



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100215/2022

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Held in Chambers on 19 July 2022

Employment Judge L Doherty

10 **Ms Yvonne Welsh**

**Claimant
By Written
Submissions**

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South Lanarkshire Council

**Respondent
By Written
Submissions**

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DECISION OF THE TRIBUNAL

The Tribunal, having reconsidered its decision under Rule 72 (2) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules),
25 confirms its original decision.

NOTE

1. The respondents made an application for reconsideration of the Tribunal's decision dated 30 May 2022 which found the claimant's dismissal to be unfair.
2. The application is made under Rule 70 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules). The
30 Tribunal was satisfied that there was an error in its reasons which meant that the application for reconsideration should not be refused on the grounds that the application had no reasonable prospects if success, and that the Tribunal should reconsider its judgement in light of the error which the reconsideration
35 application highlighted.

3. The parties agreed that a hearing was not required and the Tribunal was satisfied that a hearing was not required in the interests of Justice having regard to Rule 72 (2) of the Rules.

4. Both parties provided written representations.

5 The Application

5. The application is made on the basis that the Tribunal's decision requires to be revoked in the interests of justice, on the basis that the Tribunal did not take into account that the dismissing officer upheld ground 1 of the charges levelled against the claimant at the disciplinary hearing in reaching her
10 decision to dismiss her.

6. It is submitted that the Tribunal erred in terms of its finding in fact narrated at paragraph 43 on page 8, where she stated that "*Ms. McCrea did not find grounds 1 and 2 to be upheld. She upheld grounds 3, 4, 5 and 6*".

7. It was pointed out that Ms. McCrea upheld ground 1, as well as grounds 3,
15 4, 5 and 6, and reference was made to page 184 of the evidence bundle where, under the heading 'Summary of Grounds 1 and 2', in the second paragraph, Ms McCrea stated the following:

*"In terms of Grounds 1, these allegations have been found, you have been charged with assaulting a service user on 2nd November 2020. This is an
20 extremely serious charge and if convicted may prevent you from carrying out your duties as a Residential Social Care Worker. "*

8. The respondents point out that decision was reiterated in the letter sent to the Claimant by the Respondent dated 23 August 2021 . This sets out explicitly that 5 of the 6 grounds were found as reasons for the dismissal for gross
25 misconduct, especially:

"1. On 2nd December 2020, you were charged with assaulting a service user on 2nd November'.

9. It is submitted that the Tribunal's error is repeated on a number of occasions with the judgement referring to the dismissing officer having upheld 4 charges,

as opposed to 5 and a repetition of the dismissing officer not having upheld charge 1, which is incorrect.

10. It is also submitted that at paragraph 86 of the Reasons again reference is made to Ms McCrea not having upheld charge 1, when she did, in fact, do so.
- 5 It is also submitted that in paragraph it is stated that the respondents did not "(have) reasonable grounds upon which to conclude that something significant had occurred which contributed to gross misconduct on the part of the Claimant".
11. It is submitted that the failure by the Tribunal to correctly relate the grounds which had been found upheld, goes to the question of whether there were reasonable grounds to dismiss or not, and which the Respondents submit that the Tribunal should reconsider its decision in the light of the correct facts.
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12. It is also submitted that at paragraph 93 of the judgement, reference is again made to charges 3, 5 and 6 when considering whether the dismissal was within the band of reasonable responses for misconduct in terms of those charges. It is submitted that, if the correct finding in terms of charge 1 is added into that consideration, the Tribunal might have reached an alternative conclusion.
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Consideration

- 20 13. Rule 70/72 provides:

70. *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.*

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71. *Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties)-within-1~4-days-of-the-date-on-which-the-written-record;- or other written communication, of the original decision was sent to the*

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parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

72.—

5 (1) *An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and*
10 *refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined*
15 *without a hearing. The notice may set out the Judge's provisional views on the application.*

(2) *If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response*
20 *to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.*

14. As recorded in paragraph 37 of its Reasons, the Tribunal found that the
25 Claimant faced disciplinary charges in the following terms:

“1. On 2 December 2020 charged with assaulting a service user 2 November 2020.

2. You inappropriately restrained a young person (PM) when positioned on the floor of 2 November 2020.

3. *You failed to notify the SSSC that you have been charged with a criminal offence.*
 4. *You've you have been issued with Temporary Suspension Order from SSSC which is resulted in you not being able to fulfil your duties from*
5 *17 February 2021.*
 5. *Your actions are in breach of South Lanarkshire Councils Code of Conduct, section 18, three and five.*
 6. *Your actions are in breach of Social Work, Resources Code of conduct, sections A1, A3. A6.C11, C2 C3 D1."*
- 10 15. At paragraph 43 the Tribunal erroneously found that of the 6 grounds in the disciplinary letter invite, Ms McCrea did not find grounds 1 and 2 to be upheld and that she upheld grounds 3,4,5 and 6.
16. The Tribunal was satisfied that there is an error in its reasons, in that it failed to record that the dismissing officer did in fact uphold what was labelled as a
15 separate charge 1 in addition to charges 3,4, and 5. That meant that the Tribunal has failed to record in its reasons that the dismissing officer specifically found that the claimant had been charged with assaulting a service user.
17. The Tribunal however found that the dismissing officer upheld the charge of
20 the claimant having failed to report that she had been criminally charged to the SSSC.
18. That meant that albeit the Tribunal erred in that it failed to record that charge
25 1 had been upheld, it did find that the respondents concluded that claimant had been criminally charged with assaulting a service user but failed to report that to the SSSC, and that this was a factor which was taken into account by Ms McCrea the dismissing officer in her decision making. This is demonstrated in that at paragraph 43 of the Findings in Fact the Tribunal sets out the reasons given by Ms McCrea which include the following (emphases added):

Therefore, in coming to my decision I have taken into account everything that was presented by you and your Trade Union and although I have not found on allegation 2 **1 cannot ignore the fact that you have been charged with assaulting a young person** and as a result you have received a temporary suspension of your SSSC registration. This suspension prevents you from carrying out your contractual obligations of your employment until at least February 2022 and at which point there is no guarantee that your registration will be reinstated. This prevents the organization being able to provide you with alternative duties indefinitely.

By being charged with assaulting a young person and not notifying the SSSC breaches Social Work Resources Code of Conduct Section A1 Interests of Service Users, Section A3 Honesty, Section A6 Competence, Section C2 Taking professional responsibility and Section D, Personal Standards upholding professional integrity.

In addition, I cannot ignore the reputational damage of South Lanarkshire Council that a charge of this nature could incur.

Your actions have also breached South Lanarkshire's Council's Code of Conduct section 2 Code of Good Governance and Section 3 Employee Conduct.

Your position as a Residential Worker has a unique position of trust within the Council and towards the highly vulnerable young people that you are charged with caring for and by breaching the above Codes of Conduct that trust has been breached.

Therefore, I have found the above allegations to amount to gross misconduct and therefore you will be dismissed from your post effectively immediately."

19. At paragraphs 80 of its Consideration, the Tribunal record that the claimant had been charged by the police. Albeit the reasons erroneously do not reflect that Ms McCrea upheld the separate charge 1 that the claimant had been charged by the police, they again did reflect that the respondents upheld the

charge that the claimant had been charged by the police and had failed to report that to the SSSC.

20. Paragraph 80 states:

5 *"80. The Tribunal was satisfied Mr McCrea genuinely believed the claimant was guilty of matters which underpinned the 4 charges she found upheld, based on the fact that the claimant was charged by the police and did not report that to the SSSC, and was subjected to a TSO. The Tribunal was also satisfied that she genuinely believed that these matters related to the conduct of the claimant, which is a potentially*
10 *fair reason for dismissal. "*

21. This demonstrates that in its Consideration albeit the Tribunal erred in failing to record that charge 1 had been upheld, it did have regard to the fact that the respondents concluded that the claimant had been charged by the police with assaulting a service user (charge 1) in reaching their decision to dismiss her,
15 and this was a factor taken into account by the respondents.

22. The Tribunal then considered the effect of its failure to accurately record that charge 1 had been upheld at paragraph 86 of its Consideration . Paragraph 86 of the Reasons states;

4 *Applying the objective test of the reasonable employer, in reaching the*
20 *decision to dismiss it was unreasonable to take into account an unspecified 'something significant' which the claimant had not been charged with and had no notice of. The claimant had not been charged with failure to record the matter in the Daily Recording sheet. Ms McCrea, not having upheld charges 1 and 2, has no reasonable*
25 *grounds upon which to conclude that something significant had occurred which contributed to gross misconduct on the part of the claimant.*

Although this paragraph is inaccurate in that it starts that charge 1 had not been upheld by Ms McCrea, as indicated above the Tribunal have taken into
30 account that that the Ms McCrea had concluded that the claimant had been

charged with assaulting a service user. Further in any event there was no basis upon which the respondents could reasonably conclude that 'something significant' had happened in circumstances where Ms McCrea had not upheld charge 2 .that the claimant had assaulted a service user. This was the case even although, even although she upheld the indisputable charge 1, (that the claimant was charged by the police with assaulting a service user). The fact that the claimant was criminally charged by the Police is a matter out with the control of the claimant; objectively the fact that she was charged with assaulting a service user could not reasonably give rise to the conclusion that something significant had occurred, where Ms McCrea had not upheld the charge that the claimant had assaulted the service user. Therefore had the Tribunal correctly reflected that charge 1 had been upheld, applying the objective test of the reasonable employer, this would not have had the effect of causing the Tribunal to conclude that the decision to dismiss was one which fell within the band of reasonable responses.

23. Furthermore, in its Consideration the Tribunal took into account the respondent's submission as to the conduct for which the claimant was dismissed, and the cumulative nature of this.

24. At paragraph 90 of its Consideration the Tribunal found that;

20 "6. *The respondents have been clear that the charges are cumulative in nature, and that one does charge does not attach more weight than another. Applying the reasoning in Tayeh it is fatal to the fairness of the dismissal if any significant charge had been taken into account without reasonable grounds. The respondents did not have reasonable grounds upon which to conclude that claimant's being subjected to a TSO amounted to misconduct on her part.*

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30 7. *The Tribunal also found that the respondents did not have reasonable grounds to conclude that breaches of the Resource Code and the Code of Conduct were separate and equal charges of misconduct, which resulted in the Claimant facing two counts of equally serious misconduct for the same offence (paragraph 91 of the Consideration).*

The Tribunal therefore concluded at paragraph 92 of its Consideration that dismissal for the cumulative reasons relied upon by the Respondents therefore fell out of the band of reasonable responses .

25. As submitted by Ms Ismail, applying the logic in *Tayeh v Barchester Healthcare Limited 2013 EWCA Civ 29* the decision to dismiss is rendered
5 unfair if any significant charge is taken into account without reasonable grounds. Logically therefore the Tribunal would have arrived at the same decision even if its reasons had correctly recorded that charge 1 was upheld.
26. For these reasons, having reconsidered its decision the Tribunal was not
io satisfied that it was in the interests of justice that the original decision should be varied or revoked, and the original decision is confirmed.

15 **Employment Judge: L Doherty**
Date of Judgment: 21 July 2022
Entered in register: 26 July 2022
and copied to parties

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