



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case Number: 4107775/2019**

**Employment Judge D Hoey**

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**Mr Scott Gibson**

**Claimant  
Represented by:  
Mr J Gibson  
(claimant's father)**

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**ASDA Stores Limited**

**Respondent  
Represented by:  
Ms Hand  
(Counsel)  
Instructed by  
Messrs Addleshaw  
Goddard**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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**The claimant's application dated 6 February 2021 and 11 November 2021 for reconsideration of the judgment sent to the parties on 23 January 2021 is refused, there being no reasonable prospects of the judgment being revoked.**

### **REASONS**

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#### **Background**

1. I have undertaken a preliminary consideration of the claimant's application for reconsideration of the judgment dismissing his claim.

2. At a hearing lasting 5 days from 9 to 13 November 2020 the claimant's claims of unfair dismissal and disability discrimination were heard. Previous case management had resulted in the parties working together to agree the issues to be determined.
- 5 3. Following conclusion of the hearing, the parties were advised that the Tribunal would issue a reserved judgment following deliberation. Deliberation took place on 30 November and 7 December 2020.
4. Written reasons were issued on 23 January 2021. The claims were partially upheld and the parties had been asked to work together with a view to fixing  
10 a remedy hearing if needed.
5. The unanimous judgment of the Tribunal was that the claimant was unfairly dismissed by reason of the investigation that led to his dismissal. Had a fair procedure been followed the Tribunal found there was a 75% chance that the claimant would have been fairly dismissed. Further, the basic and  
15 compensatory awards should be reduced by 75% by reason of the claimant's conduct. The Tribunal also found that the claimant had unreasonably failed to follow the ACAS Code by not pursuing an appeal against his dismissal and the compensatory award should be reduced by 10%. The remaining claims were dismissed.

20 **6 February 2021 email and correspondence from claimant's father**

6. On 6 February 2021 the claimant's father sent an email to the Tribunal asking for a reconsideration. That email was missed by the administration team. On 11 November 2021 the claimant's father sent a further email attaching the earlier email noting that he had not heard in respect of his reconsideration  
25 application.
7. That email was brought to my attention on 15 November 2021 and following consideration of the claimant's father's email and the judgment, a response was issued on 16 November 2021 finding that the application had no reasonable prospects of success on the basis that the issues raised by the

claimant's father were issues that had been considered and determined at the hearing. Although the claimant's father did not agree with the judgment, that was the decision the Tribunal had reached following consideration of the evidence led before it applying the legal tests.

- 5 8. The claimant's father sent a further email on 23 November 2021 asking for clarification as to the reasons why his reconsideration application was not successful. The claimant's father was told that detailed reasons would be issued. This judgment sets out the further detail sought by the claimant's father.

10 **The law**

9. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70).
- 15 10. Rule 72(1) of the 2013 Rules of Procedure empowers me to refuse the application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked.
11. The importance of finality was confirmed by the Court of Appeal in **Ministry of Justice v Burton and another [2016] EWCA Civ 714** in July 2016 where  
20 Elias LJ said that:

25 **“the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board 1975 ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Ironsides Ray and Vials 1994 ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review.”**

12. Similarly, in **Liddington v 2Gether NHS Foundation Trust EAT/0002/16** the Employment Appeal Tribunal chaired by Simler P said in paragraph 34 that:

5           **“a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or by adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to**  
10           **provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered.”**

13. In common with all powers under the 2013 Rules, preliminary consideration  
15           under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay. Achieving finality in litigation is part of a fair and just adjudication. It is also important to  
20           recognise that fairness and justice applies to both parties – the claimant and the respondent.

### **The application**

14. To ensure both parties understand the Tribunal’s reasons, I shall deal with  
25           each relevant part of the reconsideration application in turn. References to paragraphs are to paragraphs in the judgment issued by the Tribunal.

#### **The argument that a 75% reduction due to contribution “does not make sense”**

15. Firstly the claimant’s father argues that it does not make sense to find the  
30           dismissal unfair and then hold that there would have been a 75% chance that he would have been fairly dismissed

16. The Tribunal found that the dismissal was unfair as a result of the procedure that had led to the claimant's dismissal. At paragraphs 249 to 356 the Tribunal considered whether or not it was just and equitable to reduce the compensatory award as a result (which could only happen if the Tribunal considered the claimant's conduct caused or substantially contributed to) his dismissal.

17. The Tribunal found that the claimant accepted the facts that had led to his dismissal; that he had sat in his car for 30 minutes when he should have been working. The claimant knew doing so was wrong. The claimant had been dismissed because of that conduct. The claimant accepted it had occurred and so the conduct itself was not in dispute. The Tribunal found that the conduct was blameworthy. He knew there was other work to be done but chose to sit in his car (rather than go into the store). It was that conduct which led to his dismissal.

18. In assessing the extent to which it was just and equitable to reduce the compensatory award the Tribunal considered all the facts. Given the nature of the conduct we considered it was just and equitable to reduce the compensatory award by 75%. The conduct was very serious and in the Tribunal's view a 75% reduction was just and equitable.

**The argument that it is unfair to reduce compensation where the respondent was at fault**

19. The claimant's father argues that the "disregard for a fair and reasonable procedure (which was the reason for the unfair dismissal), as clearly set out in respondents comprehensive policy/procedure documents, is surely the responsibility of the respondent. As lay people, are we expected to believe that it is fair and reasonable that the claimant was 75% responsible for this finding given that he played no part in nor bore any responsibility for the organisation and execution of the investigation meeting? That the claimant should be penalised financially to the benefit of the respondent (who was responsible for the unfair dismissal) we believe is unjust."

20. In making its decision to reduce the award by 75% the Tribunal applied section 122(2) and 123(6) of the Employment Rights Act 1996. This requires the Tribunal to consider the facts and in respect of the compensatory award reduce the award by “such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal so far as that loss is attributable to actions taken by the employer”.
21. The failure with regard to the procedure was the respondent’s failures but we considered the claimant’s conduct which caused his dismissal to be such that a 75% reduction in compensation was just and equitable in all the circumstances applying the statutory wording.
22. The claimant was guilty of conduct that justified the reduction of the compensatory award. He had been responsible for something which was potentially gross misconduct. Taking account of the failures of the respondent the Tribunal concluded that it was just and equitable to reduce the award by 75%.

**Argument the respondent failed to properly investigate**

23. The claimant’s father argued that the approach to the investigation rendered the dismissal unfair and no reduction in compensation should be ordered. The claimant’s father argued that given the respondent’s “actions (or lack of) we would question their intent and commitment to provide a fair and reasonable hearing process”.
24. The Tribunal took account of the failures of the respondent in their dismissal of the claimant. The Tribunal also took account of the claimant’s knowledge and in particular that he knew what he had done was wrong – see paragraphs 315 and 325. From the information before the respondent the conduct was potentially gross misconduct -see paragraphs 331 and 332. The surrounding circumstances are important - see paragraphs 334 and 335.

25. We considered at paragraphs 364 to 367 whether or not a fair dismissal could have taken place given the unfair investigation on the facts of this case. The Tribunal concluded that while it was not a certainty, the chances of a fair dismissal occurring was very high. The Tribunal considered that there was a possibility had a fair investigation been carried out that the dismissing officer might have issued a final written warning. Applying the law as set out in **Polkey** in this case the Tribunal considered that there was a 75% chance the claimant would have been fairly dismissed had a fair procedure been followed – specifically taking account of each of the failures we found that rendered the decision to dismiss unfair. It is also relevant to note that the claimant was subject to a live warning that had been issued.

26. The Tribunal carefully considered all the facts of the case and concluded that such a reduction was appropriate.

**Argument claimant reasonably failed to appeal**

27. The claimant's father argued the claimant tried hard to appeal and given the respondent refused to allow the claimant's father to conduct his appeal, it was reasonable for him not to proceed with it.

28. In this case the respondent initially refused the claimant's request to allow his father to be present at the appeal hearing. They subsequently changed their mind as we set out at paragraph 161. The respondent had decided to allow the claimant to attend the hearing with his father. While his father was not able to conduct the hearing, if the claimant required to speak with his father breaks would have been permitted. Taking account of how the claimant had conducted previous formal hearings (see paragraph 163 and 164) we concluded that such an approach was reasonable.

29. The Tribunal considered this at paragraphs 369 to 373. We considered that the adjustment proposed by the respondent was reasonable, namely to allow the claimant's father to accompany him to the hearing and have private discussions with him as needed. From the information before the respondent

that was a reasonable position to adopt. We appreciated that the claimant's father had a different view as to the reasonableness of that approach but that view was formed with the knowledge the claimant's father had as opposed to the information that was before the respondent at the time.

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30. As we said at paragraph 372 we considered the claimant's failure to take up the offer of an appeal with his father being present was unreasonable. It prevented the respondent from being given the chance to reconsider their decision. We considered it to be unreasonable not to engage with the respondent and progress the appeal given their adjustment to the process, which was objectively reasonable. As we set out at paragraph 373 the claimant's father was not fully aware as to how the claimant had been able to engage with the respondent on previous similar situations. Had he been in full possession of the facts his position would have been different.

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31. In all the circumstances the claimant's failure to progress his appeal was unreasonable and a 10% reduction in compensation was just from the facts of this case.

**Argument the reason for dismissal changed and was therefore unfair**

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32. The issue in this case was whether the dismissal was fair in all the circumstances. The reasons for the dismissal were the set of facts or beliefs in the respondent's mind that led to their dismissing the claimant. We considered this at paragraph 139. The dismissing officer considered carefully what the claimant had done (which was something the claimant admitted doing). We note this was confirmed in writing (at paragraph 144).

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33. While the matter was not eloquently expressed by the respondent, the essence of the charge was clear and was understood by the claimant. The claimant knew that he was being disciplined because he sat in his car for 30 minutes when he should have been working. That conduct was considered (reasonably) to amount to gross misconduct.

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34. While the label applied to that conduct was inelegant and varied (including “theft of company time”), the essence of the allegation was clear and consistent. That did not change and the Tribunal was satisfied the reason why the claimant was dismissed was the facts believed by the respondent at the date of dismissal which was confirmed in writing.

35. The Tribunal is unable to respond to queries as to what the respondent does now with regard to the records they keep or what action is taken following the judgment (which is a matter the claimant can raise with the respondent directly). The Tribunal’s judgment is a matter of public record.

**Argument the Tribunal ignored the reality of the claimant’s disability**

36. The claimant’s father argued this factor had a fundamental impact on all aspects of the case and was crucial to the Tribunal’s judgement. It was suggested that the claimant’s “disability/learning difficulties have been largely swept aside in favour of the respondent’s assertions that Scott’s learning difficulties are “mild” (an assumption that they are ill qualified to make) and do not affect his intellectual or social ability to acquit himself without counsel in a disciplinary or court procedure”.

37. The Tribunal considered the issue of knowledge of disability very carefully and fully took into account the issues the claimant and his father raised. It is not correct to say the Tribunal “swept aside” the claimant’s disability/learning difficulties in favour of the respondent’s assertions.

38. This issue was determined on the relevant evidence before the Tribunal. The Tribunal considered carefully the information that was before the respondent which was the key question. As set out at paragraph 16 the claimant did not disclose further information to the respondent as to his medical position from that originally provided to the respondent (which was why the Tribunal considered that information). The Tribunal also considered the evidence of the relevant staff who had experience of the claimant from working closely with him. From the information before the respondent there was no

information that could reasonably result in the respondent needing to challenge the information they had on file (see paragraph 15).

5 39. We were conscious of the claimant's father's position and discussed it at paragraphs 173 to 175. In short the information before the respondent at all material times fundamentally differed from the position the claimant's father believed to exist. We carefully considered the points made by the claimant's father. We had to look at the information that was before the respondent and their approach in our assessment in light of the statutory tests.

10 40. We analysed the issue as to knowledge of the claimant's disability at length from paragraphs 402 to 450. We note, for example, at paragraph 404 that the claimant accepted he did not raise his impairments with any of the respondent's staff nor discuss the issues he faced with regard to his health.  
15 The information the respondent had was the information on file and their substantial experience of working closely with the claimant (including their experience in disciplinary contexts when the claimant had not asked for his father's help). We carefully tested that evidence and analysed the position as against what the claimant's father said the position was.

20 41. The information before the respondent at all material times was limited (see paragraphs 408, 409 and 413). The experience the respondent's staff had who made the relevant decisions was consistent with the information in their possession. They had personally experienced working with the claimant  
25 including in situations similar to those to which the claim relates.

42. We assess at paragraphs 414 to 436 the position advanced by the claimant's father and the evidence before the respondent. We carefully assessed what information was before the respondent at the relevant times and what their  
30 knowledge of the position was.

43. As we say at paragraph 436 the claimant had not, as a matter of fact, provided the respondent with sufficient information to result in them knowing the claimant had a disability (as defined by the Equality Act 2010). The

information before the respondent did not disclose that the claimant was a disabled person. The fact the respondent subsequently conceded (for the purposes of the Hearing) that the claimant was a disabled person was not relevant in assessing what they knew at the time of the events in question, which can only be considered from what was said, done and known at the material times.

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44. We also considered whether the respondent ought reasonably to know the claimant was a disabled person and we were satisfied that it was not reasonable for the respondent to be so aware. This was analysed at paragraphs 437 to 450. The claimant's father's view flatly contradicted the experience the respondent's staff had of the claimant. They reasonably used their experience of working with the claimant (including in dealing with similar situations) in reaching their view.

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45. The claimant's father provides more material in his reconsideration application as to the claimant's position. What the Tribunal has to consider, however, is the information that was before the respondent at the time. We did so in detail. The information in the claimant's father's possession is not relevant in assessing whether the respondent knew or ought reasonably to have known of the claimant's disability, where such information was not provided to the respondent (and where the information fundamentally differed from what the respondent had experienced given their lengthy working relationship with the claimant).

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46. The claimant's father also makes reference to what was agreed in relation to the hearing. We considered the information that was before the respondent at the material times which was the relevant information to be considered. Any medical information provided after the employment had ended was not relevant to assessing what the respondent knew at the time of the events in question, which was what we considered at length and carefully given the differing positions before us.

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47. The fact the claimant was in receipt of disability related benefits was a relevant but not conclusive factor. We took that into account along with the other facts in the context of the issues we determined. Disability for the purposes of benefit payments is not the same issue as to disability for the purposes of Equality Act claims. We carefully considered the evidence of each of the respondent's witnesses.

48. We considered the claimant's father's criticisms of the relevant witnesses and their involvement in the process. The Tribunal did not agree that their evidence was not credible. The Tribunal was satisfied the evidence from the respondent's witnesses was candid, clear and cogent with regard to their knowledge as to how the claimant worked with them. That was an assessment made from all the information before the Tribunal, including the information provided to the respondent at the time.

49. In all the circumstances the respondent did not know the claimant was a disabled person and it was not reasonable for them to know that, irrespective of what the claimant's father knew.

**Other arguments made by the claimant's father**

50. The claimant's father argues that the respondent's witnesses "must have known" that the claimant needed help with certain tasks and had limited skills in some areas. We considered the knowledge of the respondent's witnesses in detail and found their evidence to be credible. They did not consider the claimant to have an impairment that affected his ability to carry out day to day activities to any substantial (in the sense of more than minor or trivial) extent. From the facts that was a reasonable position.

51. The claimant's father notes that "the claimant had been employed for 19 years and 6 months and was a model employee with perfect attendance, worked flexibly and was popular with staff and customers alike". We accepted that (as

did the respondent) but the issue was with regard to his conduct on the day in question in context.

52. The claimant's father asserted that there was a desire to remove the claimant  
5 "for whatever reason" and that the claimant's father "knew of the respondent's methods". The Tribunal found no evidence for such an assertion. The Tribunal was satisfied the claimant was dismissed for the conduct which he had admitted, which amounted to gross misconduct. It was that reason alone.

10 53. The claimant's father concludes saying "We would hope that this has given an alternative view of the events leading up to Scott's dismissal. This we believe to be more like the truth and better explains the respondent's actions and motives." The Tribunal considered the evidence carefully in reaching its decision as to the facts it found. That was considered by examining the  
15 evidence that was presented, orally and in writing, mindful of the claimant's father's belief and his arguments. The Tribunal was satisfied that the position asserted by the claimant's father was not what had occurred. The claimant had been guilty of the conduct that caused his dismissal.

**Not in the interests of justice to allow reconsideration**

20 54. The points raised by the claimant are attempts to re-open issues of fact on which the Tribunal heard evidence from both sides and made a determination having considered the facts presented during the hearing and applied the law. In that sense they represent a "second bite at the cherry" which undermines the principle of finality. Such attempts have a reasonable prospect of resulting  
25 in the decision being varied or revoked only if the Tribunal has missed something important, or if there is new evidence available which could not reasonably have been put forward at the hearing. A Tribunal will not reconsider a finding of fact just because the claimant wishes it had gone in his favour.

30 55. That broad principle disposes of all the points made by the claimant. There is no evidence that shows the Tribunal has missed something important or that new evidence is being presented that could not reasonable have been put

forward at the time. The claimant was given a fair opportunity to present his case and challenge the respondent which he did.

56. The Hearing concluded and the judgment was issued on the basis of the information before it with both parties having been given a fair opportunity to present their case and hear each other's submissions and present any response.

57. The claimant's father confirmed upon conclusion of the case that he was satisfied he had led all the evidence he wished to lead in respect of his case and the Tribunal had sought to assist the claimant and his father to ensure a fair hearing was conducted.

58. The claimant's father's application for reconsideration is based on the fact that he argued he did not like the conclusions the Tribunal reached. These were, however, conclusions reached from the evidence led before it.

### **Conclusion**

59. I considered the overriding objecting in reaching my decision to ensure the decision as to the reconsideration application taken was fair and just. That applies to both the claimant and the respondent since justice requires to be achieved for both parties. I have done so carefully.

60. Having considered all the points made by the claimant's father in light of the judgment that was issued I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The points of significance were considered and addressed at the Hearing. It is not in the interests of justice to reconsider the decision the Tribunal reached.

61. The application for reconsideration is therefore refused under rule 72(1) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

### **Apology for delays**

62. Unfortunately the given the administrative issues that arose in this case

delays have been occasioned for which an apology was issued. It is regrettable that such delays occurred in this case.

**Summary**

5 63. The Tribunal has taken the time to consider each of the issues raised by the claimant's father. In all the circumstances there are no reasonable prospects of reconsidering the unanimous judgment of the Tribunal. The application is therefore refused.

10 Employment Judge: David Hoey  
Date of Judgment: 08 December 2021  
Entered in register: 14 December 2021  
and copied to parties