EMPLOYMENT TRIBUNAL

Claimant **Mr Ramsden**

Respondent SpaMedica Limited

Employment Judge Dr E P Morgan

Appearances

Claimant: Ms Brooke-Ward (Counsel)
Respondent: Ms Gould (Counsel)

JUDGMENT
ON APPLICATION FOR RECONSIDERATION

1. As there are no reasonable prospects of the Judgment (sent to the parties on 19 August 2020) being varied or revoked, the application for reconsideration is refused.

REASONS

1. By Judgment promulgated on 19 August 2020, the Tribunal determined the Claimant had not made any qualifying protected disclosure for the purposes of section 43B of the Employment Rights Act 1996.

2. Rule 70 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (The Rules) provides an Employment Tribunal may, either on the application of a party, or of its own initiative, reconsider a judgment where it is necessary in the interests of justice to do so. In the event of exercising this discretion, the Tribunal may confirm, vary or revoke its previous judgment.

3. Rule 71 makes clear, any application for reconsideration must be lodged with the Tribunal within the period of 14 days of the date the judgment (or written reasons if later) was sent to the parties. Any application must set out why it is said reconsideration is necessary.

4. The application relied upon by the Claimant was received by the Tribunal on **27 August 2020.** There is no dispute that the application was made in time. The application was at the same time served upon those acting for the Respondent. Those acting for the Respondent have confirmed their objection to the application by email of **28 August 2020**.

5. The language of Rule 70 makes clear that the Tribunal enjoys a discretion. The exercise of that discretion requires the Tribunal to consider and determine whether reconsideration is *necessary* in the interests of justice. What is necessary in the interests of justice will itself depend upon all of the circumstances of the case. These include the interests of both parties to the litigation, the overriding objective and, the public interest requirement that there should – as far as possible – be finality in litigation.

6. Where, as here, the issue of reconsideration arises as a result of an application by one of the parties, the Tribunal must first consider whether there is a reasonable prospect of reconsideration in the interests of justice. As might be expected, dissatisfaction with the judgment itself will not be a sufficient justification for reconsideration.

7. The application is contained within a single page letter. It details one ground, namely:

> "The Claimant believes that it is necessary for the judgment to be varied or revoked because despite counsel, on behalf of the Claimant, making submissions for EJ Morgan to consider whether the disclosures made by the Claimant could be deemed, collectively, to amount to a protected disclosure under the principles established in *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540 (paras 37-40 of the Skeleton Argument on behalf of the Claimant) this was not considered and/or is not reflected in the written reasons.

8. The letter continues:

> "In accordance with rule 70 of the ET Rules, it would therefore be in the interests of justice to vary or revoke the judgment to conclude that the Claimant's disclosures collectively amounted to being a protected disclosure…"

Discussion and Conclusion

9. The sections of the skeleton argument relied upon by Counsel for the Claimant of particular relevance to the application are to be found in paragraphs 32, 37-38. In the course of which it is stated:

> "Protected Disclosure
> 32. The Claimant avers that the disclosures made (detailed in the Further and Better Particulars [52-74] were all qualifying disclosures within the meaning of section 43B of the Employment Rights Act 1996, either in isolation or by looking the disclosures collectively…
>
> Disclosure of Information
> …
> 37. Furthermore the Claimant invites the Honourable Tribunal not only to look at the disclosure in isolation, but given the period of time over which the disclosures were made and the numerous emails, communications and reports, to look at the collective nature of such disclosures:
> - By referring to the [sic] or combining it with what the Claimant has said before (or afterwards); and
> - By the context in which it was disclosed.
>
> The Claimant would seek to rely on the case of *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540…

> 38….It is submitted that following *Norbrook* the communications from the Claimant don't merely read together to provide context but rather they help to clarify the reasoning behind the numerous disclosures and explain the concerns the Claimant had in respect of particular policies and conduct within the Respondents [sic] company."

10. It will be apparent from those passages that the Claimant was inviting the Tribunal to aggregate the communications which he contends were made by him; both in respect of the character of the information alleged to have been imparted and to demonstrate the concern which it is alleged the Claimant was operating under at the material time.

11. However, as the extracts quoted demonstrate, this was in fact the secondary position advanced by the Claimant; his primary case being that there had in any case been multiple discrete protected disclosures upon which he relied. The Further and Better Particulars cited by Counsel confirmed this to be so.

12. In *Norbrook Laboratories*, the claimant transmitted 3 emails to his employer. At first instance, the Employment Tribunal concluded that taken together, the emails constituted a protected disclosure. In the course of her Judgment, Slade J acknowledged that a communication might be read as 'embedded' within a later communication. She also acknowledged that two communications might constitute a protected disclosure. Slade J was, however, swift to observe that whether they do so is a question of fact.

13. As originally formulated [p14 §3] the claim referred to a single disclosure. This is repeated elsewhere in the Particulars of Claim [p19 §20]. It is also said that the Claimant raised concerns throughout the course of his employment [p19 §21]. By the time of the preliminary hearing before EJ Bright on 16 April 2020, it was clear that the Claimant was advancing a case of multiple putative disclosures. The "Agreed List of Issues" refers to protected disclosure (in the singular). However, paragraph 13 of that document records:

> "The Claimant avers that the issues were raised in individual emails prior to 13 May 2019 (which are detailed in the Further Particulars dated 12 May 2020) and then a formal written grievance dated 13 May 2019 was submitted to Mr Simon Shephard the Chief Operating Officer (COO)".

14. Whether the Claimant was advancing a case of multiple disclosures, or a single disclosure, the Employment Rights Act 1996 imposed upon him the same burden, namely: to satisfy the Tribunal that the communication was made and that it was the product of the necessary subjective belief which was, viewed objectively, reasonable. The authorities (including *Norbrook*) confirm this to be so.

15. As recorded in the Reserved Judgment [para 40] it is permissible for a Claimant to rely upon the cumulative or aggregated effect of a sequence of communications. However, aggregation cannot be seen as a means by which to exonerate the Claimant from the obligation of satisfying the Tribunal as to the detail and quality of his own belief. This is a matter upon which the Claimant is expected (if not required) to adduce evidence. As noted in the course of the Reserved Judgment [para 8] the Claimant has had the benefit of legal

representation throughout. Despite this assistance, the Further and Better Particulars and principal witness statement did not provide the details necessary to identify the detail of the communications relied upon by the Claimant or the detail of his belief. This difficulty was the subject of exchange between the Tribunal and both Counsel and their submissions invited upon it: [para 11]. It is nonetheless clear from the Further and Better Particulars, that the communications cited by the Claimant were relied upon as tending to show either a breach of a legal obligation, or, the concealment of such a breach.

16. Having made its principal findings of fact, the Tribunal gave specific and detailed consideration to the question whether the Claimant had made a protected disclosure. In the course of doing so, the Tribunal recorded the submission on behalf of the Claimant by which the Tribunal was invited to aggregate the communications upon which he relied. The Tribunal recognised that such an approach might be permissible and legitimate in a given case: [para 40]. The factors in the present case included the limits of the evidence which the Claimant had himself provided to the Tribunal [para 42] and his inability in cross-examination to provide any explanation for this deficiency.

17. The Tribunal made additional findings of fact in relation to each of the putative disclosures. As recorded in the Reserved Judgment, in some instances it could not be satisfied that the communication had in fact been made [e.g. PD6 para 62]. However, where it was satisfied, it proceeded to consider and make findings regarding the Claimant's subjective belief and the reasonableness of the belief in question. In doing so, the Tribunal considered the issue of belief having regard to the totality of the communications [e.g. in relation to PD2 at para 50] and in the context of related communications [e.g. in relation to PD3 at para 53;PD8 at para 69; PD11 at para 86; PD 20-22 at para 122; PD23 at para 129]. Further, the Tribunal recognised that the repetition of previously communicated information did not preclude a finding that a qualifying protected disclosure had been made [para 88 and 93].

18. In respect of each of the communications relied upon by the Claimant, the Tribunal has found as a fact that either the Claimant had not formed the necessary subjective belief and/or that such belief, in any event, was not reasonable.

19. As noted in the Reserved Judgment, it is not disputed that communications may be considered cumulatively or aggregated as component parts of a single disclosure. However, in the view of the Tribunal, whether or not it may do so is heavily dependent upon the Tribunal's assessment of the quality of the Claimant's belief (if any) at the time of the communications upon which he relies. The decision of Slade J in ***Norbrook Laboratories*** does not alter this position. The Tribunal's findings in relation to the communications in this case and the quality of the belief upon which the Claimant relied, preclude any determination that the 24 putative disclosures are capable of aggregation so as to found the basis of a single qualifying disclosure in this case.

20. Accordingly, paragraph 3 of the Reserved Judgment accurately records the Tribunal's determination that the Claimant did not make '*any form*' of protected disclosures.

21. Given this position, the Tribunal is satisfied that it is not necessary in the interests of justice to exercise the powers of reconsideration under Rule 70 and further that the application has no reasonable prospect of success. In reaching this conclusion, the Tribunal has had regard to all of the circumstances of the case, including but not limited to the fact that submissions on the issue of aggregation have already been accommodated in the formulation of the Tribunal's findings of fact. The application is therefore dismissed.

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Employment Judge Dr. E P Morgan
7 September 2020

JUDGMENT SENT TO THE PARTIES ON
1 October 2020