



EMPLOYMENT TRIBUNALS

Claimant: Mr L Hermitt

Respondent: Trafford Council

JUDGMENT

The claimant's application dated 23 August 2023 and 13 July 2023 for reconsideration of the Judgment sent to the parties on 30 June 2023 is refused.

REASONS

1. There is no reasonable prospect of the original decision being varied or revoked. My reasons for reaching that conclusion are set out below.
2. The claimant's original application sent on 13 July 2023 runs to some 23 pages and has a number of exhibits attached to it. However, the application fails to identify why the claimant says it is in the interests of justice for the decision to be reconsidered. The application is also somewhat difficult to follow, both in terms of understanding the legal factual arguments which are being made in relation to the original Tribunal Judgment because the claimant's linguistic style can sometimes be somewhat opaque.
3. In response to the original reconsideration application Employment Judge Cookson directed that the claimant be required to explain the grounds on which he said the application was necessary in the interests of justice, and he was encouraged to explain his grounds of application briefly and using straightforward language.
4. The claimant responded to that request with a five page document on 23 August 2023. The fact it is shorter is helpful, but the grounds for the reconsideration itself are still somewhat difficult to discern.
5. In broad terms, the claimant's grounds for applying for reconsideration appear to be:
 - (1) his belief that his claim has not been fully addressed, that it was wrong to find that he had not made a protected disclosure, and that the Tribunal has not properly considered the regulatory implications of him being a registered social worker; and

(2) that there is new or additional evidence which should be considered.

6. Written reasons for the Tribunal's Judgment in this case were not requested.

7. At the original hearing, the Tribunal considered complaints of detriment under section 47B of the Employment Rights Act 1996 ("ERA") and automatically unfair dismissal under section 103A of the ERA. These claims had been subject to a deposit order made by Employment Judge Sharkett at a hearing on 1 June 2022. One of the reasons why the deposit order was made was that at the hearing before Employment Judge Sharkett the claimant had been unable to properly identify what information he had disclosed.

8. At the outset of the final hearing further time was spent seeking to understand on what basis the claimant says he had made a qualifying protected disclosure, colloquially known as "blowing the whistle". Considerable time was spent seeking to understand the claimant's case in this regard, but we continued to have a significant lack of clarity about the claimant's case. The claimant suggested that he had made a disclosure of information which tended to show a breach of the Care Act, although the claimant was unable to explain to us in any meaningful sense what legal obligations he believed had been breached.

9. In terms of the information which had been disclosed, the claimant told us that he had told a lawyer acting for the Greater Manchester Mental Health Trust (to whom the claimant had been seconded) that she should have seen some earlier statements that he had produced. Despite extensive efforts by the Tribunal, this was the best that we could do. However, the claimant failed to explain to us what the difference was between the statements and what the significance of those differences might be in terms of a breach of legal obligations.

10. The tribunal unanimously concluded that the claimant had not established that he had made a protected disclosure and that his claim for unfair dismissal was not well founded. His claims were dismissed.

11. In the application for reconsideration the claimant has identified five steps which the Employment Tribunal must take to identify if there has been a qualifying protected disclosure, but his application still fails to address the questions of what information had been disclosed and why the claimant believed that that disclosure tended to show a breach of a legal obligation and tended to show a breach of one of the relevant matters in section 43B(1)(a)-(f) ERA.

12. In the application for reconsideration the claimant also refers to "a suppression concealment of information", but this was not referred to this at the hearing before the Tribunal and the claimant has not explained why not.

13. In this application the claimant has referred to the relevant legal issues for the Tribunal to address, the information he has provided still fails to identify precisely what the claimant is relying on. At paragraph 117 he says this:

“The claimant has referred to the production of an inquest report towards an inquest matter he produced October 2019. At his meeting a year later 15.10.20, he had disclosed to the existence of such earlier report which said mentioned his concerns that may have made a difference at the time with the patient.”

14. That appears to be a different case from the one he presented at Tribunal, but he cross-refers to a number of documents which were included in the original Tribunal bundle (pages E98-E103). There is no explanation as to the claimant did not refer to these documents if they were relevant or why he had not applied to amend his claim if he wished to present his claim in a different way.

15. In the circumstances, there is no reasonable prospect of the original decision that the claimant had failed to show that he had made a qualifying protected disclosure, being varied or revoked. Accordingly, there is also no reasonable prospect of the original decision to dismiss the claimant's claims that he was automatically unfairly dismissed under section 103A and/or that he was subject to a detriment under section 47B being varied or revoked.

16. The other complaint considered by the original Tribunal panel was that the claimant had been unfairly constructively dismissed. In the original Judgment that complaint was dismissed because the Tribunal found that the claimant had failed to meet the burden of proof to show that he had been dismissed in accordance with section 95(1)(c) – namely that he had terminated the contract under which he was employed with or without notice in circumstances in which he was entitled to terminate it without notice by reason of the employer's conduct. This is what is commonly known as a constructive dismissal.

17. The reconsideration application alludes at various points to issues which the claimant had relied upon in relation to his constructive dismissal complaint. However, the arguments are difficult to follow. It seems in essence that what the claimant says is that he thinks the Tribunal made the wrong findings of fact. The Tribunal panel made findings of fact based on the evidence before it and on the balance of probabilities. It is perhaps inevitable in litigation that the losing party will be dissatisfied with the outcome, but that is not a reason to allow an application to re-litigate the matter. An application for reconsideration requires a judicial decision that it is in the interests of justice to look at the case again. Although rule 70 allows Employment Tribunals a broad discretion in this regard, the discretion must be exercised in a way which has regard not only to the interests of the party seeking the review or reconsideration but which also has regard to the interests of the other party and to the public interest in there being finality of litigation where possible.

18. At the final hearing in this case the Tribunal panel did our best to consider all of the evidence before us and reach relevant findings of fact on the basis of the information which the parties had provided to us.

19. The claimant has not explained on what basis he suggests that the Tribunal applied the law in relation to constructive dismissal incorrectly or why he says our findings were perverse.

20. For example, in the reconsideration application the claimant refers to his suspension which was something he relied upon as amounting to a breach of trust and confidence. The Tribunal panel found that in relation to the authorisation for the claimant's suspension, the respondent had not demonstrated that it had fully complied with its own procedures when the claimant was suspended by a senior employee of the NHS Trust that the claimant had been seconded to. However, we accepted that the respondent had been involved in the suspension and the claimant had been informed of the reasons for it. The claimant accepted that the concerns raised about his conduct were very serious. We were not satisfied on the basis of the evidence before us that the claimant had shown that the procedure was contractual in nature, and although we were not satisfied that the procedures had been properly adhered to, we concluded that the breaches which had occurred did not amount to fundamental breaches of the implied term of trust and confidence.

21. Further, on the basis of the evidence before us, and in particular the claimant's detailed resignation letter, we concluded that the circumstances of his suspension, which had occurred some 9-10 months before his resignation, had not been an influencing factor on his decision to resign and in any event the delay between the suspension and resignation meant that any breach of contract which had occurred had been waived by the claimant.

22. In the circumstances there is nothing in the reconsideration application which suggests that the Tribunal's conclusions in relation to the above matters are wrong such that the claimant's claim that he was constructively dismissed should succeed. This is also true of other issues referred to in the application for reconsideration. The Tribunal made findings about the claimant's grievance, the provision of the risk assessment tool and the last straw. In circumstances where it is difficult to discern the grounds on which the claimant says the Tribunal's decisions about these matters were wrong and should be decided differently, it is difficult to comment in detail, but the Tribunal made findings about each of these matters and concluded, on the balance of probabilities, that the claimant had not shown that there had been a fundamental breach of contract, whether from a single event or when taken cumulatively, such that the claimant was entitled to resign and treat himself as dismissed.

23. In particular, although this position does not appear to be consistent with the grounds of reconsideration, the claimant had told us that the last straw which had led to his dismissal had been the contents of the investigative disciplinary report which had shown that his managers had raised concerns about him which he had been previously unaware of. In the section in the application for reconsideration headed "Last Straw" the claimant refers to the authorisation for his suspension and the risk assessment tool issue, that is the fact that the respondent had not disclosed the risk assessment tool used by managers to decide to dismiss him, and he also refers to concerns about the impartiality of the investigation panel members.

24. However based on the evidence presented to the tribunal at the final hearing and most significantly based on the contents of the claimant's resignation letter and what he told us at the final hearing, we found that the reason the

claimant had resigned had been contents of the investigation report which referred to concerns raised by the claimant's managers. We accepted that because these were matters which the investigatory manager considered to be relevant to possible disciplinary action and that it was in accordance with good industrial practice that the investigation report made clear what the concerns were in order that the claimant would have an opportunity to address those concerns during the disciplinary process. That was the last straw which the claimant had identified to us at the final hearing.

25. In terms of other issues which appear to be referred to in the application, at no time at the final hearing, or at previous preliminary hearings, had the claimant raised concerns about the impartiality of the disciplinary panel, and this appears to be an attempt by the claimant at this late stage but without any explanation of why and why it was not referred to earlier.

26. In the circumstances there is nothing in the application which suggests that it is in the interests of justice for the Tribunal to reconsider the conclusions that it made about the reasons for the claimant's resignation and whether he had been constructively dismissed in that regard.

27. Finally the claimant also refers refers to regulatory matters including issues about the regulatory process which has continued after he resigned. It is clear that the claimant is dissatisfied with the way the respondent has dealt with those regulatory matters and the claimant's professional body, but as his concerns about those issues relate to events which happened after his resignation, they cannot be relevant to whether he was constructively dismissed.

28. The claimant also suggests that he was not adequately prepared for the final hearing and seeks now to introduce various documents such as his contract of employment.

29. The Tribunal panel were not satisfied with how the respondent had prepared for this Tribunal hearing. It does appear that the Tribunal bundle had been prepared late and the organisation and format of that bundle presented considerable difficulties for the Tribunal panel. We expressed our dissatisfaction at the time for the unsatisfactory state of affairs, but the claimant told us he wanted to proceed and it does not explain why the claimant himself had not ensured that all of the relevant evidence which he wished to rely on was before the Employment Tribunal.

30. In terms of documents which the claimant has identified which are relevant to his constructive dismissal, the claimant has failed to identify why those documents were not available to him at the time of the final hearing or why he had not brought copies to the final hearing if the respondent had not included them in the bundle. In those circumstances there is little reasonable prospect of the Tribunal changing any of the findings that it made on the basis of documents which the claimant could have produced to us at the relevant time but chose not to. There is no reasonable prospect of the Tribunal varying its decision in those circumstances.

Employment Judge Cookson
Date: 31 October 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
7 November 2023

FOR THE TRIBUNAL OFFICE