Neutral Citation Number: [2024] EAT 42

Case No: EA-2023-000036-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 March 2024

Before :

THE HONOURABLE MR. JUSTICE SHELDON

- -

Between:

TOBY NICOL

Appellant

- and –

(1) WORLD TRAVEL AND TOURISM COUNCIL
(2) GLORIA GUEVARA
(3) EMILIO GRACIA

Respondents

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Ms Anna Greenley (instructed by **Prettys Solicitors LLP**) for the **Appellant**
Mr Piers Martin (instructed by **Sherrards Employment Law Solicitors**) for the **Respondents**

Hearing dates: 28-29 February 2024

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JUDGMENT

Whistleblowing, Protected Disclosures – Practice and Procedure

The ET dismissed the claimant's claims that he had been unfairly dismissed and subject to detriment as a result of protected disclosures that he had made: sections 103A and 47B of the Employment Rights Act 1996. On appeal, the claimant took issue with a large number of findings made by the ET. The claimant complained that a finding had been made on a point that was not in issue between the parties and had already been admitted by the respondents. The claimant complained that a finding was made on a point that was not one of the issues that the ET had to decide and had not been put to the claimant in cross-examination. The claimant also contended that the ET had applied an inappropriate approach to a disclosure that had been made to person A, which was then transmitted to person B. The claimant contended that as long as a protected disclosure had been made to A, and B knew that a disclosure had been made, B did not need to know the detail of what had been disclosed to A.

Held: appeal allowed in part, and dismissed in part.

The ET had made an error in reaching a decision on a point that had not been argued (namely that PD3 had not being made on or around 14 August 2019). Nevertheless, the ET would not have reached a different conclusion even if the error had not been made and so remittal was not required. The ET made an error in finding that the claimant had made inappropriate sexualised comments towards another employee, as this was not part of the case that the claimant understood that he had to meet, and he was not cross-examined on the point. This was a standalone point and did not infect the decision as a whole. The ET did not err in deciding that person B needed to be aware of some of the detail of what the claimant had disclosed to person A. According to the structure of the whistleblowing legislation, for employers to be fixed with liability they ought to have some knowledge of what the worker is complaining or expressing concerns about. It is not enough that person B knows that the claimant has made a disclosure to person A.

Introduction

1. This appeal raises a series of challenges to a decision of the Employment Tribunal ("ET") sitting (via CVP) in London South (Employment Judge Barker, Ms H Bharadia and Mr P Adkins) on 10-14 and 17-18 October 2022, and sent to the parties on 14 December 2022. I refer to the parties as the claimant and respondent, as below. The case concerned a number of disclosures of information that the claimant contends that he made, and which he alleged were "protected disclosures" under the statutory whistleblowing regime: these are referred to as PD1-6. The ET found that: (i) the claimant's claim of automatically unfair dismissal (s103A of the Employment Rights Act 1996 ("ERA")) against the first respondent fails and is dismissed; and (ii) the claimant's claims of detriment on the grounds of having made protected disclosures (section 47B of the ERA) against the first, second and third respondents fail and are dismissed.

2. Both parties were represented by counsel before the ET: Ms Greenley for the claimant, and Mr Martin for the respondents. The same counsel appear before me.

The Factual Background

3. The first respondent is a not-for-profit organisation that represents the interests of the global private sector tourism industry. The second respondent is its President and CEO. The third respondent is the first respondent's director of Human Resources ("HR").

4. The claimant had worked as a consultant for the first respondent since 2011. On 1 May 2019, he commenced employment as Vice-President of Communications and PR. He was dismissed by the first respondent on 14 October 2019. The ET found that

by the end of May, beginning of June, 2019 the claimant had decided that he was not willing to work with the second respondent as a full-time employee.

5. One of the members of the claimant's team was Ms Wynne. On 14 June 2019, she wrote a long complaint about the second respondent to Ms Underwood, an HR consultant engaged by the first respondent. This was triggered by the second respondent having sent Ms Wynne a series of angry WhatsApp messages on 12 June 2019, asking what had happened that day when Ms Wynne had made an error in setting up a conference call line with some journalists. On 12 and 14 June 2019, the claimant sent two WhatsApp messages to the second respondent, warning her of the dangers of communicating with junior staff members by WhatsApp. He considered that this would cause them to resign, and would leave the first and second respondents open to "legal challenge", and damage to the reputation of the first respondent. These two messages were accepted by the respondents to be "protected disclosures" (PD1, and PD2 respectively).

6. The second respondent apologised to Ms Wynne about her WhatsApp messages, and the apology was accepted. Nevertheless, the second respondent did not consider that her actions had been inappropriate, and she did not agree that the first respondent would be at risk of litigation. She also did not regard the claimant's WhatsApp messages as protected disclosures.

7. On 18 July 2019, Ms Magoja, who had also been working in the claimant's team, was signed off sick with stress for four weeks. On 14 August 2019, Ms Magoja reported to Ms Vallis, her line manager, that she had concerns about the claimant's behaviour. This was shared with Ms Roberts, one of two HR consultants (Ms Green was the other) who had been engaged by the first and second respondents to try to improve the internal management of staff and staff morale. Their engagement followed an

unfavourable staff survey entitled "Great Place to Work". Particular concern was expressed about the second respondent's approach to people management and her demanding work ethic.

8. On 14 August 2019, the claimant contacted Ms Roberts to ask after Ms Magoja. Ms Roberts told the claimant that Ms Magoja had expressed concerns about his behaviour, but did not tell him that those concerns related to allegations of sexual harassment.

9. The claimant alleged that he made a further disclosure, PD3, to Ms Roberts in a conversation on 14 August 2019. He said that he told Ms Roberts that the reason for Ms Magoja's absence was that the second respondent had repeatedly messaged her at evenings and weekends. (The ET made findings about PD3, which form the basis of one of the grounds of appeal, and I shall address it in more detail later in this judgment).

10. On 15 August 2019, Ms Roberts and Ms Vallis spoke to Ms Magoja. Ms Magoja told them that the claimant had behaved inappropriately toward her in the workplace on a number of occasions. This was conveyed to the second respondent shortly afterwards.

11. On 21 August 2019, the claimant met with the second respondent. The claimant alleges that at this meeting he made a further disclosure, PD4, about "being bullied and harassed whilst employed by the first respondent and that the second respondent's behaviour to his team members and others in the first respondent had been unacceptable." At this meeting, the claimant told the second respondent that he did not want to be an employee of the first respondent any longer, and wanted to work as a consultant instead. The claimant also indicated that he had taken legal advice on his situation a few weeks previously.

12. After the meeting, Ms Roberts telephoned the claimant to tell him of Ms Magoja's allegations of sexual harassment. An investigation into the allegations was conducted by Ms Green. She spoke to four colleagues identified by Ms Magoja as people she wished her to approach.

13. On 27 August 2019, the claimant met with Ms Roberts and Ms Green. The claimant was told that the investigation with Ms Magoja was continuing. Following the meeting, the claimant emailed Ms Roberts and Ms Green to complain that, on 22 August 2019, the second respondent had called a meeting of the "entire comms team" (that is, the claimant, Ms Wynne and a contractor) to discuss issues which the claimant said had been brought up in Ms Wynne's exit interview. The claimant complained that this was entirely inappropriate and that, as Ms Wynne had made allegations of bullying and harassment against the second respondent, these matters should not have been discussed in front of others, and that amounted to further bullying and harassment. (The email complaint was PD5). The email might have been forwarded to the second respondent but, even if it was, it was not read by her.

14. By this point in time, the second respondent was considering whether to terminate the claimant's employment. On 28 August 2019, the second respondent had messaged Ms Roberts to tell her to do a Google search of "Toby Nicol and Easyjet": this produced material alleging that the claimant had abused a free flights benefit when he was a director of Easyjet in 2010. Ms Roberts discussed these allegations with the second respondent the following day. The second respondent said that the allegations were previously unknown to her, and they made her consider that the claimant "needed to be out of the organisation". On 30 August 2019, the second respondent told Ms Green to consider how to "exit" the claimant from the organisation.

15. On 29 August 2019, Ms Roberts and Ms Green conducted some workshops with junior staff. On 3 September 2019, Ms Roberts told the second respondent that lots of complaints about her management style had come out of the workshop process.

16. On 2 September 2019, the claimant wrote to the second respondent, copying in Ms Roberts and Ms Green. The letter stated that to protect his "reputation and health", he needed to restructure his working relationship. He said that:

> "I have sought legal advice ... to understand my options. He [the claimant's solicitor] advises that my employment rights have been infringed.. . . This would include a case for bullying, harassment, defamation, undermining and a whistleblower-style complaint into the leadership style of the CEO and culture at [the first respondent]."

17. The claimant proposed a consultancy arrangement with the second respondent. He expressed the view that the second respondent did not need a replacement senior Communications Director "as you are likely to confront again many of the issues which have made me come to this decision and [Ms Wynne] included in her exit interview." The claimant sought financial terms which included an *ex-gratia* payment of £40,000, and for him to receive the same salary as he was currently earning but for working 3 days per week for the rest of 2019, and 2 days per week thereafter. The second respondent believed that the claimant was blackmailing her.

18. The first respondent made the claimant a without prejudice offer of settlement on 13 September 2019. Beforehand, the second respondent dispensed with the services of Ms Roberts and Ms Green, and hired the third respondent to be the first respondent's new People and Culture (HR) Director. On 12 September 2019, Ms Green sent to Ms Messina, the Chief of Staff of the first respondent, the conclusions of her investigation into Ms Magoja's allegations against the claimant. Ms Green reported that four colleagues said that the claimant could be "laddish, lewd and inappropriate" at work, but none could recall the specifics that Ms Magoja had raised. Ms Green expressed

the view that the claimant needed to be "more careful in his choice of humour and language", but did not think that "there is a case for him to answer at this time". Ms Green removed the word "lewd" from her handover note, following pressure from the claimant.

19. In a subsequent WhatsApp exchange between Ms Messina and the second respondent, it was stated that Ms Magoja had told the third respondent that Ms Green had "convinced her not to make a case against" the claimant. The second respondent stated that "in order to fire [the claimant] we need [Ms Magoja] to proceed", "And afterwards, she can change her mind", "We need to ask [Ms Magoja] to help me proceed so that we can fire him fast", "[the claimant] manipulated her", "That's why I think that it's best if he leaves", "It's urgent that [Ms Magoja] puts this on the record. I'm being told that her mom is a lawyer".

20. Negotiations between the claimant and the first respondent were not successful. On 14 October 2019, the first respondent dismissed the claimant, purportedly for redundancy.

The ET Proceedings and the ET's Decision

21. In advance of the hearing before the ET, the parties agreed a list of issues. These were reflected in the ET's judgment at paragraphs 5 to 10:

> "5. The Claimant asserts that he made disclosures, both individually and when aggregated which, per Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540, EAT, amount to protected disclosures pursuant to s.43B(1) ERA 1996.
>
> 6. It is accepted by the Respondents that the Claimant made the following two protected disclosures:
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> a. PD1: 12 June 2019 to Gloria Guevara by Whatsapp message:
>
> "However, this issue raises some important questions about how these things are handled. I don't believe that WhatsApp is the right channel

to communicate in this manner to team members – especially junior members of the team. It means more people will quit, leaves WTTC wide open to legal challenge and potential damage to the organisation's reputation."

b. PD2: 14 June 2019 to Gloria Guevara by Whatsapp message:

"we also need to be acutely aware of the potential risk of litigation by staff members, corporate governance, (we've already had one audit) and the potential impact on the reputation of WTTC if grievances become public – which they inevitably will following MeToo movement"

7. Do the following, individually and/or when aggregated, amount to protected disclosures within the meaning of s.43B(1) ERA 1996?

a. PD 3: 14 August 2019 to Susy Roberts during a verbal conversation in which the Claimant conveyed the information that the reason for Ms Magoja's long term stress related absence was the Second Respondent's conduct, in particular her repeated weekend and evening messaging and calls.

i. Did the Claimant reasonably believe that this disclosure was in the public interest and was that belief objectively reasonable?

ii. The Respondent asserts that it was not, as the Claimant was trying to divert attention away from his own alleged misconduct (namely, allegations of sexual harassment made by Ms Magoja).

b. PD4: 21 August 2019 to Gloria Guevara during a verbal conversation during which the Claimant repeated the disclosure of information in relation to his own experience of being bullied and harassed whilst employed by the First Respondent and that the Second Respondent's behaviour to his team members and others in the First Respondent had been unacceptable

i. Was this a disclosure of information?

ii. Did the Claimant reasonably believe that this disclosure was in the public interest and was that belief objectively reasonable?

iii. The Respondent asserts that it was not, as the Claimant was trying to strengthen his hand in the negotiations.

c. PD5: 27 August 2019 to Susy Roberts and Loraine Green by email within which he stated:

"I recognise that we do not have an exit process at WTTC; but it is neither acceptable nor compatible with UK employment law for a person who has previously made allegations of bullying and harassment against the CEO (in her letter to Kate Underwood of 12 June 2019) and who has specifically cited the behaviour of the CEO in her exit interview to have to endure a further hour long meeting where her very allegations were used against her… This is yet further

> evidence of the culture of bullying and harassment which has developed at WTTC and why it is impossible for me to continue line managing people within the organisation."
>
> i. Was this a disclosure of information?
>
> ii. Did the Claimant reasonably believe that this disclosure was in the public interest and was that belief objectively reasonable?
>
> iii. The Respondent asserts that it was not as the Claimant was trying to strengthen his hand in the ensuing negotiations.
>
> d. PD6: 2 September 2019 to Gloria Guevara in an email disclosing bullying and harassment by the CEO and of a systemic culture of bullying and harassment at WTTC including the contents and handling of the Great Place to Work Survey and the circumstances surrounding the departures of Caroline, Chloe, Elizabeth and others:
>
> i. Was this a disclosure of information?
>
> ii. Did the Claimant reasonably believe that this disclosure was in the public interest and was that belief objectively reasonable?
>
> iii. The Respondent asserts that it was not, as the Claimant was trying to strengthen his hand in the ensuring negotiations.
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> 8. Dismissal – s.103A ERA 1996 - Was the reason or the principal reason for the Claimant's dismissal that the Claimant made a protected disclosure(s) such that it was automatically unfair pursuant to s.103A ERA 1996?
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> 9. Detriment – s.47B(1) ERA 1996. The Claimant relies upon the following detriments:
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> a. His dismissal (against the First and Second Respondents)
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> [there were also issues concerning detriments relating to responses to a subject access request. These are not relevant to this appeal].
>
> 10. Was any detriment suffered on the grounds the Claimant had made a protected disclosure(s) contrary to section 47B(1) ERA 1996?

22. The ET's judgment extends to 36 pages, and consists of 173 paragraphs. The ET made a number of findings of fact; the ET set out the law (which is not subject to any criticism by the parties to this appeal); and then applied the law to the facts. One of the ET's findings of fact was that "the claimant did make inappropriate sexualised comments to Ms Magoja".

23. With respect to PD3, the ET found that the claimant had not disclosed to Ms Roberts on 14 August 2019 that the cause of Ms Magoja's absence was due to weekend calls from the second respondent. The ET's reasoning for this was set out at paragraphs 52 to 55.

> "52. The claimant's third disclosure is said to be that he told Ms Roberts in a conversation on 14 August 2019 that the reason for Ms Magoja's absence was that the second respondent repeatedly messaged her at evenings and weekends. We do not accept that the claimant communicated this information about Ms Magoja to Ms Roberts on 14 August, for the following reasons.
>
> 53. The claimant's own witness statement does not state that he told Ms Roberts this. On the contrary, at paragraph 32 his statement states "I understand that [she] had cited to Susy "the weekend calls from Gloria" as an issue with her stress", that is, that Ms Magoja told Ms Roberts this. Ms Roberts' witness statement does not record this being said to her at all by the claimant on that date, or that she told him this. Ms Roberts' evidence was that she had conversations with the first respondent's staff generally about the second respondent's messages out of hours but without reference to Ms Magoja individually. Indeed, for the majority of the time that Ms Roberts had been engaged by the first respondent, Ms Magoja had been absent.
>
> 54. In cross-examination, the claimant was unable to explain why this was not referred to in his witness statement. Ms Roberts' answers to cross-examination revealed that she had made a record of this call in her diary entries but that the Tribunal did not have a copy of these and she had not consulted her diaries before writing her witness statement.
>
> Her oral evidence was that her call with the claimant covered the issue of the reporting line of Ms Magoja and that she needed to be "brought back sensitively into the workplace" regarding weekend calls from the second respondent. We do not accept her evidence that it was the weekend calls from the second respondent that necessitated Ms Magoja's return to the workplace being sensitively handled, but if this was said at all it referred to Ms Magoja's mental health.
>
> 55. On the balance of probabilities we do not accept that the alleged information was disclosed by the claimant to Ms Roberts in that conversation, given that all of the witness evidence fails to refer to it and the claimant was unable to explain why this was the case. Ms Roberts made contemporaneous notes of this call but has not disclosed them and did not consult them before making her witness statement. Given the alleged importance of the information about the effect of the second respondent's behaviour on the first respondent's staff, it is not credible to assert that this disclosure was made in the wholesale absence of any reference to it in the claimant's Tribunal documentation. Therefore, we do not accept that there was a disclosure

> from the claimant to Ms Roberts that the cause of Ms Magoja's absence was due to weekend calls from the second respondent on 14 August 2019".

24. In its reasoning (the application of the law to the facts found), the ET stated at paragraph 152 that:

> "As indicated above, we do not find that PD3 actually took place on the balance of probabilities on the date alleged by the claimant. It is possible that similar information to that alleged to have been disclosed was disclosed in other ways and on other occasions by the claimant to Ms Roberts and did come to the attention of the second respondent, but the claimant has not established on the balance of probabilities that there was a clear chain of communication as alleged in PD3".

25. With respect to PD5, the email of 27 August 2019, the ET found that this did disclose evidence of wrongdoing in relation to a potential breach of a legal obligation relating to the meeting of the Communications team with the second respondent on 22 August 2019. The ET also found that part of the consideration for sending this email was to protect junior members of staff against the second respondent and so the public interest test was satisfied, although the primary motivating factor was found to be to strengthen the claimant's position in the forthcoming negotiations and to safeguard his position against disciplinary action. Accordingly, the disclosure of information in the email was found to be a 'protected disclosure'.

26. Nevertheless, the ET found that this was not communicated to the second respondent in sufficient detail so that she was aware of a protected disclosure having been made to Ms Roberts and Ms Green on this occasion. The ET found that the email itself did not come to her attention until the legal proceedings, even if it had been forwarded to her. The ET also found that in a conversation that Ms Roberts had with the second respondent on 3rd September 2019, in which she told her to be careful and to take legal advice as lots of complaints about her management style had come out of the workshop with junior staff, Ms Roberts did not make "direct reference" to the claimant's email of 27 August 2019.

27. PD6 was the letter sent by the claimant to the second respondent on 2 September 2019. He copied in Ms Roberts and Ms Green, and referenced their conversation of 21 August 2019 (see paragraph 11 above). He stated that:

> "I have reluctantly come to the conclusion that, in order to protect my reputation and health, I now need to restructure my working relationship with you and WTTC despite the financial risk which this carries." "… I have sought legal advice… to understand my options. He [the claimant's solicitor] advises that my employment rights have been infringed…. This would include a case for bullying, harassment, defamation, undermining and a whistleblower-style complaint into the leadership style of the CEO and culture at WTTC…"

28. The letter proposed a consultancy agreement for the claimant, and proposed that:

> "the Communications function reports to Teresa or Virginia in her new Chief of Staff role in the short term… I do not believe that WTTC needs a replacement senior Communications Director as you are likely to confront again many of the issues which have made me come to this decision and [Ms Wynne] included in her exit interview".

29. The ET found that the letter did not provide any more information about how the claimant's employment rights had been infringed, but was a broad statement of the opinion of the claimant's solicitor. The ET found that the letter did not provide any more information as to what the claimant believed had happened to cause the departure of other employees. The ET also found that the reference to "many of the issues which have made me come to this decision and [Ms Wynne] included in her exit interview" did not clearly identify the second respondent's behaviour as being the cause of either his, or Ms Wynne's, departure. In reaching this conclusion, the ET referred to the fact that the claimant had referred to a lack of his own career advancement in his meeting with the second respondent on 21 August 2019, and the lack of career advancement had also been Ms Wynne's stated reason for leaving in her own conversation with the second respondent.

30. The ET found that the letter of 2 September 2019 did not constitute the disclosure of information, whether read alone or cumulatively by reference to the contents of Ms

Wynne's exit interview. The ET found that Ms Wynne's exit interview did not disclose bullying by the second respondent, even though it did repeatedly criticise her style of management. When asked about workload, the ET noted that Ms Wynne said "overall I felt like it was fine for me personally". With respect to WhatsApp contact, the ET noted that Ms Wynne had said that "It's inappropriate for the CEO to have a direct line to staff and to use that line to tell them they have done something wrong . . . It's invasive". The ET found that although that was a direct criticism, it was not tantamount to alleging harassment amounting to a breach of legal obligation.

31. The ET found that PD6 did not contain a disclosure of information which the claimant reasonably believed to be in the public interest. The ET found that the letter was part of a carefully considered negotiating tactic relating to the claimant's request for more favourable terms and a financial settlement from the first respondent.

32. The ET went on to consider the circumstances leading up to, and the reason for, the claimant's dismissal. The ET found that the decision was taken by the second respondent, and that this decision was already in train by the end of August. The ET found that the second respondent had begun to consider dismissing the claimant as early as 28 or 29 August 2019.

33. The respondents had asserted that the reason for the dismissal was the claimant's redundancy. The ET found that there was no genuine redundancy, and that the label of redundancy was a cover for the breakdown in the relationship with the claimant. The label of redundancy was partly an act of "reputation management". In advance of the claimant's dismissal, the ET noted that the respondents understood that the claimant was asserting that he was a whistleblower. The ET concluded that the respondents never considered the claimant to be a whistleblower, and this played no part in their decision to dismiss. The ET found the respondents considered the claimant's

allegations of whistleblowing to be part of his negotiating tactics. The ET also found that the claimant was not dismissed for making "disclosures", and that PD1, PD2 and PD5 did not more than trivially influence the respondents such that the claimant was subject to a detriment for having made them.

The Appeal

34. The claimant pursues six grounds of appeal:

i) The ET reached a decision on a point that had not been argued, namely that PD3 had not been made on or around 14 August 2019 (paragraphs 52 and 152);

ii) The ET misapplied the law in re-applying the test in s.43B(1) ERA 1996 to the onward communication of PD5 to the Second Respondent (paragraph 161);

iii) The ET misapplied the test in s.43B(1) ERA 1996 by considering its own belief, rather than the claimant's reasonable belief, when finding that PD6 did not tend to show breach of a legal obligation and therefore amount to a qualifying disclosure (paragraphs 95 and 162 of the judgment);

iv) The ET misapplied the law by considering whether the Respondents believed the claimant to be a whistleblower when forming its conclusion on causation (paragraph 112);

v) a) In finding that the claimant had "made inappropriate sexualised comments to Ms Magoja" the tribunal reached a decision on a point that was not argued in the case;

b)Further or alternatively, there was no evidence to support this finding and/or this was a finding no reasonable tribunal directing itself properly on the law could have reached (paragraph 46).

vi) There was no evidence to support the finding of the judgment that the second respondent understood the allegations of sexual harassment against the claimant to be substantiated by the 28 or 29 August 2019 (or at all) and that this was causative of his dismissal (paragraph 167).

35. Taking each of these grounds of appeal in turn, I shall set out the submissions of the parties.

Ground 1

36. The claimant contends that the respondents had admitted in their Grounds of Resistance that the claimant had made the disclosure of information that is described as PD3, and this was not one of the list of issues that the parties had agreed needed to be decided by the ET. As a consequence, and contrary to authority, the ET should not have investigated the matter and erred in law by reaching a decision as to whether the disclosure hade been made. As a consequence, the ET did not consider whether PD3 met the public interest test and was therefore a qualifying disclosure (which was the point in issue between the parties), and the ET did not consider whether PD3 was causative of the Claimant's dismissal or the detriments suffered by him.

37. The respondents contend that a list of issues is not determinative of what an ET is permitted to find having heard the evidence. Further, that in any event the list of issues did permit the ET to make findings on what was actually said by the claimant, so that it could determine whether or not that disclosure of information amounted to a protected disclosure. As a matter of fairness, it was permissible for the ET to consider the content of the conversation on 14 August 2019 that makes up PD3 as this had been put to the claimant in cross-examination.

Ground 2:

38. The claimant argues that the ET had found that PD5 was a qualifying disclosure and that Ms Roberts (to whom the claimant had made the disclosure) communicated the claimant's concerns to the second respondent. It is then contended that the ET fell into error by inserting a new hurdle into section 103A of the ERA, by importing the test in section 43B(1) as to the need for "information" to that onward communication. In other words, the disclosure by the claimant to Ms Roberts was already a qualifying disclosure, and did not need to requalify when it was transmitted to the second respondent. The statutory provisions in section 103A do not contain a specific test for knowledge; all that is necessary is that the making of the disclosure was formative.

39. In oral argument, Ms Greenley emphasised the importance for whistleblowers to have statutory protection, and that the Courts have interpreted the provisions in a way to ensure that that protection was not easily evaded: for example, in *Royal Mail Group Ltd. v Jhuti* [2020] ICR 731. For there to be a further requirement that the onward communication of a qualifying disclosure had to be sufficiently detailed – as detailed as the initial disclosure – would make it too easy for the statutory protection to be lost. All that was required when considering the decision made by a person to whom onward transmission of a qualifying disclosure had been made was that the decision-maker was aware that there had been a disclosure. They did not need to know about its contents, or whether the disclosure was of information that made it a qualifying disclosure.

40. The respondents contended that it was not necessary to consider the principles required for an onward transmission, as the ET had not found that there had been onward transmission of a disclosure to the second respondent at all. In oral argument, Mr Martin contended that, in any event, even if there had been onward transmission,

there had to be onward transmission of sufficient detail of the disclosure for the whistleblowing protection to apply.

Ground 3:

41. The claimant contends that the ET erred by finding that what was said by Ms Wynne in her exit interview was not "tantamount to alleging harassment amounting to a breach of a legal obligation". This amounted to the ET substituting its own view of whether the disclosure was in the public interest for that of the worker contrary to *Chesterton Global Ltd (trading as Chestertons) v Nurmohamed [2018]* ICR 731, per Underhill LJ at [28]. The ET had to consider what the claimant reasonably believed when he referenced Ms Wynne's exit interview in his letter of 2 September 2019. The ET should have asked: (i) did the claimant hold the belief subjectively; and (ii) was the claimant's belief objectively reasonable for him. The ET erred by not asking those questions.

42. The respondents say, however, that the claimant has mischaracterised the relevant paragraph of the ET's decision (paragraph 95). Read in context, it is clear that the ET was dealing with the issue of whether the letter of 2 September 2019 contained a disclosure of information or only opinion. The same applied to the ET's subsequent conclusion at paragraphs 162-3. As a result, the ET had found that the PD6 did not clear the first hurdle – the disclosure of information component of section 43B(1) of the ERA – and the claimant's reasonable belief was therefore irrelevant. In any event, the ET found, and was entitled to find, that the Claimant did not have a reasonable belief that matters were raised in the public interest.

Ground 4:

43. The claimant takes issue with the ET's finding at paragraph 112 that "the respondents never considered that the claimant was actually a whistleblower and that this played no part in their decision to dismiss him". The claimant contends that this was a misdirection of law as the respondents' belief as to whether or not he was a whistleblower is irrelevant to the analysis that the ET should make. It goes directly against the analysis of the Court of Appeal in *Beatt v Croydon Health Services NHS Trust* [2017] IRLR 748, which stands for the proposition that it is not a defence to a claim under section 103A of the ERA that an employer did not believe that the employee's disclosures were protected disclosures. If the employment tribunal finds that the disclosures were "protected", the employer will be liable if the employee was dismissed for making disclosures even if the employer did not consider them to be protected disclosures.

44. The respondent contends that the ET correctly understood the analysis in Beatt – it is quoted at paragraph 146 of the judgment; and that this analysis was applied properly on the facts.

Ground 5:

45. The claimant contends that the finding that he had made inappropriate sexualised comments to Ms Magoja should not have been made by the ET as it was not an issue in the case and was not necessary to the ET's findings. What the ET needed to consider was whether the allegations of sexual harassment were a reason for the claimant to behave in the way he did with respect to PD3: the respondent having put in issue whether the claimant was making the disclosure about Ms Magoja's stress-related absence so as to divert attention away from his own alleged misconduct towards her. The claimant also contends that there was no evidence to support the

finding made by the ET, or that it was perverse applying the test in *Yeboah v Crofton* [2002] IRLR 634.

46. The respondents contend that the ET did not fall into error in making this finding. The matter was put to the claimant in cross-examination and it was argued about in closing submissions. The perversity challenge is not met, according to the respondents, as there was evidence available to the ET from which it could make the finding that the Claimant had committed sexual harassment.

Ground 6:

47. The claimant takes issue with the ET's finding, as expressed at paragraph 167 (the first paragraph under the sub-heading 'The claimant's dismissal') that the second respondent understood that the allegations of sexual harassment made by Ms Magoja against the claimant "had been substantiated". The claimant contends that, at the relevant time, there was no evidence that the second respondent knew anything about the allegations other than that the matter was under investigation. Moreover, the outcome of that investigation was announced on 12 September 2019 to the effect that "I don't think there is a case for him to answer at this time". This was also supported by the various WhatsApp messages of 12 September 2019, which show that when the second respondent was made aware that Ms Magoja was not making a case against the claimant, she said that "In order to fire him, we need her to proceed", and that afterwards "she can change her mind". The claimant contends that this finding is important, because it went to the issue of causation.

48. The respondents contend that the ET was entitled to make the finding that it did based on the evidence that was available. In any event, even if the finding was impugned it did not vitiate the ET's overall conclusion as there were other causes, unrelated to the protected disclosures that led the second respondent to dismiss the claimant when she

did. At paragraph 167, the ET refer to a number of factors which strengthened the second respondent's decision to dismiss the claimant: learning of the Easyjet issue on 28 August 2019, and the claimant's letter of 2 September 2019 threatening litigation and requesting favourable terms as an alternative, which she regarded as blackmail.

Discussion

49. I have carefully considered the various arguments made by the claimants and respondents, both in writing and at the oral hearing before me. My analysis of the arguments is set out as follows.

Ground 1: *was the ET entitled to reach a decision on whether the disclosure of information described as PD3 was actually made by the claimant?*

50. Employment tribunals must deal with cases fairly and justly. Indeed, this is the "overriding objective" to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. An essential component of fairness is that the parties should know the case that they have to make or meet. This is achieved through the pleadings that the parties are required to produce at the initiation of the proceedings, where allegations of fact and their legal ramifications are set out by the claimant and responded to by the respondents: allegations of fact may be admitted, denied or not admitted. This is also achieved by the process of seeking to agree the list of issues that need to be decided by the employment tribunal, with confirmation or otherwise of that list addressed by the employment tribunal usually at the outset of the hearing.

51. The process of settling pleadings and finalising the list of issues also provides the framework within which the employment tribunal will carry out its function of adjudicating on the dispute between the parties. This proposition is reflected in the recent judgment of Lord Hodge in *Griffiths v TUI (UK) Ltd* [2023] 3 WLR 1204 at § 41 where he explained that:

> "In an adversarial system, subject to the constraints of case management, the parties frame the issues which the court is to determine; it is not normally part of the court's business to investigate admitted facts: Akhtar v Boland [2015] 1 All ER 664, at §16 per Sir Stanley Burnton. The trial judge's role is normally limited to determining the disputed issues which the parties present and to determining those issues based on the evidence which the parties adduce. The trial judge does justice between the parties in so doing: see Air Canada v Secretary of State for Trade [1983] 2 AC 394, 438 per Lord Wilberforce; Al-Medenni v Mars UK Ltd [2005] EWCA Civ 1041 at [21] per Dyson LJ".

52. In *Akhtar v Boland*, in the context of admissions and interlocutory judgments, Sir Stanley Burnton stated, at §16 that:

> "Where an allegation made by one party in proceedings is admitted by the other party in unqualified terms, that other party must not seek to adduce evidence or raise arguments to the effect that that admission is not binding on him. The court has no jurisdiction to investigate a fact that has been admitted, unless the party making the admission obtains the permission of the court under CPR 14.1(5) to withdraw the admission and does so".

53. Sir Stanley Burnton was referring in *Akhtar* to the rules contained in the Civil Procedure Rules ("the CPR"). The CPR does not apply automatically to the employment tribunals but, where the employment tribunal rules are silent on a matter, they will frequently apply the same general principles as are applied in the civil courts, even if they do not follow the letter of the CPR in all respects: see Smith LJ in *Governing Body of St Albans Girls' School v Neary* [2010] IRLR 124 at §47.

54. The employment tribunal rules are silent with respect to the withdrawal of an admission made in the Grounds of Resistance. It has been held, however, that the process for the withdrawal of admissions set out in the CPR provides a useful guide for how the employment tribunals should deal with an application for withdrawal: see *Nowicka-Price v Chief Constable of Gwent Constabulary* UKEAT/0268/09 (3 August 2009, unreported).

55. In this case, the claimant set out his contention with respect to PD3 at paragraph 8 of his particulars (section 8.2 of the ET1) as follows:

> "On 14th August 2019, the Claimant had a conversation with Susy Roberts, an HR consultant engaged by the First Respondent regarding the First Respondent's Social Media Manager (Veronica), and her long-term absence from work, with work related stress. Veronica had cited as a cause/contributory factor, weekend calls from the Second Respondent. This point was communicated to Ms Roberts by the Claimant."

56. At paragraph 20 of the Grounds of Resistance, the respondents pleaded that:

> "The Respondent admits that in or around 14 August 2019 the Claimant did suggest to Susy Roberts – an HR consultant engaged by the First Respondent - that weekend calls from the Second Respondent had been a contributing factor in a colleague Veronica (the First Respondent's social media manager) taking long term absence from work with work-related stress".

(emphasis added).

On its face, therefore, this was a clear admission that the claimant had had a conversation with Ms Roberts around the 14 August 2019, in which he disclosed information as described in his particulars at paragraph 8.

57. In the Grounds of Resistance, at paragraphs 21-22, the respondents stated that this was not a protected disclosure: the claimant was seeking to divert attention away from his own conduct towards Ms Magoja at a time when an allegation of sexual harassment against him was being investigated. The respondents pleaded that the claimant did not genuinely believe he was making the disclosure of information about Ms Magoja in the public interest.

58. This formulation – that the information was disclosed on or around 14 August 2019, but it was not genuinely believed by the claimant – made its way into the list of issues agreed by the parties (set out at paragraph 21 above), and into the list that was

prepared by the ET and which ought to have framed the issues which it was required to adjudicate upon.

59. In the circumstances, therefore, the ET should not have sought to investigate the question as to whether or not the information was conveyed by the claimant to Ms Roberts on or around 14 August 2019, and should not have made findings on the point which contradicted the admission unless the respondents had specifically sought to resile from the admission and a determination had been made that they could. The respondents did not make any such application.

60. The claimant was questioned as to why he had not referred to the conversation in his witness statement. This was unfair to him. In light of the admission, and later the agreed list of issues, the claimant would have reason to think that he would not need to give any evidence at all on this point as there was no dispute that it had occurred.

61. In my judgment, therefore, the finding made by the ET that the conversation on or around 14 August 2019 had not occurred was made in error of law. I will deal later in this judgment with whether this makes any difference to the outcome of the case.

Ground 2: *The tribunal misapplied the law in re-applying the test in s.43B(1) ERA 1996 to the onward communication of PD5 to the Second Respondent (paragraph 161).*

62. Based on the parties' arguments, I have to consider two issues here: (i) was there any ongoing transmission to the second respondent of information contained in the email to Ms Roberts and Ms Green; and (ii) if so, was the transmission of information in sufficient detail for statutory protection to apply.

63. With respect to (i), the ET found that the claimant's email of 27 August 2019 was not seen by the second respondent, even if it had been forwarded to her. The ET also found that, on 3 September 2019, Ms Roberts made no "direct reference" to the email.

At paragraph 90 of the ET's judgment, it is stated that: "Ms Roberts' evidence was that she told the second respondent that the particular concerns raised about the second respondent were her use of WhatsApp and the terms of Ms Wynne's departure." On its face, this sentence makes no mention of the claimant being the source of the "particular concerns". Earlier in paragraph 90, the ET records that: "On 3 September Ms Roberts told the second respondent to be careful, and to take legal advice, as lots of complaints about her management style came out of the workshop". This is clearly a reference to the workshops with junior staff conducted by Ms Roberts and Ms Green which were described in the previous paragraph (89): "Ms Roberts and Ms Green conducted some workshops with the first respondent's junior staff on 29 August and reported the outcomes to the second respondent."

64. A plausible reading of paragraphs 89 and 90, therefore, is that the ET did not find that Ms Roberts told the second respondent anything about the claimant's email of 27 August 2019. The ET expressly says that no "direct reference" was made to the claimant's email, and what was said to the second respondent about the "particular concerns" about her management style appears to be derived from junior staff who attended the workshops.

65. There is, however, reference to the claimant's concerns at paragraph 161, where the ET is applying the law to the facts found. After finding at paragraph 160 that the disclosure PD5 was a qualifying disclosure made by the claimant, the ET state at paragraph 161:

> "However, on the balance of probabilities we do not accept that this was communicated to the second respondent in sufficient detail so that she was aware of a protected disclosure having been made to Ms Roberts and Ms Green on this occasion. *It is not sufficient that, as we have found, Ms Roberts told the second respondent of the claimant's concerns over the terms of Ms Wynne's departure and her use of WhatsApp.* There is no evidence from which we could find that sufficient factual allegations (as opposed to opinion) were

> communicated by Ms Roberts to the second respondent in their conversation on 3 September or in the period from 27 August to 3 September for the second respondent to have been aware of a protected disclosure having been made on 27 August".

(emphasis added).

66. This paragraph presupposes that the ET has already made a finding that Ms Roberts has told the second respondent "of the claimant's concerns". This can only be a reference back to its findings at paragraph 90, where the ET refer to "the particular concerns raised about the second respondent", as the "concerns" referred to in both paragraphs are about the second respondent's use of WhatsApp and the terms of Ms Wynne's departure.

67. Paragraph 161 and paragraph 90 appear to be inconsistent with one another. In my judgment, there are only two realistic possibilities as to what has occurred in the drafting of the ET's judgment and in the ET's analysis. Either the reference to the "claimant's concerns" in paragraph 161 was inserted in error: what the ET intended to refer to were the concerns that had been referred to more generally in paragraph 90, and which did not appear to refer to the claimant at all. Or the ET was referring to the claimant as being the source, or among the sources, of the "particular concerns" referred to in paragraph 90 even if he is not referred to expressly in that paragraph.

68. In my judgment, the latter interpretation is to be preferred. First, this makes more sense. Paragraph 161 is dealing with the alleged protected disclosure (PD5) made by the claimant in his email of 27 August 2019. If paragraph 90 meant that Ms Roberts conveyed nothing at all about the claimant's concerns that were contained in his email of 27 August 2019 then that was all that the ET would have needed to say at paragraph 161. Instead, the ET wrote a paragraph (of more than ten lines) about the sufficiency or adequacy of the detail of the claimant's concerns as expressed in the email of 27 August 2019 that were passed on by Ms Roberts to the second respondent.

69. Second, this tribunal should ordinarily expect, and assume, that employment tribunals will not make inconsistent findings within their judgments. This tribunal should, therefore, seek to read employment tribunal judgments as if there are no inconsistent findings, if that can be done without unduly straining the language used by the employment tribunal. In the instant case, it is possible to read the ET's judgment in a way which eliminates the inconsistency between paragraph 161 and paragraph 90.

70. It is possible to read paragraph 90 as if it was referring to the claimant as being the source, or among the sources, of the concerns that were conveyed to the second respondent on 3 September 2019. Paragraph 90 states that "there is no evidence that on [3 September 2019] Ms Roberts made any *direct reference* to the claimant's email of 27 August" (my emphasis). This leaves room for an implication that "indirect" reference was made to that email. When the ET then go on to say that "Ms Roberts' evidence was that she told the second respondent that the particular concerns raised about the second respondent were her use of WhatsApp and the terms of Ms Wynne's departure", this could refer both to the information that came out of the workshops, and also the concerns that had been expressed by the claimant as those concerns were about the second respondent's use of WhatsApp and the terms of Ms Wynne's departure. In other words, the particular concerns that were being conveyed to the second respondent included those that had come out of the workshops with junior staff, but also those that had been made by the claimant. Paragraph 90 can be read to say that. That is, that Ms Roberts conveyed the concerns of the claimant without mentioning directly that this had been set out in the email of 27 August 2019.

71. As for (ii) given that, as I have just explained, the ET found that Ms Roberts told the second respondent of the claimant's concerns over the terms of Ms Wynne's departure and her use of WhatsApp, I have to consider whether the ET erred in law by deciding that this was not communicated to the second respondent in sufficient detail

so that she was aware of a protected disclosure having been made by the claimant on this occasion.

72. I was not referred to any authority dealing with this point, and so it is necessary to go back to first principles to consider what level of detail of knowledge is required of a protected disclosure by person B when the actual disclosure is made to person A. Is it sufficient that person B merely knows that a disclosure has been made to person A, or does person B have to know at least some of the content of the disclosure that has been made?

73. The starting point for this analysis is the statutory wording. Section 43A of the ERA provides that:

> "In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H".
>
> "Sections 43C to 43H deal with the persons to whom the "qualifying disclosure" is made (e.g to an employer) or the other circumstances which cloak the "qualifying disclosure" with protected status (e.g. disclosures of an exceptionally serious nature)."

74. Section 43B of the ERA provides that:

> In this part, a "qualifying disclosure" means any disclosure of information which in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:
>
> (a) …….
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
>
> (c) …….
>
> (d) that the health and safety of any individual has been, is being, or is likely to be endangered ……"

75. It has been explained that for a disclosure to be found to be a qualifying disclosure (s43B ERA), all five of the following elements must be present (*Williams v Michelle*

Brown AM UKEAT/0024/19):

i) A disclosure of "information";

ii) The worker must believe that the disclosure is made in the public interest;

iii) The belief in the disclosure being in the public interest must be reasonably held by the worker;

iv) The worker must believe the disclosure tends to show one or more of the matters listed in s43B(1)(a)-(f) ERA; and

v) The belief in the disclosure tending to show matters in s43B(1)(a)-(f) ERA must be reasonably held by the worker.

76. It has been held that there must be sufficient information disclosed to satisfy s43B. This is a matter of evaluative judgment for the Tribunal to decide in light of all the facts in the case. In order to be a qualifying disclosure, the disclosure has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in section 43B(1): *see Kilraine v London Borough of Wandsworth* [2018] ICR 1850 at §35. Two or more communications taken together can amount to a qualifying disclosure even if, taken on their own, each communication would not. (*Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540). Whether two communications are to be read together is a question of fact for the Tribunal (*Simpson v Cantor Fitzgerald Europe* [2020] EWCA Civ 1601).

77. Section 103A of the ERA provides that:

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".

What was the reason for the claimant's dismissal is judged by the well-known test set out in *Abernethy v Mott, Hay and Anderson* [1974] ICR 323 CA: the "set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee". This was recognised by the Court of Appeal in *Beatt*.

78. In *Beatt*, the employer had set out in its decision letter that the reason for the employee's dismissal was that he had made various disclosures about the employer's services as a hospital trust, including issues around safety. The employer's essential defence was that the disclosures were not protected. It was contended on behalf of the employee that if the disclosures were protected, then the dismissal contravened section 103A of the ERA. The employer contended that the decisive issue was not whether the tribunal found the disclosures to be protected but whether the decision maker believed that they were. The employer's contention was rejected by the Court of Appeal. It did not matter whether or not the employer believed the disclosures were protected.

79. The Court of Appeal's judgment was given by Underhill LJ, who held at §80 that:

> "*It is necessary in the context of s.103A to distinguish between the questions (a) whether the making of the disclosure was the reason (or principal reason) for the dismissal; and (b) whether the disclosure in question was a protected disclosure within the meaning of the Act.* I accept that the first question requires an enquiry of the conventional kind into what facts or beliefs caused the decision-maker to decide to dismiss. But the second question is of a different character and the beliefs of the decision-taker are irrelevant to it. Parliament has enacted a careful and elaborate set of conditions governing whether a disclosure is to be treated as a protected disclosure. It seems to me inescapable that the intention was that the question whether those conditions were satisfied in a given case should be a matter for objective determination by a tribunal; yet if Ms McNeill were correct the only question that could ever arise (at least in a dismissal case) would be whether the employer believed that they were satisfied. Such a state of affairs would not only be very odd in itself but would be unacceptable in policy terms. It would enormously reduce the scope of the protection afforded by these provisions if liability under s.103A could only arise where the employer itself believed that the disclosures for which the claimant was being dismissed were protected. In many or

> most cases the employer will not turn his mind to the question whether the disclosure is protected at all. Even where he does, most often he will be convinced, human nature being what it is, that one or more circumstances are present that mean that the disclosure is unprotected – for example, that it was unreasonable for the employee to believe that the relevant 'section 43B matter' was engaged; or that the disclosure was made in bad faith or was not in the public interest; or, in the case of disclosure under 43G, that one or more of the additional requirements for protection was not satisfied. *I do not believe that Parliament can have intended employees to be unprotected in such cases. In my view it is clear that, where it is found that the reason (or principal reason) for a dismissal is that the employee has made a disclosure, the question whether that disclosure was protected falls to be determined objectively by the tribunal*".

(emphasis added).

80. Ms Greenley contended on behalf of the claimant that the judgment of Underhill LJ in *Beatt* stood for the proposition that a dismissal is automatically unfair under section 103A of the ERA if the reason for dismissal is that a disclosure has been made, and that disclosure is a protected one, even where the decision-maker does not know the content of the disclosure. I do not accept that contention. In *Beatt*, Underhill LJ was not considering the question of what knowledge the employer has to have of the content of the disclosure: on the facts of the case, it was clear that the employer knew about the content. The issue for the Court of Appeal was whether the employer needed to know that the disclosure was "protected", and Underhill LJ decided that issue in the negative: whether or not the disclosure was "protected" was an objective matter. I do not consider, therefore that the decision in *Beatt* is of any real assistance in determining the question raised in this appeal.

81. During the course of the hearing, I put to Ms Greenley the example of an employee who had made a series of complaints which did not constitute protected disclosures but made one further complaint (e.g. about health and safety) which did constitute a protected disclosure. I asked whether the employer contravened section 103A of the ERA for dismissing the employee for making the final disclosure even though he did

not know the content of it: he was simply fed up with the employee making complaints. Ms Greenley contended that that would be sufficient: the employee had made a protected disclosure (the final complaint), and the employer dismissed him because he had made that final complaint. Accordingly, the employer dismissed the employee for making a protected disclosure.

82. It does not seem to me that this can be right. The premise of Ms Greenley's arguments would be that the content of the disclosure is entirely irrelevant to the decision-maker; the only question is whether a disclosure has been made. It does not matter to the decision-maker if the disclosure was a qualifying or protected disclosure or not. It seems to me that this interpretation involves a purely mechanistic application of the statutory wording, without properly appreciating that whistleblowers are intended to be protected because they have raised something of substance which Parliament has decided merits protection. For employers to be fixed with liability, therefore, they ought to know at least something about the substance of what has been made: that is, they ought to have some knowledge of what the employee is complaining or expressing concerns about.

83. This is supported, in my judgment, by the fact that in the analogous context of the law of victimisation (mindful that the legislation prohibiting victimisation and the whistleblower legislation are fundamentally of the same character even if the precise structure and language is not the same), the knowledge of the protected act by the victimiser is of real relevance: see *Nagarajan v London Regional Transport* [2000] 1 AC 501 at pp.519H-520A per Lord Steyn:

> "[The preferred] interpretation [of section 2(1) of the Race Relations Act 1976] contemplates that the discriminator had knowledge of the protected act and that such knowledge caused or influenced the discriminator to treat the victimised person less favourably than he would treat other persons. In other words, it postulates that the

> discriminator's knowledge of the protected act had a subjective impact on his mind."

84. I do not consider that this construction would undermine the protection afforded to whistleblowers. In the ordinary case, the substance or content of the disclosure is well known to the decision-maker, as it will have been sent directly to them or transmitted onwards. Where the decision-maker is deliberately kept in ignorance of the substance or content of the disclosure and a bogus reason for dismissal is invented, then the employment tribunal is permitted to penetrate through the invention: see *Jhuti* at [60].

85. In the instant case, therefore, the ET did not err in law merely because it considered the question as to what detail of the disclosure was provided to the second respondent. The ET found that the detail provided was not "sufficient". This finding is not challenged on perversity grounds, and so I consider that this ground of appeal must fail.

Ground 3*: The ET misapplied the test in s.43B(1) ERA 1996 by considering its own belief, rather than the claimant's reasonable belief, when finding that PD6 did not tend to show breach of a legal obligation and therefore amount to a qualifying disclosure (paragraphs 95 and 162 of the judgment.*

86. PD6 (the letter of 2 September 2019) was made up of two parts: (i) the advice given to the claimant by his solicitor; and (ii) the reference to Ms Wynne's exit interview. On this appeal, the claimant does not take issue with the ET's finding at (i) that the disclosure relating to the advice given to the claimant by his solicitor did not amount to a disclosure of information sufficient to constitute a 'qualifying disclosure'. The claimant was right to do so. The letter of 2 September 2019 does not contain any information as to how the claimant's employment rights have been infringed.

87. With respect to the ET's finding at (ii) – reference to Ms Wynne's exit interview -- the proper reading of the judgment is that the ET made two findings: (a) the reference to the exit interview did not amount to the disclosure of information that was capable

of amounting to a 'qualifying disclosure'; and (b) the claimant did not have a reasonable belief that the disclosure was in the public interest. Ms Greenley, for the claimant, contends that the ET erred because it contravened Underhill LJ's admonition in *Chesterton* at §28, that an employment tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. However, that warning applies to the latter and not the former of the findings made by the ET. In *Chesterton*, Underhill LJ was not considering the question of whether the disclosure of information was adequate to satisfy the test for 'qualifying disclosure'. That is clear from §26 of his judgment where he explains that "The issue in this appeal turns on the meaning, and the proper application to the facts, of the phrase 'in the public interest'". This distinction is also picked up by Sales LJ (as he then was) in *Kilraine* at § 36, where he states that the question as to whether an identified statement or disclosure meets the standard of having sufficient factual content and specificity is:

> "likely to be closely aligned with the other requirements set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in *Chesterton Global Ltd v Nurmohamed* [2018] ICR 731, para 8, this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief".

88. The question of public interest is only considered, therefore, if the disclosure of information is capable of being a "qualifying disclosure", and the ET found that it was not. In doing so, the ET was not making a judgment as to whether or not the disclosure of information was made in the public interest. Rather, it was making a judgment as to whether or not the disclosure of information was capable of amounting to a "qualifying disclosure" before considering the public interest test.

89. This is clear from the structure of the ET's decision. At paragraphs 91-95, the ET was considering the content of the letter of 2 September 2019. The ET concluded at paragraph 95 that the claimant had not "made disclosures of information in the email of 2 September, either in the email itself or cumulatively by reference to the contents of Ms Wynne's exit interview." This finding is repeated at paragraph 163, where the ET stated "As we have found earlier, reference to Ms Wynne's exit interview was also no[t] sufficient to import factual allegations of wrongdoing into the email of 2 September itself." At paragraph 164, the ET went on to consider the public interest question, finding that the letter of 2 September 2019 did not contain "any attempt to disclose information which the claimant reasonably believed to be in the public interest" (a finding which is not challenged on appeal).

90. At paragraph 95 of its judgment, therefore, the ET was entitled to evaluate for itself whether the *Kilraine* test was satisfied: that is, does the statement or disclosure contain sufficient factual content or specificity such as is capable of tending to show one of the matters listed in 43B(1). The ET concluded that it did not. First, the ET found that the exit interview with Ms Wynne and the letter of 2 September 2019 were not "sufficiently clear as to the reason for either individual's departure". Second, the ET noted that the exit interview did not disclose bullying by the second respondent. Third, the ET referred to what it described as "The most direct criticism" that is made by Ms Wynne: "It's inappropriate for the CEO to have a direct line to staff and to use that line to tell them they have done something wrong . . . It's invasive". The ET found that although that was a direct criticism, it was not "tantamount to alleging harassment amounting to a breach of legal obligation". In other words, in the ET's evaluation, and consistent with the Kilraine analysis, this was not capable of tending to show that there was a breach of legal obligation; that is, one of the matters listed in section 43B(1).

91. In any event, even if the ET had erred in finding that the letter of 2 September 2019, with the reference to Ms Wynne's exit interview, did not amount to a disclosure of information capable of being a "qualifying disclosure", the ET went on to decide that the public interest test was not satisfied, and that conclusion is not challenged. Accordingly, any error would not have affected the outcome.

Ground 4: *The ET misapplied the law by considering whether the Respondents believed the claimant to be a whistleblower when forming its conclusion on causation (paragraph 112).*

92. In my judgment, the claimant's criticism of paragraph 112 of the ET's judgment, where the ET state that: "We find that the respondents never considered that the claimant was actually a whistleblower and that this played no part in their decision to dismiss him", is misplaced. This finding of the ET is not inconsistent or contrary to the Court of Appeal's judgment in *Beatt*.

93. It is necessary to read this sentence from paragraph 112 of the judgment in context. At paragraph 109, the ET noted that at the point when the respondents were considering the claimant's dismissal and were asserting that there was a redundancy situation, they understood that the claimant was "asserting that he was a whistle-blower". Indeed, this point had been foreshadowed by the claimant in his letter of 2 September 2019 where he notified the second respondent that his solicitor had advised him that his employment rights had been infringed and his case would include "a whistleblower-style complaint into the leadership style of the CEO and culture at WTTC. . . " In those circumstances, whether or not the claimant was regarded by the respondents as a whistleblower, and whether or not this had any impact on the respondents' decision, were issues of fact that the ET was entitled to consider. If the ET had concluded that the claimant was regarded by the respondents as a whistleblower, and they had dismissed him for that reason (or for that principal reason), then this would go a long way towards a conclusion that section 103A of the

ERA had been contravened. Conversely, if the ET had concluded that the claimant was not regarded as a whistleblower then, subject to *Beatt* (which the ET was clearly familiar with), this might have a bearing on whether the decision to dismiss was infected by the underlying disclosures.

94. The ET was clearly conscious that a distinction had to be made between the making of disclosures and whether or not the respondents thought that the claimant was a whistleblower or not. Indeed, at paragraph 168 (as part of the ET's reasoning as to the claimant's dismissal), the ET stated the following:

> "In the second respondent's letter of 8 October to the first respondent's board, she makes no reference to the whistleblowing allegations whatsoever. They are also not referred to in the contemporaneous WhatsApp messages. We find that the respondents never considered that the claimant was actually a whistleblower and that this played no part in their decision to dismiss him. We find that in their view, this was simply part of the claimant's negotiating strategy. We also do not find that the claimant was dismissed for making "disclosures", whether or not the respondents considered these to be protected disclosures (Croydon Health Services NHS Trust v Beatt 2017 ICR 1240, CA)".

95. It can clearly be seen here that the ET is making a number of different points. First, that the reasons given by the second respondent in explaining to the first respondent's board as to why she wished to dismiss the claimant did not include the underlying whistleblowing allegations, and these are not referred to in the WhatsApp messages. That would be supportive, although not conclusive, of a finding that the underlying whistleblowing allegations did not have any bearing on the reason for dismissal. Second, that the respondents did not regard the claimant as being a whistleblower, that this made no part of their decision. The assertion that he was a whistleblower was seen to be part of his negotiating strategy. Third, the claimant was not dismissed for making disclosures, whether they were regarded as "protected disclosures" or not.

96. The third point is a correct direction of law, picking up the ET's earlier reference to *Beatt* in its section of the judgment on the law: see paragraph 146. It can be seen to be

distinct from the second finding – which is really a repeat of the sentence in paragraph 112, which the claimant complains about. In this context, it can be seen that that sentence is not an error of law, as it did not prevent the ET from asking itself and answering the correct question: was the claimant dismissed for making disclosures, whether they were regarded as "protected disclosures" or not.

Ground 5(a): *In finding that the Claimant had "made inappropriate sexualised comments to Ms Magoja" the tribunal reached a decision on a point that was not argued in the case.*

Ground 5(b): *Further or alternatively, there was no evidence to support this finding and/or this was a finding no reasonable tribunal directing itself properly on the law could have reached (paragraph 46).*

97. Although I do not have the Employment Judge's notes of the hearing, Mr Martin could not confirm to me that the claimant was directly challenged on his evidence, as set out in his witness statement, that he had not made inappropriate sexualised comments to Ms Magoja. Mr Martin could not confirm that this point had been put directly to the claimant, and Ms Greenley did not recall that it had been put. The ET's judgment does not indicate that the point was put. There is reference to the claimant being cross-examined as to whether "Ms Wynne had previously made complaints about his inappropriate behaviour towards her, including behaviour and comments of a sexual nature, in 2018" (see paragraph 47), but that is not the same as putting to the claimant that he had done the same with respect to Ms Magoja, especially where in his own witness statement to the ET he had denied the allegations made by her. I was taken by Mr Martin to his written closing submissions. There is no mention there that the claimant was asked specifically whether he had made the comments, nor is it argued that he had made them. It seems highly likely, therefore, that the matter was not put to the claimant in cross-examination.

98. In the circumstances, I consider that the ET fell into error by making a finding that the claimant had made inappropriate sexualised comments to Ms Magoja. In his witness

statement, the claimant had denied making these comments. During the course of his oral evidence, the claimant was not specifically challenged on this point and did not know therefore that the matter was being put in issue. In the circumstances, it was unfair for the ET to have made a finding to the contrary. This is especially so case where this particular finding would be bound to impact on the claimant's general reputation beyond the specific claims being considered by the ET.

99. I do not need to deal, therefore, with the further contention made by the claimant at Ground 5(b) that the finding made by the ET was one which it could not reasonably have reached, in accordance with the test set out in *Yeboah*. It is extremely difficult to assess whether the *Yeboah* test is met as the ET provides no reasons for why it reached the decision that it did.

100. Mr Martin, on behalf of the respondents, argued that the ET's reasoning could be inferred from parts of the ET's decision. I do not agree that that is possible. Mr Martin suggested that paragraph 47, which states that "The claimant accepted in cross-examination that Ms Wynne had previously made complaints about his inappropriate behaviour towards her, including behaviour and comments of a sexual nature, in 2018", is part of the ET's reasoning on this point. I consider that that is unlikely, given that all it said was that another employee had made complaints, not that the claimant accepted that those complaints were made, or that there was a finding by the first respondent or any other body that they had been made.

101. Mr Martin also referred to paragraph 78 of the judgment which he dealt with the claimant's demeanour to the ET. That paragraph states that: "Ms Roberts' evidence was that the claimant was "very angry" about the allegations that had been made and his evidence to this Tribunal indicated that he was still angry about them now". However, the ET did not say that it found the claimant's response to be improper. One

cannot infer from the fact that an accused person is "very angry" about the allegations that they are true.

102. The Ground of Appeal 5a therefore succeeds. I shall deal with the consequences of this later in this judgment.

Ground 6: No evidence to support the finding that the Second Respondent understood the allegations of sexual harassment against the Claimant to be substantiated and that this was causative of his dismissal.

103. At paragraph 167 of the judgment, the ET found that as early as 28 or 29 August 2019, the second respondent had begun to consider dismissing the claimant, having been shocked and concerned to hear about allegations of sexual harassment made by Ms Magoja against the claimant, which the ET says the second respondent "understood had been substantiated". Ms Greenley contends that the latter finding was in error and that this taints the ET's reasoning on dismissal. I disagree. I do not consider that the ET actually made an error in stating that as at 28 or 29 August 2019, the second respondent "understood [that the allegations] had been substantiated", when one reads the ET's finding in context.

104. It seems to me that the ET was using the term "substantiated" in the sense of whether evidence had been provided to support or prove the truth of the allegations: that is, was there substance to the allegations, rather than had they actually been proven. Indeed, that is how the ET uses the term "substantiate" elsewhere in its judgment. At paragraph 102, in describing the report of the investigation into the allegations reported by Ms Green on 12 September 2019, the ET stated that "none of the four colleagues [who Ms Magoja had asked Ms Green to speak to] could *substantiate* the specific allegations that Ms Magoja had raised" (emphasis added). In other words, what the ET was saying there was that none of the colleagues could support the specific allegations.

105. In my judgment, there was material available to the ET that enabled it to reach the conclusion that, as at 28 or 29 August 2019, the second respondent understood that the allegations had been substantiated. The ET's findings of fact (which are not challenged by the claimant on this appeal) are that the second respondent had been informed of the allegation of sexual harassment made by Ms Magoja against the claimant. On or shortly after 15 August 2019, she had been told by Ms Vallis (Ms Magoja's line manager") that "I really believe [her]". This could have been understood by the second respondent as support for the allegations against the claimant being true. Furthermore, on 15 August 2019, Ms Roberts had messaged the second respondent and told her that "there was a very serious allegation she [Ms Magoja] has made which we need to discuss". The second respondent had interpreted Ms Roberts' references to "serious allegations" as an indication that Ms Roberts was suggesting that the claimant should be dismissed (even though that was not what she had intended, in fact, to communicate). This is further material that could have been understood by the second respondent as support for the allegations against the claimant being true.

106. I do not consider that the material that subsequently came to the second respondent's attention: namely, the investigation report that there was "no case to answer"; or the WhatsApp messages about persuading Mas Magoja to make the claim and then she could withdraw it afterwards, undermine the ET's finding. The finding that is being criticised is one that was said to operate on the second respondent's mind on August 28 or 29 2019, at the commencement of her thinking about dismissing the claimant. What happened subsequently is irrelevant to her thought process at that earlier stage.

107. Accordingly, I consider that this ground of appeal fails.

Conclusion and Disposal

108. In my judgment, therefore, the appeal is allowed on grounds 1 and 5(a). I do not need to reach a decision on ground 5(b). The remaining grounds of appeal are dismissed.

109. Ground 5(a) is a self-contained matter. It does not affect, or infect, the rest of the ET's findings. It does not go to the question of causation either with respect to the decision to dismiss by the first respondent, or the detriment claims against the individual respondents (the second and third respondents). Accordingly, it is not necessary for me to remit the matter for further consideration. Rather, the ET's judgment should be read as if the material after the first sentence in paragraph 46 is deleted.

110. With respect to ground 1, having detected a legal error, I must remit the case unless (a) I conclude that the error cannot have affected the result, in which case the error will have been immaterial; or (b) without the error, the result would have been different and I can conclude what it must have been. I am reminded that in both of these cases, I am not permitted to make any factual assessment for myself or make any judgment as to the merits. The result must flow from findings made by the ET, supplemented only by undisputed or indisputable facts: see Laws LJ in *Jafri v Lincoln College* [2014] ICR 920 at § 21. I am reminded that in *Burrell v Micheldever Tyre Services Ltd* [2014] ICR 935, Maurice Kay LJ observed that "Provided it is intellectually honest [the EAT] can be robust rather than timorous in applying what I shall now call the Jafri approach."

111. In my judgment this is one of those comparatively rare cases in which this tribunal can conclude that the error made by the ET cannot have affected the result: that the same conclusion would have inevitably been reached.

112. First, although the ET found that the specific conversation of 14 August 2019 had not occurred, the ET did have in mind that the second respondent may have been aware of the substance of what the claimant was alleged to have said on that occasion, but through other means and at another time. At paragraph 152, the ET observed that it was "possible that similar information to that alleged to have been disclosed [in the specific conversation on or around 14 August 2019] was disclosed in other ways and on other occasions by the claimant to Ms Roberts and did come to the attention of the second respondent". The ET do not go on to find that the possible receipt of that information by the second respondent had any impact or influence on her decision-making with respect to the claimant.

113. Second, the entire thrust of the ET's analysis is that the disclosures by the claimant about the second respondent's management style and her treatment of employees did not play any material part in the respondents' decision-making. With respect to the claimant's dismissal, the ET make positive findings about the reasons. At paragraph 112, the ET find that was set out by the second respondent about the claimant's situation in her email to board members of the first respondent on 8 October 2019 "accurately represents the respondents' reasons for terminating the claimant's employment". This did not include "the whistleblowing allegations". Similarly, at paragraph 167, the ET set out the background to the second respondent considering the dismissal of the claimant, and then the further matters that strengthened her decision. This did not include "the whistleblowing allegations".

114. At paragraph 171, the ET dealt specifically with PD1, PD2 and PD5 (which involve disclosures of information about the second respondent's management style), finding that these disclosures did not more than trivially influence the respondents such that he was subjected to a detriment (his dismissal) for having made them. The ET continued by saying that "There was no suggestion that the second respondent gave

any thought to the claimant's criticism of her management style and her use of WhatsApp on those occasions". At paragraph 172, the ET found that at the end of August the second respondent did not pay a great deal of attention to PD1 and PD2 when she was reminded of them. The ET found that "she was more concerned with the potential risk to Ms Magoja of the harassment by the claimant, and the risk to the first respondent of Ms Magoja litigating and the financial and reputational cost of that. She was also concerned about the risk of keeping the claimant in the first respondent's employment after discovering about the Easyjet allegations" (the points made at paragraph 167).

115. Against this background, and especially given these positive findings, it is inconceivable that the ET would have reached a different conclusion on dismissal or detriment had the ET not made an error as identified at Ground 1 and had accepted that the claimant did make the specific disclosure about the second respondent's treatment of Ms Magoja to Ms Roberts on or around 14 August 2019. Accordingly, I conclude that the error at Ground 1 cannot have affected the result. The error was, therefore, immaterial and there is no reason to remit the matter to the ET for further consideration.