



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000912/2024

Held in Chambers on 11 February 2025

Employment Judge L Doherty

Mr D McCallion

Claimant  
[via Written  
Submissions]

Menzies Distribution Solutions Limited

Respondent  
[via Written  
Submissions]

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the judgment issued on 30 October 2024 is confirmed under Rule 68 (2) of the Employment Tribunal (Constitution and Rules of Procedure ) Regulations 2024 (the Rules).

### REASONS

1. The claimant applied for reconsideration of a judgment issued to the parties on 30 October 2024. The judgment as issued following a two day hearing to consider the claimant's unfair dismissal claim. The Tribunal found the claimant had been unfairly dismissed as a result of a deficiency in the appeal procedure, but that no compensation was due on the basis of the claimant's contributory conduct and the application of the principles to be derived from the case of *Polkey*. A judgment with reasons was issued to that effect.

2. Part of the Tribunal's reason included a finding that the respondents were unable to access the personnel file of a Mr Curran, as he was not an employee of the respondents but of another company MDL. The claimant had submitted in the course of the hearing that he was treated differently to Mr Curran, who

he submitted had not been dismissed for a tachograph offence, whereas the claimant was.

3. The application for reconsideration was made under Rule 69 of the Rules and was opposed. The application was not refused under Rule 70 (2). The parties  
5 agreed that the application could be dealt with without a hearing and under Rule 70 (5) of the Rules and the Tribunal considered that a hearing was not necessary in the interests of justice. The parties were given a reasonable opportunity to provide further written submissions under Rule 70 (5).

#### 10 **Claimant's application**

4. The claimant asked for a reconsideration of the judgment on the basis of disparity of treatment of other employees and the compensatory award.
5. The basis of the claimant's application was that another employee, Mr Curran, had been treated differently to the claimant and had not been dismissed for a  
15 tachograph offence. The respondents witness had given evidence to the effect that Mr Curran was not employed by the respondents but by another company MDL, and they did not have access to his personnel records. The claimant submitted a letter from Mr Curran and his tax records to establish that he had been employed by the respondents at the point when the claimant  
20 was dismissed. The claimant submitted that this demonstrated that the respondents had access to Mr Curran's records.
6. The claimant also submitted that he had discovered that the Transport Manager, a Mr Johnson, had left the respondents employment just as his appeal manager, Mr Hutchinson, started which would explain why Mr  
25 Hutchinson did not know Mr Johnston. The claimant submitted that the fact that Mr Johnston had interviewed him for his job and disciplined Mr Curran should be taken into account.

#### **Respondent's opposition**

7. The respondents opposed the application. They submitted that the grounds of the application were not key to the issues or the final judgment and provided no material change in circumstances.
8. The respondents also made submissions to the effect that Mr Curran had TUPE transferred to the respondents on 1 April 2023 and it was believed in good faith by the respondent's witnesses that he was employed not by the respondents, but by MDL. A copy of the letter sent to Mr Curran on 3 March 2023 identifying a proposed transfer date of 1 April 2023 was provided. The respondents submitted that Mr Curran was disciplined on 12 February 2021 while still employed by MDL. The date of the incident leading to the claimant's dismissal was 13 March 2023, prior to Mr Curran's employment transferring to the respondents. Mr Curran retired on 24 March 2023. There is no electronic personnel file for Mr Curran, and his records were difficult to access. The claimant did not raise Mr Curran at all until the appeal.
9. The respondents submitted that the position is in any event unchanged as at the point when Mr Curran was disciplined he was employed by a different entity.

### Consideration

10. Rule 68 of the Rules provides:
- 68 (1) The 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.*
- (2) A judgment under reconsideration may be confirmed, varied or revoked.*
- (3) If the judgment under reconsideration is revoked the Tribunal may take the decision again. In doing so, the Tribunal is not required to come to the same conclusion.*

11. There is an underlying public policy principle in the Tribunal proceedings, as in any litigation, that there should be finality in litigation. Reconsiderations is not an opportunity for a disappointed party to get a second bite of the cherry. A judgment should only be reconsidered and varied or revoked if it is in the interests of justice to do so. A tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective in the Rules to deal with cases 'fairly and justly'. The interest of justice must be seen from both sides.
12. Reconsideration of a judgment may be necessary in the interests of justice if there is new evidence that was not available to the tribunal at the time it made its decision. This is the basis upon which the Tribunal understood the claimant's application to be made. The new evidence he relied upon was that Mr Curran was employed by the respondents at the time when the claimant was dismissed, not by MDL as claimed by the respondent's witnesses and had been found by the Tribunal.
13. The Tribunal was satisfied that Mr Curran was employed by the respondent at the point when the claimant was dismissed. This indeed is now a matter of concession by the respondents, albeit they provide an explanation as to why the witnesses could not access Mr Curran personnel records, submitting that they believed in good faith he was employed by MDL at the time. They also make submissions as to the timeline of Mr Curran's disciplinary hearing, his TUE transfer and the claimant's disciplinary proceedings.
14. The Tribunal has not heard evidence and is not in a position to make findings in fact on these points. Nor is the Tribunal in a position to make findings in fact about the magnitude of Mr Curran's tachograph offence and whether his circumstances were truly comparable to those pertaining to the claimant.
15. Regardless of this, however, the Tribunal has to take into account that one of the underlying principles to be applied in considering an application for reconsideration on the basis of new evidence is that the new evidence is relevant and would probably have had an important influence on the hearing.

16. The Tribunal has found that the claimant was unfairly dismissed and made a declaration to that effect. Even if the Tribunal had been in a position to conclude that there was a disparity of treatment between the claimant and Mr Curran, the effect of that would have been limited to providing an additional basis upon which to conclude that dismissal was unfair. The Tribunal would still have required to go on to deal with the question of remedy in the same manner as it did, and as is set out in its judgment and reasons.
17. Having found dismissal unfair, the Tribunal concluded that that compensation should be reduced to zero on the basis of the claimant's contributory conduct. That conclusion is unaffected by any consideration of how Mr Curran's circumstances were dealt with by the respondents. The new evidence which the claimant sought to introduce would therefore have had no influence on the final determination made at the hearing and the Tribunal's judgment on compensation.
18. The Tribunal did not consider that the claimant's submissions as to Mr Johnston's involvement added anything to its consideration of the application. The fact that he may have disciplined Mr Curran and was also the individual who interviewed the claimant for his post is irrelevant to the Tribunal's judgment on the fairness of the dismissal or the amount of compensation awarded.
19. The Tribunal was therefore not persuaded that was in the interests of justice to revoke its judgment on the basis of the claimant's application and the judgment is confirmed under Rule 68 (2) of the Rules.

Date sent to parties

**L Doherty**

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**20 February 2025**