EMPLOYMENT TRIBUNALS

Claimant: Ms L Kong

Respondent: Gulf International Bank (UK) Limited

JUDGMENT
ON CLAIMANT'S APPLICATION FOR RECONSIDERATION

The Claimant's application for reconsideration is dismissed.

REASONS

Background

1. This matter was heard over 8 days (including 2 days in Chambers) between 9 and 29 January 2020. Judgment on liability was reserved and sent to the parties on 6 March 2020. For the reasons set out in that judgment, the Tribunal (comprising myself, Ms T Breslin and Mr I McLaughlin):

    a. dismissed the Claimant's claim that she was subjected to detriments because she made protected disclosures contrary to s 47B Employment Rights Act 1996 (ERA 1996) because it was outwith the Tribunal's jurisdiction having regard to the time limit in s 48(3) ERA 1996;

    b. found the Claimant's claim that she was unfairly dismissed by the Respondent, contrary to ss 94-98 ERA 1996, to be well-founded;

    c. found the Claimant did not cause or contribute to her dismissal and no deduction falls to be made to any compensation that she may be awarded by reason of any conduct of hers occurring prior to dismissal;

d. found there should be no *Polkey* deduction to any compensation awarded to the Claimant;

e. found the Respondent unreasonably failed to comply with a relevant Code of Practice and accordingly any award made to the Claimant will be subject to an uplift pursuant to s 207A(2) Trade Union Labour Relations (Consolidation) Act 1992; and,

f. dismissed the Claimant's claim for wrongful dismissal.

2. A Telephone Case Management Hearing was due to be heard on 16 March 2020 for the purposes of giving directions for the determination of remedy, but the parties agreed to that being postponed as the Claimant had indicated an intention to apply for reconsideration of the judgment.

3. By email of 20 March 2020 the Claimant made an application under Rule 71 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Tribunal Rules) for the reconsideration of the reserved judgment of the Employment Tribunal in this matter. With the application, the Claimant enclosed three Appendices: 1) email correspondence between the parties regarding the date of final disclosure exchange; 2) an order from Employment Judge (EJ) Wade of 19 November 2019; (3) a photograph of part of her closing submissions. By email of 30 March 2020 she made further representations.

4. At my invitation, the Respondent submitted representations on the Claimant's application by email of 3 April 2020.

5. I afforded the Claimant an opportunity to reply to the Respondent's submissions, which she exercised by email of 14 April 2020, to which she attached a letter from EJ Wade of 19 December 2019 and her prior application for specific disclosure.

The law

6. Rules 70-73 of the Tribunal Rules provides as follows:-

> **70. Principles**
> 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") may be confirmed, varied or revoked. If it is revoked it may be taken again.
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> **71. Application**
> 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.

> **72. Process**
> (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.
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> (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.
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> (3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.
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> **73. Reconsideration by the Tribunal on its own initiative**
> Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).

7. The Tribunal thus has discretion to reconsider a judgment if it considers it in the interests of justice to do so. Under Rule 72(1), I must dismiss the application if I consider that there is no reasonable prospect of the original decision being varied or revoked. Otherwise, I must (under Rule 72(2)) consider whether a hearing is necessary in the interests of justice to enable the application to be determined. A hearing would, unless not practicable, be a hearing of the full tribunal that made the original decision (Rule 72(3)). If, however, I decide that it is in the interests of justice to determine the application without a hearing under Rule 72(2), then I must give the parties a reasonable opportunity to make further written representations.

8. In deciding whether or not to reconsider the judgment, the authorities indicate that I have a broad discretion, which *"must be exercised judicially … having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible be finality of litigation"* (*Outasight v Brown* [2015] ICR D11). The Court of Appeal in *Ministry of Justice v Burton* [2016] ICR 1128 also emphasised the importance of the finality of litigation (ibid, para 20).

9. That said, if an obvious error has been made which may lead to a judgment or part of it being corrected on appeal, it will generally be appropriate for it to be dealt with by way of reconsideration: *Williams v Ferrosan Ltd* [2004] IRLR 607 at para 17 *per* Hooper J (an approach approved by Underhill J, as he then

was, in *Newcastle upon Tyne City Council v Marsden* [2010] ICR 743 at para 16).

10. It may also be appropriate for a judgment to be reconsidered if a party for some reason has not had a fair opportunity to address the Tribunal on a particular point (*Trimble v Supertravel Ltd*, *Newcastle-upon-Tyne City Council v Marsden* ibid).

11. However, a mere failure by a party (in particular a represented party) or the Tribunal to raise a particular point is not normally grounds for reconsideration (*Ministry of Justice v Burton* (ibid) at para 24) – an application for reconsideration is not an opportunity to re-argue the merits.

12. Where a party wishes to rely on fresh evidence, the EAT has given clear guidance to the effect that the most appropriate way to do so is by way of an application for reconsideration of the tribunal's decision, rather than an appeal to the EAT, since the tribunal is better placed to decide whether the evidence would if available at the original hearing have made any difference to its conclusions: *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 and para 9 of the *Practice Direction (Employment Appeal Tribunal - Procedure) 2018*. The same *Ladd v Marshall* test applies both on reconsideration and on appeal to the question of whether fresh evidence should be admitted, i.e. the question is whether the evidence have been obtained with reasonable diligence for use at the hearing; whether it is relevant and would probably have had an important influence on the hearing; and whether it is apparently credible: *Outasight VB Ltd v Brown* [2015] ICR D11 (approved by the Court of Appeal in *Ministry of Justice v Burton* [2016] EWCA Civ 714, [2016] ICR 1128). However, as the EAT made clear in *Outasight* (para 31), reconsideration may be permitted on the basis of fresh evidence not meeting the *Ladd v Marshall* test where it is in the interests of justice to do so.

My judgment

13. The Claimant's application takes the form in places of a series of questions. It runs to 27 pages. I have assumed that the Claimant intends her questions to constitute submissions as to errors that she maintains have been made in the judgment. I have considered the merits of each of the points made by the Claimant, in the light of all of the representations and documents she has submitted and the Respondent's representations. Applying the legal principles, set out above I find as follows in relation to each of the Claimant's points. I adopt the headings and numbering used by the Claimant in her application. Paragraph references are to paragraphs of the Reserved Judgment on Liability, save where otherwise stated. Bearing in mind that full reasons were given by the Tribunal in our Reserved Judgment, the need to deal with this application in line with the overriding objective in Rule 2, and in particular in a way that is proportionate, my reasons here are set out as briefly as possible:-

B.1. Detriments (subsection (1) s 47B and subsection (1B) s 47B)

B.1.1. Identification of Acts vs Decision with Time Limit

14. The Tribunal has in my judgment taken the correct approach to determining whether the acts complained of were in time. A key question for the Tribunal in this respect was whether any of the acts complained of by the Claimant that were in time were unlawful. If not, they could not form part of a continuing act with any act that was out of time: see the *South Western Ambulance* case (para 209).

15. For the reasons set out at para 212, Detriments b. and c. were precluded by s 47B(2) ERA 1996. For the reasons set out at paras 216-217 we found that Detriments d. and e. were unmeritorious. We found that Detriment a. was meritorious (para 215), but it was out of time (para 218).

B.1.2. Combining Detriment b. and Detriment c.

16. The Tribunal did not 'combine' Detriment b. and Detriment c., we found (para 212) that they could not be separated from the act of dismissal applying the relevant legal principles that we set out at paras 206-208.

B.1.3 Standalone Detriment concerning the pre-exit engineered email by Ms Yates

17. The second amendment application was refused for the reasons set out at paras 33-37. The Claimant does not identify any alleged error in the approach the Tribunal took to considering that amendment application. It is immaterial whether the pre-exit email detriment was grouped under PD4 or between PD4 and PD10, the main point so far as amendment was concerned was that the Claimant had been well aware of that email since receiving it in disclosure and the amendment application made in Closing Submissions was too late to add that as a substantive issue. In any event, even had that amendment been allowed, and the consequent claim succeeded on the merits, it would have been out of time and therefore likely not to succeed for the same reasons as Detriment a. did not succeed (para 218). Further, we have set out our conclusions as to Ms Yates' motivation at paras 228-229. We did not find that she was motivated by the Claimant's protected disclosures.

B.1.4 Detriment e. Manner of Appeal

18. The Tribunal found that the manner in which the appeal was conducted by Mr Withers did not constitute a detriment (para 213) and that in any event he was not motivated by the Claimant's protected disclosures (para 217). The Tribunal's findings of fact regarding the appeal are at paras 190-192. The Claimant's points here amount merely to disagreement with the Tribunal's conclusions of fact and an attempt to re-argue the merits.

19. The Tribunal is aware of the law on the burden of proof and set this out at para 202. Although the application of those principles are not spelled out in the judgment in relation to this particular detriment, the position in relation to this Detriment e. was that the Tribunal did not find the Claimant had discharged the initial burden on her since it did not consider there was a detriment, nor was there anything to suggest that Mr Withers was motivated by the Claimant's protected disclosures. The burden did not therefore shift to the Respondent.

20. In any event, as a matter of general principle, the shifting burden of proof has no role to play where the Tribunal is able to make clear findings of fact: see *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 *per* Lord Hope at para 32. That was a discrimination case, but I see no reason why the same principle should not apply in the context of a protected disclosures claim. In this case, the Tribunal was able to conclude as a matter of fact (para 217) that Mr Withers was not motivated by the Claimant's protected disclosures.

B.2 Dismissal (s 103A)

21. The Tribunal in my judgment has properly applied the principles in *Jhuti* and we set out our conclusions as to the motivation of the various individuals involved in the decision-making process in paras 221-230. The Claimant's points here amount to disagreement with our factual conclusions and an attempt to re-argue the merits.

B.3 Causation Test

22. So far as I am aware, the Tribunal has identified all of the pleaded detriments (which were those identified in the agreed list of issues) and has properly applied the causation test to those alleged detriments.

B.4 Burden of Proof

23. The Tribunal's conclusions in relation to the detriments are set out at paras 211 to 218. It was only in relation to Detriment a. that the Tribunal found the Claimant had discharged the initial burden on her so that an explanation from the Respondent was called for. The Respondent failed to provide a satisfactory explanation and so the Claimant's Detriment a. claim succeeded on the merits, although it was outwith the Tribunal's jurisdiction as it was out of time (para 218).

B.5 Time Limit

24. The Claimant's points here cover much of the same ground as the previous four points. A new point, so far as the second amendment application is concerned, is the correspondence with Judge Wade (referred to in paras 33-34 of the Claimant's application), which was not drawn to the Tribunal's attention at the hearing. However, it does not explain why an application could not have been made at the start of or during the hearing rather than in closing

submissions. Nor does it dispose of the point in para 36a of our judgment, which was applicable to most of the proposed amendments, that they were *"not dealt with in oral evidence in the way that [they] would have to have been if [they] were a separately pleaded detriment. We cannot fairly determine [them] now"*.

C. Summary of Key Issues

25. The points at paras 36-44 of the Claimant's application are all concerned with the Tribunal's conclusions as to the detriments claims, and the reasons for the Tribunal finding those to be unmeritorious and/or out of time. The Tribunal has taken the correct approach for the reasons set out above. Further, regarding the Claimant's point at para 40, the time limit in s 48(3)/(4) ERA 1996 does not run from the date on which the act in question is 'identified' but from the date on which it was 'done' or 'decided on', which in relation to Ms Yates' email was the time it was sent. The Claimant's knowledge of that act goes to 'reasonable practicability' and 'reasonableness' and the Tribunal's reasons for refusing the second amendment properly took into account the Claimant's state of knowledge.

26. As to the Claimant's complaint at para 45(a) of her application about the rejection of the first amendment application, the Tribunal's reasons for refusing that amendment are set out at paras 11-32. The Claimant suggests that the Tribunal failed to take into account 'the difficulty the Claimant faced in finding who were the individuals that should be liable'. It is correct that this particular point is not specifically addressed in the Tribunal's reasons. It is correct also that it was a live issue in the proceedings as to which individuals, out of Ms Garrett-Cox, Ms Yates and Mr Mohammed, had been the relevant decision maker(s). However, the alleged difficulty in identifying the decision-maker was not a point on which I have noted the Claimant placing much reliance at the start of proceedings when the first amendment application was considered, hence it not featuring in the Tribunal's reasons. Considering the point now, there is no doubt that the Claimant was aware from the day of her dismissal that those three individuals were involved in the dismissal as all three were in the room (virtually in Mr Mohammed's case) when she was informed that she was being dismissed. Ms Garrett-Cox also personally signed the dismissal letter and therefore on any view could have been identified as an individual decision-maker from the outset of these proceedings. In the circumstances, in my judgment, there is no reasonable prospect of this particular point making any difference to the Tribunal's decision on the first amendment application, particularly given that the Claimant's position at the hearing was that the reason she had not pleaded a case against individuals was a combination of legal advice and an unwillingness to make things 'personal'.

27. As to the Claimant's para 45(b), the Tribunal specifically considered the application of *Jhuti* when addressing the claim against the Respondent (paras 222-230).

28. As to the Claimant's para 46, the Claimant did not at the hearing suggest that the wrongful dismissal claim was a claim for breach of the implied term of trust and confidence, but if that was the way she intended to put her case, then that claim is precluded by the House of Lords decision in *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518, and this point stands no reasonable prospect of making any difference to our judgment.

D Law and Legal Authority

29. This section of the Claimant's application sets out legal principles without identifying any reason why the judgment should be reconsidered.

E. Errors in the ET's Legal Approach/Procedure and the Impact Analysis

E.1. Detriments

E1.1 Error 1 – Detriments vs Act/Failure to act

30. The points made by the Claimant in this section appear for the most part to repeat those that she made in her Section B and for the reasons set out above I do not consider that there are any errors in the judgment with regard to the Tribunal's approach to the Claimant's detriment claims. At para 65 the Claimant mentions a number of matters that were not pleaded by her as detriments (or were refused as additional detriments in the second amendment application) and therefore did not need to be dealt with in the judgment. The points made by the Claimant here are merely attempts to reargue the merits.

E.1.2 Error 2 – Standalone Detriment for Pre-Exit Email

31. This is the same point as B.1.3. above.

E.1.3 Error 3 – Causation Test on Detriments

32. The Claimant here sets out a series of matters that she refers to as detriments which were not pleaded as detriments (or permitted to be relied on as detriments by the Tribunal under the second amendment application). That is why they are not considered as such in the judgment. However, the Tribunal did consider all the evidence it heard in reaching its conclusions as to the motivations of Ms Harding, Ms Yates, Ms Garrett-Cox and Mr Mohammed in the run-up to the Claimant's dismissal. Its conclusions of fact in respect of that evidence are set out at paras 221-230. Insofar as the Claimant seeks to challenge those findings, she is seeking to re-argue the case on its merits.

E.1.4 Error 4 – Burden of Proof in the Legal Approach under s 47B ERA

33. The Tribunal set out the law as to the burden of proof at para 202 (in relation to the detriments claim) and at para 220 (in relation to the unfair dismissal

claim). The Tribunal applied those legal principles in reaching its determination. Save in relation to Detriment a., the Tribunal was able to reach positive findings of fact without explicit resort to the burden of proof. As noted above, the Supreme Court in *Hewage v Grampian* made clear this was an acceptable approach.

34. The Claimant refers to the differential treatment between her and Mr Sutton. This is dealt with at para 228, where we explain why this did not lead us to conclude that the Claimant's protected disclosures were the sole or principal reason for her dismissal. The Claimant also refers to Ms Yates' discouraging of Ms Harding from raising a grievance (dealt with in our para 153) and Ms Yates' email of 21 November 2018 and the reasons why that was drafted in order to engineer the Claimant's dismissal. Our reasons for concluding that Ms Yates' was not motivated by the Claimant's protected disclosures when drafting this email are set out at paras 228-229. We did not specifically address the question of Ms Yates' motivation for discouraging Ms Harding from raising a grievance, but we did not need to in order to explain our decision on the legal issues. The Claimant's points in this section thus amount to an attempt re-argue the merits of the case.

E.1.5 Error 5 – Failure to Attribute the Individual's Act/Failure to act to Employer

35. The Claimant in this section makes various points which appear to relate to the Tribunal's interpretation and application of the *Jhuti* principle. The Tribunal's interpretation of *Jhuti* was set out at paras 203-205, and its application of those principles to this case was set out at paras 222-230. Regarding Ms Yates, the Tribunal found that her state of mind could be attributed to the employer (para 223), but that she had not been motivated by the Claimant's protected disclosures (paras 225-226 and 229).

36. The position of Ms Harding was dealt with at para 224. The Tribunal found that she was in the hierarchy of responsibility above the Claimant, but did not participate in the decision-making process. Accordingly, her state of mind was only to be attributed to the employer if she had 'invented' something which led the employer to dismiss. For the reasons set out at para 225, the Tribunal found that this was not the case: what led the employer to dismiss was Ms Harding's degree of upset. That upset was, we found, genuine and not an 'invention' of the sort the Supreme Court had in mind in *Jhuti*.

37. The positions of Ms Garrett-Cox and Mr Mohammed are dealt with at para 229: the Tribunal found that they were not motivated by the Claimant's protected disclosures.

38. The Claimant again appears to be seeking to re-argue the merits in respect of the Tribunal's conclusion on these issues.

E.1.6 Error 6 – Combining Detriment b + Detriment c

39. This raises many of the same points B.1.2 above and the same reasons apply. The 'detriments' listed by the Claimant at para 91 were not pleaded as detriments in the case.

E.1.7 Error 7 – The Manner of Appeal – Detriment e.

40. This raises many of the same points as B.1.4 above and the same reasons apply. The Claimant is here seeking to re-argue the merits of the Tribunal's conclusions of fact in relation to the handling of her appeal. In doing so, she makes a number of detailed points that she did not make, and/or placed little emphasis on, at the hearing and which are not therefore dealt with in the Tribunal's reasons, but they did not need to be in order to explain our decision.

Error E.2 Time Limit

E.2.1 Error 8 – Last act or failure to act in Time

41. The points made by the Claimant in this section cover the same ground as Section C above. As noted there, the time limit in s 48(3)/(4) ERA 1996 does not run from the date on which the act in question is 'identified' but from the date on which it was 'done' or 'decided on'. The Claimant's knowledge of the acts she mentions goes to 'reasonable practicability' and 'reasonableness' and the Tribunal's reasons for refusing the second amendment properly took into account the dates on which the various matters that the Claimant sought to add as detriments in her second amendment came to her knowledge.

E.2.2. Error 9 – Reasonableness for Time Extensions s 48(3)(b) ERA 1996

42. This section appears to relate to the Claimant's second amendment application. So far as the question of time limits was concerned, the Claimant has, as already noted, misunderstood the effect of ss 48(3)/(4) ERA 1996. However, the second amendment application was not refused only because the matters the Claimant sought to add as detriments were out of time, but because the application was made in closing submissions, after the conclusion of the evidence and because many of the matters that the Claimant sought to raise as detriments were not dealt with in oral evidence in the way that they would have been had they been separately pleaded detriments and it was in our judgment unfair to permit the amendments at so late a stage. There is no legal error in the Tribunal's approach to this question. The Claimant is seeking to reargue the merits of the Tribunal's decision on the amendment application.

E.3 Dismissal

E.3.1. Error 10 – Causation Test and burden of proof regarding Dismissal s 103A

43. The Claimant here repeats points that she made earlier about the Tribunal's application of the burden of proof. Those points are wrong for the reasons set out in relation to E.1.4 above. Further, the Claimant is wrong to say that the Respondent failed to prove its reasons for dismissal. The Respondent advanced alternative principal reasons for dismissal. The Tribunal found as a fact that the principal reason for dismissal was the primary one of the alternatives advanced by the Respondent, i.e. conduct: see para 226.

E.3.1. Error 10 – Hidden reason vs Adopted reason, Jhuti case

44. The Claimant here complains about the Tribunal's analysis and application of the *Jhuti* principle. However, there is no legal error in the Tribunal's approach in this respect for the reasons set out at E.1.5. above. The Claimant goes on to reargue the merits in respect of the factual findings on which the Tribunal's conclusions are based.

E.4 Adverse inferences

E.4.1 Error 11 – Inadequate justification for no adverse inferences to draw

45. The Claimant here is again seeking to reargue the merits in respect of the Tribunal's factual findings. Further, she repeats the error made earlier of suggesting that the Respondent failed to prove its principal reason for dismissal. As already noted, the Tribunal found that the Respondent proved that the principal reason for the Claimant's dismissal was her conduct. This was the Respondent's principal reason as set out in the termination letter, as well as in these proceedings.

F Factual errors

46. I note that the Respondent agrees that the Tribunal has misrecorded the dates for disclosure and exchange of witness statements as set out in the Claimant's paragraph 124, but there is little difference in dates and I cannot see that it could possibly make any difference to the decision that the Tribunal reached on the second amendment application.

47. The precise audit ratings set out in the Claimant's para 125 are not material to the judgment.

48. As to the point made in the Claimant's para 126, the Tribunal's finding of fact at para 164 concerns Mr Mohammed's oral evidence about a text message that the Claimant sent to him after the telephone call that he deals with in para 44 of his witness statement. There is no inconsistency here and in any event this point is not material to the judgment.

Additional points in the Claimant's email of 30 March 2020

49. This further application for reconsideration was submitted outwith the normal 14-day time limit in Rule 70. However, the Tribunal has power under Rule 5 to extend that time limit. This is a broad discretion to be exercised in accordance with the overriding objective: *Gosalakkal v University Hospitals of Leicester NHS Trust* (UKEAT/0223/18/DA) *per* HHJ Richardson at para 10. In this case, it appears to me to be in the interests of justice to permit the Claimant to pursue these further points out of time as they have been submitted shortly after her original application (which was in time), they do not expand significantly on her original application, and the Respondent has had an opportunity to provide a response to them as part of the case management timetable I had already set, so there is little prejudice to the Respondent.

50. The Claimant in her email of 30 March 2020 refers to what was said in the Court of Appeal in *Jhuti* [2017] EWCA Civ 1632, [2018] ICR 982 at para 69 about the possibility of a claim being made directly against an employer in respect of dismissal as a detriment, if it is made on the basis that the employer is vicariously liable under s 47B(1B) for the unlawful act of an individual employee under s 47B(1A). The Court of Appeal's decision in *Jhuti* preceded that of the Court of Appeal in *Timis v Osipov* and was carefully considered by the Court in that case. I do not see that there is any inconsistency between the two decisions on this point.

51. In my judgment, it is correct, and remains so *post-Timis v Osipov*, that it is in principle possible for a claim that dismissal is a detriment to proceed without the individual co-worker being named as a respondent, but only if there is a pleaded case against an individual co-worker for which the employer accepts vicarious responsibility, i.e. in respect of which the Respondent does not seek to run the 'reasonable steps' defence in s 47B(1D).

52. That was not the position in this case. In this case, the Claimant had not pleaded any case that any particular individual had subjected her to the detriment of dismissal. As noted in para 16, she had pleaded a case that dismissal was a detriment to which she was subjected by her employer (and not an individual). She had done so on the basis of legal advice and because she *"had not wanted to make the claim a personal one against individuals"*. The claim had thus been deliberately pleaded as a claim directly against the employer that dismissal was a detriment. This is precisely the claim precluded by s 47B(2) as the Court of Appeal confirmed in *Timis v Osipov*.

53. The Claimant therefore needed to amend her claim to identify a particular individual (or individuals) who she alleged had subjected her to the detriment of dismissal. Had the Respondent in response indicated that it would accept vicarious liability and not sought to run the 'reasonable steps' defence, any such amended claim could have proceeded solely against the employer, but there would still have been a need to consider whether the amendment should be permitted, bearing in mind its timing and the consequent widening in scope of the case against the Respondent. However, the Respondent was not willing to concede that it would accept vicarious liability in respect of the individuals

that the Claimant proposed to name (Ms Garrett-Cox and Ms Yates), so the amendment application had to be considered by the Tribunal on the basis that not only was an amendment required that would have the effect of widening the case against the Respondent, but would also likely necessitate an adjournment of the hearing so as to give the proposed individual respondents and the Respondent an opportunity to take advice and prepare responses to the amended claim.

54. I do not therefore consider there was an arguable error of law in the Tribunal's approach, and certainly none that it would be appropriate for the Tribunal to correct by way of application for reconsideration, bearing in mind the statutory provision and the binding Court of Appeal authority on this particular issue.

55. I will add this: I have (and the Tribunal panel had) sympathy for the Claimant in respect of the impact that s 47B(2) ERA 1996 had on her case. It is an impact that became more significant in the light of the facts as we found them to be at the conclusion of the hearing than it appeared to be when we were considering the Claimant's amendment application at the outset. This is because it is possible that, had the Tribunal been required when considering the reason for the Claimant's dismissal to consider whether it was a detriment to which she was subjected because of her protected disclosures, rather than whether her protected disclosures were the sole or principal reason for her dismissal, there would have been a different outcome in respect of that part of the Claimant's claim. We did not make any findings in that respect, but it is possible that the Tribunal would have concluded, given our findings in relation to Detriment a. and Ms Harding's conduct, and the link between that and the Claimant's dismissal, that the decision to dismiss was sufficiently influenced by the Claimant's protected disclosures to meet the causation test that applies in a detriments case.

56. However, that was not the test that the law required us to apply. We had to consider whether the Claimant's protected disclosures were the sole or principal reason for her dismissal. We found that they were not. It was noted by the Court of Appeal in *Timis v Osipov* (see in particular para 78 of Underhill LJ's judgment in that case) that s 47B(2) is a *"clumsy"* provision and that *"it may well be that Parliament did not really think through the technical challenges"*, but the Court of Appeal nonetheless held that the effect of s 47B(2) was clear. The consequences for the Claimant in this case are thus simply the result of where Parliament has seen fit to draw the line between unfair dismissal and detriments cases in the protected disclosure context.

Conclusion

57. For the reasons set out above, I do not consider that any of the points made by the Claimant as to why the Tribunal should reconsider its decision in the interests of justice have a reasonable prospect of success. Many of them are simply wrong either as to the facts or the law. None of them identify any arguable legal error of approach, and certainly no legal error of the obvious

kind that might appropriately be rectified on an application for reconsideration rather than by way of appeal to the EAT. The Claimant does not seek to rely on new evidence *per se*. All the evidential points relate to matters that were before the Tribunal, although some were not emphasised by the Claimant or otherwise drawn to the Tribunal's attention during the hearing. However, while acknowledging that the Claimant acted in person and has no legal training, the Claimant in my judgment had a fair opportunity to put her case at the hearing and the interests of justice do not require her to be given a second opportunity to argue the merits of the case.

58. The Claimant's application is accordingly dismissed.

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Employment Judge Stout

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Date 30 April 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

5 May 2020

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FOR THE TRIBUNAL OFFICE