



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss J Davidson

**Respondent:** National Express Limited

**UPON APPLICATION** made by letter dated **23 December 2023** to reconsider the judgment dated **11 December 2023** under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing and a Reserved Judgment followed.

## JUDGMENT ON RECONSIDERATION

1. The claimant's application dated 23 December 2023 numbered 1i for reconsideration of the judgment sent to the parties on 12 December 2023 is permitted and the respondent shall pay to the claimant the additional sum for the compensatory award of **£17.26 net**. The total enforceable compensatory sum to be paid by the respondent to the claimant is therefore **£2,401.46 net**.

2. The claimant's remaining applications dated 23 December 2023 numbered 1ii, 1iii, 2, 3 and 4 for reconsideration of the judgment sent to the parties on 12 December 2023 are refused.

## REASONS

3. The Full Merits Hearing for this case was heard by me on the 11, 12 and 13 October 2024. Oral Judgment was given during the hearing and remedy was awarded. Following the hearing, the claimant's representative requested written reasons. Written reasons were provided and are dated 11 December 2023. These were sent to the parties on 12 December 2023.

4. The claimant, by letter dated 23 December 2023 applied for the reconsideration of the Judgment and it is this application that is being considered today.

5. The respondent, by letter dated 1 February 2024, provided written objections to the claimant's application for reconsideration.

6. On 18 March 2024, the Tribunal wrote to the parties advising that it was considering that the claimant's application could be considered without a hearing and it invited the parties to provide their view on this.

7. On 21 March 2024, the respondent's representative wrote to the Tribunal advising that it consented to the reconsideration continuing on the papers and without a hearing on the basis that this included the respondent's response to the application as sent on 1 February 2024.
8. The claimant did not respond to the Tribunal's correspondence.
9. On 4 April 2024 a Notice of Hearing was sent to the parties which stated that it was in the interest of justice to not require a hearing and that the decision would be made in writing. It also stated that the parties would not need to attend.
10. The application for reconsideration has been made in time. The process by which the Tribunal considers this application is set out in Rule 72.
11. I have before me the following documents:
  - a. Script of the Oral Judgment.
  - b. Written Reasons dated 11 December 2023 as sent to the parties on 12 December 2023.
  - c. Application for reconsideration by the claimant dated 23 December 2023
  - d. Response to claimant's application for reconsideration dated 1 February 2023 as submitted by the respondent.
12. Additionally, the online version of the written reasons were reviewed. It is noted that the online version is not the correct version of the written reasons and so a Notice of Correction will follow. The correct version was sent to the parties on 12 December 2023 and is held on the Judicial Case Management system.

Rules regarding reconsideration

13. The claimant's application for reconsideration was made within the required timeframe.
14. Rule 72(1) requires me to consider whether there is any reasonable prospect of the original decision being varied or revoked. I need to decide whether there is any reasonable prospect of a conclusion that variation or revocation of the original decision is necessary in the interests of justice.
15. There must be some basis for reconsideration; the process is not an opportunity for a party to provide further evidence or to seek to reopen matters which the tribunal has determined without good reason.
16. I have carefully considered the claimant's application and the grounds she sets out for her application as follows.
17. In summary, this was a claim for unfair dismissal and wrongful dismissal. The circumstances of the case are as follows:
  - a. The claimant was a driver of vehicles for the respondent both around Stansted Airport and airside.
  - b. The respondent operated a strict Drug and Alcohol Policy (D&A Policy) in which it provided that drivers must take an alcohol breath test upon attending work. This policy required that drivers must have a breath alcohol limit of no more than 7mg/100ml of breath.

- c. The claimant was dismissed on 14 July 2021 for gross misconduct following her failing 3 breath tests. Over the course of these tests, her breath alcohol reduced to 8mg/100ml.
  - d. The claimant appealed against her dismissal, but this was not upheld.
18. Within my Oral Judgment and in the written reasons, the following findings were made:
- a. That the respondent operated a D&A Policy that provided for a lower breath alcohol limit than the legal breath alcohol and that it was reasonable for it to do so.
  - b. That the claimant was a professional driver required to operate within the perimeter of the airport.
  - c. That the respondent formed a genuine and honest belief in the claimant's misconduct in that she had failed 3 breath tests and that this was a reasonable belief to hold.
  - d. That the finding of unfair dismissal was due to the flawed appeal stage.
  - e. That the claimant had consumed alcohol and that it was solely her actions that led to the failure of the three breath tests.
19. I will consider each of the claimant's applications for reconsideration in turn.
1. Limiting the Claimant's compensation to the age of 65 years old:
    - (i) Claimant's incorrect date of birth:

20. I have reconsidered the written reasons and note that at para 154 the claimant's date of birth is incorrectly stated as 2 February 2025.

21. At the time of the hearing, specifically at para 195, and upon reconsideration, I find that it is just and equitable in all of the circumstances to award the claimant compensation up to her 65<sup>th</sup> birthday, and there is an error on the original judgment.

22. In correcting the error, the correct birthday is 20 February 2025

23. The calculation that is incorrect is Period 6, which starts at paragraph 195 of the written reasons.

24. This is for the period from 1 January 2025 to the correct date of 20 February 2025, which should be 7-weeks and not the 5-weeks provided for.

25. I have concluded that it is a revocation of the original decision and that it is in the interests of justice to do so.

26. This calculation will be carried out following my consideration of the whole of the claimant's application. The table for this calculation is at schedule 1 to this judgment.
    - (ii) Not awarding Claimant compensation to her 70<sup>th</sup> birthday

27. Within the written reasons the claimant's 70<sup>th</sup> birthday is included as a key date, as this was the date to which she was seeking compensation.

28. At the time of the hearing the length of time for which compensation should be awarded was considered, para 195. This was Period 6 for the compensation calculation. For this

reconsideration I have considered whether it would be just and equitable to award further compensation. I have taken into account the following:

- a. The claimant's assertion that she will need to work until her 70<sup>th</sup> birthday.
- b. The payrises that were scheduled to be awarded by the respondent.
- c. That there is no evidence of potential pay increases, whether by pay rise, promotion or change of employment.
- d. That an award has already been made for a period from dismissal in 2021 to February 2025.

29. Within my original reasons, I was unable to take into account any pay increases for Period 6, whether from the claimant's current employer or new employer at any point during the period being compensated for as no evidence was provided for this period of time. So, for the compensation period 6 and onwards, the claimant will have the benefit of the respondent's pay rises, whether or not her ongoing earnings increase or decrease.

30. I have considered the claimant's position that she will need to work until her 70<sup>th</sup> birthday and this may, or may not, prove to be the case. I am satisfied that the award already provided is for a considerable period and there are many variables that could come into play during this time.

31. I found that it was just and equitable to limit compensation to the claimant's 65<sup>th</sup> birthday in my original decision. It is accepted that the incorrect retirement age was referenced. I have taken to opportunity to review the length of the award and consider that an award for 2 ½ Years is a considerable award where account is taken for salary uplifts from the Respondent but not from the claimant's new employment. On reconsideration, I still find that it is just and equitable to limit compensation to this date.

32. I am satisfied that an award to the claimant's 65<sup>th</sup> birthday is just and equitable in all of the circumstances, which I have given above and there is no reason for me, nor is it in the interests of justice, to vary or revoke the original decision.

(iii) Incorrectly identifying the state retirement age

33. I have considered the claimant's application and the respondent's response. I accept that I made an error in the stating of the state retirement age.

34. In point 1ii of her application, the claimant gave reasons as to why the award should be extended to her 70<sup>th</sup> birthday. There are no further reasons given in this application 1iii other than I made an error as to the age.

35. The grounds relied on are matters that could make reconsideration necessary in the interests of justice. I have therefore reconsidered my decision and find that in considering the application, which includes the application to award the claimant compensation until her 70<sup>th</sup> birthday (application 1ii above), I am satisfied that an award to the claimant's 65<sup>th</sup> birthday is just and equitable in all of the circumstances, which I have given above and there is no reason for me, nor is it in the interests of justice, to vary or revoke the original decision.

2. Polkey Reduction

36. Throughout the written reasons, I have found that the claimant has acted in the manner alleged and that the respondent genuinely and honestly believed that she had done so following a reasonable investigation. It is only when considering the substantial merits of the

case and the overall fairness of the proceedings have I found fault in the respondent's conduct, in that I have found that the procedure by the respondent was flawed at the appeal stage.

37. I have found that the respondent operates a strict D&A Policy and that it is reasonable for them to do so.

38. The claimant makes reference to paragraph 11 and 146 of the written reasons and I have considered these.

39. In considering the Polkey reduction, I have taken into account the following:

- a. The appeal was unfair because the appeal officer did not keep an open mind and did not address the points of appeal.
- b. The claimant did consume alcohol leading to the positive tests.
- c. There were no exceptional circumstances to take into account.
- d. The D&A Policy operates a strict breath alcohol policy, which I have found to be reasonable.
- e. That the likely conclusion of a fair procedure would still be dismissal, but this is not a certainty.

40. Given that the appeal was flawed due to the failures by the respondent, it cannot be said that the outcome of a fair procedure would always be the claimant's dismissal.

41. However, I have found that the claimant did consume alcohol that has led to the 3 failed breath tests. I have found that the D&A Policy operated by the respondent is reasonable in all of the circumstances. I am satisfied that in stating that "*the likely conclusion of a fair procedure would still have been the claimant's dismissal, but this is not a certainty*", gives the claimant a chance that she may not have been dismissed. This is not on balance of probabilities, as she has acted as alleged and the policy is strict, but dismissal was not 100% likely either.

42. I am satisfied that a 75% reduction is just and equitable in all of the circumstances and that reasons have been given for that reduction and there is no reason for me, nor is it in the interests of justice, to vary or revoke the original decision.

### 3. Contributory conduct reduction

43. I have found that the claimant did consume alcohol that caused her to fail 3 breath tests. I have also found that she was solely responsible for these failures. (para 145).

44. I have found that the respondent operated a strict D&A policy that provided for an acceptable breath alcohol level that is lower than the legal limit and, in the circumstances given within the written reasons at para 123, I have found that this is reasonable.

45. The policy operated by the respondent has a lower acceptable breath alcohol level, this is not a zero-alcohol level. The claimant's breath alcohol readings were falling during the 35-minute test period and were at 8mg/100ml at the final test. This was still a failure.

46. I am satisfied that the claimant was solely responsible for the alcohol within her breath alcohol results. The written reasons provide that whilst the claimant failed the breath tests, the readings were just over the limit, justifying a reduction of 75% to reflect her conduct.

47. I am satisfied that a 75% reduction is just and equitable in all of the circumstances and that reasons have been given for that reduction and there is no reason for me, nor is it in the interests of justice, to vary or revoke the original decision.

4. Acas Uplift

48. I am satisfied that I have explained within the written reasons that the failings in this case are in relation to the procedure followed by the respondent, specifically the appeal.

49. The Acas uplift applies to the failure to follow the Acas Code of Practice on Disciplinary and Grievance procedures.

50. This was not a failure to comply with the Code of Practice as a whole, but only in part, i.e. the appeal. I am satisfied that a 10% uplift reflects this partial failure by the respondent, it is just and equitable in all of the circumstances and there is no reason for me, nor is it in the interests of justice, to vary or revoke the original decision.

**Judgment**

51. The claimant's application dated 23 December 2023 numbered 1i for reconsideration of the judgment sent to the parties on 12 December 2023 is permitted and the respondent shall pay to the claimant the additional sum for the compensatory award of **£17.26 net**. The total enforceable compensatory sum to be paid by the respondent to the claimant is therefore **£2,401.46 net**.

52. The claimant's remaining applications dated 23 December 2023 numbered 1ii, 1iii, 2, 3 and 4 for reconsideration of the judgment sent to the parties on 12 December 2023 are refused.

**Employment Judge C Illing**  
**Date: 16 May 2024**

