EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105124/2022

Hearing on application for reconsideration on written submissions, considered by the Tribunal on 7 August 2023

Employment Judge A Kemp
Tribunal Member I Ashraf
Tribunal Member F Parr

Mr M Harvie	**Claimant** **Represented by:** **Mr G Robinson,** **Lay Representative**
Scottish Ambulance Service Board	**Respondent** **Represented by:** **Mr G Fletcher,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that each of the parties' applications for reconsideration is refused.

REASONS

Introduction

1. A Judgment in this case was issued on 14 June 2023 ("the Judgment"). It was sent to the parties on 15 June 2023.

2. On 20 June 2023 the claimant's representative wrote to the Tribunal to raise the issue of re-instatement. The Tribunal replied on 22 June 2023 to state that that was taken as an application for reconsideration, and set out the Tribunal's reasons for that in more detail.

3. On 28 June 2023 the respondent's solicitor wrote to the Tribunal to seek reconsideration. It set out detailed arguments for doing so.

4. The parties were asked for their views as to whether the applications should be addressed at a hearing or by written submissions under the terms of Rule 72, and both confirmed that they wished the matters raised to be dealt with by written submissions. Those written submissions were provided on 31 July 2023, and the Tribunal considered them thereafter.

The claimant's submission

5. The following is a very basic summary of the claimant's written submission, the full extent of which the Tribunal considered. On the issue of remedy it was only right that the claimant be re-instated or re-engaged in light of the Tribunal's findings. There was no submission on why the claimant had not sought those remedies in the Schedule of Loss or his evidence. There was a separate submission rejecting the arguments for the respondent in its reconsideration application.

The respondent's submission

6. The following is again a very basic summary of the written submission for the respondent the full extent of which was considered. The Judgment was an error of law. The Tribunal had substituted its decision for that of the respondent. Experience of dealing with drunk people was ignored, and training more recently than a decade ago was not necessary. The evidence had not been considered in the round, both on the merits and in relation to mitigation. The evidence had not been appropriately considered. Inferences should have been drawn from the arrest and charge of the claimant. Matters have been addressed with hindsight, and after the decision to dismiss was made. The findings for breach of the 2010 Act were made inappropriately and without sufficient evidence. The submission also responded to the application by the claimant. Reliance

was placed on the authorities of ***Small***, cited in the Judgment, in respect of the respondent's application and ***Paul v East Surrey District Health Authority [1995] IRLR 305*** in respect of the response to the claimant's application***.***

The Law

7. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 set out the Rules of Procedure in Schedule 1, and those in relation to the reconsideration of judgments are at Rules 70 – 73. The provisions I consider relevant for the present application are as follows:

> **"70 Principles**
>
> 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.
>
> **71 Application**
>
> 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 14 days of the date on which the written record, or other written communication, of the original decision was sent to the 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 Process**
>
> (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 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 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 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.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part."

8. The power in the Rule is to be exercised having regard to the overriding objective in Rule 2. It states as follows:

"**2 Overriding objective**

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

9. In ***Serco Ltd v Wells [2016] ICR 768***, the EAT observed that the Rules of Procedure must be taken to have been drafted in accordance with the principles of finality, certainty and the integrity of judicial orders and decisions.

10. In ***Liddington v 2Gether NHS Trust EAT/0002/16*** the extent to which reconsideration was appropriate was addressed by the EAT which stated that "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."

11. Remedies for a successful claim of unfair dismissal are addressed in sections 112 – 126 of the 1996 Act. In the event of a finding of unfair dismissal, the tribunal requires to consider whether to make an order for re-instatement under section 113 of the Employment Rights Act 1996, and then if not whether to make an order for re-engagement. What falls within a re-instatement order is set out in section 114 and within a re-engagement order in section 115. There is a discretion to exercise on whether or not to grant such orders addressed under section 116 as follows:

> "(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—

(a) whether the complainant wishes to be reinstated,

(b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

(2) If the tribunal decides not to make an order for re-instatement it shall then consider whether to make an order for re-engagement and if so on what terms.

(3) In so doing the tribunal shall take into account –

(a) any wish expressed by the complainant……

(b) whether it is practicable for the employer…. to comply with an order for re-engagement and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms….."

12. In ***Rao v Civil Aviation Authority [1992] IRLR 203*** the EAT gave the following summary:

"We extract from these cases the following principles.

(a) Orders for reinstatement or re-engagement under section [113] are primary remedies for unfair dismissal.

(b) Such orders are discretionary: see section [112 and 113 (a) and (b)].

(c) The only fetter on that wide discretion is that a tribunal must "take into account" the considerations set out respectively in section 116(1) and (3)].

(d) In both subsections the word "practicable", is used. It is not "possible"; it is not "capable"."

13. In the context of (b) above 'practicable' means "capable of being carried into effect with success" ***Coleman v Magnet Joinery Ltd [1975] ICR 46***. When considering practicability, either for re-instatement or re-engagement, issues as to whether trust and confidence have broken down; whether the employer genuinely, albeit unreasonably, believed in

the claimant's guilt; and whether the relationship has so soured to make it impracticable, may be amongst those that are relevant. It is the Tribunal which makes the assessment of practicability at first instance. This will include, for example, an assessment of whether the employer's view that trust and confidence has broken down is real and rational. It is the employer's view of trust and confidence which is material in this context ***United Lincolnshire Hospitals NHS Foundations Trust v Farren UKEAT/0198/16,*** subject to scrutiny by the Tribunal. The employer's view is not determinative, as illustrated in ***London Borough of Hammersmith & Fulham v Keable [2022] IRLR 4.*** The principle in ***Farren*** was approved by the Court of Appeal in ***Kelly v PGA European Tour [2021] IRLR 575.***

14. The issue of contribution to dismissal was addressed in ***British Airways PLC v Valencia [2014] IRLR 683.***

Discussion

(i) Claimant's application

15. The claimant did not include re-instatement or re-engagement in the remedy sought in the Schedule of Loss, although the case management order sought details of remedy. The list of issues prepared by the claimant did not include that in relation to remedy, nor was it raised when the issues were raised by the Judge. No evidence on that aspect was given by the claimant, nor was it raised in submission. Nevertheless, as the Tribunal's message of 22 June 2023 sets out, section 112(2) of the Employment Rights Act 1996 requires a Tribunal to explain the issues of re-instatement and re-engagement to a claimant in the event that the claim of unfair dismissal succeeds and that was not done at the Final Hearing. On that basis, the Tribunal considered it appropriate to address that issue, and do so on the basis that the claimant seeks re-instatement, or re-engagement.

16. There is no right to re-instatement or re-engagement, it is a matter for the discretion of the Tribunal. Section 116 of the 1996 Act sets out three factors that are to be considered. The first is the wish of the claimant, which is referred to above. Whilst the claimant did not state it at the Final Hearing, it is now his position. The second is the matter of practicability.

On that, we had the evidence of the respondent of their views of the actions of the claimant. Whilst we have made our findings on them set out in the Judgment, we did not doubt that those views were entirely genuinely held by the respondent. There was no evidence given directly on the point of re-instatement or re-engagement but that was because the claimant had not included it in the Schedule of Loss or list of issues, such that there was no evidence on it from either party. In those circumstances we consider that the Tribunal requires to make its assessment on the evidence it did hear from the respondent. The Tribunal had the evidence from the respondent on its views on the reasonableness of its decision to dismiss and it is a clear inference from that evidence that the respondent would not trust the claimant were an order for re-instatement or re-engagement to be made. That is we consider a factor against exercising discretion to make an award of re-instatement or re-engagement.

17. The third factor is whether the claimant caused or contributed to his dismissal, and if so whether it is just to order re-instatement or re-engagement. In that regard, we held that the claimant had contributed to his dismissal. The Judgment set out the details of our findings in that regard. We considered having regard to those findings as to his contribution that it would not be just to order re-instatement or re-engagement. That assessment of the position was, we considered, strongly supported by the separate matter of the other finding which affected the level of contribution in relation to the claimant having initially intimated an appeal, and then withdrawn that. We consider that when exercising the discretion of whether or not to make the order the claimant now seeks that his failure to pursue the appeal, even on written submission only as we referred to in the Judgment, was a factor that told against making such an order. The combination of the failure to appeal and that of the contribution to dismissal reduced to a material extent the awards of compensation that we made.

18. In light of all of the circumstances we decided that it was not appropriate to reconsider the Judgment in regard to remedy, and specifically that it was not appropriate in the exercise of our discretion to order re-instatement or re-engagement. The claimant's application is therefore refused.

(ii) Respondent's application

19. The respondent argued firstly that the Tribunal had substituted its decision for that of the respondent. We do not agree with that submission. The respondent argued secondly and thirdly that the focus was solely on the moment of the strike on the member of the public by the claimant, not his entire conduct. The disciplinary allegation was however of assault. The respondent chose that allegation. But in any event the circumstances as a whole were considered, and the Judgment states specifically that the aspects for which any reasonable employer could criticise the claimant's actions could not be held by any reasonable employer to be sufficient to amount to gross misconduct.

20. The fourth point is that the claimant had substantial experience in dealing with drunk persons but that is not, in our view, the point. The point was the circumstance that took place in the incident referred to. The claimant was not in the disciplinary allegation said to have failed to deal with the situation as expected, or apply de-escalation techniques or something similar. As the authorities referred to in the Judgment make clear, in our view, the allegation made against the employee by the employer is one basis of fairness.

21. The fifth point is an allegation that claiming self-defence is not applying the right test. It is not clear to us what point the application seeks to make. Simply making a claim of self-defence is not the issue. The issue is that of the extent of the band of reasonable responses to the question of whether or not the claimant's conduct amounted to gross misconduct, and was an assault. We addressed that in the Judgment.

22. The sixth point is an allegation that the member of the public having not touched the claimant before the strike was a point which had been lost in the Judgment. It was not.

23. The seventh point is what is said to be a focus on the actions of Mr Cormack, particularly in paragraph 138. That paragraph simply commented on his evidence.

24. The eighth point is in relation to mitigation, but the Tribunal does not understand the point that it seeks to make. Mitigation in our view extended beyond the matter of length of service, and included (if there could be a view held by a reasonable employer that the claimant's actions amounted to gross misconduct) that he had been materially provoked, as referred to in the Judgment.

25. The ninth point is in relation to comments of the security staff, which were hearsay evidence given by the claimant, but that was relevant evidence which we accepted, and had not seriously been challenged in cross examination.

26. The tenth point is about the failure to delay the disciplinary hearing to obtain CCTV footage, but that is not with the benefit of hindsight, it is what the claimant's solicitor sought to happen in an email to the respondent.

27. The eleventh point is an allegation of matters being considered on the issue of fairness which arose after the decision, on which we consider, following the lettering used by the claimant that

> A The matters are addressed in the Judgment.
> B The evidence of what had been said in court was hearsay evidence given by the claimant, not challenged in cross examination. We accepted the claimant's evidence on that point.
> C Having accepted that the Procurator Fiscal did make the remark in court about having seen the CCTV evidence, we considered that that was indeed very powerful evidence. That arises from the role of the Procurator Fiscal. This paragraph is however in the context of the breach of contract claim, not that of unfair dismissal. It is not therefore an issue of the band of reasonable responses but what had or had not occurred on the balance of probability.
> D The extent to which the claimant contributed to the dismissal is a matter which we addressed in the Judgment. We do not accept that the evidence referred to at C had no evidential weight.

28. The twelfth point is in relation to the discrimination claim. Evidence as to disadvantage was referred to at paragraph 17 of the Judgment. The

claimant was not represented at the disciplinary hearing, as the application for his solicitor to do so was refused by the respondent.

29. The thirteenth and final point notes the terms of paragraphs 185 and 198. The former is in relation to what is, in our view, a reasonable adjustment. The latter is in relation to what the impact of that adjustment would have been. The sentence following that quoted refers to the loss already having been compensated in the claims for breach of contract and unfair dismissal, such that no additional pecuniary loss arose.

30. The Tribunal does not consider that any of the arguments for the respondent should be accepted as grounds for reconsideration. They are either said to be points of law, which are relevant to an appeal, or the kind of argument referred to in ***Liddington*** as being not appropriate for reconsideration. The Tribunal refuses the application.

Conclusion

31. The application for reconsideration by each party is refused. The Tribunal decision is unanimous.

Employment Judge: A Kemp
Date of Judgment: 16 August 2023
Date Sent to Parties: 17 August 2023