



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100407/2021

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**Reconsideration Application Meeting under Rule 71  
by Cloud Video Platform (CVP) on 14 February 2022**

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**Employment Judge: A Strain  
Members: L Grime and J McCaig**

**Mr J Kelly**

**Claimant**

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**Prestonfield Golf Club**

**Respondents**

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### DECISION OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal refuses the Respondent's application for reconsideration  
25 of the Employment Tribunal Judgment dated 29 September 2021

### REASONS

#### **Background**

##### *Application for reconsideration*

1. The Respondent presented an application for reconsideration of the  
30 Tribunal's judgment dated 29 September 2021 by email of 21 October 2021.  
This was supplemented by written submissions sent by email on 12 January  
2022.
2. The Claimant had responded by written submissions dated 18 January 2022.

*The Respondent's Application*

3. The basis of the application for reconsideration was restricted to the issue of whether or not the Claimant had made a protected disclosure on 9 June 2019 regarding the washing down of machines for which he was subject to a detriment. The Respondent submitted that a protected disclosure could only be made by one person, and the legislation seeks to protect the first person that brings a matter to light. The legislation cannot protect two or more people, jointly and severally. The Respondent submitted that the Tribunal had found the 3 greenkeepers considered the washing down of machinery to be contrary to SEPA Regulations and unlawful. It was submitted that the finding of fact in the Judgment at paragraphs 6 (7) and (8) related to events from 2016. So that, when the claimant, almost four years later, refuses to carry out a task, see finding of fact: 6 (37), no protected disclosure is being made at that time. Some four years on from the original protected disclosure, the Claimant at this time is forcefully making an allegation rather than communicating information. The Respondent referred to the case of ***Cavendish Munro Professional Risks Management Ltd v. Geduld (Rev 1) [2009] UKEAT 0195\_09\_0608 (6 August 2009)*** in support of this submission.
4. The Respondent submitted that the Claimant, by refusing to work, was taking "protective action" in which an employee has the right not to be subjected to any detriment/ deliberate failure to act done on the ground that in "circumstances of danger" which the employee "reasonably believed to be serious and imminent", the Claimant took / proposed to take "appropriate steps to protect himself or other persons from the danger". The danger may be danger to the employee personally or danger to others, including members of the public might be affected by the contamination of water flowing into the nearby loch: ***Masiak v City Restaurants (UK) Ltd [1998] UKEAT 683\_97\_2906 (29 June 1998)***
5. Protection under those circumstances, was afforded through Sections 44 and 100 of the Employment Rights Act 1996. These sections were not considered

by the Tribunal given that the case was not pleaded under those particular sections of the Act.

*The Claimant's Response*

- 5 6. The Claimant submitted that the Respondent did not make the submission that the original disclosure was made in 2016 and could not have been made by the Claimant alone in 2020 at the Hearing. There was nothing in statute which prevented a disclosure being made by more than one person. In any event, the Claimant made the protected disclosure and, he suffered a detriment for making the disclosure. Furthermore, the Respondent failed to provide any authorities or, the statute which is relied upon, to support the assertion that a "disclosure can only be made by 1 person and that, the law seeks to protect the first person that brought it to light." and that, the "legislation cannot protect two or more people, jointly and severally". This was a new point that was not raised by the Respondent in submissions at the Hearing.
- 10 7. The Tribunal found that the Claimant had made the disclosure and suffered a detriment as a result of making the disclosure. In any event, the Claimant was the only party to the claim, the other 2 Greenkeepers were not party to the Claim. The Tribunal therefore did not have cause to consider joint and several liability. The Tribunal only had to consider the detriment that was suffered by the Claimant as a result of making a protected disclosure.
- 15 8. The Respondent alleges that "when the claimant, almost four years later, refused to carry out a task, see finding of fact: 6 (37), no disclosure is being made at that time." On the basis that it is not new information. The Respondent did not raise this during submissions and is now raising this for the first time. In any event, protected disclosure covers information which the person receiving is already aware of. In effect, it is bringing some matter to the employer's attention and often involves drawing conclusions from information that is readily available.

**Discussion and Decision**

9. The Tribunal agreed with the Claimant's submission that the Respondent was raising points in the application for reconsideration that could have and should have been raised at the Hearing if they were being insisted upon.

10. Notwithstanding that, the Tribunal considered the points raised by the Respondent as follows:

*The original disclosure was made in 2016 and the law only protects the first person that brings it to light.*

11. The Tribunal was not referred to any statutory or case law authority which supported the Respondent's position. The Tribunal did not, in any event, agree with either proposition. The Tribunal made no finding that a disclosure had been made in 2016. The Respondent makes the assumption that it has.

12. Even if it were the case that the disclosure had been made in 2016 (on which the Tribunal made no finding) that did not prevent a disclosure regarding the same subject matter being made at a later date. The Tribunal found that the protected disclosure was made on 9 June 2020 in its findings in fact at paragraph 37. The disclosure was found to have been made by the Claimant (nobody else). Even if a disclosure had been made in 2016 by someone else (on which the Tribunal made no finding) that did not prevent the Claimant making a disclosure on the same topic 4 years later. There was no authority for the proposition that only the first person making the disclosure gains protection under section 43B or that multiple Claimants could not be protected for the same disclosure.

*The Claimant by his comments on 9 June 2020 was forcefully making an allegation rather than communicating information such that there was no protected disclosure*

13. The Tribunal had found and determined that the Claimant made a protected disclosure on 9 June 2020. The Tribunal applied the legal tests and were satisfied that the statement made by the Claimant constituted a protected disclosure. The Respondent raises nothing new nor any authority to suggest that the Tribunal erred in reaching this conclusion.

*Claimant was taking protective action*

14. The Tribunal did not find nor conclude that the Claimant was taking “protective action”. The Respondent states such a case was not pled. This ground for reconsideration does not make sense given that the Tribunal made no such finding and the Respondent argues no such case was pled.

*Conclusion*

15. The unanimous view of the Tribunal was that the application for reconsideration be refused.

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Employment Judge: Alan Strain  
Date of Judgment: 14 February 2022  
Entered in register: 28 February 2022  
and copied to parties

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