EMPLOYMENT TRIBUNALS

Claimant: **Mr M Ilsley**

Respondent: **Swisco Ltd**

Before: **Employment Judge P Cadney**

Representation:
Claimant: Written Submission
Respondent:

Reconsideration Judgment

The judgment of the tribunal is that-

i) The claimant's application to revoke or vary the Judgment is dismissed.

Reasons

1. I heard a Preliminary Hearing on 2nd February 2023. The claimant has appealed the order and has made an application for re-consideration of one aspect of the order; relating to paragraph 65 and ground 4 of the Grounds of Appeal. In its reconsideration application the claimant sets out that the application has been made on the direction of the EAT for a hearing on 21st June 2024.

2. For ease of comprehension paragraph 65 is set out below:

65 - S103A – The claimant accepts that this has been misidentified and is in fact a claim pursuant to s44 ERA 1996. The claimant's specific allegation is that the alleged behaviour of Mr Coish (para 4-4.9) was a detriment suffered because the claimant had in general terms raised health and safety concerns. However not only has the claimant not correctly identified the correct section of the ERA he does not identify which subsection of s44 (a) – (e) relied on and, therefore how he brings himself within the protection of the section.

3. The basis of the re-consideration application is that the tribunal has mis-recorded the claimant's position in that paragraph, and in essence that the application before the tribunal in respect of which he was seeking permission to amend was to pursue a claim for automatic unfair dismissal pursuant to s 103A, and not a claim for Health and Safety detriment pursuant to s44 ERA 1996, and that the reference to s44 was the tribunal's suggestion of an alternative way in which the claim could be put. If this is correct the application was not to amend to bring an s44 detriment claim, but to bring a claim for automatically unfair dismissal pursuant to s103A which was not withdrawn; and the tribunal has misunderstood and determined the wrong application .

4. The respondent objects to the application being reconsidered on the basis that it is out of time by reference to the EAT's order of 8th January 2024 which gave permission for the application to be made to the ET within 21 days (29th January 2024). The claimant only made the application on 22nd April 2024 after three chasing e-mails from the EAT and has provided no explanation for the delay. Unless the ET dismisses the application on the papers there will be insufficient time to list a reconsideration hearing before the appeal hearing on 21st June which will inevitably be delayed. The delay will therefore potentially cause significant prejudice to the respondent and should be dismissed on the grounds that it has been submitted out of time in any event, and before any consideration of the merits.

5. The claimant has stated in reply that he is not seeking a full hearing and will accept the tribunal's decision on the papers; and in reply the respondent has effectively repeated its earlier points.

6. My view is that I should attempt provide as much assistance as I can both to the parties and the EAT, and insofar as I am able I will address the merits of the application. It must be said at the outset that paragraph 65 necessarily represents my understanding of the points discussed in the hearing. I have no specific recollection now of the specific exchanges in relation to this point, and it is obviously possible that my understanding was correct, or that it was wrong, or that that the claimant's representative and I were talking at cross purposes.

7. The application for reconsideration relates to paragraph 65, which forms part of the discussion and consideration of the application to amend, which related to the final Amended Particulars of Claim suppled with the application to amend on 1st February 2023.

8. I have reviewed the Amended Particulars of Claim and it sets out the following:

   i) The implied term of mutual trust and confidence (para 2.1);

   ii) Alleged breaches of the implied term (para 3.1 - 3.16 / 4 - 4.9) ;

   iii) The failure to pay unpaid wages / unpaid overtime/ unpaid holiday which are brought as separate heads of claim, and also repudiatory breaches of contract (para 5 – 5.5);

iv) Health and Safety concerns – He refers to undertaking additional roles/work (para 6.1) ; and of raising these concerns on three occasions, emails of 14th July2021 and 19th October 2021, and orally on 24th November 2021 (paras 6.2 – 6.4). Paras 4-4.9 are also relied on as detriments for raising health and safety concerns (see para 8.3).

v) He resigned in circumstances amounting to constructive dismissal (paras 7-8), and relies on breach of the implied term (para 9.1a), breaches of the express terms relating to pay (para 9.1b), and suffering detriment (para 9.1c). (For the avoidance of doubt these paras are misnumbered, being sub paragraphs of para 8.1 but I have used the numbering of the Amended Particulars of Claim).

vi) Detriment resulting from raising health and safety issues (para 8.3);

vii) The claimant reiterates the claims in respect of excessive work and/or non-payment of overtime as express breaches of contract and freestanding claims (paras 8.4 / 8.5);

viii) He asserts a claim for unlawful detriment for time off to care for his father s57A ERA 1996 (para 8.6)

ix) He then sets out the claims (paras 9.1- 9.5) which includes at para 9.3 "compensation for suffering a detriment under s103A ERA 1996"

9. There are a number of points which are apparent from the Amended Particulars of Claim:

i) There is no reference anywhere to a claim in relation to protected disclosures / whistleblowing detriment/dismissal other than in para 9.3 as set out above.

ii) That sole reference is included in paragraph 9.3 which refers to suffering detriment and makes no express claim for automatic unfair dismissal other than by reference the section number itself.

iii) There is, on the basis both of the Amended Particulars of Claim and/or the reconsideration application, no application to amend to add a claim of whistleblowing detriment, which is curious if the allegations of health and safety disclosures/detriments were intended also to be relied upon as public interest disclosures/detriments on which the claim for automatic constructive unfair dismissal is founded.

iv) There is no pleaded claim for automatic unfair dismissal pursuant to s100 ERA 1996 (health and safety dismissals) anywhere in the Amended Particulars of claim, which is also curious if the allegations of health and safety were intended to form the basis of a claim for automatic unfair dismissal.

v) If the claimant did intend to bring a claim for whistleblowing detriment/ automatic unfair dismissal he has not set out the basis for such claims anywhere in the Amended Particulars of Claim, which is I assume, why I asked whether there was an error in para 9.3 and whether this should in fact

be a reference to s44 ERA 1996 health and safety detriment, to which as recorded in paragraph 65 of the CMO, my understanding was that the claimant's representative agreed.

10. On the assumption that I am wrong or had misunderstood I have decided to reconsider para 65 as requested, and albeit submitted out of time.

11. Firstly, and as is set out in the CMO, my understanding was that the claimant was seeking to add to specific detriment claims pursuant to s57A and s44 ERA 1996, and the reference to s103A was in error. However the reconsideration application is based on the premise that I am wrong in this. Having reviewed the Amended Particulars of Claim, it remains my view that the most natural reading of the application as a whole is that my original understanding was correct.

12. However on the assumption that I was wrong and that there was in fact an application to amend to add a claim of automatic constructive dismissal pursuant to s103A, I have no doubt that I would have dismissed the application for the following reasons:

    i) There is no pleaded claim that the claimant has made any protected disclosure; and were I to grant the amendment it would inevitably have required a further order for Further and Beter Particulars of the disclosures and how it was asserted that they met the statutory tests, particularly in relation to the issue of how the claimant asserted that he reasonably believed the disclosures were in the public interest as the dispute appears to relate to an entirely private dispute as to the amount of work required of the claimant.

    ii) Put simply I would not readily grant an application to amend made by a represented party where it is not possible to know from the amended pleadings what the basis of the claim is; or where it would necessarily generate an order for Further and Better Particulars in order to understand it. This is in fact exactly the approach that took when I understood that the application was one to add a claim of s44 detriment, and hence the comment in paragraph 65 that the claimant had not identified in the pleading which sub-sections of section 44 he was relying on. This point would obviously also have equally applied had I understood that the claim was intended to be brought as a claim under s103A.

13. Having re-considered I remain of that view. In the circumstances, there is nothing in the reconsideration application which sets out any basis for considering that there is a reasonable prospect of the original decision being varied or revoked (r72(1) Employment Tribunals Rule of Procedure 2013) and accordingly the application is refused.

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Employment Judge P Cadney
Dated: 8th May 2024

Judgment entered into Register
And copies sent to the parties on

28th May 2024

for Secretary of the Tribunals