



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000032/2023**

**Reconsideration in Chambers on 26 October 2023**

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**Employment Judge C McManus  
Member A McFarlane**

**Mr A Fleming**

**Claimant  
In Person**

**Abbey Metal Ltd**

**Respondent**

**Represented by:  
Ms M Jenkins Solicitor**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of this Tribunal dated 18 July 2023, entered in the register and copied to parties on 19 July 2023, is reconsidered in terms of Rules 70 to 72 of the 20 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, on the application of the claimant.

The outcome of the reconsideration is that the decision is confirmed.

### **REASONS**

#### **Background**

25 1. The background is set out at paragraphs 1 – 11 of the Judgment dated 18 July 2023.

That Judgment followed an Oral Judgment given at the conclusion of the Final Hearing ('FH') on 21 June 2023.

2. The claimant seeks reconsideration in the interests of justice. The claimant's 30 grounds for seeking reconsideration of the Judgment of the Tribunal dated 18 July 2023 are set out in:

- Email from the claimant of 5 July 2023 (prior to the written reasons being issued).
- Email from the claimant of 11 September 2023.

3. The reconsideration application is in respect of preliminary matter dealt with 5 at the start of the FH, being:

(1) that the claim did not include a claim for detriment under section 47B of the Employment Rights Act 1996 ('the ERA').

(2) To refuse the application to amend the claim to include the proposed terms set out at paragraph 10 of the Judgement dated 18 July 2023, 10 which seek to bring a claim for detriment under section 47B of the ERA'.

4. The reasons for these preliminary decisions are set out in paragraphs 12 – 21 of the Judgment dated 18 July 2023.

5. The respondent's position on the reconsideration application is set out in an email from the respondent's representative of 15 August 2023.

### 15 **Initial Consideration of Reconsideration Application**

6. Parties' representatives were informed of the initial view at the Rule 72(1) stage in correspondence sent from the Employment Tribunal office on 10 July 2023. That view was that the reconsideration could be dealt with on consideration of the parties' written positions. Given that the reconsideration 20 application was made prior to the issue of the written reasons, the claimant was allowed to provide any further written comments in respect of the reconsideration application within 14 days of the issue of the written reasons.

The written reasons were issued on 19 July 2023. The claimant's further comments were received on 11 September. On application of the overriding 25 objective to deal with matters fairly, as set out in Rule 2 of the Employment

Tribunal (Constitution and Rules of Procedure) Regulations 2013 ('the Tribunal Rules') the content of the claimant's email of 11 September have also been taken into account in this reconsideration. The respondent confirmed on 11 September that they had no further comment following that email.

### **Decision that a Detriment Claim was not included in Original Claim**

7. In his reconsideration application of 5 July 2023, the claimant states *"I believe that there is enough information in the ET1 with the appropriate box ticked to demonstrate that this was not a new claim and given the type of claim is a*  
5 *whistleblowing claim I believe it is in the public interest for this to be heard."*

8. The 'appropriate box ticked' which the claimant seeks to rely on is at section 8.1 of the ET1 form. The box is ticked to indicate *'I am making a whistleblowing claim including dismissal or any other unfair treatment after whistleblowing'*. It is one box to indicate a whistleblowing claim both for  
10 dismissal and for detriment. It is not disputed that the content of the ET1 claims that the claimant was dismissed because of whistleblowing. In these circumstances that ticked box could indicate one or both of a claim for dismissal and/or detriment. That ticked box is taken in the context of what is stated in the paper apart.

15 9. The claimant seeks to rely on particular sections of the paper apart submitted by him with the ET1 claim form as bring a claim for detriment. The relevant sections are:

*"3/1/23 I asked JM if we were going to address these issues raised in the letter, this was said in front of my colleague Hawk. JM was unhappy and*  
20 *proceeded to shout and swear in my face so much so that he was spitting as he was swearing at me. He said maybe there are 2 points and left. This was not an appropriate reaction from the Director when serious health and safety breaches have been raised.*

*I returned to my work station where JM and TM were standing and I asked*  
25 *why there was only 2 problems and I proceeded to point out additional concerns where I was standing. JM came over to me continued to shout and swear and then grabbed my arm. I asked him calmly to remove his hand and I said come on*

*there are 2 holes in the ceiling where we work and the electricity box is there.*

*Whilst this was ongoing I had concerns for my own*

30 *physical health and safety as there were no witnesses and I was not in view of the cameras. I reiterated further concerns over the lack of lighting and JM charged at me and shouldered me. I asked what he was doing as he had assaulted me and he said that he knew what I was doing and he walked away shouting and swearing.*

*16/1/23 I went to work and continued to perform my duties when I was asked  
5 by TM to go to the office. At 12.30 I was informed by Fergus Wallace (FW) that JM has let you go to which I asked him to confirm and he said that I was dismissed for gross insubordination. I asked him if he was serious and he told me to get my stuff and leave.*

*I firmly believe the only reason I have been dismissed is because I have  
10 whistle blown, where I have made a qualifying disclosure involving raising concerns to both TM and JM over danger to the health and safety of any person including myself, colleagues and members of the public. If I had not mentioned the health and safety breaches or whistle blown I would still have been employed. I knew by raising these issues I would be a marked man*

15 *however it was more important to highlight these issues and hopefully work with the business to resolve. It is no coincidence that the formal letter was raised on the 13/1/23 and I was dismissed without warning on the 16/1/23. This has culminated in me being dismissed for sham reasons of gross insubordination as opposed to sitting down and going through the issues and*

20 *providing me and my colleagues with reassurances that these issues would be fixed and resolved and safety was paramount. Throughout my time here I was not given any warnings and received praise from customers for my work on numerous occasions.”*

10. This wording was considered in making the decision set out in the Judgment  
25 dated 18 July 2023, particularly from line 25 of that paragraph 13, as follows:

*“Although the allegations that the claimant was shouted and sworn at are set out in the original paper apart, there is no indication in the ET1 that the*

*claimant suffered a detriment other than dismissal. There was no explanation why the claimant had not indicated in the original paper apart to the ET1 that*

30 *the respondent's actions resulted in him "...feeling distressed, upset, stressed, humiliated and belittled, culminating in suffering sleepless nights following the incident and being prescribed anti-depressants by his doctor." It was not suggested that those consequences would not have been known by the claimant at the time of his submission of the ET1 and its' paper apart. The claimant's position at the Hearing was that he had received advice from CAB*

5 *before submitting his ET1 and the original paper apart."*

11. The claimant's reconsideration application still provides no explanation for this failure.
12. The 'detriment' would be what was suffered as a result of action taken by the respondent in consequence of the alleged whistleblowing. The ET1 and  
10 its paper apart do not set out what is said to have been suffered by the claimant i.e. what the detriment was. Being shouted and sworn at is not necessarily a detriment in itself. The consequences of being shouted and sworn at may be a detriment but that is not set out in the ET1 or its paper apart.
- 15 13. The reasons why it was decided that the ET1 and its paper apart do not include a claim for detriment are set out in paragraph 13 of the Judgment dated 18 July and are confirmed on this reconsideration.
14. The allegations of whistleblowing which the claimant seeks to rely on in respect of the detriment claim are the same allegations relied on in the  
20 dismissal claim. Those allegations were considered at the FH and it was determined that the claimant's dismissal was an automatic unfair dismissal under section 103A of the Employment Rights Act 1996 (protected disclosure), in respect of disclosures in respect of health and safety. The claimant's claim in that regard was successful. The claimant's allegation of 25 the respondent's health and safety breaches were aired in the public FH and are addressed in the decision dated 18 July 2023. The findings in fact include, at paragraph 28:

*“The claimant was dismissed following having raised concerns about health and safety in respect of conditions at the respondent’s premises. The claimant gave a list of health and safety concerns to the respondent’s owner*

*(John McLean) on 13 January 2023 and had an exchange of words with him about that. John McLean then reported to Fergus Wallace (respondent’s Manager) that the claimant had been threatening and aggressive towards him.”*

15. The allegations sought to be relied on in the detriment claim have been heard and findings in fact have been made. It did not require the claim of detriment to proceed in order for those allegations to be heard. In all the circumstances, any public interest in the detriment claim being heard does not outweigh the principles in respect of statutory time limits for bring claims and fair notice.

#### **Decision to refuse Amendment Application**

16. The reasons for the decision to refuse the amendment application are set out at paragraphs 14 – 21 of the Judgment dated 18 July and are now confirmed. No further information has been provided by the claimant to explain why an amendment application was not made at an earlier date.

17. In consideration of the balance of hardship, we take into account that no medical evidence has been submitted by the claimant to support his position that he suffered a detriment as result of the respondent’s behaviour. No evidence has been produced by the claimant to support a significant award being made for injury to feelings, in the event of the detriment claim being successful.

18. The claimant relies on *Trimble v Supertravel Ltd [1982] ICR 440* and *Lynn Phipps v Priory Education Services Ltd [2023] EWCA Civ 652 CA*. The interests of justice have been considered. For the reasons set out in paragraphs 13 – 21 of the Judgment dated 18 July 2023, it is not in the interests of justice for Tribunal to determine a claim in respect of alleged detriment under section 47B ERA.

**Employment Judge: C McManus**  
**Date of Judgment: 02 November 2023**  
**Entered in register: 14 November 2023**  
**and copied to parties**

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