EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102334/2022

Employment Judge B Campbell

Ms A Henderson	**Claimant**
GCRM Limited	**First Respondent**
Mr Mark Tomnay	**Second Respondent**
Ms Ella Tracey	**Third Respondent**

JUDGMENT FOLLOWING CONSIDERATION

1. The claimant's application for reconsideration of the tribunal's judgment dated 21 April 2023 is refused;

2. The judgment is amended as necessary to reflect the third respondent's liability consequent on the complaint under section 47B of the Employment Rights Act 1996 succeeding; and

3. Some minor errors in the original judgment are corrected as detailed below.

REASONS

Background

1. The claim was originally presented to the employment tribunal on 28 April 2022. Before that, the claimant had initiated ACAS Early Conciliation involving the respondents on 1 March 2022 and Early Conciliation numbers and certificates were issued on 8 March 2022.

2. The claim was defended by all respondents and response forms were presented on 1 June 2022.

3. The claim progressed to a full hearing over six days in January 2023. The tribunal issued a reserved judgment with reasons on 21 April 2023 (the '**judgment**'). In summary, it was found that:

    a. Some but not all of the disclosures made by the claimant to her employer were protected disclosures as defined in section 43 of the Employment Rights Act 1996 (**'ERA'**);

    b. The claimant was subjected to the detriment of dismissal by reason of having made those protected disclosures;

    c. The claimant was not automatically unfairly dismissed by reason of having made those disclosures;

    d. The claimant was unfairly dismissed in the more general sense contrary to section 94 ERA; and

    e. A further hearing would determine any issues of remedy.

4. On 7 May 2023 the claimant submitted a written application for reconsideration of the judgment under rule 71 of the Employment Tribunals (Constitution and Rules of Procedure) 2013 (the **'ET rules'**) – referred to below as the **'application'.**

5. The application was expressed as follows:

'This an (sic) application is to request the tribunal reconsider the decision (Judgement Para 211) that the claimant making her protected disclosures was not the sole or principal reason for her dismissal and therefore she was not automatically unfairly dismissed under section 103A ERA.'

6. The application went on to outline the claimant's reasons why she believed that part of the judgment should be reconsidered.

7. Her points were, in condensed form, as follows:

   a. The tribunal was satisfied that a sequence of disclosures made by the claimant about staffing and skills shortages, high workloads, long working hours, and sub-optimal laboratory configuration and equipment qualified as protected disclosures;

   b. The tribunal went on to find that the making of those disclosures contributed to the decision to dismiss her so that a detriment was suffered under section 47B ERA;

   c. The views, motivations and decisions of the second respondent and an HR officer named Lorna Young, both of whom had shaped the disciplinary process in its initial stages, had a bearing on the decision taken by the third respondent to dismiss the claimant;

   d. Those views, motivations and decisions were a result of the claimant making her protected disclosures;

   e. The principle confirmed in ***Royal Mail v Jhuti (2019) UKSC 55*** is applicable, namely that where a dismissing manager is unwittingly influenced or manipulated by others for whom their employer is responsible, the improper motives or actions of the latter may be taken into account in judging the reasonableness of the employer's actions as a whole;

   f. Applying this principle should lead to the result that the influence of the second respondent and Ms Young on the third respondent should be considered when identifying the reason for the claimant's dismissal;

g. The claimant was not guilty of any blameworthy conduct, i.e. misconduct;

h. The tribunal concluded that the claimant was dismissed by reason of her conduct, and thus within the scope of section 98(2) ERA, but that there was no conduct of a type which would have justified the sanction of dismissal; and

i. Therefore, the tribunal ought to have found that the only reason there could be for the claimant's dismissal was the making of her protected disclosures.

8. The application was made within the 14-day time limit contained in rule 71.

9. On initially reviewing the application I did not consider there to be 'no reasonable prospect of the original decision being varied or revoked' under rule 72(1). Subject to fuller development, and any submissions in reply by the respondent, the claimant had potentially put forward a stateable case.

10. I therefore did not refuse the application at that time and asked for the respondent's preliminary view on the application, and sought confirmation from both parties of whether they were content for the application to be determined without the need for a hearing.

11. Mr Ross, solicitor for the respondents, provided a note summarising the claimant's reasons for resisting the application on 29 May 2023 (the **'objection'**).

12. In summary, the basis for the respondents' objection to the application were:

a. A tribunal should only reconsider an aspect of its earlier judgment if it is in the interests of justice to do so, as confirmed in rule 70 of the ET rules and ***Ebury Partners UK Limited v Mr M Action Davis 2023 EAT 40***;

b. In particular the principle of finality of litigation should be respected, i.e. the parties deserve closure once a decision has been made and a

party who has had a fair hearing of their case should not be given a 'second bite of the cherry' if they are dissatisfied with the outcome;

c. Reconsideration as an option is more suitable to deal with procedural mishaps and the like than identifiable errors of law, which are better suited to an appeal to the Employment Appeal Tribunal;

d. The basis of the claimant's application is not one or more factors suitable for being dealt with by that process, but rather that she simply does not agree with the tribunal's original decision (on the question of whether she was automatically unfairly dismissed) and would simply be looking for a rehearing of that complaint; and

e. The above factors point in favour of there being no reasonable prospects of success in the application and no need to consider it on its merits at all, but if that were to be done then the application should be dealt with by way of written submissions and not at a hearing and further directions would be awaited.

13. I agreed to consider the application on the basis of written submissions and gave the claimant an opportunity to provide anything further in support of her application and in light of the respondents' objection by 5 June 2023. The respondents were given until 12 June 2023 to provide any further submissions in reply.

14. I was content that the overriding objective under rule 2 of the ET rules was best served by dispensing with the need for a hearing, taking into account in particular the desire to save expense and further delay, and to deal with issues proportionately. Even although the claimant had desired a hearing and was not legally represented, she was able to set out her position clearly in writing and it was felt that nothing would be lost by dealing with the application on the papers as opposed to in person.

15. The claimant submitted a further note of submissions on 4 June 2023. Mr Ross provided a note of submissions on 12 June 2023.

16. In addition to the points made in the application, the claimant's note of 4 June 2023 covered the following:

    a. The claimant was still concerned that her lack of legal experience would put her at a disadvantage when explaining her case in writing as opposed to being given the opportunity to present it at a hearing;

    b. She was seeking clarification of the tribunal's reasons for finding that the making of protected disclosures was a material influence in her being subjected to the detriment of dismissal under section 47B ERA but not the sole or principal reason for her dismissal, so as to make that dismissal automatically unfair, under section 103A ERA;

    c. She also sought clarification of what the tribunal did deem to be the sole or principal reason for her dismissal (if not the making of her protected disclosures). In doing so she again made reference to ***Royal Mail v Jhuti*** and the principle that the reason for an employee's dismissal could go wider than what was in the mind of the person taking the decision to include, for example, the influence of others on that person;

    d. She believed that as the tribunal found her to be 'blameless', her dismissal could not be by reason of conduct and a finding that it was because of her protected disclosures should be made;

    e. The apparent inconsistency in the tribunal upholding the detriment claim but not the automatic unfair dismissal claim was a 'denial of justice'; and

    f. If on reconsideration it is still the tribunal's finding that the reason for the claimant's dismissal was her conduct, then the nature of that conduct should be stated in detail.

    The claimant's note also included some submissions about the potential effect on the reputation of another ex-employee of the first respondent caused by the second respondent's evidence. However,

that was not relevant to the application and the purpose of the process provided for in rule 71 of the ET rules.

17. The respondents' note of 12 June 2023 added the following to Mr Ross' initial submissions:

a. No clarification of what was the sole or principal reason for the claimant's dismissal was necessary – it was stated to be conduct which was a reason recognised as both possible and potentially fair within section 98(2) ERA;

b. Further, the tribunal was entitled to find, as it did, that this reason was in the mind of the third respondent and genuinely held by her, but despite that the dismissal was unfair because of the grounds for her holding that belief or the process followed which led to that belief being held;

c. In seeking a finding that the making of her protected disclosures was the sole or principal reason for her dismissal, the claimant is merely asking the tribunal to decide a point a different way because she was unhappy with the original finding – without something more such as perceived irrationality or perversity in the finding, it is not enough merely to seek a review on that basis;

d. The tribunal should always be mindful of the desirability of achieving finality in litigation and not merely allow either party a second opportunity to pursue some or all of their case where on the face of it they had an adequate opportunity the first time around;

e. The tribunal found as fact that the third respondent genuinely believed the claimant to have been guilty of misconduct (whatever were the shortcomings or flaws in the process to take her to that point), and similarly the second respondent and Ms Young, who both influenced the third respondent, also genuinely believed the claimant had committed acts of misconduct;

f. The decision in ***Royal Mail v Jhuti*** did not contain anything to prevent the tribunal from making those findings if the evidence supported them;

g. The reasonableness of the dismissal process, taking in matters such as the quality of the investigation which preceded it, is distinct from the reason for the dismissal itself; and

h. The tribunal was entitled on the evidence to find that the protected disclosures were not of a sufficient degree of influence on the third respondent to amount to the sole or main reason why she decided to dismiss the claimant, and the application should therefore be refused.

Discussion and decision

18. I took note of the judgment of HHJ Tayler in ***T W White & Sons Limited v Ms K White UKEAT/0022/21*** and ***UKEAT/0023/21*** and in particular paragraph 49 which summarised the sequential approach to be taken in dealing with an application for reconsideration.

19. I considered the following to be relevant to the determination of the application:

a. If the application was to be considered on its merits, was it 'necessary in the interests of justice' per rule 70 that it be granted;

b. If the application were granted, what further orders or directions should be made.

20. I noted that the claimant was seeking a finding that she had been automatically unfairly dismissed under section 103 ERA because the sole or principal reason for her dismissal was that she had made protected disclosures.

The substantive application

21. I considered the claimant's application on its merits. There is no onus on either party in terms of whether it is in the interests of justice that a tribunal decision be varied revoked under rule 71.

22. The essence of the claimant's application is clear and indeed understandable. In a very basic sense, the tribunal has reached conclusions in two of her complaints which appear to her to be contradictory – that is to say:

    a. It has found that she suffered the detriment of dismissal 'on the ground that' she made protected disclosures (the section 47B complaint), but

    b. It has found that 'the reason (or, if more than one, the principal reason)' for her dismissal was not the making of those same protected disclosures (the section 103A complaint).

23. This appears to her to be anomalous – if her dismissal when viewed as a detriment is found to be on the ground that she made her disclosures, it should follow that the sole or principal reason for her dismissal should also be the making of those disclosures.

24. However, it has been clarified judicially that this is not necessarily the case. It has been recognised that the degree to which the making of protected disclosures must be part of the cause of the act complained of is different under each test.

The test under section 47B

25. The degree of causation in a detriment complaint has been expressed in various broadly similar ways, such as:

    a. The detriment must be more than 'just related' to the disclosures, and the disclosures must be the 'real' or 'core' reason for the detriment - ***London Borough of Harrow v Knight [2003] IRLR 140*** and ***Aspinall v MSI Mech Forge Ltd UKEAT/891/01***;

    b. The disclosures must 'materially influence (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower' - ***NHS Manchester v Fecitt and others [2012] ICR 372***.

       As ***Fecitt*** is a judgment of the Court of Appeal, the phrasing used by the Court should be given more weight to the extent it differs from (a).

The test under section 103A

26. The legal test to be applied in relation to a complaint of automatic unfair dismissal is different. This is at least in part because the provisions of that section were introduced into an already existing set of statutory rules governing the law of dismissal generally, and related to that a well-established body of case law. By contrast, the protection of whistleblowers from detrimental treatment in the course of their employment has been formulated and developed in a way closer to discrimination law. This was recognised as potentially leading to anomalous outcomes by the Court of Appeal in ***Fecitt*** – see paragraph 44 of the Court's judgment.

27. Section 103A asks the question – was the making of protected disclosures the sole or principal reason for the dismissal?

28. Straight away it can be appreciated that the making of the protected disclosures must be a more dominant factor in the decision than it needs to be under a detriment claim.

29. As with any case involving a dismissal challenged as being unfair, assessing what was the sole or principal reason requires identification of the facts and beliefs in the mind of the individual who took the decision to dismiss and which made them reach that decision. This is potentially an exercise with narrower scope than the task of establishing causation in a detriment complaint.

30. On the evidence in this case Ms Tracey, the third respondent who took the decision to dismiss the claimant, knew about the existence of the claimant's protected disclosures in general terms. This was largely through the claimant raising them in her defence to the disciplinary allegations, including by asking Ms Tracey to consider the points she had raised in her grievance. At least some of her protected disclosures were referenced there.

31. However, they were not the sole or dominant cause of Ms Tracey's decision to dismiss the claimant. She decided to dismiss the claimant because, in her mind, there was sufficient evidence of the claimant being grossly negligent in her role. In reaching that decision she relied on the investigatory material

assembled by Mr Tomnay and Ms Young, and on direct answers given by Mr Tomnay to her clarificatory questions which she put to him during an adjournment in the disciplinary hearing. Those were, in short, the four disciplinary allegations that the claimant was asked to answer.

32. The tribunal found that Mr Tomnay was motivated to initiate a disciplinary process by the claimant making protected disclosures, and that Ms Tracey in turn relied on everything which followed, all to a sufficient degree that it could be said that the test of causation required for a detriment claim was met. In other words, the disclosures had a material influence on the dismissal decision.

33. The tribunal were aware that they were legally permitted to make a finding that the disclosures were the sole or principal reason for the dismissal under section 103A if they found the evidence supported that conclusion. In doing so they could apply the principle confirmed in ***Royal Mail v Jhuti*** to the effect that Mr Tomnay's and/or Ms Young's influence on the fact that a disciplinary procedure was activated and the course it then took could be taken into account if it influenced sufficiently the decision which Ms Tracey reached. So, for example, if they withheld important evidence which went in the claimant's favour, or distorted and exaggerated evidence which pointed against her, because she had made protected disclosures, and Ms Tracey then relied on that to reach the decision that dismissal was justified when she would not have so concluded otherwise, the knowledge and motivations of Mr Tomnay or Ms Young could be considered as relevant to the question of causation.

34. However, the tribunal found that the making of protected disclosures did not occupy that level of prominence in the overall set of reasons in the mind of Ms Tracey. Even when recognising that the protected disclosures were a factor leading to her decision, and a material one, they were not the main one. That was the evidence gathered during the disciplinary investigation. Ms Tracey found it to be sufficient in quantity and gravity to justify dismissal. The tribunal found that there were flaws in the process by which she arrived at that decision, but that is a separate matter from the question of what were her reasons.

35. Hence the claimant's uncertainty over how she could be dismissed by reason of conduct, when in her mind she had committed no acts of misconduct, is recognised. However it is what is in the mind of the decision maker that matters, even if that amounts to a partial or erroneous set of facts, beliefs or conclusions.

36. In very brief terms therefore, the part played by the protected disclosures was material enough to pass the less demanding test under section 47B but not to clear the higher bar set by section 103A. The Court in ***Fecitt***, paragraph 45, noted that had Parliament wanted the test of causation of detriment under 47B to match that in relation to unfair dismissal *'it could have used precisely the same language, but it did not do so.'*

37. Therefore the tribunal's original reasoning is believed to be sound and does not require to be changed. The application therefore does not succeed and, subject to the matters dealt with below, the judgment remains in its existing form.

Additional matters

Liability of the third respondent in relation the section 47B complaint

38. In the course of dealing with the claimant's application a matter occurred which I consider it is in the interests of justice to address at the same time under the reconsideration procedure.

39. In short, having found that the third respondent had subjected the claimant to the detriment of dismissal, making the first respondent vicariously liable, the tribunal should not have dismissed the claim against the third respondent. The first respondent is legally liable as well as her, and not instead of her.

40. This requires to be addressed by way of the following amendments to the judgment:

    a. Conclusion 3 of the judgment should now read as follows:

    'the claimant was subjected to the detriment of dismissal by the third respondent by reason of having made protected disclosures under

section 47B(1A) and the first respondent is deemed also liable under section 47B(1B) of the Employment Rights Act 1996;'

b. Conclusion 4 of the judgment should now read as follows:

'the claimant was not subjected to an unlawful detriment by the second respondent under section 47B of the Employment Rights Act 1996, and her claim against him is dismissed;'

c. A new explanatory paragraph 201 should be added as follows:

'A worker cannot make a claim directly against their employer of detriment by reason of making protected disclosures where the detriment alleged is their dismissal. Their remedy in that scenario is a claim under section 103A of automatic unfair dismissal, which the claimant has separately made. However, the worker may make a complaint of detriment based on their dismissal against the person who took that decision, if that decision-maker is the employee or agent of the employer themselves – section 47B(1A) ERA. When that is found to have happened, then under section 47B(1B) *'that thing is treated as also done by the worker's employer'*. The employer therefore becomes vicariously liable. This has been found to apply to the detriment of dismissal – ***Timis v Osipov [2018] EWCA Civ 2321***."

d. Paragraph 206 (formerly 205) should have a new second sentence added as follows:

'She was subjected to the detriment of dismissal by Ms Tracey acting in the capacity of agent of her employer.'

and a new final sentence as follows:

'Section 47B(1B) states that *'that thing is treated as **also** done by the worker's employer'* – emphasis added. That wording implies that both parties are deemed to be liable. The complaint is therefore upheld against both the first and third respondents.'

e. Paragraphs 207 to 210 (formerly 206 to 209) under the heading 'The detriment claims against the second and third respondent' should be deleted and a new paragraph 207 should be added as follows:

'In relation to the claim against the second respondent, he did not take the decision to dismiss the claimant. Dismissal is the only detriment claimed to have taken place by reason of the protected disclosures being made. There is no foundation for the claim against him personally and that complaint is dismissed.'

Corrections under the 'slip rule' – rule 69

41. In response to a communication received from Ms Roebuck suggesting that her description in the judgment as the first respondent's former Quality Manager was incorrect, the parties' views were sought. They agreed that references to her holding that status were erroneous and should be removed. This is now addressed.

42. Similarly, it was noted that the numbering of some sub-paragraphs in the judgment did not match the principal paragraph number of which they formed part. This is also now addressed.

43. A revised judgment is therefore issued dealing with the above matters.

Employment Judge: **B Campbell**
Date of Judgment: **06 July 2023**
Entered in register: **10 July 2023**
and copied to parties