EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4100591/2020

Reconsideration held at Dundee on 12 November 2021

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Employment Judge W A Meiklejohn
Tribunal Member Ms F Paton
Tribunal Member Dr R A'Brook

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Mr A Greasley-Adams	**Claimant** **Represented by:** **Dr C Greasley-Adams**

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Royal Mail Group Ltd	**Respondent** **Represented by:** **Dr A Gibson –** **Solicitor**

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JUDGMENT FOLLOWING RECONSIDERATION

The unanimous decision of the Employment Tribunal in respect of the claimant's application for reconsideration is as follows –

(i) The Judgment dated 27 August 2021 (the "Judgment") is varied as follows –

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(a) Paragraph 179 is deleted and the following paragraph is substituted –

"179. Disparaging comments about the claimant could have the effect of violating his dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant (the "proscribed effect") but only to the extent that the claimant was

aware of them. We found that the claimant became aware of what his colleagues were saying about him only during the B&H investigation. However, for the reasons set out at paragraphs 182-190 below, we did not believe that the unwanted conduct had the proscribed effect."

(b) Paragraph 243 is deleted and the following paragraph is substituted –

"243. Taking the foregoing into account and looking at matters in the round, we decided that it would be just and equitable to extend time in relation to the harassment claim but only to the extent of allowing consideration of matters occurring on or after 2 September 2019."

(ii) Save only as so varied, the Judgment is confirmed.

REASONS

1. Following a hearing which took place on 26, 27, 28 and 30 July and 2, 3 and 4 August 2021 (with a deliberation day on 5 August 2021) we handed down the Judgment in terms of which we unanimously dismissed the complaints brought by the claimant under –

   (a) section 47B of the Employment Rights Act 1996 ("ERA"),

   (b) section 26 of the Equality Act 2010 ("EqA"), and

   (c) section 27 EqA.

2. On 7 September 2021 the claimant submitted an application for reconsideration of the Judgment.

Tribunal Rules

3. Rule 70 of the Employment Tribunal Rules of Procedure 2013 (the "Rules") sets out the principles to be applied when dealing with an application for reconsideration –

> "*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.*"

4. The claimant's application for reconsideration was submitted timeously in terms of Rule 71.

5. The application was referred to me and, in terms of Rule 72, I decided that it should not be refused on the basis that there was no reasonable prospect of the original decision being varied or revoked. I did not express a provisional view on the application. I directed that the respondent should be invited to respond to the application. The respondent having done so and both parties having agreed that the matter should be dealt with without a hearing, we met in Dundee on 12 November 2021 to deal with the application.

Grounds for the application

6. The application contains 10 separate grounds and we will set these out and deal with them in turn. Before doing so, we make some general observations.

7. A number of the claimant's grounds allege perversity. We reminded ourselves of the test for perversity. In ***Yeboah v Crofton 2002 IRLR 635*** the Court of Appeal in England said (at paragraph 93) –

> *"Such an appeal ought only to succeed where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached."*

8. A number of the claimant's grounds allege that the Judgment is not compliant with ***Meek v City of Birmingham City Council 1987 IRLR 250***. In that case Bingham LJ said this –

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"*It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises….*"

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9. A number of the claimant's grounds allege failure to consider all of the detriments identified in the claimant's pleadings and all claims submitted by the claimant. The claimant set out his case several times, as follows –

(a) in his ET1,

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(b) in the document which accompanied his agenda for the first of the four preliminary hearings,

(c) in his Further and Better Particulars extending to 82 pages,

(d) in his Scott Schedule, and

(e) in his revised Further and Better Particulars extending to 83 pages.

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10. From the claimant's revised Further and Better Particulars and his Scott Schedule, EJ McPherson was able to identify the matters complained of and issues to be addressed at the final hearing. We drew on this when setting out within the Judgment the issues we had to determine.

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11. Finally, a number of the claimant's grounds allege errors of law. We have sought to revisit these where we considered it appropriate to do so in the course of our reconsideration.

Ground 1

Protected Disclosures: The reasoning in the discussion is perverse and/or not compliant with Meek v Birmingham City Council, and it is argued to have involved an error of law.

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12. This focussed on an alleged inconsistency between what we said at paragraphs 148 and 154 of the Judgment about the claimant reporting driver infringements. At paragraph 148 we said –

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> "*The claimant had a reasonable belief that this was in the public interest."*

At paragraph 154 we said –

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> "*….we believed that the real reason that the claimant was trying to get Mr Knox removed from driving was to enhance his own opportunities for overtime. That did not in our view engage the public interest."*

13. At paragraph 148 we were setting out the claimant's position. This is clear from paragraph 147 which starts "*The claimant's position was that…."* and paragraph 149 which starts "*The respondent's position….was that….*". We set out our own views on whether the claimant made a protected disclosure at paragraphs 150-155. Accordingly, paragraph 154 is a statement of our view whereas paragraph 148 is a statement of the claimant's view. There is no inconsistency.

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14. Our views were not based solely on new managers coming to the Stirling office but also on the impact of Mr Bullen's appointment on the availability of overtime. We did not believe that our findings were vitiated by the reference in the claimant's email of 1 August 2019 to other MGV drivers. We were satisfied that the claimant's primary focus was on his own opportunities for overtime. We do not agree that our reasoning was perverse and/or not ***Meek*** compliant.

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Ground 2

Protected Disclosures: Error in Law in making assumption of no "subjective reasonable belief" and referencing Babula in justification, when Babula is primarily related to the test of "objective reasonable belief".

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15. The claimant's argument here appears to be that because he made reference to *"public safety"* he must have had a reasonable belief that he was making a disclosure in the public interest. Under reference to ***Chesterton Global Ltd v Nurmohamed 2015 ICR 920*** the claimant states that "*the law does not prevent somebody making a protected disclosure simply because there is also a potential personal gain".* We are said to have erred in law by applying a test of *"motivation"* rather than "*reasonable belief".*

16. We agreed with Dr Gibson's defence of our reference to ***Babula***. He states –

> "*Babula….does not "focus on the issue of the objective test of reasonable belief". It focusses on the approach to be taken by the Tribunal to the question of a reasonable belief, which is to consider whether the worker subjectively believed at the time that the disclosure was in the public interest; and if so, whether that belief was objectively reasonable."*

17. We had in mind that we should consider whether the claimant subjectively believed at the time that his disclosure was made that it was in the public interest. If he did so, we should then decide whether his belief was objective reasonable.

18. We believed that the claimant's motivation for his disclosure was an element in our assessment of whether he held a subjective belief that the disclosure was in the public interest. He wanted Mr Knox to be removed from driving duties so as to enhance his own opportunities for overtime rather than to enhance public safety. That in our view goes to the reasonableness, or otherwise, of his belief that his disclosure was in the

public interest. We adhere to our view that the claimant did not have a reasonable belief that he was making a disclosure in the public interest.

Ground 3

5 **Protected Disclosures: Procedural Failure to consider all the detriments that the claimant had identified in his pleadings.**

19. Here the claimant starts by referring to Rule 42 of the Rules –

10 "*The Tribunal shall consider any written representations from a party, including a party who does not propose to attend the hearing, if they are delivered to the Tribunal and to all other parties not less than 7 days before the hearing."*

15 20. The claimant contends that the Tribunal should have fully considered the information contained in his Further and Better Particulars of 14 December 2020 as well as in his witness statement -

"*….the detriment as set out in those written documents….should have*
20 *been addressed in their entirety."*

21. The claimant's said Further and Better Particulars were not understood by the Tribunal to be relied on as written representations under Rule 42. They were not adopted as such in advance of nor at the hearing. In
25 contrast, the claimant's Statement of Facts was adopted by the claimant as part of his evidence in chief (see paragraph 37 of the Judgment).

22. We did not consider every alleged detriment contained in those Further and Better Particulars. We did consider the alleged detriments as set out
30 in the claimant's Scott Schedule. We believed that this contained the clearest and most manageable articulation of the claimant's complaints. We believed that this was consistent with the overriding objective in Rule 2 of the Rules to deal with cases *"fairly and justly"* which includes "*dealing with cases in ways which are proportionate to the complexity and*
35 *importance of the issues".*

23. We did not understand the claimant's reference at his sub-paragraph (a.) in Ground 3 to a *"but for"* argument. Section 47B ERA gives a worker the right not to be subjected to detriment on the ground that he has made a protected disclosure. We noted that *"being labelled a harasser"* was not included in the detriments set out in the claimant's Scott Schedule. We believe that we have dealt with this adequately at paragraph 160 of the Judgment.

24. The claimant asserts that we were "*required to consider also if there had been detriment to the Claimant with discussions on the floor that the Claimant had been looking at people's personal files because he had made these disclosures".* Once again this was not a detriment referred to in the claimant's Scott Schedule. We believe that we have dealt with matters appropriately by focussing on the claimant's Scott Schedule.

Ground 4

Harassment: Perversity and/or failure to be Meek compliant in not providing full explanation as to why evidence presented to the court has been omitted.

25. The claimant refers to paragraph 166 of the Judgment and accuses us of *"victim-blaming"* where we say "*It appeared to us that the claimant had to some extent invited talk about himself by making reference to his agreement".* What we had in mind was that the claimant by disclosing the "*fact"* of his COT3 agreement was acting contrary to paragraph 14 of that agreement which imposed an obligation of confidentiality.

26. The claimant then goes on to refer to various specific paragraphs of the Judgment –

(a) Paragraph 165 – the claimant disputes our finding that "*We did not have evidence which allowed us to determine when disparaging comments were made nor how often nor what was said nor by or to whom"* (and our similar statement at paragraph 180). Based on our

findings in fact at paragraphs 77-81 of the Judgment, we stand by what we said at paragraph 165.

(b) Paragraph 167 - the claimant argues that the "*singling out*" was Mr McEwan's proposal that collection element of the claimant's duty should be removed. Our findings in fact at paragraph 90 of the Judgment are consistent with what we say at paragraph 167. We see no reason to revisit the point.

(c) Paragraph 171 – the claimant's criticism here focusses on Mr Walker's conclusions in the case of Mr Knox. We set out those conclusions at length at paragraph 101 of the Judgment. We consider that what we said at paragraph 171 was accurate and not vitiated by the claimant's reference to Mr Walker's conclusions in the case of Mr Knox. We would also observe that while we had an anecdotal description from the claimant of how his Asperger's Syndrome affected him, we did not have evidence as to how this actually impacted him in the workplace.

(d) Paragraph 177 – the passage we have quoted here from Dr Gibson's submissions provided the rationale for our conclusion that none of the *"unwanted conduct"* was done with the proscribed purpose. Again, we see no reason to revisit the point.

Ground 5

Harassment, Procedural Error/Error in Law – Failure to Consider all Claims submitted by the Claimant and/or identified by the panel at all levels of test.

27. We considered on reflection that we had not taken the correct approach in determining the question of whether the unwanted conduct had the proscribed effect. Specifically –

(a) We found at paragraphs 179-181 that the unwanted conduct came to the claimant's attention during the bullying and harassment investigation and had the proscribed effect.

(b) We went on to determine at paragraph 190 that it had not been reasonable for the unwanted conduct to have the proscribed effect.

28. Section 26(4) EqA requires us to take into account the three matters mentioned there, which include "*whether it was reasonable for the conduct to have that effect".* Accordingly, we should have considered this <u>before</u> and not after deciding whether the unwanted conduct had the proscribed effect.

29. We stand by what we said at paragraphs 182-190 of the Judgment. The consequence of our finding that it was not reasonable for the unwanted conduct to have the proscribed effect was that the conduct did not have that effect for the purposes of section 26(1)(b) EqA.

30. We should also have addressed the effect, if any, of section 136 EqA (**Burden of proof**). This provides, so far as relevant, as follows –

> *"(1) This section applies to any proceedings relating to a contravention of this Act.*
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

31. We had regard to the decisions of the Court of Appeal in England in ***Ayodele v Citylink Ltd [2017] EWCA Civ 1913*** and of the Supreme Court in ***Hewage v Grampian Health Board 2012 IRLR 870***. In ***Ayodele*** the burden of proof did not shift to the employer because the employee did not discharge the onus of establishing facts which engaged section 136(2). This included a complaint of harassment (see paragraph 81 of the Court of Appeal's Judgment). In ***Hewage*** (per Lord Hope at paragraph 32) –

> "….*it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination.*

But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

32. The result of our findings as re-stated at paragraph 29 above – that the unwanted conduct did not have the proscribed effect - is that section 136(2) is not engaged in this case.

33. Once again the claimant argues that we have failed to consider matters raised in his Further and Better Particulars. What we have said at paragraph 22 above applies with equal force here.

Ground 6

Harassment, error of law in determining a proscribed effect when it came to the issues of the things said during the bullying and harassment investigation.

34. The claimant asserts that the Judgment was not ***Meek*** compliant at paragraph 190. We did not agree, although we might have indicated (as we do now) that the primary responsibility for assessing whether what was said during the bullying and harassment investigation was (a) relevant to the matters under investigation and (b) truthful rested with and was properly discharged by Mr Walker. We believe that paragraphs 177-191 need to be read together and that, thus read, they are ***Meek*** compliant.

35. The claimant then asserts, if we understand correctly, that we have focussed on the context in which words were used in the bullying and harassment investigation at the expense of consideration of the words used. That we have considered the actual words used is demonstrated by our quotation of them. We do not accept that we have given inappropriate weight to the fact that these words were used in the context of a bullying and harassment investigation.

Ground 7

Unfair proceedings: The introduction of a new ground of resistance in final written submissions as prejudicing the Claimant and not in-keeping to the overriding concept of justice.

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36. We had some difficulty with this as the claimant does not specify what the new ground of resistance is said to be. We speculate that Dr Gibson is correct in surmising that it is this – in addition to their denial that unwanted conduct took place, the respondent sought in their submissions to assert
10 that if the alleged unwanted conduct took place, it did not have the proscribed effect.

37. Dr Gibson is correct in saying that this was addressed by EJ McPherson in his Note following the preliminary hearing on 6 January 2021, when he
15 set out the issues. It was also addressed in our own list of issues which drew on the one prepared by EJ McPherson. It was not a new ground of resistance.

38. The claimant also refers to the fact that Dr A'Brook mentioned during the
20 hearing that he had been a trade union representative. It is entirely normal for a Tribunal member to have a trade union background. Dr A'Brook held a number of positions with the AUT (Association of University Teachers) and latterly the UCU (University and College Union). He has no connection with any of the parties, witnesses or others referred to in the
25 evidence, nor with the CWU. If it were otherwise, he would have recused himself.

Ground 8

Mr Fix It complaint, Failure to Ascertain Full Facts and Witness Orders

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39. There are two aspects to this. The allegation of failure to ascertain full facts relates to an incident in September 2019 when the claimant was alleged to have driven his vehicle at excessive speed within the industrial estate where the Mr Fix It premises were located. We did not make
35 findings in fact about this because we did not believe it was relevant to the

matters we had to decide. We did touch on it at paragraph 174 of the Judgment where, referring to a conversation between Mr Knox and Mr Kerr, we said that *"it was no more than speculation by the claimant that this conversation had been in some way linked to his disability".*

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40. The other aspect relates to the claimant's application for witness orders in respect of Mr Gardner, the owner of Mr Fix It, and three of his staff. The claimant asserts that this was to be decided at the hearing. The background is that the claimant's application for witness orders in respect of Mr Gardner and three unnamed members of his staff was considered by EJ Kemp at the preliminary hearing on 22 September 2020. In refusing the claimant's application, EJ Kemp said that there was a *"stronger case"* for a witness order in respect of Mr Gardner and that it was appropriate to fix a further preliminary hearing to address this and any other outstanding issues.

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41. In his Note following the further preliminary hearing on 6 January 2021, EJ McPherson recorded (at paragraph 17) that *"The claimant no longer seeks an order against Mr Gardner".*

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42. As narrated by Dr Gibson in his response to the claimant's application for reconsideration, a further application by the claimant for witness orders was addressed in an email from the Tribunal to the claimant on 29 June 2021. That email stated that EJ McFatridge was not prepared to grant the witness orders sought and continued –

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> "*The matter may be re-addressed during the hearing by the panel hearing the case after they have heard the claimant's evidence."*

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43. The matter was not raised by the claimant or his representative at the conclusion of the claimant's evidence. The interests of justice do not require that we revisit it now.

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Ground 9

Issue of Time Bar and Errors in Law

44. We are not persuaded that we require to reconsider our decision on whether there was a *"continuing act"* but we are prepared to do so on the question of whether it was just and equitable to extend time in the claimant's harassment complaint. Specifically, we are prepared to reconsider the balance of prejudice.

45. We do not agree with the claimant that the Judgment is not ***Meek*** compliant at paragraph 242. We have contrasted the prejudice to the claimant in losing the ability to pursue elements of his harassment complaint with the prejudice to the respondent in having to face complaints brought out of time. We have referred to the matters which we took into account in deciding that the balance of prejudice favoured the respondent.

46. That said, we are content to elaborate here. In ***Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 23*** the Court of Appeal in England, after referring to ***British Coal Corporation v Keeble 1997 IRLR 336*** and the factors found at section 33 of the Limitation Act 1980, said (per Underhill LJ at paragraph 37) –

> "*The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular…."the length of, and the reasons for, the delay". If it checks those factors against the list in* ***Keeble****, well and good; but I would not recommend taking it as the framework for its thinking."*

47. The ***Keeble*** factors, and their relevance in this case, are as follows-

    (a) The length of and reasons for the delay – here the delay was short, at least in the case of matters of which the claimant became aware on 2 September 2019.

(b) The extent to which the cogency of the evidence is likely to be affected by the delay – here there was no real risk of this, given the extent to which matters were documented.

(c) The extent to which the party sued had cooperated with any requests for information – here this did not seem relevant.

(d) The promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action – here this did not offer much assistance.

(e) The steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action – again this did not offer much assistance.

48. The reason for the delay in this case seemed to us to be the ignorance of the claimant as to the detail of how the time limit operated in his case. The delay was short, at least in relation to matters of which the claimant became aware on 2 September 2019. We considered on reflection that it was harsh to the claimant to refuse to extend time in the case of matters which were only a few days out of time. In contrast, the respondent would still have to answer a complaint of harassment in relation to matters which were not out of time. We decided upon reconsideration that the balance of prejudice favoured the claimant to the extent of allowing consideration of matters occurring on or after 2 September 2019.

49. This did not alter the substance of the Judgment as we had already looked at all of the matters said to be unwanted conduct when dealing with the claimant's harassment complaint.

Ground 10

Perversity in respect of Victimisation Claim and/or not Meek compliant.

50. We are asked to revisit a number of paragraphs in the Judgment, as follows –

(a) Paragraph 204 – The claimant alleges that what we said here is perverse – "*The claimant alleged that being subjected to the B&H complaints was a detriment. We agreed. However those complaints were not submitted because the claimant had done a protected act but because of the effect his behaviours had on Mr McEwan and Mr Knox."* We refer to paragraph 196 of the Judgment. So far as relevant here, the claimant's protected acts were (a) the bringing of the previous claim and (b) asserting rights derived from the COT3 agreement. The behaviours of the claimant about which Mr McEwan and Mr Knox complained (see paragraphs 93-96 of the Judgment) went some way beyond these protected acts. Accordingly we do not agree that our statement is perverse.

(b) Paragraphs 215-216 – We understand the allegation of perversity here to relate to Mr Walker upholding Mr McEwan's bullying and harassment complaint on the basis that the claimant had threatened Mr McEwan personally (as opposed to raising proceedings against the respondent). In his conclusions, Mr Walker said this –"*I do not believe that Mr Greasley Adams directly threatened to raise legal proceedings against Mr McEwan personally. However, I believe it was reasonable for Mr McEwan to think that the legal action referred to by Mr Greasley Adams might include action against Mr McEwan personally. I believe this caused Mr McEwan increased levels of stress and anxiety."* We considered that Mr Walker had been entitled to find that the claimant had caused Mr McEwan stress and anxiety and it was this rather than a protected act which led him to uphold Mr McEwan's complaint. We do not agree that what we said at paragraphs 215-216 was perverse.

(c) Paragraph 205 – The claimant alleges that our statement – *"What Mr McEwan said about the previous case did not feature in his* [Mr Walker's] *decision to uphold the complaints"* – is perverse. The explanation of why this is said to be perverse is hard to follow. However, on revisiting this, we have noted that Mr Walker did mention some matters which related back to the claimant's original Tribunal claim (see paragraph 103). Notwithstanding this, our statement that this did not feature in Mr Walker's decision (as referred to in the

immediately preceding sub-paragraph) was correct. We do not therefore agree that paragraph 205 is perverse.

(d) Paragraph 207 – The claimant challenges as perverse our statement that *"We considered it unfortunate that the claimant appeared to have paid scant regard to the obligation of confidentiality as to the "fact" (ie the existence) of the agreement in clause 14."* Our view of the evidence was that the claimant spoke about the existence of his COT3 agreement beyond the extent permitted by clause 15 of that agreement. We stand by that.

51. We are also asked to revisit the following paragraphs in the Judgment but, in contrast with those mentioned in the preceding paragraph, there is no reference to any specific wording in the Judgment. This has made it difficult to understand where the perversity is said to have occurred.

(a) Paragraph 217 – What is set out in the claimant's application for reconsideration appears to extend beyond this paragraph. The paragraph itself deals with part of the investigation of the Mr Fix It complaint. We can find no perversity there. For the sake of completeness, we note that the claimant makes reference here to the burden of proof shifting to the respondent. We refer to what we have said at paragraphs 30-32 above. We did not believe that section 136(2) EqA was engaged in this case.

(b) Paragraph 219 – We have nothing to add beyond what we have said at this paragraph (and paragraph 118 which is referenced here). We find no perversity.

(c) Paragraph 223 – Again we have nothing to add beyond what we have said at this paragraph. We find no perversity.

(d) Paragraph 245 – In this paragraph we simply comment on our view of the claimant and some of our earlier findings. We do not agree that there is any perversity here.

52. The claimant under this Ground also alleges that the Judgment was not ***Meek*** compliant but does not explain why. We can see nothing in the

claimant's references to the above-mentioned paragraphs in the application for reconsideration to indicate in what respect the Judgment is said not to be ***Meek*** compliant.

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Employment Judge:	**W A Meiklejohn**
Date of Judgment:	**01 December 2021**
Date sent to parties:	**01 December 2021**

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