



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106889/2020

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Held in Glasgow by CVP on 11 January 2022 with parties written representations dated 13 January 2022 and 8 February 2022; private deliberations in chambers in 25 March 2022

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Employment Judge: Rory McPherson

Mrs D Richardson-Webb

Claimant  
Represented by:  
A Stobart -  
Counsel  
[Instructed by:  
C Maclean -  
Solicitor]

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The Royal Conservatoire  
of Scotland

Respondent  
Represented by:  
G Mitchell –  
Solicitor

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### JUDGMENT FOLLOWING RECONSIDERATION

25 The decision of the Employment Tribunal in respect of the claimant's application for reconsideration is as follows –

(i) The Reasons section of the Judgment dated (the "Judgment") is varied as follows –

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1. **Paragraph 19** is varied for clarity by inserting after "appended to the" the phrase "introduction and findings element of the report"; and
2. **Paragraph 20** is varied by clarity by inserting after "*In this report*", the phrase "the introduction element of which referenced the meeting process set out at paragraph 19 above, and accurately set out that 'Agreed notes of these meetings are appended to this report,'" and

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3. **Paragraph 20** is further varied for clarity, by adding at the end, the sentence; “Those anonymised agreed notes of meetings with two students and two members of staff formed part of that report. Those agreed notes formed the investigation carried out by Mr Smith, and the header to each described that in attendance (beyond the redated names) and the academic registrar, was Mr Smith, and started with Mr Smith thanking (initials of interviewee) for coming and explained that he had requested (name redacted) attending at the investigatory meeting to discuss the alleged behaviours of a staff member.” and
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4. **Paragraph 92** is further varied for clarity by adding after “*corroborating evidence*” the phrase “, being the anonymised agreed notes of meetings, appended to and forming part of the report of Monday 11 March described at paragraph 20 above, as an enclosure with the 12 June 2020 letter set out above at paragraph 69 and listed therein as Investigation Report”; and
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5. **Paragraph 205** is varied for clarity by deletion of final sentence and the insertion of “She had anonymised agreed notes of meetings with two students and two members of staff appended to and forming part of the report of Monday 11 March, as set out at paragraph 19 above.”; and
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6. **Paragraph 215.1** is varied for clarity by deletion of the phrase “*anonymised statements from the two students and the claimant’s response, together with Mr Smith’s conclusion*” and inserting the phrase “anonymised agreed notes of meetings with two students appended to Mr Smith’s conclusions and the claimant’s response.”; and
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7. **Paragraph 216.1** is varied for clarity by deletion of the phrase “*anonymised statements from two students*” and inserting the phrase “anonymised agreed notes of meetings with two students appended to Mr Smith’s conclusions and the claimant’s response.”; and

8. **Paragraph 217.1** is varied for clarity by deletion of the phrase “*anonymised statements from two students*” and inserting the phrase “anonymised agreed notes of meetings with two students appended to Mr Smith’s conclusions and the claimant’s response.”; and
- 5 9. **Paragraphs 218.1 and 219.1** are varied for clarity, by deletion of the phrase “*the anonymised statements from two students*” and inserting the phrase “anonymised agreed notes of meetings with two students appended to Mr Smith’s conclusions and the claimant’s response.”; and
- (ii) While the Tribunal has varied the Reasons for its original Judgment, it being  
10 in the interests of justice to do so, that Judgment is confirmed, without variation, and the claimant’s claim for unfair dismissal, is unaffected, as that claim did not succeed, and that Judgment is confirmed.
- (iii) The respondent’s application for expenses is refused.

### REASONS

- 15 1. Following a hearing which took place on **23, 24, 25 and 30 March 2021** the Employment Tribunal handed down the Judgment dated **24 May 2021** and sent to the parties **25 May 2021** in terms of which the complaint of unfair dismissal did not succeed.
2. On **7 June 2021**, the claimant’s representative applied for reconsideration of  
20 the Judgment, it set out that

25 *In the judgment EJ McPherson finds at paragraph 205 that Dr Fitch "had written statements from two students and members of staff." We attach copies of notes taken during the cross examination of Dr Fitch ... According to the first set of notes Dr Fitch accepted during cross-examination that "she didn't look at any of evidence behind the investigations, only the report – a completed investigation with an outcome that was stated" According to the second set of notes Dr Fitch accepted during cross examination that "She was looking at a completed investigation with an outcome that was stated – she didn't consider any of the documents from the original report."*

5           *The claimant believes that it is necessary for the judgment to be revoked and taken again. The conclusion reached by EJ McPherson (at paragraphs 246-247) was that it was reasonable for Dr Fitch to conclude that the claimant's actions in relation to a number of allegations were so serious to*

10           *amount to gross misconduct and that Dr Fitch was entitled to conclude that dismissal was appropriate. EJ McPherson finds that at the stage when the respondent formed its belief it had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. That conclusion was reached on the basis of erroneous facts. EJ McPherson*

15           *had found that Dr Fitch "had written statements from two students and members of staff" when she had accepted during cross examination that she only had Mr Smith's investigation report and outcome but, not the underlying statements upon which the decision was based. The respondent did not have reasonable grounds for its belief as it had not carried out as much investigation into the matter as was reasonable in all the circumstances."*

3.     The claimant's application for reconsideration was submitted timeously in terms of **Rule 71** of the Employment Tribunal Rules of Procedure 2013 (the 2013 Rules).
- 20    4.     The application was referred to the Employment Judge who decided that it should not be refused on the basis there was no reasonable prospect of the original decision being varied or revoked. No provisional view was expressed on the application.
- 25    5.     The Tribunal invited parties' views on whether the application could be determined without a Hearing and confirmed that any response to the application should be copied to the other parties. Parties were advised that should reconsideration take place without a hearing they would be given an opportunity to provide written representations.
- 30    6.     The respondent set out its views on the reconsideration in August 2021 setting out that there was no issue with the Tribunal's finding, the documents were

those at pages as 149 to 164 of the joint bundle, being the notes of meeting between Alan Smith and two members of staff in March 2019.

7. Representatives for both respondents intimated that they were agreeable to the appointment of a hearing.
- 5 8. Having considered parties' respective positions, the Tribunal concluded that it was in the interests of justice, to appoint a public Hearing, to consider the claimant's application. The Hearing took place on **11 January 2022**.
9. On **11 January 2022**, at the Reconsideration Hearing a Bundle was provided.
10. For the claimant, it was argued that what was sought was a variation to the Findings in Fact and in short that Dr Fitch while had papers, Dr Fitch had simply looked at the outcome of the Smith report and thus it could not be said that she formed her own view. That would be mean subsequent conclusions set out at **paragraphs 215, 216, 217, 219 and 236** should not stand and those should be varied to the effect that the Tribunal was not be satisfied that the respondent had reasonable grounds to sustain its belief.  
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11. For the claimant criticism was also levelled at what was described as a scripted letter, which is understood to be a reference **Dr Fitch's July 2020 Outcome** Letter set out from **paragraphs 130 to 138** of the judgment.  
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12. For the respondent, it was argued that any confusion arose due to the phrasing referencing Mr Smith's Investigation Report and outcome and the separate "*underlying statements*" which the respondent had never sought to argue Dr Fitch had had or considered.  
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13. In the course of the Hearing the respondent argued that the claimant representative had substantively departed from the arguments in the **7 June 2021** reconsideration application, and subsequent to the Hearing argued that the respondent representative's typed note issued **13 January 2022** should be accepted as supplementary submissions.  
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14. For the respondent, in its written response, it is argued that "*there was no specific suggestion*" that Dr Fitch did not have what, on reconsideration above

the Tribunal varies, for clarity, as the anonymised agreed notes of meetings with two students and two members of staff appended to the conclusion element of the Smith report.

15. In response to the respondent typed note, for the claimant it was described that the Tribunal appeared to have anticipated the claimant's arguments advanced on 11 January 2022 based on the 7 June application, and the 13 January 2022 application was opposed. Further for the claimant, it was argued that if the Tribunal allowed the lodging of such supplement submissions, the claimant should be permitted to respond.
16. On **21 January 2022** the Tribunal, having regard to the overriding objective permitted the respondent supplementary submission and directed that the claimant would have 14 days (until 4 February 2022), and if a greater period was required the claimant representative should set out its position by 28 January 2022.
17. Subsequently the Tribunal granted a request by the claimant representative to extend the time for responding to **8 February 2022**.
18. On **8 February 2022** response for the claimant was provided to the respondent's supplement submission within the extended time for doing so.
19. In response, for the claimant it is argued, in summary, at paragraph 13 that there was no evidence before the Tribunal that Dr Fitch had the anonymised agreed notes of meetings with two students and two members of staff appended to the Smith report and further that, if she did that, she did not adequately interrogate the conclusions in the Smith Report.
20. This judgment sets out the Tribunal conclusions in relation to reconsideration.

## 25 **Tribunal Rules**

21. **Rule 70** of the 2013 Rules, sets out the principles to be applied when dealing with an application for reconsideration –

22. *“A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision (“the original decision”) may be confirmed, varied or revoked. If it is revoked it may be taken again.”*

### Grounds for the application

23. The application alleges errors of fact in respect of the relevant paragraph and the Tribunal sought to revisit same, during its reconsideration, clarifying matters by variation for clarity.

24. However, Tribunal on reconsideration remains satisfied that the claimant’s claim of unfair dismissal does not succeed.

### Tribunal’s consideration

25. The Tribunal reminded itself of the terms of paragraph **33** of the claimant’s submission which included a description that *“In cross examination, she accepted that she did not see any of the statements in the original case nor did she investigate the matter following the submission made by the claimant, she relied wholly on the findings of AS. She discounted the concerns of HH”* and paragraph **50** of the claimant’s submission, which describes, so far as relevant to the issues here that *“The difficulty, in this case, is that Dr Fitch did no investigation. She relied on the belief of Alan Smith...”*, and further paragraph 56 of the claimant submission, which described that the respondent (Dr Fitch in essence) *“relied on a flawed investigation undertaken by AS”* which had been criticised by Prof Hodgart. That criticism, the Tribunal sets out at paragraph 34 of the Judgment. However, what is described as the flawed investigation, was that exercise carried out by Mr Smith which created the **agreed notes of meetings** including of two students contained at **page 149 to page 161** (16 pages) of the bundle for the Full hearing.

26. As set out, at paragraph **205** of the judgment, the Tribunal did not accept that Dr Fitch was required to personally interview all individuals advancing

complaints, noting the claimant, in her March 2019 response to Mr Smith identified that a number of complaints were not in the UK.

27. As set out at **paragraph 212** of the judgment, it was not suggested that it was open to Dr Fitch to simply adopt the conclusions of Mr Smith without consideration of the material before her. That material included the anonymised agreed notes which were appended to the Smith Report and formed, so far as relevant the investigation element of the Report.
28. In her evidence Dr Fitch described that she evaluated the evidence that she had. That evidence included the totality of the Smith Report issued 11 March 2019. The report starts at **page 165**, that report sets out "*Agreed notes of each of those meetings are appended to this report*".
29. While placed, earlier in the bundle for the full hearing, due to the chronological construction of the Bundle, the appended **agreed notes of meetings**, were created by the investigation process adopted Mr Smith. That was his investigation that resulted in his issue of the conclusion element of his report to which his investigation process was appended as agreed notes.
30. The appended agreed notes of meetings including of two students were contained at **page149** to **page161** (16 pages) of the bundle for the Full hearing and which were described as appended to the conclusion element of his report (which itself was just over 2 pages incorporating brief summary findings) were in the documentation which Dr Fitch had.
31. Those agreed notes of meetings formed the investigation by Mr Smith which the claimant submissions described as flawed and which the respondent was criticised for relying upon in the claimant submissions.
32. Each of those notes of meetings were headed identifying that in attendance (beyond the redated names) and the academic registrar was Mr Smith. The Note for each occasion commenced Mr Smith "*began by thanking*" initials of interviewee "*for coming and explained that*" he "*had requested*" name redacted "*attending at the investigatory meeting to discuss the alleged*



*behaviours of a staff member...".* It was his investigation, rather than the earlier statements, that Dr Fitch referred to.

33. Handwritten notes were provided, for the claimant to which the Tribunal was directed in the bundle for this hearing, narrated that Dr Fitch admitted that she didn't go back to that original investigation "(the 103 pages)". The significance of that reference is the Smith report did not contain 103 pages of documentation. It was not in dispute in the hearing that those 103 pages of original statements, did not form part of the documentation available to Dr Fitch.
- 10 34. For the claimant representative typed notes set out that Dr Fitch didn't look at any of the evidence behind the investigations, only the report- a completed report with an outcome that was stated. That completed report expressly incorporated the agreed notes. Those typed notes continue that, in relation to page 460 of the original bundle (being the part of Dr Fitch's outcome letter addressing allegation set out at 219 of the Tribunal judgment), it was noted has having been it put to Dr Fitch that this had not been investigated fully and notes Dr Fitch as responding that she had that independent review report. That criticism was understood to have been directed to the absence of further investigation and the independent review report being the totality of the Smith report. That was a reference to the review carried out by Mr Smith.
- 15 35. As the claimant notes described Dr Fitch admitted that she did not go back to the original statements.
- 20 36. Dr Fitch had been taken being those appended **agreed notes of meetings** in cross with Dr Fitch being challenged on the use of the phrase "*vaguely remember*", (in relation to which as set out in **paragraph 218** the Tribunal set out that it did not accept that the respondent had reasonable grounds to sustain a belief in relation to the relevant allegations).
- 25 37. It was not, suggested when she was taken to the agreed **notes of meetings** that she had not, in any event, read them. Dr Fitch in re-examination was taken to **p157** and **160** of the bundle for the original hearing, in the context of the cross on the language used in those agreed notes of meetings.
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38. Dr Fitch described that she had evaluated what she had in front of her, including describing that she went through the documents forensically. What was appended to the Mr Smith's conclusions were those 16 pages of **agreed notes of meetings**, although they were erroneously separated in the Joint Bundle for the Full Hearing appearing from **page 146 to 161**.
39. As above the reconsideration expressly set out, as above that it was "*accepted during cross examination that **she only had Mr Smith's investigation report and outcome but, not the underlying statements upon which the decision was based.***"
40. It is argued, now, that she did not consider those appended **agreed notes** which formed the investigation report by Mr Smith.
41. The Tribunal agrees, that in response to it being put to Dr Fitch that *but you didn't look at the statements* (while she was directed to the top of page 518 of the bundle for the full Hearing, being that part of her outcome letter where she narrated the first allegation, and not directed to the 2 1/2 pages of Smith conclusions nor the agreed notes expressly described as appended), Dr Fitch responded that she had the Smith report, the complaint was upheld by Mr Smith, that Mr Smith had conducted a proper investigation, which she contrasted with the approach taken with Prof Hodgart (in respect of whose view Tribunal's Findings in Fact so far as relevant are set out at **paragraph 34** of the judgment). That investigation and assessment by Mr Smith included the agreed notes appended to, and expressly referred to in the wording of the conclusion element of the Smith report.
42. That is to say Dr Fitch, as the claimant set out in the reconsideration application, only had Mr Smith's investigation report and outcome but, not the (103 pages) of underlying statements.
43. The Tribunal reminds itself that, as set out at **paragraph 12** of the judgment, Mr Smith on 6 February 2019, invited the claimant to an Investigation meeting, the purpose of which was to "*discuss statements submitted by 10 student complaints in relation to alleged breach of the respondent Dignity at Work and Study Policy.*"

44. It was never suggested that Dr Fitch had the **statements** submitted by the 10 students.

45. At **paragraph 19** of the judgment, the Tribunal sets out some aspect of the procedure adopted by Mr Smith and sets out that “*Mr Smith... met the two students and two staff members separately. Notes of the meeting were created and agreed noted of same were **appended** to the Report of Monday 11 March issued to the claimant*” with allegations and student responses narrated within the subparagraphs 1 to 3. It is, thus, correct that Dr Fitch did not go back to the *original statements*. Those “*original statements*” were the trigger for Mr Smith’s actions as set out at paragraph 19 of the judgment.

46. At **paragraph 20** of the judgment, the Tribunal sets out its findings that Mr Smith produced a Report and sets out conclusions.

47. When Dr Fitch was directed, in cross to her letter of 1 July 2020 (at page 512 of the bundle), in relation to the first allegation (set out at **paragraph 215** of the judgment) it was put to Dr Fitch, that she did not look at statements, to which she responded that she had the Smith report (which upheld that allegation), setting out that Mr Smith had carried out a proper investigation, that was a reference to the totality of the Smith report including, what Dr Fitch regarded as a proper investigation being the agreed notes.

## 20 **Conclusion**

48. The natural meaning of “statement” was the original statements, and the understandable criticism that Dr Fitch had not gone to the 103 pages (as the claimant notation intimates was understood) of statements, which predate the process adopted by Mr Smith, rather than what are expressly described within the report “*agreed notes of meetings*” which were appended. That the bundle, as it sought to place matters in chronological order, artificially and erroneously, separated the agreed notes created before the conclusion element of the Smith report is not regarded as material.

49. The Tribunal remains satisfied that the Smith report included the appended anonymised agreed notes of meetings with two students. It did not have any statements. Dr Fitch had been not provided with the statements which led to the process of the anonymised agreed notes of meetings with two students and two members of staff appended to the Smith report.
50. In relation to the allegations at paragraphs **215, 216, 217** and **219** as set out Dr Fitch had the anonymised statements from the two students which were appended to the Smith report however they are more properly described as *“anonymised agreed meeting notes with the students”*.
51. The Tribunal remains satisfied, having regard to the totality of evidence including that Dr Fitch’s understanding of “statement” were those statements created before the Smith report including the attached anonymised agreed meeting notes, that her reference to the Smith report included what she regarded, and referenced, as Mr Smith’s proper investigation specifically the attached anonymised agreed meeting notes.
52. The Tribunal, however, is satisfied that it is in interests of justice to vary its Findings for clarity as set out above.

### Expenses

53. The respondent confirms its application for expenses in its Further Submission on the basis that the reconsideration application has been pursued unreasonably and without any reasonable prospect of success. That application is opposed.
54. As the reference is to expenses, I proceed on the basis that the application is by reference to **Rule 76 (1)** of the 2013 Rules (expenses or preparation time Order).
55. The Tribunal recognises that consideration of expenses is fact dependent and is a fact-sensitive exercise. The Tribunal has applied the 3-stage test, firstly asking whether the precondition for making an expenses Order has been established, secondly, the Tribunal considers whether to exercise its discretion to make such an award, that whether it would be appropriate to

make such an Order, and thirdly (if it is appropriate) to assess the quantum of that award.

56. In the exercise of the discretion broadly, the Tribunal noted that it is generally recognised by Tribunals that for conduct to be regarded as “*vexatious*”, there must be evidence of some spite or desire to harass the other side, or the existence of some other improper motive.

### **Expenses application**

### **Discussion and Decision**

57. The Tribunal has fully considered the terms of the respondent’s written submissions, however, considers that in light of the variation set out above it cannot be said that the application was improper or unreasonable, nor that the application caused the opposing party any unnecessary costs. This was a complex fact sensitive case, and one in which on reconsideration the Tribunal has varied the judgment for clarification. It is not considered in all the circumstances that the precondition is met for making any Order for expenses for the whole or any of the costs associated with the reconsideration application. It is not necessary in the circumstances to consider whether to exercise its discretion to make such an award. Had the Tribunal required to exercise its discretion, in light of the variation it would not do so in all the circumstances.

### **Conclusions**

58. While the Tribunal has varied the Reasons for its original Judgment, it being in the interests of justice to do so, that Judgment is confirmed, without variation, the claimant claim of unfair dismissal, is unaffected, as that claim did not succeed, and that Judgment is confirmed.

59. The respondent's application for expenses is refused.

5      **Employment Judge:      R McPherson**  
      **Date of Judgment:     25 March 2022**  
      **Entered in register:    06 April 2022**  
      **and copied to parties**

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