EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105373/2023

Hearing Held on 16 February by Cloud Based Video Platform

Employment Judge Hendry

Mr M Radcliffe	**Claimant** **Represented by:** **Ms S Shiels - Solicitor**
CHC Scotia Limited	**Respondents** **Represented by:** **Ms L Usher - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondents application for reconsideration having been considered is rejected.

REASONS

1. The claimant raised unfair dismissal proceedings against his employers. He claimed unfair dismissal but the employment relationship continued. A claim for interim relief was lodged by him and heard by the Tribunal on 29 September 2023. The respondent company was not represented. The Tribunal granted the application for interim relief and a judgment was issued to parties on 19 October 2023.

2. The respondent company instructed solicitors to defend the claim. On 1 November they wrote to the Tribunal with an application for reconsideration of the judgment under Rule 71 of the Employment Tribunal Rules. A Preliminary Hearing had been arranged in relation to the case. I indicated that the reconsideration application could be discussed at the Preliminary Hearing with a view to ascertaining parties' preliminary stance as to how to proceed.

3. The claimant's solicitors wrote to the Tribunal on 16 November setting out their basis for opposing the reconsideration. In the circumstances and given that the reconsideration related to the relatively rare process of interim relief I suggested that there should be a hearing at which oral arguments in relation to the reconsideration could be heard. Accordingly, the reconsideration application was set down for a CVP digital hearing which took place on 16 February. Both parties made reference to their earlier correspondence and supplemented this with oral argument. I indicated that there was a Bundle of documents lodged for the Interim Relief hearing and whether that would be produced given that it had been referred to at the earlier hearing. Parties indicated that they were confident that the further Bundle of Documents produced was sufficient.

Reconsideration Application/Competency

4. A brief background to the claim is that the claimant suffered from serious back problems which he believed 'were caused or exacerbated by the vibrations he sustained whilst flying a particular manufacture of helicopter. He

used his mobile telephone to make a video recording of part of a flight. This is not a disputed allegation. The claimant was suspended on 24 August 2023. He was issued with a first written warning and was demoted from Captain to Co-Pilot with a corresponding decrease in pay with effect from 1 September 2023 and appealed against his disciplinary outcome. The penalty was modified after appeal in that he retained his salary as Captain from the 1 September 2023 to the 1 September 2024. But otherwise suffered a demotion in rank and status. He was required to undertake certain training requirements effectively to requalify for the Captain's role.

Interim Relief Hearing

5. The respondent company say that they did not have sight of the ET1 form or the Notice of Hearing until 2 October 2023 (after the interim relief hearing had taken place on 29 September). I explained that the ET1 and Notice was addressed to the respondent at CMC House, Howe Moss Drive, Kirkhill Industrial Estate, Aberdeen, AB21 0GL. The respondent's employees were based at CHC House until July 2023. In July 2023 all employees were moved to the North Hangar Building, Hutton Road, Aberdeen, a short distance from CHC House. It is a different postal address.

6. The respondent's agents submitted that they had taken all reasonable steps to ensure that they continued to receive post. Their client's purchased a redirection service from the Royal Mail, it also had employees regularly go to CHC House to check if any mail had not been redirected. Employees were instructed to take any correspondence addressed to the HR Team to that Department. They explain that because the ET1 form and the Notice did not require to be signed for it did not come to the attention of the HR Team until 2 October. The respondent assumed that the documents were delivered to CHC House (there was no redirection on the envelope and the mail picked up from CHC House had passed to the respondent's Stores Department who sort the mail. However, the exact mechanics of what

happened is not clear. As the documents were not addressed to a particular person or department it was held in the general mail tray resulting in a delay.

7. The respondent's solicitor made reference to the Employment Tribunal Rules observing that an interim relief hearing is fixed very quickly and can only be postponed where there are "special circumstances". There was no prohibition on postponement and special circumstances did not have to be "exceptional circumstances" ***(Lunn v Ashton Derby Group Limited).*** Her position was that in the circumstances a postponement would have been granted as a result of the respondent's non receipt of the Notice of Hearing. If the HR Department had received the Notice of Hearing at any time before the hearing actually took place they would have arranged representation. Once the Notice of Hearing was received the matter was chased up quickly by the HR Department who contacted the Tribunal that day to discover what had happened.

Arguments from the Interim Relief Hearing

8. The respondent's agents referred to their written application. She began her submissions with a reference to Rule 70 which allows the Tribunal to reconsider a judgment "where it is necessary in the interests of justice to do so". Had the respondent attended the hearing they would have made the following arguments. Firstly, they would have contended there was no dismissal. The respondent would have argued that its disciplinary policy gave it power to demote the claimant from Aircraft Commander and Captain to Co-Pilot (page 99 paragraph 645 of the Disciplinary Policy). If the Tribunal took the view that the disciplinary sanction did constitute a dismissal they would have argued/argue that the disciplinary sanction was altered to a material degree by the appeal. In the circumstances where an employee appeals a disciplinary sanction they are deemed to consent to the revocation of the dismissal. The dismissal effectively vanishes (***Merangakis v Iceland Foods Limited*** [2022] EAT 16). Accordingly, their

argument was that as there had been no dismissal it would not be competent to award interim relief. It was suggested interim relief is best suited to a situation where an employee is no longer in active employment. The award of interim relief here would operate to undermine a disciplinary decision that had been taken by the respondent in respect of admitted misconduct. The award caused other practical difficulties in their view. The claimant was not obliged to work. This has placed the respondent in a very difficult position in terms of managing the claimant's ongoing employment. It was also argued that the misconduct was sufficiently serious to warrant a disciplinary sanction and was not in any way influenced by any protected disclosure made by the claimant. The claimant had admitted that he had taken the video footage and this was serious misconduct. The respondent company had a clear duty to ensure that the flights are operated safely and in a professional manner.

9. The solicitor disputed that these would be matters for the full hearing to consider and indicated that they are central to the application for a reconsideration. If the Tribunal had put matters in a relevant context it would have been obvious that the disciplinary sanction was not retaliation for any particular disclosure but instead a legitimate response following an act of admitted serious misconduct

10. In addition, the respondent's agent argued that the interim relief decision caused confusion and difficulty for their clients and undermined their ability to manage the employment relationship with the claimant Their position is the claimant will not be prejudiced by revocation of the Judgment. He will continue to receive his pay as a Captain. There was no reason why the employment relationship should not continue as normal without the imposition as it was put on an interim relief order or input from the Tribunal until conclusion of the proceedings.

11. In response Ms Shiels took issue as to the competency of the reconsideration process under Rule 70. She referred the Tribunal to section

128 of the Employment Rights Act 1996 which deals with interim relief. The power of the Tribunal to deal with the matter is a statutory one. Section 128(5) provides that the Tribunal shall not exercise any power of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in so doing. His submission was that failing to make proper mail room arrangements, following a change of office, could not amount to a special circumstance.

12. In relation to the issue of dismissal this was canvassed to the Tribunal at the time of the award. Reference had been made to the case of ***Hogg v Dover College*** and to a so named ***"Hogg"*** dismissal. The respondent's disciplinary policy was not contractual (the respondent's solicitor acknowledged this). There had been a fundamental breach constituting a dismissal.

13. In her letter of 16 November the respondent's lawyer had advanced four grounds relating to the respondents not having received the ET1. They argued that the Tribunal had not given consideration to the question of whether the claimant was dismissed and thirdly that the claimant minimised the seriousness of his misconduct. Ms Shiels submitted that there was ample evidence presented to the Tribunal which indicated that the disciplinary action was inconsistent and disproportionate. There was evidence of the respondent's senior management asking that photographs should be taken during flights. In any event such arguments were more relevant to the substantive hearing rather than the interim hearing. In her view the argument that the claimant suffered no prejudice cuts both ways in that the respondent has, after the appeal, agreed to pay the claimant his full salary for another year. However, the demotion does have considerable impact on the claimant who has lost his status and seniority and has been demoted. This has no impact on day-to-day work as even if he remained a Captain he could be asked to fly as a Co-Pilot. The terms of the Order was to continue the claimant's contract as "Aircraft Commander and Captain". It did not require the respondent to allow the claimant to fly as a Captain.

Discussion and Decision

14. The starting point are the provisions concerning the reconsideration of an Employment Tribunal Judgment as laid down by Rules 70 to 73 of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, which provide under the heading "Reconsideration of Judgments":

'Principles

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[3]") may be confirmed, varied or revoked. If it is revoked it may be taken again.

Application

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 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.

Process

72.—(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)…"

15. The first issue to address is whether or not reconsideration is competent in relation to the review of the interim relief award that has been made. Ms Shiels set out the statutory basis on which an interim awards are made suggesting in effect it was in a unique position separate from the usual ET claims. It was not disputed that the clear direction in the statute is that the interim award process needs to be dealt with quickly and an initial hearing can only be postponed in special circumstances.

16. Much of the case law on reconsideration predates the current rules. Under the 2004 ET Rules, Rule 34(3) read:

'***Subject to paragraph (4), decisions may be reviewed on the following grounds only — (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; (d) new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time; or (e) the interests of justice require such a review***."

The examples given are often a useful starting point when considering applications for reconsideration.

17. In the case ***Outasight VB Ltd v Brown*** UKEAT/0253/14 Judge Eady QC overturned a decision of an employment tribunal judge which had held that the new structure gave the Judge wider discretion to decide cases in the interests of justice than under the 2004 Rules. She held that such an approach was not correct. Judge Eady had pointed out that the former specific grounds of review could be seen as particular instances when the interests of justice would generally have required such a review, and any consideration of an application under one of the specific grounds would

have taken the interests of justice into account. The 2013 Rules required the same approach to be taken as under the 2004 Rules but the principles in the case law that had built up under the previous rules, including the specific grounds, were still relevant post 2013.

18. It is also relevant that there is an underlying public policy principle in all proceedings of a judicial nature that there should be finality to litigation. Reconsiderations should be seen as limited exceptions to the general rule that employment tribunal decisions should not be reopened and re- litigated. ***(Stevenson v Golden Wonder Ltd*** 1997 IRLR 474 EAT).

19. Rule 70 of the 2013 Rules provides that a judgement will only be reconsidered where it is *"necessary in the interests of justice to do* so" while on the face of it giving an employment tribunal wide discretion, the case law considering the same ground under the 2004 Rules suggests that it will be carefully applied. The ground only applies where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order.

20. The leading case of the scope of the "interests of justice" as a ground for review was the case of ***Trimble v Supertravel Ltd*** [1982] ICR 40 In that case a tribunal held that Mrs Trimble had been unfairly dismissed but went on without hearing her representative on the question of compensation, to hold that she would receive no compensatory award due to her failure to mitigate her loss. This suggests that there has to be some denial of natural justice before reconsideration is appropriate.

21. Under Rule 70 a reconsideration should be granted if it is necessary in the interests of justice to do so. The Judgment can be confirmed, varied or revoked.

22. Ms Shiels' argument is superficially attractive but to accept it would mean a departure from the ET Rules creating an exception for an interim award

preventing reconsideration even where the interests of justice would require it. I do not accept that this was the intention of Parliament when providing this particular remedy, interim relief, to remove it from the overall framework of the ET Rules. This would be unsatisfactory. It would mean that even the sort of clear grounds given as grounds for reconsideration (review) under the 'old' Rules such as a decision being made due to an administrative error or where a party did not receive a notice would be debarred from the process. In my view the interim award can properly be subject to reconsideration.

23. The next question is whether or not it is in the interests of justice for the reconsideration to be granted. I regret to say that I have very little sympathy for the situation that the respondent company finds themselves in. The application was properly served (that was accepted) and it was a serious failing in the system they had set up for checking mail and redirecting it appropriately that caused the difficulty for them. Nevertheless, that does not necessarily debar them from this remedy. In circumstances such as these the focus for the reconsideration must relate to the strength of the defence to the claim or to some obvious problem with the claim being advanced that would have succeeded if the respondent had been represented at the initial hearing. Accordingly, we must therefore look carefully at the grounds that would have been advanced and which are advanced now.

24. The respondent's agents say that there was no *"Hogg"* dismissal. They point to the legal principle that disciplinary appeals which overturn a dismissal have the legal effect of restoring the employer/employee relationship as if the original dismissal had not taken effect. Ms Shiels did not dispute the principle but argued that this was not an analogous situation. The claimant had not overturned a dismissal by the employer. He had mitigated through the appeal process the financial penalty that would otherwise follow his demotion but only for a period. He had still been demoted and entitled to regard himself as dismissed. An aggrieved employee is entitled to seek redress (***Buckland v Bournemouth University*** [2010] EWCA Civ 121).

25. The legal principle that Ms Usher says applies was considered in the case of ***Patel* v *Folkstone Nursing Home Ltd*** [2018] EWCA Civ. The claimant was a care assistant, who had been dismissed over two charges of misconduct. He appealed under a contractual procedure, and was told by letter that his appeal had been successful. He refused to return to work and claimed unfair dismissal. Before the Employment Tribunal the respondent argued that the successful appeal had re-instated the claimant, so there was no dismissal. The ET rejected this argument. The Court of Appeal overturned that decision holding that in the context of an ordinary employment contract the effect of a contractual right of appeal against dismissal is that a successful appeal revives the contract and 'extinguishes' the original dismissal.

26. It seems to me that the situation here, as Ms Shiels submits is not analogous. It seems to be accepted that the appeal process here was not contractual but there is a more significant difference. The fact that here the appeal mitigated the penalty would not restore the contract to what it had been before the disciplinary hearing. Ms Usher emphasised the protection of his salary (for a period of a year to allow him to retrain) but that ignores the other substantial effects of the demotion. I noted that in the recent case of ***Jackson* v *The University Hospitals of North Midlands NHS Trust*** 2023 EAT it was held that there was still a "**Hogg**" dismissal where a nurse had lost her grade 6 position and had been given a lower grade job but with her salary preserved. She went on to lodge grievances about the process. The EAT held that the Tribunal had erred in not considering the letter from the employer telling the claimant this was not a ***"Hogg"*** dismissal. The Judge set out the options an employee had in this sort of situation from acceptance of the new terms, claiming "constructive dismissal" and leaving to remaining and claiming dismissal under the ***Hogg*** principles. In addition, in the present case the respondent accepted that the appeal process adopted was not contractual.

27. In these circumstances I can see no bar to the claimant proceeding with his claim for unfair dismissal. That claim might not ultimately be upheld by a Tribunal but the argument put forward by the respondent that a partially successful appeal means there can be no dismissal is misconceived.

28. It was suggested interim relief is best suited to a situation where an employee is no longer in active employment. The award of interim relief here would operate to undermine a disciplinary decision that had been taken by the respondent in respect of admitted misconduct. The award causes other difficulties. The claimant was not obliged to work. This has placed the respondent in a very difficult position in terms of managing the claimant's ongoing employment. It is also argued that the misconduct was sufficiently serious to warrant a disciplinary sanction and was not in any way influenced by any protected disclosure made by the claimant. The claimant had admitted that he had taken the video footage and this was serious misconduct. The respondent company has a clear duty to ensure that the flights are operated safely and in a professional manner.

29. The other grounds for the reconsideration relate to the suggestion that the claimant minimised the seriousness of his actions. The information given to the Tribunal at the interim relief hearing explains fully the reason for the conduct and the claimant's understanding that filming was tolerated if not on occasions encouraged. However, he had accepted that although this had been his understanding that filming was prohibited on safety grounds. The Tribunal fully examined the allegations and the claimant's position. Although there was no appearance at the hearing on behalf of the respondent their position on the disciplinary matters was set out clearly in the documentation produced.

30. The final ground was that if there had been attendance at the hearing the Tribunal would have been told that they were not prepared to allow the claimant to return to the role of Captain. That seems to have been clear from the disciplinary outcome and appeal. How the respondent responds to the order which is to preserve the claimant's contract until the merits of the

proceedings are determined is of course a matter for them but I am of the view that they are in no different a position to that of any employer where such an order is granted and that the practical difficulties are minimal as the effect of the appeal is to allow the claimant to fly as a Co- Pilot rather than as a Captain.

31. For the foregoing reasons I am not convinced that it is in the interests of justice to grant the reconsideration disturbing the interim relief award already made.

Employment Judge: J M Hendry
Date of Judgment: 23 April 2024
Entered in register: 23 April 2024
and copied to parties