any event there was sufficient evidence outside of that conversation on which to reach my conclusions.

50. I do not therefore consider it to be in the interests of justice to amend the Judgment in this respect.

Issue (h)

51. Finally the claimant raises paragraph 99 on page 24 of the Judgment. This is part of my discussion of whether the claimant resigned sufficiently promptly in response to a fundamental breach of contract, in the event that such breach had occurred. I had already found for reasons set out in paragraphs 90 to 97 that no such breach took place.

52. It is said that I have ignored that the claimant was making efforts to reach agreement with the respondent over the termination of his employment over the period being considered, and that when this was not possible he submitted his resignation at the earliest opportunity.

53. On the contrary I carefully considered that a dialogue was going on between the parties for at least part of what I saw to be the relevant period, namely 30 October 2020 until the resignation date of 8 January 2021. I explained that the closest the respondent came to breaching mutual trust and confidence, the term relied upon by the claimant, was between 30 October and 10 November 2020. On the latter date Mr Starrs made it clear to the claimant that he was able to give priority to bringing the claimant back to work rather than mutually agreed termination of employment, and on that same day Ms Patterson emailed him alleging that in doing so the respondent had *'moved the goal posts'* and its conduct would

support a constructive unfair dismissal claim. This was the same issue which caused the claimant ultimately to resign, two months later.

54. I next considered what the parties said and did for a time after that, recognising that there could be further events which had a bearing on when such a claim should be presented to the employment tribunal. Mr Starrs did not again offer termination with a termination package. He no longer saw that as necessary. He reinforced this in the email correspondence between the parties on 17 to 29 November (dealt with at paragraph 57 of the Judgment). He made it clear that he wished the claimant to get well again and return to work, and that although there was still a disciplinary case to deal with, the result was likely to be a warning.

55. I also noted of relevance that the claimant was acting through a solicitor from 2 December 2020 at the latest, over a month before he resigned. Should it have been required, it is expected that he would have been advised of all the requirements of making a claim of constructive unfair dismissal at that point.

56. Although it is correct and potentially relevant that the claimant was hoping to revive the possibility of a termination with compensation, he could not keep open the option to resign and claim constructive unfair dismissal indefinitely. This is in effect what he argues he should have been able to do by attempting to continue a conversation when it was clear by the end of November 2020 at the latest that it was one the respondent no longer wished to have.

57. I considered that I was entitled to reach my conclusion on the facts found and that I have explained sufficiently why I did so. I am not persuaded that the interests of justice require me to change this aspect of the Judgment.

Employment Judge	**Judge B Campbell**
Date	**14 October 2021**
Date sent to parties	**14 October 2021**