EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Murphy**

Respondent: **Cardiff Galvanizers (1969) Ltd**

Heard at: **CVP Video** **On: 4 January 2023**

Before: **Employment Judge R Powell**

Members: **Ms C Izzard**
Mr P Collier

Representation:
Claimant: Mr A Walton (Solicitor
Respondent: Mr G Pollitt (Counsel)

RECONSIDERATION

1. In this case the Employment Tribunal promulgated a Judgment with Reasons on 15 February 2022. That Judgment related to a claim for constructive unfair dismissal, assertions of detriment on the grounds of protective public interest disclosures contrary to Section 47B of the Employment Rights Act 1996 and, in respect of the unfair dismissal, asserted that the dismissal was itself principally by reason of one or more of the protected public interest disclosures; contrary to Section 103A of the same Act.

2. The Judgment of the Tribunal concluded that the detriment claims were not within its jurisdiction by reason of late presentation. It concluded that the Claimant had been constructively unfairly dismissed and, within that finding, a conclusion that the Respondent had not established a potentially fair reason but, it had discharged the burden upon it to disprove that the principal reason for dismissal was the protected public interest disclosure.

3. The reconsideration application made two broad complaints, the first concerned a finding of fact in relation to a disclosure said to have occurred on 11 March 2020.

4. The second complaint asserted that the Tribunal had erred in law in finding that the Respondent had proven that the dismissal was not principally by reason of the one proven disclosure.

5. I considered that initial application on the papers and I refused the application in respect of the first complaint and allowed the second application in respect of the reason for dismissal.

6. The matter was initially listed for a Reconsideration Hearing before a full panel in accordance with Rule 70 and 71 on 4 September 2022. It could not proceed on that day and was relisted for today. The Hearing is by CVP and the advocates today also appeared at the original Hearing.

7. Both parties have prepared written submissions which we have considered in some detail. From those submissions we have identified that there are two broad issues that are before us today, they are;

   (1) Whether or not the Tribunal has jurisdiction to entertain this Reconsideration Application.

   (2) If so, whether or not the Tribunal should exercise its statutory discretion to confirm, vary or rescind its original decision and make a fresh decision on the merits..

8. The first point is raised by the Respondent. The Respondent refers to the authority of Trimble v Supertravel Ltd [1982] IRLR 451, [1982] ICR 440, EAT. Which concluded, as summerised in the ICR headnote:

   "Held, allowing the Appeal, the review procedure enabled errors which occurred in the course of proceedings to be corrected regardless of whether the error was a major or minor one, although it ought not to be invoked when an error of law was alleged after the parties had had a fair opportunity to present their case without procedural mishap."

9. This guidance, which has been confirmed in many subsequent cases, was subject to challenge in Outasight VB Limited -v- Brown [UKEAT/0253/14] wherein it was stated that the substantial revisions to the Employment Tribunals Rules of Procedure in 2013did not materially alter the scope of the Employment Tribunal's jurisdiction on applications for reconsideration compared to those which were in place at the time of the ***Trimble*** decision.

10. For the above reasons, the Respondent argues that the Employment Tribunal has no jurisdiction to determine this Application.

11. The Claimant opposes that position and argues that the scope of the Employment Tribunals jurisdiction is not so tightly fettered and that it is in the interests of justice, and it is proportionate; in terms of costs and delay that the Application is decided by this Tribunal.

12. It is correct to note that the Claimant has presented an Appeal to the Employment Appeal Tribunal in this case and so she has an alternative path to redress if we conclude the subject of her application before us is without our jurisdiction. We understand that her appeal is stayed pending this Reconsideration Application. We are not aware of the scope of the Appeal or the degree to which the Appeal has progressed. But she has a path to redress, if the arguments she makes today are not within our jurisdiction.

Decision On Jurisdiction

1. We take into account that the legal principles to which the Claimant refers in this reconsideration application are those which were set out in the Claimant's written submissions before this Tribunal at the liability hearing in December 2021.

2. In short, the key cases upon which the Claimant relies today are the ones which we had in mind at the liability hearing and the ones to which the Claimant was able to speak in her closing submissions on that occasion.

3. We note that both parties were clearly aware of the relevance and the importance of the reason, or principal reason, for the dismissal at the liability hearing. Further, both parties were professionally represented.

4. In our judgment, both parties had an unfettered opportunity, in their written and oral closing submissions, to address the points that they thought were pertinent and necessary to their success.

5. We record that whilst the Claimant's written argument at the liability Hearing set out the same legal matrix she asserts at this reconsideration, the oral submissions made on her behalf at the liability hearing gave no attention to this point. We record that some aspects of her original written submissions, although ostensibly referring to the claims under section 47B, were also referable to the Section 103A claim and in the course of our deliberations we deduced from aspects of her written argument that which we thought were also relevant to the 103A claim.

6. It follows that, in our Judgment on the submissions of the parties today, there was no "procedural mishap" in the conduct of the December 2021 liability hearing. Secondly, if any error of law is found to exist within our liability decision, it clearly does not stem from a procedural mishap or failing.

7. In our Judgment the reconsideration application before us today does not fall within our jurisdiction.

The Merits of the Reconsideration Application

8. That said, the parties having given a great deal of time and effort to their preparation and presentations on the merits of the application, we give our decision and reasons on the merits; necessarily on an "obiter" basis.

9. The core of the claimant's application is set out in her most recent written submission by Mr Walton around 22nd December 2022, which we read in the context of his prior written application. In that he identified that the question the tribunal had to answer was the "reason for the dismissal"

10. He refers to:

    a. Fitzmaurice v Luton Irish Forum, EAT 2021; which stated that tribunals must focus on whether the disclosure constituted a "material factor" in the dismissal, as opposed to the sole reason for it.

    b. Maud v Penrith District Borough Council and in particular;

    c. Salisbury NHS Foundation Trust v Wyeth UKEAT/0061/15/JOJ which emphasised the tribunal's responsibility to conduct a critical analysis of the Respondent's reason for a dismissal and to properly explain our findings and reasoning in that regard (paragraph 18).

11. We accepted the necessity of careful analysis; to avoid the possibility of eroding the protection intended for people who have made protected public interest disclosures. And we record that before us today, both parties have stated that our written reasons demonstrated that we had undertaken a critical analysis of the respondent's reasons for its actions, and had done so with care.

12. We also accept that in a case of a cumulative repudiatory breach; through a series of acts or omissions, it is necessary to look at the respondent's motivation for each proven element and to identify whether, within such a series of proven acts, the principal reason for the respondent's conduct was the claimant's proven protected public interest disclosure.

13. We found that prior to the earliest of the alleged protected disclosures, there were difficulties between the parties; an ongoing dispute over the claimant's calculation of staff wages (paragraph 43 and 44). We found that the relationship between the Claimant and, Mr Gareth and Mr Robert Evans, had notably worsened by 2019 (see paragraph 46 and 48). There were disputes about the signing off of timesheets and bonus payments (see paragraph 53 and 55), so the relationship between the parties had an element of antipathy and of mutual difficulty before the first of the disclosures upon which the Claimant now relies.

14. The Claimant pleaded five protected public interest disclosures; these again are recorded in the Judgment:

    a. The first one concerned unlawful deductions which the Tribunal found was not proven,
    b. The second was withdrawn as a disclosure but was said to be a relevant factual background; a dispute between the Claimant and Mr Gareth Evans over bereavement leave for staff,
    c. The third was over a potential unfair dismissal; which was not upheld,
    d. The fourth was over a dispute over night shift payments; which was withdrawn,
    e. The fifth, which occurred on 18th March 2020, the COVID sickness incident, which the Tribunal upheld.

So, of the five asserted protected public interest disclosures which were pleaded, two were withdrawn as disclosures but remained as disputed incidents which contributed to the claimant's decision to resign, two were found to be unproven and one was upheld.

15. For the purposes of this decision, the Tribunal will take into account the disclosure in relation to the dispute over unfair dismissal (this was the subject of the first ground of the reconsideration application) but does not do so with the other three which, are not in any sense now argued as protected disclosures.

16. The Claimant's case states that at paragraph 178 and 180 of the Tribunal's reasons ; "the five specific findings of fact are a reference to the five pleaded public interest disclosures" but having already established to our satisfaction that she made a protected public interest disclosure on 18 March (paragraph 182) the Claimant respectfully contends that the Tribunal should not have approached the causation question regarding the principal reason for dismissal in such a sweeping and generalised manner.

17. The claimant goes on to assert that any Claimant relying on a constructive unfair dismissal claim is likely to make reference to the cumulative conduct of a Respondent, as such the mere recognition that there were a multiplicity of factors which may or may not have led to the constructive dismissal would necessarily rule out success for any and all such applicants.

18. The Tribunal does not accept the claimant's concluding proposition has a bearing on this case. The dicta in Salisbury NHS Trust directs the Tribunal to undertake a careful analysis of each element and that approach avoids the mischief the claimant identifies.

19. A protected disclosure could be the motivation for a series of actions by an employer, it could be the cause of the most serious single incident or It might lead to an enduring subconscious bias. Whether it does so is a matter of fact and the degree to which it might do so is also a matter of fact for the tribunal to determine.

20. The Tribunal sought to analyse each element of the respondent's cumulative repudiatory conduct and, in the course of our Judgment looked at individual aspects of the relevant conduct and identified, for instance:

    a. The character of the relationship between the claimant and the respondent at different points in time.
    b. The causes of tension between the parties which were not consequent to the proven protected disclosure (or the 11th March alleged disclosure).
    c. The differing motivations of Mr Robert Evans, for instance;
        i. His reasons for managing the claimant's sickness absence [reasons paragraph 147].
        ii. His motivations after he received a verbal complaint about his brother's conduct from the Claimant on 5th May 2020 and ;
        iii. His motivation when he received a subsequent email, again highly critical of his brother in August 2020; neither of which were asserted to be protected public interest disclosures.

21. The Tribunal also took into account that there was, again discrete from the asserted public interest disclosures, or the proven disclosure, a background of difficulties between the parties which existed prior to the first disclosure and that was reflected in the Respondent's view that the Claimant was standing up for workers' rights rather than the interests, sometimes at least, of the Respondent.

22. The Tribunal considered the claimant's argument which relied upon the case of El Megrisi v Asad University (IR) In Oxford 2009 UKEAT

0448/08. In that case multiple disclosures had been made under Section 43B of the Employment Rights Act and thus it was necessary for a Tribunal to take into account all of those disclosures. The judgment stated that the proven disclosures should not be considered separately nor in isolation; they should be assessed cumulatively.

23. The Tribunal fully accepts that as a principle. However, in this case, on our findings of fact, there was only one proven disclosure and, even if we were wrong to find only one disclosure was proven (as far as we understand from the reconsideration application), it is only asserted the Tribunal should have found two protected disclosures proven:11th March and 18th March.

24. We expressly considered the respondent's conduct of 11th and 18th March 2020 [reasons paragraphs 222 to 225].

25. We then considered each element of the claimant's case in respect of the subsequent conduct of Mr Robert Evans. We made express findings of fact about his motivations [reasons: paragraphs 227, 228, 231, 234, 244]. It was evident that the conduct of Mr Robert Evans between early May and Mid-August 2020 was severe and sustained. It was, in our judgment, clear that his conduct was motivated by a false allegation from an employee and the claimant's complaints against Mr Robert Evans and his brother.

26. The Tribunal does not believe that it erred in law by failing to take into account all *the pleaded* disclosures. We expressly did take into account the *proven* disclosure but, had both the 11th and 18th March disclosures been proven, this would not materially alter the character of the relationship as we found between the parties before 11th March, nor would it materially alter our findings of fact that Mr Robert Evans' attitude towards the Claimant was materially altered by the allegation from Wendy Jones and then influenced by the oral complaints against his brother in May and August 2020.

27. We expressly found that there were motivations, other that the claimant's protected public interest disclosure, affecting the Respondent's attitude towards the claimant. Those other motivations both pre-dated and post-dated the pleaded March disclosures.

28. We are, and were, fully aware that the disclosure of the COVID incident on 18 March was a matter that would be part of the Respondent's thinking. The question is not whether the COVID protected public interest disclosure was, consciously or unconsciously, some part of the Respondent's motivation; the question we are required to determine was

whether it was the reason for Mr Robert Evans conduct; or if, not the only reason, the principal reason.

29. In our Judgment, it was not the principal reason for Mr Robert Evan's conduct. He consciously sought the claimant's resignation and he pressed the claimant to resign by his conduct. His conduct was motivated by the claimant's complaints against his brother and himself. Having taken all of those matters above into account, we do not believe that the Tribunal would have reached a different decision with respect to the motivation of Mr Robert Evans.

30. In light of the above, had we jurisdiction, we would have affirmed our decision and rejected the application to revoke or vary it.

31. In our oral judgment we did not set out our decision on the claimant's argument that the we were wrong to distinguish between the claimant's protected disclosure of the 18th March 2020 and her response "Why?" when asked for the name of the employee who had initially raised a concern to her [Reasons:177]. Mr Pollitt, kindly reminded us of this omission which we undertook to set out in these written reasons,

32. The conduct of which the claimant complained was Mr Robert Evan's shouting at the claimant; which we found proven and took into account [Reasons: 225] as a element of the cumulative conduct that amounted to a repudiatory breach of the implied term of trust and confidence.

33. We also examined the degree to which Mr Robert Evan's and Mr Gareth Evan's relevant conduct was related to the protected disclosures.

34. In reaching our conclusions on the principal reason for the dismissal, which entailed considering alleged acts and omissions across part of 2019 to August 2020, the tribunal viewed the 18th March exchanges as a whole; we did not decide that Mr Robert Evan's shouting was otherwise than part of context of the claimant's protected disclosure, albeit the immediate catalyst of Mr Robert Evan's conduct was not the disclosure.

35. We did not find that the protected disclosure had no influence on the respondent's repudiatory conduct. On the contrary, we concluded that the respondent had only satisfied us that the protected disclosure was not the principal reason for the dismissal.

_____

Employment Judge R Powell
Dated: 26th February 2023

JUDGMENT SENT TO THE PARTIES ON 3 March 2023
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche