EMPLOYMENT TRIBUNALS

Claimant: **Mr K Jarco**

Respondent: **Hovis Ltd**

Before: Employment Judge Midgley

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The claimant's application for reconsideration is refused because there is no reasonable prospect of the decision being varied or revoked.

REASONS

1. The claimant has applied for a reconsideration of the Reserved Judgment dated 17 November 2020 which was sent to the parties on 25 November 2020 ("the Judgment"). The grounds are set out in his email dated 9 Decmber 2020.

2. The claimant applied for reconsideration, having received the reasons, on 25 November 2020 Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). Under Rule 71 an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The application was therefore received within the relevant time limit.

3. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.

4. The grounds relied upon by the claimant are identified in the application attached to the claimant's email above which take the form of a statement dated 9 December 2020. In summary he relies upon the following points:

    a. He has new evidence in that he has located a copy of his contract and the letter of dismissal.
    b. There is evidence that Mr Hughes was aware of his protected disclosure to the ICO in January 2020 because his statement which he sent to the Tribunal in preparation for the telephone case management hearing on 7 April 2020 made reference to that disclosure and the dismissal letter written by Mr Hughes referred to that statement.

5. The claimant's contract of employment and the specific role for which he was employed is of no relevance to the issues decided in the Reserved Judgment.

6. The fact that Mr Hughes knew of the fact of the protected disclosure is clearly of relevance to the decision to strike out the claim under s.103A ERA 1996. The evaluation of the evidence, which will take the form of the letter of dismissal and Mr Hughes' evidence as to what he knew of the claimant's complaint to the ICO, to determine whether the claim is made out is ultimately one for the Tribunal that will hear that evidence at the final hearing. The essential point is that there is evidence that might establish the link between the disclosure and the dismissal and it is contained in a document produced by Mr Hughes detailing the reason for the dismissal.

7. In consequence, it cannot be said that there is no evidence which could establish the link, and the task of evaluating the evidence must be left to the Tribunal that conducts the final hearing. However, for the reasons given at paragraphs 84 to 85 of the Reserved Judgment, I remain of the view that the claimant has little reasonable prospect of persuading the Tribunal of that link, given the claimant admits the conduct which the respondent argues was the reason for dismissal, and that conduct could certainly be proved to be gross misconduct. I observe that it is regrettable that the claimant did not refer me to the relevant passage during the preliminary hearing when asked whether he was able to point to any evidence that showed Mr Hughes was aware of the protected disclosure.

8. The Employment Appeal Tribunal ("the EAT") in Trimble v Supertravel Ltd [1982] ICR 440 decided that if a matter has been ventilated and argued then any error of law falls to be corrected on appeal and not by review. In addition, in Fforde v Black EAT 68/60 the EAT decided that the interests of justice ground of review does not mean "that in every case where a litigant is unsuccessful he is automatically entitled to have the tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This

ground of review only applies in the even more exceptional case where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order".

9. Here, striking out a claim under s.103A ERA 1996 on the grounds (or partial grounds) that there is no evidence to establish that the dismissing manager knew of the protected would plainly be wrong and 'a denial of natural justice.' It would be to ignore the content of the letter of dismissal and the content of the document referred to in it.

10. The claim under s.98(4) ERA 1996 is not effected given that the protected disclosure plays no part in it: if the claimant establishes that he was dismissed because he made a protected disclosure, his claim succeeds under s.103A, not s.111, if he does not establish that, he has no reasonable prospect of demonstrating that his dismissal was unfair for the reasons set out in paragraph 7 above.

11. Accordingly, I grant the application for reconsideration pursuant to Rule 72(1) solely in relation to the claim under s.103A ERA 1996, the claim will be permitted to proceed but the claimant must pay a deposit to proceed with that claim pursuant to Rule 39 as it has little reasonable prospect of success.

12. The result is that the claimant must proceed with the following claims:-

    a. S.103A ERA 1996 subject to payment of a deposit
    b. S.47B ERA 1996 subject to payment of a deposit
    c. S.13, 26 and 27 EQA 2010 subject to payment of a deposit in relation to each factual allegation in respect of each legal claim.
    d. The claim for unlawful deduction of wages.

13. The parties will receive separate correspondent identifying the size of the deposits to be paid.

Employment Judge Midgley
Dated: 27 January 2021

Judgment sent to the parties: 12 February 2021

FOR THE TRIBUNAL OFFICE