



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Coyle

**Respondent:** St Mungo Community Housing Association

## RECONSIDERATION JUDGMENT

The Claimant's application dated 17 February 2023 for reconsideration of the judgment sent to the parties on 13 February 2023 is refused.

### REASONS

1. There is no reasonable prospect of the original decision being varied or revoked.
2. The Claimant's reconsideration application spans 21 pages. It disagrees with every aspect of the Tribunal's decision – the factual findings, the statement of relevant legal principles and the conclusions. It is not necessary or proportionate to provide a response to each of the Claimant's comments in turn. The reconsideration process is not an appropriate forum for a line-by-line debate about the merits of the Tribunal's Reasons, or for the Claimant to reargue the case. Rather it is an opportunity for the Claimant to persuade the Tribunal that there is an error in the reasoning such that the outcome should arguably be varied or revoked.
3. The Claimant's comments and criticisms of what is set out in the Reasons at paragraphs 1 – 76 have been carefully reviewed. They amount to an attempt to challenge factual findings by disputing the Tribunal's assessment of the evidence. No further factual findings are necessary based on the points made in relation to these paragraphs. It is not appropriate for the reconsideration process to be used to reargue the Claimant's factual case in an attempt to achieve more favourable factual findings.
4. Where challenges are made by the Claimant to the Tribunal's factual findings in disputing particular conclusions, these are not separately

considered in these Reasons. All factual findings were supported by evidence and findings that were open to the Tribunal to make.

5. The Tribunal acknowledges that there is a typographical error in paragraph 114. The word “nationality” should read “disability”. This typographical error has no bearing on the Tribunal’s analysis of the law to the facts and the resulting conclusions.
6. The remainder of the Claimant’s points in relation to the summary of legal principles which comment on paragraphs 122 and 123 of the Reasons do not identify any error of law.
7. The Claimant’s comments in relation to paragraph 144 provide no basis for changing our conclusions as to whether there were the alleged protected disclosures. The Claimant had not alleged (and it was not one of the agreed issues) that “disclosures to Mr Penny were also in writing re legal obligations rest breaks”.
8. The Claimant challenges the Tribunal’s conclusion to reject the automatic unfair dismissal complaint, on the basis that the only proven protected disclosure was not the principal reason for dismissal (paragraph 146). He asks the Tribunal to infer that Hannah Archer would have disclosed the protected disclosure (or its contents) to Mr Bawden in the period between 31 January 2022 and the second probationary review meeting on 3 February 2023. Having checked the Tribunal’s notes of evidence and submissions, this was not a point which was put to Mr Bawden in cross examination nor was it a submission made by the Claimant at the conclusion of the case.
9. The Tribunal’s finding at paragraph 147 as to the principal reason for dismissal was based on the evidence from Mr Bawden, viewed in the context of his dismissal letter. The mandatory checks required were the need to carry out at least two patrols each night.
10. The Claimant’s points made in relation to paragraphs 149 does not deal with the chronological issue made at this point in the reasons. The Claimant can hardly take issue with the conclusions made in paragraphs 150 and 151 which make findings in the Claimant’s favour that he was disabled at the material time.
11. The Tribunal’s conclusions as to the Respondent’s actual or constructive knowledge of the Claimant’s disability before 27 January 2022 (paragraphs 152 to 156) are not arguably wrong in the light of the Claimant’s comments. Reference to context is always appropriate when considering constructive knowledge – the contents of a covering email attaching medical records is important when gauging the significance reasonably to be attached to the information provided. Furthermore, further attempts were made to investigate the true medical picture with a further referral to occupational health. The outcome of that assessment was that the Claimant told occupational health on 29 December 2021 that he “denied any limitation to walking, standing or bending and reports knee is fully healed”. The

Respondent was not bound to contact the Claimant's own treating practitioners.

12. The Claimant's points in relation to paragraphs 157 and 161 of the Reasons do not provide any arguable basis for reconsidering the Tribunal's decision.
13. In criticizing the Tribunal's conclusions at paragraphs 162, the Claimant argues that Mr Penny said during the second hearing that medical evidence was not relevant. In fact, it was Mr Bawden who said that medical evidence would not be relevant if the Claimant's position was that he carried out the building checks [327].
14. In relation to paragraphs 163 to 166, the Claimant raises a series of questions. It is not the Tribunal's role to answer these questions as part of a reconsideration application.
15. In relation to paragraph 167, the sentence that starts "Mr Bawden did not know that the Claimant was disabled" should conclude "until midway through the first hearing". The reference to the "second hearing" is a typographical error.
16. In his comments on paragraph 168, the Claimant asks why the suspension was not lifted. This is not relevant to Issue 5.1.2, which concerns the decision to withhold the medical documentation from the original investigation report. It does not concern the decision to suspend the Claimant and continue that suspension until the probationary review hearing.
17. The points made by the Claimant in relation to paragraphs 169 to 173, do not raise any arguable error in relation to these parts of the Reasons.
18. The sentence which is challenged in paragraph 174 of the Reasons concerns Mr Penny, not Mr Bawden, but the Claimant's comments focus on the conduct of Mr Bawden.
19. In commenting on paragraph 175, the Claimant challenges the evidential base for a conclusion on the before of the Respondent that he did not complete building patrols. The evidence that the Claimant did not complete building patrols is referred to in the Tribunal's findings of fact at paragraphs 32, 36-37, 38, 43 and 54.
20. The Claimant's criticisms of the Tribunal's conclusions as to the decision to maintain the Claimant's suspension (paragraphs 181 and 182) do not raise any arguable basis for varying or revoking the Tribunal's judgment.
21. The text challenged by the Claimant in paragraph 183 is merely a recitation of the Respondent's case that the decision to suspend was a proportionate means of achieving a legitimate aim. It does not at that point express any view on the merits of the Respondent's case. Flies around the bins and the other matters referred to by the Claimant are not relevant to this.

22. The Claimant's comments on paragraphs 184, 185, 189 and 190 do not raise any arguable error on the Tribunal's part.
23. Paragraph 191 is a reference back to paragraphs 36 and 37 of the Tribunal's reasons. Any employee who fails to carry out a central requirement of their role is liable to face disciplinary action. The particular requirement does not need to be included in their employment contract.
24. There is no arguable basis for reconsidering the Tribunal's conclusions identified in the points made in relation to paragraphs 192 – 195.
25. The Claimant's comments about suspension in relation to paragraphs 197(a) and (b) are not relevant to this conclusion, which does not concern the Claimant's suspension. The CCTV evidence was not shown to the Claimant; but it was used as part of the basis for the Claimant's dismissal.
26. In his comments on paragraph 197(c), the Claimant comments that "this is the worst [mistake] of all .... What are you on about here??" The Tribunal's point is that there was no deliberate omission of material documents, in that the Claimant was provided with all the building check sheets for the relevant dates. The reason why there were missing sheets for some of these dates was because the sheets were never completed by the staff on duty, not because they were deliberately omitted.
27. As to paragraph 197(d), the Claimant challenges the Tribunal's conclusion that this does not amount to an act of victimisation because the Tribunal disagreed with the Claimant's factual assertion. The wording recorded at this point in the notes of the probationary review hearing is as follows:

"KC responded, using an example to illustrate that disabilities aren't necessarily constant and that they can come and go. MB understood but said one would have to let someone know. KC inferred, he will be taking the case further. MB responded, that he feels that this is a veiled threat"
28. Whilst the notes recorded he said he felt that this was a veiled threat, we rejected the Claimant's contention insofar as it went beyond what was recorded in the notes. The Claimant contended that "Matthew Bawden 'goaded' the Claimant in hearing 'submit it to the court then – you sound like you are threatening us'". This is materially different from what is recorded. As a result, the Tribunal was entitled to reject this allegation on the facts.
29. Insofar as the Claimant complains about the Tribunal's failure to listen to a covert recording of what was discussed during the second probationary review meeting, there was no application to admit such an audio recording. EJ Gardiner made it clear at the start of the Final Hearing that all relevant documents were before the Tribunal and further evidence would only be admitted for good reason. The Claimant did not seek to persuade the Tribunal that it should listen to the audio recording or justify why this was necessary.
30. It is still not clear, even after the conclusion of the Final Hearing that the audio recording would have supported the Claimant's factual allegation

dealt with at paragraph 187(d) of the Reasons.

31. In commenting on paragraph 187(e) the Claimant is inviting the Tribunal to make different factual findings as to what took place during the probationary review meeting. The criticism of the Tribunal's finding at paragraph 187(f) does not establish any error in relation to the Tribunal's reasoning. The Tribunal was entitled to come to the conclusion it did.
32. The Claimant's points in relation to paragraph 187(g) do not raise an arguable point in relation to our conclusion.
33. The Claimant's contract does not provide any basis for reaching a different conclusion at paragraph 201 in relation to the claim for rest breaks.
34. The Tribunal will amend its Judgment under Rule 69 in the two respects identified above to correct clerical mistakes and accidental slips.

**Employment Judge Gardiner**

**8 March 2023**