EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104002/2024

Held in Glasgow on 25 July 2024

Employment Judge P O'Donnell

Mr J Scanlan	**Claimant** **Represented by:** **Mr B Duffy - Lay Representative [Attending remotely by CVP]**
Pintplace Ltd	**First Respondent** **Represented by:** **Mr T Merck - Counsel [Instructed by Holly Blue Employment Law]**
Mr W C McIntosh	**Second Respondent** **Represented by:** **Mr T Merck - Counsel [Instructed by Holly Blue Employment Law]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:

1. The respondent's application for reconsideration is granted and the Tribunal's judgment sent to parties on 25 March 2024 awarding the claimant interim relief is revoked.

2. Within 14 days of the date this judgment is sent to parties, each party will set out their position on whether or not the Tribunal should make an award of expenses or preparation time order against the first respondent in respect of their conduct of the case as it relates to the application for interim relief.

3. Within 14 days of the date of the present hearing, the first respondent will provide to the claimant's representative a complete copy of the till receipt relied on by the respondent as evidence of the claimant's misconduct.

4. Within 14 days of the date of the present hearing, the first respondent will provide comments to the Tribunal, copied to the claimant's representative, in relation to the claimant's application for an Order for the first respondent to produce a copy of the health and safety forms which it is said the claimant and other employees had been asked to sign on or around 1 March 2024.

5. A final hearing of this case is listed to take place in person before a full Tribunal on 28-31 October 2024.

REASONS

Introduction

1. The claimant has brought a number of complaints against the respondents arising from his employment with the first respondent and its termination.

2. One of those complaints was a claim for unfair dismissal under s103A of the Employment Rights Act 1996 (ERA) and as part of that claim the claimant sought interim relief in terms of s128 ERA.

3. A hearing to determine that application was listed on 21 March 2024. None of the respondents attended that hearing. The Tribunal granted interim relief against the present first respondent (they were the second respondent at the time) by a judgment sent to parties on 25 March 2024.

4. On 29 March 2024, the first respondent applied for reconsideration of that judgment. This was opposed by the claimant. The present hearing was listed to determine the respondent's application.

Preliminary issues

5. At the outset of the hearing, the Judge explained to the claimant's representative that he had previously worked with counsel for the respondents who, at the time, had been a trainee in the firm where the Judge had been a

partner. It was explained that they had not worked together for over four years.

6. The respondent had sought to add an additional document to the bundle they had prepared for the hearing as well as adduce a video which they would rely on at any final hearing. These had been sent to the Tribunal and the claimant representative by email on the morning of the hearing; one email sent very shortly before the hearing was due to start and the other after the hearing had commenced. Mr Duffy had not received those emails and so the Tribunal did not allow the respondents to adduce these additional items at the present hearing.

Evidence

7. The Tribunal heard evidence from Gavin Boyle who is the operations manager for the first respondent as well as other companies in the same group. He gave evidence to explain why the respondents had not attended the March hearing.

8. There was a bundle of documents lodged by the respondents.

9. Given the nature of the hearing, the Tribunal did not hear evidence about the substantive issues of the claim. As with the first hearing, it took account of witness statement from the claimant, the contents of the bundle of documents as well as what both parties said in their respective pleadings.

10. In terms of submissions, Mr Merck relied on what was said in the application for reconsideration which he supplemented orally. Mr Duffy made submissions on behalf of the claimant. For the sake of brevity, the Tribunal will not set these out in detail but will address any particular issue raised in submissions in its decision below.

11. After the hearing concluded, Mr Duffy emailed the Tribunal with further submissions. The Tribunal has not taken account of these and Mr Duffy is reminded that the time and place to present any submissions (or evidence) regarding any issue is at the hearing determining that issue.

Findings in fact

12. The Tribunal made the following relevant findings in fact.

13. Mr Boyle is the operations manager for the first respondent as well as other companies within the same group. All of these companies are involved in running hospitality venues in Glasgow.

14. Three sets of correspondence from the Tribunal were received at the first respondent's address relating to the present claim. Mr Boyle could not recall the exact date but it was not in dispute that it was in advance of 21 March 2024.

15. Mr Boyle opened the correspondence addressed to the first respondent. He also opened the correspondence to another respondent (a limited company) which is no longer a party to these proceedings. He did not open the correspondence addressed to the individual respondent, Mr McIntosh.

16. Mr Boyle looked through both sets of correspondence which he opened. They appeared to him to be similar. He focussed on reading the statement from the claimant and, as he put it, "scanned" the rest of the correspondence. He did notice that Mr Duffy was named as the claimant's representative and he was familiar with Mr Duffy because he had been involved in separate Employment Tribunal proceedings brought by Mr Duffy against another company within the group.

17. Mr Boyle did not identify that a hearing to determine the application for interim relief had been listed for 21 March 2024. He does not dispute that the notice of that hearing was within the paperwork but, rather, that he missed this when looking through what had been sent.

18. After reading the paperwork Mr Boyle contacted the first respondent's legal adviser, Ms Barnett, and was asked to send her a copy of the paperwork in electronic format. Mr Boyle could not recall whether he electronically scanned all of the paperwork and believed that he may not have sent all of it.

19. The first respondent only became aware of the hearing when they received the judgment sent to parties on 25 March 2024. Mr Boyle immediately contacted the respondent's legal adviser for action to be taken in response to this judgment.

20. The application for reconsideration was lodged by email on 29 March 2024.

Relevant Law

21. The Tribunal has the power to reconsider a judgment under Rule 70 of the Tribunal Rules of Procedure. The only ground on which the Tribunal can reconsider is that it is in the interests of justice to do so.

22. The "interests of justice" test gives the Tribunal a broad but not unlimited discretion when reconsidering a decision. The Tribunal has to give regard to the principle of finality in litigation (*Newcastle Upon Tyne City Council v Marsden* [2010] ICR 743) and the power to reconsider is not there to deal with matters which should more properly be a matter of appeal (*Trimble v Supertravel Ltd* [1982] IRLR 451). The Tribunal has to approach the question of whether reconsideration is in the interests of justice by having regard to the justice to be done to both sides of the case (*Redding v EMI Leisure Ltd* EAT 262/81).

23. It was previously the case that the absence of a party was a specific ground for reconsideration and this would now be a matter which would be determined on the basis of the "interests of justice" test.

24. The case law regarding reconsideration arising from the absence of a party shows that the question is whether the party had a good and genuine reason for their absence (see, for example, *Morris v Griffiths* 1977 ICR 153, EAT and *Lewes Associates Ltd t/a Guido's Restaurant v Little* EAT 0460/08).

25. If it is the carelessness of a party that has led to their absence then this may still provide a genuine and honest reason which should be given weight by the Tribunal in considering the interests of justice (*Lawton v British Railways Board* EAT 29/80). However, a party who consciously chooses not to attend

a hearing will be expected to bear the consequences of that decision (*Fforde v Black* EAT 68/80).

26. Section 128 of the Employment Rights Act 1996 provides that a claimant can apply for interim relief if the reason or principal reason for their dismissal falls within certain provisions of the Act. For the purposes of this case, the relevant provision is s103A.

27. In order to succeed in an application for interim relief, the claimant must show that it is "likely" that the complaint of unfair dismissal will succeed. The question of what is meant by "likely" has been addressed by a number of authorities which have said that it means "a pretty good chance of success" which means more than just the balance of probabilities (*Taplin v C Shippam Ltd* [1978] IRLR 450) and that it involves a "significantly higher degree of likelihood" than more likely than not (*Ministry of Justice v Sarfraz* [2011] IRLR 562).

28. The Tribunal needs to take account of all matters that would require to be determined at the final hearing of the unfair dismissal claim although it does not require to conclusively resolve those matters before deciding on the application for interim relief (*Hancock v Ter-Berg* [2020] IRLR 97).

29. Where the main or principal reason for dismissal is that the Claimant made a protected disclosure then the dismissal will be unfair under s103A of the 1996 Act. This is one of the categories of "automatic" unfair dismissal where the reason for dismissal alone renders it unfair.

30. A "protected disclosure" is defined in s43A of the 1996 Act as being a qualifying disclosure as defined in s43B made by the worker in accordance with any of ss43C-H.

31. In order to be a qualifying disclosure, any communication must have sufficient factual content capable of tending to show one of the matters listed in s43B(1) and a mere allegation is not enough (*Kilraine v Wandsworth LBS* [2018] ICR 1850).

32. The question of how the Tribunal should approach the burden of proof in relation to the reason for dismissal in cases involving claims of automatically unfair dismissal was addressed in *Kuzel v Roche Products Ltd* [2008] IRLR 530 by Mummery, LJ:

> *"As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced led by the employee on the basis of an automatically unfair dismissal on the basis of a different reason."*

Decision

33. The Tribunal has to determine whether it would be in the interests of justice to revoke its previous decision granting the claimant interim relief. Mr Duffy made a submission that the test was whether there had been a material change of circumstances but this is not the correct test (he may have been thinking of the test for varying or revoking a case management order but that is a different matter).

34. The first issue which the Tribunal has considered in assessing what would be in the interests of justice is whether the first respondent has an explanation why they did not attend the original interim relief hearing.

35. The Tribunal is prepared to accept the evidence of Mr Boyle that he had missed the notice of that hearing when looking through the initial paperwork sent to the respondents by the Tribunal and that this was a genuine error on his part.

36. Mr Duffy sought to suggest, on behalf of the claimant, that the respondents had deliberately ignored that hearing and effectively chosen not to attend. There was no evidence whatsoever from which the Tribunal could draw such an inference.

37. Further, this theory is inherently implausible given that failing to attend the original hearing was clearly contrary to the interests of the respondent; their absence at the hearing meant that the claimant was able to present an uncontested application for interim relief that was significantly more likely, if not guaranteed, to succeed. The Tribunal can see no plausible motivation for the respondents to deliberately choose not to attend the original hearing.

38. The Tribunal does note that the application for reconsideration was made only 4 days after the interim relief judgment was sent to parties. The Tribunal considers that this shows the first respondent acting almost immediately on receipt of the judgment and certainly without any undue delay. This suggests that they would have responded with alacrity to the application for interim relief and attended the original hearing had they been aware of it.

39. This is not to say that the respondent's explanation for why they did not attend reflects well on them. A properly diligent reading of the paperwork sent by the Tribunal at the outset of the proceedings would have readily disclosed that an application for interim relief had been made and that a hearing had been listed to determine that application. The failure by Mr Boyle to ascertain this suggests a careless and somewhat lackadaisical approach. The Tribunal notes that he occupies a senior position within the group of companies of which the first respondent is a part and that dealing with paperwork (including correspondence from official bodies such as HMRC or the relevant licencing authority) must be part and parcel of his job.

40. The Tribunal does accept that Mr Boyle had a limited familiarity with the Tribunal process given that he has only been involved in one previous case (a claim brought by Mr Duffy against one of the other companies in the group). However, if anything, the Tribunal considers that a lack of familiarity would cause a reasonable person to take greater care in reading the paperwork from the Tribunal. A person who was not familiar with the Tribunal process would, in the Tribunal's view, want to ensure that they had fully understood what was going on and what they had to do to respond to the claim.

41. With all that being said, the Tribunal is of the view that there had been a genuine error on the part of the first respondent in that they had not identified the fact that there was a hearing listed to deal with the interim relief application and that this was the reason why they did not attend the previous hearing.

42. The Tribunal then turns to the question of whether the first respondent's case in respect of the interim relief application would resulted in a different outcome if that had been presented at the original hearing. It goes without saying that if the outcome would have been the same then it would not be in the interests of justice to revoke the original decision.

43. The original decision to grant interim relief had been made because the Tribunal was presented with the claimant's uncontested case as set out in his ET1 and witness statement. This information clearly set out a case of unfair dismissal under s103A ERA; the claimant alleges he made protected disclosures and was dismissed as a result. On the basis of that information, and with nothing to suggest that the claimant was dismissed for any other reason, the Tribunal concluded that the claimant had satisfied the test for interim relief.

44. The position has now changed; the respondent sets out a case that the claimant was dismissed for misconduct when they had identified from CCTV evidence and a till receipt that the claimant had given drinks to a customer without charging them.

45. Both cases are statable but neither is, on the information presented to the Tribunal, more likely to succeed than the other. The outcome of the unfair dismissal claim will depend on the view taken at the final hearing of the credibility and reliability of the evidence presented at the hearing as well as what inferences (if any) the Tribunal would be prepared to draw from the evidence.

46. This is a case which is not going to rely heavily on documentary evidence beyond the CCTV footage and the till receipt. Rather, most of the evidence will be oral evidence given by witnesses at the final hearing. Given that the Tribunal does not hear such evidence when determining an application for

interim relief and is making no findings of fact, the Tribunal can only assess the likelihood of the claimant succeeding on the basis of what is said in the ET1 and ET3 as to what each party is offering to prove. As set out above, the parties are presenting competing narratives as to why the claimant was dismissed with nothing to suggest that one narrative is more likely to win out than the other.

47. The Tribunal bears in mind when making this assessment that, given that the claimant does not have the length of service to pursue a claim of "ordinary" unfair dismissal, the burden of proof lies with him to establish the reason for his dismissal fell within s103A rather than the respondent having the burden of proving a potentially fair reason for dismissal.

48. The Tribunal should be clear that it has come to no conclusions as to the probative value of any of the evidence either side intends to present at the final hearing. Mr Duffy made submissions that the CCTV stills provided at the present hearing only show the claimant doing his job rather than any wrongdoing. This may be correct but any determination about the value of any of the evidence is a matter for the final hearing. At the present time, the Tribunal is only looking at what information is available to come to a view as to whether the claimant is likely to succeed in his unfair dismissal claim.

49. In these circumstances, the Tribunal is of the view that, had the first respondent attended the original hearing and presented their case on interim relief, it would not have concluded that the claim was "likely" to succeed given the competing versions of events and explanations for the claimant's dismissal.

50. For this reason, and taking account of the fact that the respondent had a genuine reason for not attending the original hearing, the Tribunal does consider that it is in the interests of justice to revoke its previous judgment awarding the claimant interim relief. If the original decision was left in place then the respondent would be subject to an ongoing liability to continue to pay the claimant which they would not have otherwise had.

51. The Tribunal does accept that there is a prejudice to the claimant in that he is deprived of the interim relief and, in particular, the entitlement to the continuing payment of his wages. However, that prejudice is limited given that if he is successful in his unfair dismissal claim then he will be able to recover compensation for the loss of those wages as part of the remedy for any unfair dismissal.

Expenses/Preparation time Order

52. In light of its conclusions above, the Tribunal has, of its own motion, given consideration as to whether it should make an award of expenses or a preparation time order against the first respondent in respect of their conduct of the case as it relates to the application for interim relief for the following reasons.

53. The Tribunal has the power to make an award of expenses or a preparation time order (PTO) under rule 76(1)(a) of the Tribunal Rules where it considers that a party has acted *"vexatiously, abusively, disruptively or otherwise unreasonably"* in either the bringing of the proceedings or the way that the proceedings have been conducted. The Tribunal has a duty under the Rules to consider whether to make an award of expenses or PTO but this is not automatic. Rather, the Tribunal has a discretion whether or not to actually make such an award.

54. It is quite clear that, as a result of the first respondent's actions, the claimant and his representative have been put to the additional work of preparing for and appearing at the present hearing in order to address the respondent's application for reconsideration. None of this would have been necessary if the respondent (by way of its officers) had properly read the paperwork sent by the Tribunal and so the question arises as to whether these failings are such that they amount to "unreasonable" conduct of the proceedings.

55. The Tribunal is conscious that parties must be given the opportunity to comment on this before coming to any conclusions and so parties will be given 14 days from the date this judgment is sent to them to lodge written

submissions on the issue of expenses/PTO (which should be copied to the other party by way of their representative).

56. The submissions from the claimant will require to clarify whether his representative is charging the claimant for representation as this will determine whether any award is for expenses or for a PTO. The claimant will also need to clarify either the amount of expenses or the hours spent on preparation in respect of, and only in respect of, dealing with the reconsideration application and the present hearing.

57. The Tribunal is of the view that this issue can be determined by way of written submissions rather than putting parties to the time and cost of a further hearing. However, parties are at liberty to make any submissions on whether a hearing should be listed.

Case Management

58. The Tribunal was concerned that the issue of the reconsideration application had distracted from the need to progress the claim to a final hearing and that there needed to be further case management to advance the process.

59. The claimant's representative had, as part of the correspondence which had sought a postponement of the hearing, made an application for an order for the respondents to produce certain documents:

    a. He sought the CCTV footage relied on by the respondents as demonstrating the claimant's misconduct. This had been sent by email shortly before the start of the hearing and Mr Duffy had confirmed that he had received it by the time the issues of case management were being discussed. There was, therefore, no need for any Order in respect of this item.

    b. Mr Duffy had also sought a copy of the till receipt which is also relied on by the respondents as evidence of the claimant's misconduct. This was included in the bundle for the present hearing although, as Mr Merck accepted, it was not a whole copy given that the top had been cut off. The Tribunal ordered the first respondent to provide the

claimant's representative with a whole copy of the receipt within 14 days of the date of this hearing.

c. A copy of the health and safety forms which it is said the claimant and other employees had been asked to sign on or around 1 March 2024 was also sought. The Tribunal directed that, before any decision is made on this Call, the first respondent should provide any comments within 14 days of the date of this hearing.

60. It was agreed that the case was ready to proceed to a final hearing. This will be a hearing in person before a full Tribunal and will determine both liability and remedy.

61. The Tribunal made the directions below for the preparation for the final hearing.

62. The claimant will provide, to the respondent, a preliminary Schedule of Loss within **28 days** of the date of this hearing. At the same time, the claimant will provide a preliminary Schedule of Mitigation setting out the steps he has taken to find a new job or otherwise minimise his losses.

63. A final version of both Schedules will be lodged with the Tribunal and copied to the respondent **no later than 7 days** before the final hearing.

64. The Tribunal directed that there should be a joint file of documents for the full hearing. The respondent's agent will collate and prepare this.

65. The Tribunal made the following directions for the preparation of the joint file:

a. Parties will exchange a list of the documents they wish to include in the file **within 28 days of the date of this hearing.**

b. No later than **7 days** after that exchange the respondent's representative will identify any documents on the claimant's list which they do not have in their possession.

c. No later than **7 days** after that the claimant's representative will provide to the respondent any such documents identified.

d. The final version of the file will be prepared and available to each party **no later than 28 days before the final hearing.** The version of the file available to parties can be in electronic or paper format. If the claimant's representative has a preference then he should discuss this with the respondent's agent.

e. Five copies of the final version of the file will be lodged with the Tribunal **no later than 7 days before the final hearing**. These should be provided in paper format.

66. Unless there are genuine issues with the admissibility of any particular document, neither party should seek to obstruct a particular document being included in the joint bundle. If there are issues of relevancy then these can be addressed at the final hearing in circumstances where the Tribunal has heard evidence and can judge the relevancy of any document. If there are issues of admissibility then these should be raised with the Tribunal at as early a stage as possible to allow the issue to be determined before the final hearing.

67. Parties are reminded that the Tribunal hearing the case will not read the file from cover to cover and if either party wants the Tribunal to take account of any documents then the document must be referred to by a witness in their evidence.

68. If there are any documents which parties consider they require from the other party in order to prove their case then they should seek any such documents on a voluntary basis. If a document is not provided voluntarily then parties can make an application to the Tribunal (copied to the other party) seeking an Order for production of the relevant documents. Any request for documents or application for an Order should be made well in advance of the final hearing.

69. The claimant intends to call evidence from 3 witnesses and the respondent from 2 witnesses.

70. It was agreed that 4 days would be required to hear evidence and submissions.

71. A final hearing for this case was listed at the Glasgow Employment Tribunal on 28-31 October 2024. A formal Notice of Hearing will follow.

Employment Judge:	**P O'Donnell**
Date of Judgment:	**30 July 2024**
Entered in register:	**30 July 2024**
and copied to parties	