



EMPLOYMENT TRIBUNALS

Claimant: Elizabeth Chand

Respondent: EE Limited

JUDGMENT ON AN APPLICATION FOR RECONSIDERATION

1. The claim for unfair dismissal is not well founded and is dismissed.
2. The claim for wrongful dismissal is not well founded and is dismissed.
3. The application for reconsideration of the above is not well founded and is dismissed.

Employment Judge Codd
04.01.2024

REASONS

Introduction

1. The claimant asserted that she had been unfairly and wrongfully dismissed by the respondent. The application came before me for a substantive hearing on the 2nd and 3rd of October 2023. I reserved my decision and issued a written decision on the 2nd of November 2023. I dismissed the claims for unfair and wrongful dismissal, as they were not well founded.
2. By application dated 10th of November 2023 the claimant invites me to reconsider my determination.

The applicable law

3. Rule 70 Employment Tribunals Rules of Procedure states that:

‘A Tribunal may ... 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.

4. Under Rule 71 the application must be made within 14 days after the date the decision has been sent to the parties and must set out why reconsideration is necessary.
5. Rule 72 Employment Tribunals Rules of Procedure states that:

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.

6. The only ground for granting a reconsideration of a judgment is ‘where it is necessary in the interests of justice to do so’.
7. The reasons it might be in the interest of justice to reconsider a judgment can include where (a) the decision was wrongly made as a result of an administrative error; (b) a party did not receive notice of the proceedings leading to the decision; (c) the decision was made in the absence of a party and (d) new evidence had become available since the conclusion of the

hearing which could not have been reasonably known of or foreseen at that time (**Outasight VB Ltd v Brown** 2015 ICR D11, EAT).

8. There is a long-established principle that there should be finality in litigation. The general rule is that Employment Tribunal decisions should not be reopened and relitigated.
9. An application for reconsideration is not a method by which a disappointed party to proceedings can re-argue the case all over again. **Stevenson v Golden Wonder Ltd** 1977 IRLR 474 is an EAT case which gave guidance about reviewing decisions which remain relevant to applications for reconsideration. The guidance is that rules on review were 'not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before'.
10. In summary, reconsiderations are exceptions to the principle of finality and can only be granted where to do so is necessary in the interests of justice.

Reconsideration application

11. The claimant's application set out the various findings from my original Judgment, which she sought me to reconsider. I have set out the full application below together with my analysis of each element of the application. The excerpts from my Judgment dated the 2nd of November 2023 appear in Italics.

Judgment Paragraph 66

"66. However, it is useful to the extent that it shows that the claimant is initially dealing with a single customer, who over time acquires a gradually expanding male entourage, amounting to a total of 7 individuals, who are crowded around the claimant, including viewing her screen. It does not require me to see the motion CCTV to accept that this could be an intimidating environment for the claimant."

Reconsideration Argument

"I appreciate your reason for this matter and I believe that if motion CCTV was available; it would show the immense pressure and intimidation that these individuals had placed upon me. I had ultimately stressed this, in conversation with Ella and during my suspension meeting with Miss Perry."

Analysis

12. It is not clear what the claimant seeks to be reconsidered in respect of this aspect of her case. Whilst motion CCTV was not within the hearing file, my finding supported the claimant's contention that this was an intimidating situation. No application was made in the proceedings to adduce the motion CCTV and I consider that this would have been available at the time, if the claimant had sought to adduce the same.

Judgment Paragraph 69

“69. However, the claimant started her evidence by stating that ‘customer G’ approached her stating that he had been recommended to speak to her. This in and of itself should have struck the claimant as unusual, in my view.

Reconsideration Argument

I appreciate your viewpoint for this matter, however working in a retail environment for 16 years, and being recommended by other colleagues is not unusual and therefore common practice. I too have, on many occasions recommended other colleagues when required.”

Analysis

13. I based this finding on the understanding from the evidence that ‘customer G’ had approached the claimant, without speaking to any other staff in store. However, even if this is not the case, and the claimant is right that it is routine for customers to say they have been recommended by a colleague, it does not alter the substance of my other findings in relation to this transaction as a whole. My finding in respect of this issue was a minor constituent part to the overall context of the transaction.

Judgment Paragraph 77

“77. When I asked the claimant to explain how; having completed the first transaction, the circumstances then arose where customer G requested a second sale, and why she processed this afresh, instead of accessing the first BAN, the claimant could not provide an explanation.

Reconsideration Argument

In conversation with Ella and meetings with Miss Perry, Mr Palmer and yourself, I mentioned that the customer wanted a second phone, and the immense pressure and intimidation they all gave accompanied with the stresses from my home life, caused me to do something that was out of character, and therefore I created another ban, which I have never done before.”

Analysis

14. My finding in this regard was related to the absence of an explanation of how the context of the second transaction came about. This is a request for me to reconsider my factual analysis, based on a restatement of the claimant’s position. I have already determined and made findings in respect of this and the narrative of the claimant was lacking and inadequate. It is not open to me to reconsider a matter that amounts to a restatement of matters already determined.

Judgment Paragraph 81

“81. Based upon all the evidence before me, I can entirely see why he upheld the findings that the policy had been breached, and the mitigation was an inadequate explanation. I find that the claimant had committed an egregious breach of the customer connections policy. I find her explanation inadequate. However, I stop short of finding that this was a deliberate fraud. Everything I have seen in the claimant’s presentation and evidence suggests an individual suffering from acute stress and shame as to the situation she has found herself in. My assessment is that she has blocked out the events of that day, and she is not yet ready to discuss the true circumstances. Without such an explanation, the findings that Mr Palmer arrived at in respect of this allegation, were in my view entirely reasonable, based reasonably upon the evidence before him. In my finding this allegation alone was (in and of itself) sufficient to find gross misconduct had been committed.”

Reconsideration Argument

I appreciated you reason for this matter, however Ella was already aware of this allegation prior to my suspension and disciplinary meeting. Ella observed for herself, how the overcrowding of these individuals can make someone feel pressured and intimidated. Ella then told me to take time off, due to my poor decision making, accompanied with my home and work life stresses. Ella merely saw this as a mistake, rather than gross misconduct.

During my suspension meeting with Miss Perry, I was surprised that this allegation was mentioned, as this has already been dealt with by Ella, and therefore was added in error. When Miss Perry asked me about the allegation, I had told her that Ella was aware of the allegation, and told me to take time off for my poor decision making. Miss Perry then swiftly moved onto the other allegations presented before her, without putting any more weight, onto the one already discussed with Ella.”

I appreciate Mr Palmer, like Miss Perry was presented with all the allegations; however Mr Palmer failed to read my suspension notes clearly, which stated Ella was already aware of this allegation, and therefore bringing this up in my disciplinary meeting, is procedurally unfair. Mr Palmer as a disciplinary manager should have spoken to Ella in regards this allegation, before making his decision. Mr Palmer also failed to acknowledge a mere mistake to be gross misconduct, and therefore used this as one of the allegations for my dismissal.

If Mr Palmer failed to speak to Ella, then Mr Matthewman as an appeal manager should have acknowledged this vital error, and therefore spoken to Ella. However he also failed to do so, whilst interviewing those involved.

I believe that this allegation also falls outside the band of reasonable responses, as Ella was fully aware of this allegation; however Mr Palmer simply decided to dismiss, rather than sanction a warning followed by retraining, for a long service

employee, with an unblemished disciplinary record. I therefore feel my case for unfair and wrongful dismissal should be overturned, regarding these reasons.

Analysis

15. At paragraphs 74 and 75 of my Judgment I specifically addressed the role which Ella had played in the process, and the lack of any evidence from her. I found at paragraph 75 – *“The absence of this clarifying evidence must weigh adversely against the respondent, when I consider how they formulated their decision making, and I make due allowance for this”*
16. I therefore consider that this issue was specifically addressed in my findings. I found that notwithstanding this particular deficit the evidence obtained by the respondent was sufficient to support a reasonable finding of gross misconduct. In my finding this is an attempt to re-litigate the same issues, based upon information that was before me at the original hearing. There is nothing within this information that amounts to a fresh perspective and I was aware at the original hearing of the absence of evidence from Ella.
17. I also noted at paragraph 76 that at no point had the claimant asserted that the level of intimidation from ‘customer G’ amounted to circumstances akin to a robbery in any form. I found that: *“She mentions intimidation, but at no stage has she flagged that she felt forced into the transaction by means of coercion or threat, and I find that she had immediate opportunity to do this with Ella, had this been the case.”*
18. Considering the application as a whole, I find that the elements pleaded amount to a request for me simply to alter my determination, based upon material and argument that was before me at the substantive hearing
19. For all the reasons stated above, I refuse the application for reconsideration. My decision to dismiss the claims for unfair and wrongful dismissal remains the same.

Employment Judge Codd

04.01.2024