Case No: 1306191/2024

EMPLOYMENT TRIBUNALS

Claimant: Mrs. M Gowers

Respondent: Retirement Security Limited

UPON APPLICATION by the Claimant, dated 21 August 2024, to reconsider the Interim Relief Judgment sent to the parties on 13 August 2024, under rule 71 of the Employment Tribunals Rules of Procedure 2013,

JUDGMENT

The Claimant's application for reconsideration is refused on the basis that there is no reasonable prospect of the original decision being varied or revoked.

REASONS

1. The Claimant's application for interim relief was heard on 18 July 2024. A Reserved Judgment, with Reasons, dated 10 August 2024, and refusing the application, was sent to the parties on 13 August 2024. I explained in paragraph 3 of those Reasons why it was not possible to give an oral judgment on the day of the Hearing itself. The relatively short delay in preparing the Judgment and Reasons was due to my being on annual leave for two weeks at the end of the working day after the Hearing, that leave being followed immediately by other judicial commitments.

2. For reasons unknown to me, the Claimant's application for reconsideration of the Judgment was not referred to me until 24 September 2024, more than a month after it was received by the Tribunal. I directed that a letter be sent to the parties on 24 September explaining the resulting delay in dealing with the application. I apologise to both parties for that delay.

3. The application for reconsideration was plainly made within the time limit set by rule 71 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"). In accordance with rule 72(1) of the Rules, the first step is for me to consider the Claimant's application, to determine whether there is any reasonable prospect of the original decision being varied or revoked. I have decided that there is not, for the reasons that now follow.

4. I refer to the Judgment and Reasons for the relevant background, a full summary of the relevant documentation and submissions, a statement of the relevant law, and my conclusions. I do not repeat that here, except as necessary to explain my decision in relation to the reconsideration application. Except as stated below, references to paragraph numbers relate to the Judgment and Reasons.

5. There are essentially two grounds for the reconsideration application:

5.1. The first concerns the question of whether it is likely the Tribunal at the final hearing will find that the Claimant's letter of 28 March 2023 to shareholders was a protected disclosure. Whilst the application refers to my finding that it was not a qualifying disclosure, that is incorrect on two counts. First, I was careful to avoid definitive findings; my task was to decide whether it was likely that the Claimant would establish certain matters at the final stage. Secondly, I found that it was likely that she would establish that the letter was a qualifying disclosure, but that it was not likely she would establish it was a protected disclosure.

5.2. The second ground is essentially that I failed to give sufficient weight to certain matters, or may not have considered them at all, on the question of whether it was likely the Tribunal would find that a protected disclosure was the reason or principal reason for the Claimant's dismissal.

6. I deal with each of these two grounds in turn.

7. In relation to the alleged protected disclosure (or, as it may be, disclosures) contained in her letter to shareholders of 28 March 2023, the Claimant submits that I made an error of law and/or reached a perverse decision. In short, she says that if that letter was also sent to the Respondent's directors, it was thus sent to her employer (the Respondent) and covered by section 43C of the Employment Rights Act 1996.

8. The first point to make about that submission is that if the Claimant believes that I have made an error of law or reached a perverse decision then her remedy must be to appeal. The reconsideration process is not the appropriate means of challenging a decision on this basis.

9. In any event, I respectfully disagree with the submission for the following reasons:

9.1. The application refers first to paragraph 92 but, in that paragraph, I did no more than summarise my conclusion on the question of whether it is likely the Claimant will show that the letter was (or included) one or more qualifying disclosures. The question of whether they were <u>protected</u> disclosures plainly has to be considered separately.

9.2. The application then refers to paragraph 39. In that paragraph however, I did

no more than set out the content of the covering email by which the Claimant sent the letter to the directors for onward transmission to the shareholders.

9.3. As I set out at paragraphs 79 and 93, that email is not relied on by the Claimant as a protected disclosure, or at least that is not how her case is pleaded, nor was it argued on this basis before me. I refer to paragraph 4 of her Grounds of Complaint, which were professionally drafted. Paragraph 39 of those Grounds, to which the reconsideration application also refers, does no more than recite how the disclosure was sent to shareholders, namely by means of the covering email.

9.4. The Tribunal at the final hearing might come to a different view, but I am confirmed in my conclusions at the interim relief stage by the fact that the dismissal letter – which the Claimant regards as a "smoking gun" in support of her complaint that the dismissal was automatically unfair – said that writing to shareholders was ill-advised. The Claimant must therefore, it seems to me, rely on the fact of writing to shareholders and/or what she said to them (not to the directors) as the basis for her case.

9.5. In no sense do my conclusions mean that "any report prepared by a whistleblower which contained qualifying disclosures, and which was sent to their employer, would not give them the benefit of protection". My conclusion was simply that I think it likely the Tribunal will find that, if there was one or more qualifying disclosures in the letter of 28 March 2023, it or they were sent to the Respondent's shareholders and not to the Claimant's employer.

9.6. Even if this first ground were a proper basis for reconsidering my decision, which I do not accept it is, it would be of no consequence to do so, given that I see no reasonable prospect of the second part of my decision being varied or revoked. That is that any protected disclosure is not likely to be found to have been the reason or principal reason for dismissal, to which I now turn.

10. Before dealing with the seven bullet points the Claimant sets out in support of this second part of her reconsideration application, I should deal with her general submission that those seven points may not have been taken into account in my deliberations. I note the following:

10.1. First, just because a submission is not expressly recorded does not mean that it was not considered. This is generally accepted to be the case in relation to all employment tribunal judgments and, in this instance, I specifically made this point clear at paragraph 75.

10.2. The delay in deliberating and producing the Judgment and Reasons had no impact on my consideration of the competing arguments. In fact, it enabled me to re-read in full the parties' written submissions, my detailed notes of their oral submissions, and the various documents to which they referred me – see paragraph 4 – before reaching my decision.

11. I turn now to the seven bullet points in which the Claimant sets out the matters she believes I may have failed to consider.

12. The Judgment and Reasons specifically referred to:

12.1. The Claimant's stated belief that certain Board members were not acting in

shareholders' best interests – see for example paragraphs 37, 38, 39, 40 (including its various sub-paragraphs), 49.1 and 88.

12.2. The fact that Mr Chriscoli was put at risk – see paragraph 25.

12.3. The settlement discussions with him – see paragraphs 27 and 31.3.

12.4. The subsequent proposals to increase pay and notice periods for him and/or other directors – see paragraphs 36, 37 and 40.9.

12.5. The Claimant's stated belief that Mr Chriscoli had an incentive to remove her – see paragraphs 50 and 103.5. If he did, it does not follow that it is likely the Tribunal will conclude that the incentive was any protected disclosure; it is more likely on the face of the Claimant's own argument to be that he felt she was seeking to remove him and wanted to avoid that happening.

13. As to the second bullet point:

13.1. I was aware of, and explicitly recorded, the fact that the documentation shows that the restructure was not a new topic of discussion at the time of the Claimant's suspension – see paragraphs 15, 16, 19, 20 and 21. Further, I do not agree that Mr Chriscoli's statement failed to refer to that being the case – the Judgment and Reasons mention in particular paragraphs 11 and 14 of his statement which make reference to previous discussions. The suspension preceded any alleged protected disclosures by three months and thus, even if the Claimant can show that it was "an overreach", it cannot be said that it is likely to follow that she was dismissed for making the later disclosures. It might, but the fact of the suspension could be viewed as supporting the contrary assertion – see paragraph 103.3.

13.2. The Claimant's stated belief that elderly directors may have been misled may have been part of her disclosure(s), but I do not see how it necessarily follows that this was something which should have been taken into account in deciding whether it is likely she will show that any such disclosure that was protected was the reason or principal reason leading to her dismissal. Furthermore, whilst the Claimant asserted that elderly directors were being misled, this is not something which it could be said on the face of the documents she is likely to establish at full trial (though she may do so), even accounting for what she says about Mrs Bessell's email of 21 December 2023.

14. I explicitly recorded that the Claimant was excluded from Board meetings – see paragraphs 34, 35, 40.6 and 91. I did not, and do not, share the Claimant's view that it is likely she will show that her disclosures were "the only key event" explaining that fact, particularly when the exclusion from the meetings, like the suspension, preceded any disclosures. See also paragraph 103 and its various sub-paragraphs.

15. As the reconsideration application recognises, I very much took account of the position of Mr Wakeford, but see paragraph 103.2.

16. I was not invited either in Mr Nuttman's written submissions (paragraph 50 thereof did not do so), nor in his oral submissions, to take into account that the Respondent did not await the outcome of the Narrow Quay HR investigation before dismissing the Claimant. In any event, this is not a factor that I consider leads to

any reasonable prospect of my decision being varied or revoked.

17. Whilst it is correct that the dismissal letter did not refer to the issues that led to the Claimant's suspension or to the purchase of shares by Mr Wakeford, I carefully considered the contents of the dismissal letter in reaching my decision – see paragraph 103.1 in particular.

18. The burden of proof at the final hearing and the decision in **Kuzel** were specifically noted at paragraphs 67 and 68. It is clear from what was said in that case by the Employment Appeal Tribunal (a part of its judgment approved by the Court of Appeal) that the Claimant will be required at the final hearing to show a real issue as to whether the reason put forward by the Respondent was not the true reason for dismissal. If she does, the Respondent will then be required to prove the reason for dismissal. Of course, the Claimant had the burden in the Hearing before me of showing that it is likely that she will establish at the final hearing that a protected disclosure was the reason or principal reason for dismissal.

19. On the basis of what is set out above, I see no reasonable prospect of my changing the decision I have already reached in relation to what it is likely the Tribunal at the final hearing will conclude on the question of the reason for dismissal. I must have regard to the importance of finality in this discrete part of the litigation. Nothing that the Claimant has said or submitted in her reconsideration application in this respect provides any reasonable ground for varying or revoking my conclusions set out at paragraph 103 and its various sub-paragraphs. In short, the application is an attempt to re-litigate the application for interim relief, in large part rehearsing arguments and evidence already considered and otherwise referring to matters which could have been so rehearsed.

20. The Claimant's application for reconsideration is therefore refused.

Employment Judge Faulkner
8 October 2024