EMPLOYMENT TRIBUNALS

BETWEEN

Claimant **Respondent**

C Bickerstaffe v The Royal British Legion

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Southampton **ON** 19 April 2018

EMPLOYMENT JUDGE: PSL Housego
MEMBERS: Ms A Sinclair
Mr D Stewart

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The judgment of the tribunal is that:

1. The claimant's application for reconsideration is allowed.
2. The decision of the Tribunal is confirmed.

REASONS

1. The respondent seeks reconsideration of the Tribunal's decision for two reasons. First, a misunderstanding as to submissions required as to the personal injury element of the claim, so that submissions were not made upon liability.

2. Secondly it is said that part of the Tribunal's findings found detriment by reason of public interest disclosure with no evidential basis. Further, those were not detriments that were expressly pleaded, and so the Tribunal should not have made such findings.

3. The claimant responds that a reconsideration can only be undertaken if the interests of justice so require, and that the Tribunal gave clear reasons for its decision. It is clear why the respondent lost. The respondent did not defend the personal injury element of the claim on medical grounds, but on other bases, and it was not appropriate to allow the respondent now to seek to reargue its defence on a different basis, having lost on the points on which it did defend.

4. As to the second ground, there was a limit on the lengths to which a Tribunal should go, and this was a lengthy decision making it very clear why the findings had been made. The essence of the claimant's case was always apparent, and that was all that was required.

5. The Tribunal has had the advantage of clear skeleton arguments from both Counsel and the contents of them are not repeated in this decision.

6. The Tribunal accepts that Counsel misunderstood the position as to the personal injury claim: of course the Tribunal thought the matter entirely clear, but that is the nature of a misunderstanding.

7. The Tribunal accepts that the linkage between the detriments found to be linked with the second (upheld) public interest disclosure claim, the evidence and the legal basis for it is not immediately apparent from its decision.

8. Accordingly it accedes to the respondent's request for a reconsideration of its decision.

9. Turning first to the personal injury claim, the respondent says that it refers to the 15 September 2015 issue as the primary cause of the claimant's difficulty, and that this was not found to be public interest disclosure. It is said that the medical report does not link with the second, upheld, public interest disclosure claim.

10. The Tribunal does not accept this as correct. The medical report is about the claimant's condition, and clearly states that the entirety of it is work related. The doctor was not asked to be specific about what precise events were causative, and could not realistically be expected to be so asked. What the doctor does clearly do is refer to the ongoing work issues. As Counsel for the claimant says, the report indicates that resolution might be expected within 6 months, so that given the dates, the claimant was likely to be affected by what

was found to be public interest disclosure detriment in February 2016 as that had not resolved by August 2016.

11. Counsel for the claimant is also correct in the submission that the defence to the personal injury claim was on other grounds, which did not find favour with the Tribunal, and so it is not now open to seek to defend that claim on the merits, which were not challenged before the decision was promulgated.

12. The decision makes clear (as the claimant accepts) that it is open to the respondent to seek to say there is divisibility in causation, and to seek to attribute maximum weight to matters that are not public interest disclosure detriments, so as to minimise the financial impact of the success of that claim. The Tribunal is told that a further examination is booked for 10 May 2018 so that a further, supplemental, report can be prepared. It is expected that there will be agreed questions to be put to the doctor so that a helpful supplemental report will be available to assist the Tribunal.

13. The existing report describes the condition as *"fully related to the work situation"*, and it would be to misread the report to find that it excluded reference to the matters found by the Tribunal to be public interest disclosure detriments. The conclusion of the Tribunal that the personal injury claim succeeds is maintained: the value of it is fully open for argument, given that if it is divisible and if almost all of it related to non public interest disclosure detriment it would be worth very little, or if indivisible, wholly recoverable from the public interest disclosure detriments (given the Tribunal's other conclusions on this application).

14. On the second point the respondent says that there was no clear claim of detriment such as the handling of the grievance appeal. The Tribunal notes that the issues were set out in its decision and paragraph 85.5.2 of the decision shows this was clearly in mind. The Tribunal also applies the rationale of the case provided by Counsel for the claimant, Chandhok v Chandhok UKEAT/0190/14, where it is said that the essence of the case must be clear. The respondent knew exactly what was being alleged and cross examined on it. There is no jurisdictional point.

15. The Tribunal's decision is lengthy, and did not contain reference to the burden and standard of proof in public interest disclosure cases, which is of course the well known case of Kuzel v Roche Products Ltd [2007] UKEAT 0516_06_0203, upheld in Kuzel v Roche Products Ltd [2008] EWCA Civ 380:

> *"47 Reverting to the Maund test, applicable to s103A dismissals, we would formulate the approach to be applied on the findings made by the Tribunal in this case as follows:*
>
> *(1) Has the Claimant shown that there is a real issue as to whether the*

reason put forward by the Respondent, some other substantial reason, was not the true reason? Has she raised some doubt as to that reason by advancing the s103A reason?

(2) If so, has the employer proved his reason for dismissal?

(3) If not, has the employer disproved the s103A reason advanced by the Claimant?

(4) If not, dismissal is for the s103A reason."

16. It was this test that the Tribunal applied, adapted for detriment rather than dismissal. It was plain to the Tribunal that no part of the claimant's work history was withheld from any decision maker or other actor in the events relevant to this claim. The claimant raised the issue required by (1). The respondent accepted that the handling of matters was not as it should have been, and so did not meet (2). The respondent did not meet the test in (3). The respondent had not disproved the claimant's assertion that the detriment was by reason of the public interest disclosure. Put shortly, this is an inference which the facts found amply justified.

17. Accordingly, having reconsidered its decision, and for the reasons just given, the decision is confirmed (rule 70 of the Employment Tribunal (Constitutional & Rules of Procedure) Regulations 2013, Schedule 1).

18. Counsel for the claimant enquired whether there had been a Rule 72 consideration as to whether the application for reconsideration had a reasonable prospect of success. If not he wished to apply for costs. The matter was put to me on 18 January 2018, and I did not decide that it had no reasonable prospect of success, on the basis that the full Tribunal needed to consider the second point put forward. Accordingly no claim for costs is made.

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Employment Judge PSL Housego
Dated 19 April 2018

Judgment sent to Parties on

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