Appeal No. UKEAT/0149/16/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 1 November 2016
Judgment handed down on 2 December 2016

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

EIGER SECURITIES LLP — APPELLANT

MISS E KORSHUNOVA — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PAUL NICHOLLS (One of Her Majesty's Counsel) Instructed by: Messrs TMP Solicitors 30th Floor 40 Bank Street Canary Wharf London E14 5NR
For the Respondent	MR THOMAS CORDREY (of Counsel) Instructed by: Messrs Michelmores LLP Woodwater House Pynes Hill Exeter Devon EX2 5WR

SUMMARY

VICTIMISATION DISCRIMINATION - Protected disclosure

VICTIMISATION DISCRIMINATION - Detriment

VICTIMISATION DISCRIMINATION - Dismissal

The Employment Tribunal erred in failing to identify any legal obligation, as opposed to guidance, of which the Claimant believed the Respondent to be in breach. Accordingly the finding that the Claimant had made a qualifying disclosure within the meaning of the **Employment Rights Act 1996** ("ERA") section 43B(1) and therefore a protected disclosure was set aside. The finding that the Claimant was subject to a detriment for making a protected disclosure is set aside. The Employment Tribunal also erred in applying the wrong test in considering the claim under **ERA** section 103A. They applied the test appropriate to a section 47B claim and not that for unfair dismissal. Claims remitted to a differently constituted Employment Tribunal for rehearing.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Eiger Securities LLP ("the Respondent") appeals from the decision of an Employment Tribunal ("ET"), Employment Judge Jones ("EJ") sitting with members, sent to the parties on 20 October 2015 after a hearing lasting six days. The ET held that the Claimant's dismissal was unfair under section 103A of the **Employment Rights Act 1996** ("ERA") because she made a protected disclosure and that she had been subjected to a detriment within the meaning of **ERA** section 47B on the ground that she had made a protected disclosure. The Claimant appeared in person before the ET. The Respondent was represented by Mr Uduje of counsel. Before me the Respondent was represented by Mr Paul Nicholls QC and the Claimant by Mr Thomas Cordrey of counsel.

2. The Respondent carries on a broking business in financial instruments. Mr Ashton is the managing director of the company. The Claimant commenced employment with the Respondent in October 2011. That employment terminated on 30 April 2012. From 1 May 2012 until 31 March 2013 she was a fixed share partner in the Respondent. From 1 April 2013 until the termination of her employment on 25 July 2014 she was again an employee. In April 2013 the Claimant started working on the dealing floor as a sales executive. The communication which was held by the ET to be a protected disclosure was made by the Claimant on 14 May 2014 when she challenged Mr Ashton about using her computer screen in dealing with an external trader without identifying himself as not being her. Events which followed thereafter founded the claims that by reason of a protected disclosure in her words to Mr Ashton on 14 May 2014 the Claimant had suffered a detriment by the reallocation of three of her clients and had been dismissed for that reason on 24 July 2014.

The Relevant Statutory Provisions

3. Employment Rights Act 1996

Section 43A:

"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."

Section 43B(1)

"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 …

> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, …"**

Section 47B(1):

"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

Section 103A:

"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."

The Relevant Findings of Fact

4. Mr Ashton, the managing director of the Respondent is FCA registered. He was the compliance officer. The Claimant is not FCA registered. The brokers at the Respondent as do many brokers in the industry use a tool called Bloomberg Chat to chat with traders in the firm's client banks. The Respondent's brokers would have a number of screens on which to conduct live IB chats.

5. The Respondent had a practice of sharing amongst brokers their passwords for computers and IB chat. At paragraph 19 the ET held that:

> **"… The practice meant that although each broker had their own password to the IB chat on their screens conducted in their name, they were expected to share passwords with each other and the Respondent. …"**

6. The Claimant was moved from the emerging markets desk to working with Euro and Dollar products. In April 2014 two colleagues were reassigned and the ET held that it was likely that thereafter the Claimant was working on her own. It was then that she noticed that her username and password were being used by Mr Ashton and others.

7. On 12 May when returning to the office after a break she found Mr Ashton sitting at her computer conducting an IB chat with a trader who she usually dealt with. She asked Mr Ashton what he was doing and he told her that he had just conducted a trade. The Claimant resumed her chat with the trader and explained that she had not been her speaking to him earlier but her boss. The trader agreed with her that her boss should have introduced himself. The ET found that it is likely that the Claimant changed her password. Mr Ashton asked IT to unblock her screen. They found at paragraph 28 that Mr Ashton did not complain to the Claimant about this at the time.

8. Later on 12 May Mr Ashton sent another chat to another trader from the Claimant's computer without introducing himself. When the Claimant noticed this she contacted the trader and expressed her anger. The trader was not pleased with what had been done and referred to "deception". He said that what the Claimant's boss, Mr Ashton, had done was unacceptable.

9. On 14 May Mr Ashton had asked IT to unlock the Claimant's screen as she had changed her password. When the Claimant returned to the office from a break she found Mr Ashton at her screen. There was a conflict of evidence about what was said. The ET made a finding of fact which is not challenged on appeal that when she saw Mr Ashton at her screen, the Claimant asked him to explain what he was doing. The ET found that it is likely that Mr Ashton stated he was sending a letter to the back office. The ET held at paragraph 32 that the Claimant said:

" "… but I have sent everything before I went for lunch. It is wrong for you to log in under my name when I am not in the office and trade under my name without making it clear that it is not me who is making the trade and identifying that it is you. Yes, and my clients do not like that you talk to them pretending it is me when I am away for lunch" (It is likely that this is when he stated that there was the door)"

The ET held that she then said:

"…Well, at least you can say that it is you to my clients next time."

10. Later in the day Mr Ashton again asked IT to unlock the Claimant's computer screen. Mr Ashton sent the Claimant a text message saying that if she had changed her password without giving it to him that would be gross misconduct. The Claimant responded to say that his text was noted and gave him the username and password.

11. On 2 July 2014 the Claimant made a trading error which lost the Respondent money, 1,050 Euros. She managed to reduce the loss to approximately £267.00. No warning was given and the Respondent took no disciplinary action in respect of this error at the time.

12. On 4 July 2014 Mr Ashton informed the Claimant that he would be transferring some of the new clients that she had been given in April to other brokers. The accounts of three banks were reallocated to junior brokers.

13. On 16 July the Claimant made another trading error as a result of which the Respondent stood to lose £10,000. However, as she had a good relationship with the purchasing trader he released the Respondent from the sale and no loss was suffered.

14. On 17 July 2014 Helen Thomas, the Head of HR invited the Claimant to a disciplinary hearing on 21 July to discuss "Failure to follow instructions and poor performance".

15. By letter on 21 July the Claimant said that she would not attend. The Claimant and Mr Ashton met and had an argument. Mr Ashton suspended her. The Claimant refused to leave unless she first received a letter confirming her suspension. Such a letter was given to her by Ms Thomas. The Claimant left and turned off her screen before leaving. The Claimant received another letter dated 21 July which gave the reasons for the disciplinary action. Added to the initial charge of failure to follow instructions and poor performance was that of changing her Bloomberg password without authorisation. This was said to be an act of gross misconduct.

16. A disciplinary meeting was scheduled for 24 July. The Claimant refused to attend the disciplinary hearing. Later that day in an email to her the Respondent set out the four charges against the Claimant. The first two were related to the errors on 2 and 16 July, and the fourth of refusing to attend an informal meeting with Mr Ashton or communicate with him after his return from leave on 21 July and refusing to leave the premises after being suspended, insubordination and hostile behaviour. The third charge was:

> **"That after being suspended on full pay and being specifically told NOT to touch your computer by the senior partner you refused to do so switching the computer off knowing that you had changed the password and not informing your colleagues or management of this password change as had been previously notified to you and accepted by you as gross misconduct."**

17. Mr Ashton chaired the disciplinary meeting on 24 July. Another director, Stuart Walton, was invited into the meeting. He was a director and desk head in charge of trading. He had been present at the time of the incident on 16 July. Helen Thomas took notes. The Claimant did not attend the disciplinary hearing.

18. On 24 July the Claimant was dismissed. The letter of dismissal stated that the reasons for dismissal were:

"Gross Misconduct

Insubordination - the refusal to carry out reasonable instructions from an immediate superior. Namely the misuse of company software/hardware by switching off your computer and changing passwords without notifying your superiors. And incorrect price quoting to customers which resulted in financial loss for the company."

19. The Claimant appealed. The appeal was to be heard by Ms Thomas. Through her solicitors she objected to Ms Thomas hearing the appeal. The Respondent said that Ms Thomas did not take the decision to dismiss and therefore could hear the appeal. The Claimant did not attend. After considering the Claimant's appeal Ms Thomas confirmed the dismissal by letter dated 18 August 2014. The ET recorded that Ms Thomas confirmed in evidence that the reason she did so was because she considered that Mr Ashton had a genuine and reasonable belief that the Claimant had committed gross misconduct and the Respondent had followed a fair process in deciding to dismiss. The ET found that the misconduct relied upon to dismiss the appeal was different from the reasons given for the Claimant's suspension and dismissal. They found that the incorrect price quote relied upon in the dismissal was not relied upon by Ms Thomas in dismissing the appeal nor was the potential loss on 16 July. The acts of misconduct relied upon by Ms Thomas were the Bloomberg IB chats, the Claimant changing her log-in details and switching off her computer on the day of her suspension which were termed as ignoring instructions not to touch the computer.

20. In explaining why she objected to anyone else using her computer for IB chats and having her password the Claimant provided the ET with excerpts from the Financial Conduct Authority guide for firms. Page 215 deals with controls which need to be put in place to prevent financial crime and a section on page 217 refers to individuals sharing passwords as an example of poor practice. This was relied upon by the Claimant in supporting her challenge to Mr Ashton about his use of her Bloomberg chat with traders. The ET held at paragraph 97 that

it was likely that apart from principle 7 the remainder of the principles in the guide applied to the Respondent's business.

21. The Respondent's compliance advisers FSCom wrote an opinion dated 18 March 2015 in which they advised on whether the Respondent had breached FCA Rules or committed a criminal act in relation to the allegations made by the Claimant in her ET1. FSCom stated that in their opinion the Respondent had not committed a criminal act and that the failure to identify the person using the Bloomberg terminal was not a failure to disclose information which they were under a legal obligation to provide since there was no legal obligation to do so.

Conclusions of the Employment Tribunal

22. The ET held that what they found in paragraph 32 the Claimant had said to Mr Ashton on 14 May 2014 was a qualifying disclosure within the meaning of **ERA** section 43B(1). The ET held:

> **"134. In our judgment on 14 May the Claimant verbally gave Mr Ashton information that she considered his actions were wrong. She told him that this actions in logging on to her Bloomberg chat when she is not in the office and conducting trades under her name without making it clear that it is not her doing so, was wrong. She genuinely believed that what he was doing was a breach of the regulations governing their industry and in contravention of what she believed was a legal obligation to be transparent with clients. …**
>
> **135. In our judgment the Claimant genuinely believed that what Mr Ashton was doing and what he had allowed the juniors to do in logging on to her Bloomberg and chatting and attempting to trade with people whom she considered to be her clients without first introducing themselves so that the traders thought they were dealing with her; was wrong. …**
>
> **137. It was not submitted to us that the Claimant made an allegation as opposed to giving information as the Respondent simply denied that she said anything at all about this on that day. It is our judgment that the Claimant did not accuse Mr Ashton of breaking any rules. She informed him that she did not like what he was doing, that her clients also did not like it and that he should introduce himself in the future.**
>
> **138. It is our judgment that she genuinely believed that there was an obligation on the Respondent not to mislead people about who was conducting the communication and to let them know who was. She believed that there must be a legal obligation on the business to do so. …**
>
> **141. For those reasons it is our judgment that the Claimant made a qualifying disclosure. Was it a protected disclosure?"**

23. The ET held that the disclosure was in the public interest and held at paragraph 143:

> **"143. … It is our judgment that the Claimant spoke to Mr Ashton on 14 May because she was concerned about the Respondent's lack of transparency with those who she believed were clients and because she did not want them to be misled."**

The ET further held:

> **"145. … It was reasonable for the Claimant to believe that by logging on to her Bloomberg and conducting conversations and trades in her name without identifying themselves, her colleagues were breaching some Industry Guidance or rules.**
>
> **…**
>
> **147. The Claimant had nothing to gain by challenging or causing problems with her employer. She pointed out to the Respondent on 5 occasions that she was unhappy about colleagues accessing her Bloomberg trading PC. One of those occasions was on the 14 May in which she made the disclosure. …**
>
> **148. It is therefore our judgment that the disclosure qualifies for protection and that the Claimant made a protected public interest disclosure on 14 May."**

24. The ET then considered whether the reason for the removal of three of her clients from the Claimant was because she had made a protected disclosure. The ET held:

> **"159. It is our judgment that she challenged him and colleagues about their practice of going on her computer and logging on to her Bloomberg chat on 6 occasions. The disclosure on 14 May was only one of those occasions. The Claimant openly challenged the practice of sharing passwords by repeatedly changing her password so that Mr Ashton had to ask IT to assist him in getting on to her Bloomberg. In our judgment Mr Ashton was not happy about the Claimant's actions and they were the main or more than a trivial cause of his decision to take away those 3 Banks from her."**

25. In the section of the Judgment considering the claim relating to dismissal, the ET also held:

> **"181. It is our judgment that the Claimant made a protected disclosure on 14 May and that on the grounds of that disclosure she suffered a detriment in that 3 client Banks were taken from her and given to less experienced staff than herself who she then had to supervise. …"**

26. The ET then considered the claim that the reason for the Claimant's dismissal was that she had made a protected disclosure. The ET held:

> **"166. In our judgment there was confusion about the reason for dismissal. It was for reasons that were different to the reasons why the decision was upheld. Leaving aside Mr Walton's evidence, the aspect that is consistent to both is the Claimant's actions of changing her password and of switching off her computer on 21 July when she had been told not to do so."**

27. In the section of their Judgment headed "Applying law to facts" at paragraph 169 the ET directed themselves that they were:

> **"… concerned [with] whether the making of a protected disclosure was a matter which was in the employer's mind at the time of dismissal."**

28. Two of the charges against the Claimant related to errors made by her. The ET considered how other employees had been treated for making errors and that:

> **"172. It is our judgment that we have examples of other misconduct that had occurred within the business which we can look at in order to conclude whether or not the disclosure was on the Respondent's mind when they decided to terminate her contract for her conduct."**

The ET held:

> **"176. The Claimant was dismissed over her refusal to share her password, her challenge to the Respondent's practice of sharing passwords by repeatedly changing her password once they knew the existing one and for switching off her computer when she had been told not to.**
>
> **177. In our judgment these offences are not as serious as those committed by Mr Walton and Mr Aguirre. In our judgment, had she not made the disclosure on 14 May it is unlikely that she would have been dismissed. Until 14 May the Respondent had been happy with her performance and there were no issues between them.**
>
> **178. In our judgment the Claimant has proved that a large part of why she was dismissed was her disclosure and the Respondent had it in mind when Mr Ashton made the decision to dismiss her. … Even if that were not the case, it is our judgment that Mr Ashton had in his mind at the time he made the decision to dismiss her; her challenge to him about the way in which he used her Bloomberg chat and her belief that this was improper or a breach of legal obligations."**

The ET held:

> **"180. It is our judgment that the Claimant's dismissal was mainly due to the fact that she made a protected disclosure on 14 May demonstrating that she was not happy and not going to cooperate with the Respondent's practice of sharing passwords and Mr Ashton's decision that this was unacceptable. In our judgment it is unlikely that she would have been dismissed if there had been no disclosure on 14 May and the incidents on 2 and 16 July had still occurred. In those circumstances, it is our judgment that it is highly likely that even if disciplinary action had been taken the Respondent would have taken action short of dismissal against her and imposed a warning.**
>
> **181. It is our judgment that the Claimant made a protected disclosure on 14 May and that on the grounds of that disclosure she suffered a detriment in that 3 client Banks were taken from her and given to less experienced staff than herself who she had to supervise. The Claimant was subsequently dismissed mainly because of that disclosure when she went against the Respondent's practice of sharing passwords and challenged the practice of anyone going on to a trader's Bloomberg chat without identifying themselves. In switching off the computer on 21 July she refused to obey a management instruction and once again challenged the password sharing practice. It is our judgment that had the disclosure not taken place she would not have been in that position and even if she had it is highly unlikely, given the way in which the Respondent dealt with more serious conduct from a colleague and a senior manager; that she would have been dismissed for it."**

Discussion and Conclusion

Ground 1

29. By ground 1 of the Amended Notice of Appeal the Respondent contends that the words set out in paragraph 32 which the ET found to have been spoken by the Claimant to Mr Ashton on 14 May 2014 did not disclose information but were an allegation of wrongdoing. Mr Nicholls submitted that the ET erred in holding at paragraph 134 that in telling Mr Ashton that she considered his actions to be wrong the Claimant was giving him information. It was submitted that the words used by the Claimant to Mr Ashton were an allegation rather than conveying information. Mr Cordrey agreed that this ground of appeal could be advanced notwithstanding that the point was expressly not taken before the ET.

30. Mr Nicholls contended that the decision of the EAT in **Cavendish Munro Professional Risks Management v Geduld** [2010] IRLR 38 establishes that a distinction is to be made between the provision of information and making an allegation. Mr Nicholls referred to the observation of Mr Justice Langstaff in **Kilraine v London Borough of Wandsworth** [2016] IRLR 422 in which at paragraph 30 it was said that very often information and allegation are intertwined. The decision as to whether there has been a disclosure is to be determined in the light of the statute itself.

31. Mr Nicholls contended that the words used in this case were properly to be categorised as setting out the Claimant's position. She asserted that what Mr Ashton had done in communicating with traders from her computer without identifying himself was wrong. Any information conveyed was "tangential" to making the allegation. Mr Nicholls recognised that there can be a disclosure of information within the meaning of the **ERA** even if the recipient already knew the information. There can be a disclosure of information by bringing it to the

recipient's attention. Counsel also acknowledged that if the words found to have been spoken by the Claimant had been said to a third party and not to Mr Ashton they could be said to convey information. However, spoken to Mr Ashton they were not disclosing information.

32. Mr Cordrey, counsel for the Claimant, submitted that the decision as to whether the Claimant had disclosed information to the Respondent was a straightforward issue of fact. The ET had correctly considered **Cavendish Munro** and **Kilraine** and reached a permissible conclusion on the facts. Mr Cordrey contended that, applying **Kilraine**, a statement by an employee that "your treatment of me is disgusting" would not be a disclosure of information. However saying "your treatment of me in locking me out of the office is disgusting" would be a disclosure of information. In **Kilraine** Mr Justice Langstaff held:

> **"that the words in issue in that case said nothing that was specific. They were 'there have been numerous incidents of inappropriate behaviour towards me'."**

The Judge had no difficulty in concluding that the ET had not erred in holding that the Claimant had not conveyed information within the meaning of the **ERA**. However it was said that the Claimant's words to Mr Ashton were specific and went beyond what he already knew. She told him that clients did not like him communicating from her computer without identifying himself.

33. Mr Cordrey said that there can be no definition of "disclosure". The context in which the words relied upon were said is relevant in determining whether information has been disclosed within the meaning of the **ERA**. The ET who heard the evidence reached a conclusion that was open to them in deciding that the words used were a disclosure of information.

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34. There is no difference between counsel on the principles to be applied in determining whether a Claimant has disclosed information within the meaning of **ERA** section 43B(1). It is the words of the statute which are to be applied. In **Kilraine** Mr Justice Langstaff cautioned against determining the issue by asking whether the relevant words are "information" or an "allegation". At paragraph 30 Mr Justice Langstaff observed:

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> **"… very often information and allegation are intertwined. …"**

C

35. The Claimant stated to Mr Ashton that it was wrong for him to trade from her personally designated computer without making it clear that she is not the person making the trade and identifying himself. If the statement had stopped there it may have been no more than an allegation of wrongdoing. However the Claimant went on to tell Mr Ashton what her clients thought of his behaviour. This was new information given to Mr Ashton. The two sentences should be read together and considered in their context. This is an example of the situation envisaged by Mr Justice Langstaff in **Kilraine** in which allegation and information are intertwined. Whether such words are to be regarded as "disclosure of information" within the meanings of **ERA** section 43B(1) depends on the context and the circumstances in which they are spoken. The decision as to whether such words which include some allegations cross the statutory threshold of disclosure of information is essentially a question of fact for the Employment Tribunal which has heard evidence.

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36. In my judgment on the findings of fact of the words used by the Claimant to Mr Ashton the ET did not err in concluding the Claimant had disclosed information to him within the meaning of the **ERA** section 43B(1).

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Ground 2

37. In order to be a "qualifying disclosure" within the meaning of the **ERA** section 43B the disclosure of information must in the reasonable belief of the worker making the disclosure, be in the public interest and tend to show, amongst other alternatives, that a person has failed to comply with a legal obligation to which he is subject.

38. Mr Nicholls contended that the ET failed to engage with the question of whether the Claimant reasonably believed that the Respondent had been in breach of a legal obligation. The point is made succinctly in paragraph 3 of the amended Notice of Appeal:

> **"[The ET] did not find that [the Claimant] reasonably believed that there had been a breach of a legal obligation. The Tribunal found only that the Claimant reasonably believed that her colleagues were breaking some industry guidance or rules' (paragraph 45) without considering whether there was a reasonable basis for believing that such guidance or rules involved legal obligations."**

39. Mr Nicholls referred to paragraph 137 in which the ET held that the Claimant did not accuse Mr Ashton of breaking any rules. She informed him that she and her clients did not like what he was doing in using her computer to contact clients without informing them that they were dealing with him and not the Claimant. Counsel pointed out that whilst the ET held at paragraph 138 that the Claimant believed there must be a legal obligation on the Respondent's employees not to mislead people about who was conducting the communication they did not identify any such legal obligation. Mr Nicholls referred to the judgment of the EAT in **Blackbay Ventures Ltd v Gahir** [2014] IRLR 416 in which HH Judge Serota QC, sitting with members, held at paragraph 98 that in considering whether there had been a protected disclosure:

> **"Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. …"**

40. It was said that when they reached their conclusion on this issue the ET held at paragraph 145 that there had been a breach of industry guidance or rules. However the ET failed to consider whether the industry guidance or rules gave rise to legal obligations.

41. Mr Cordrey contended that the ET gave themselves a correct self direction in paragraphs 121 and 122 on whether the disclosure was a qualifying disclosure. Save in obvious cases the EAT should be slow to decide that the ET had failed to apply the correct self direction. Counsel submitted that in paragraph 138 the ET concluded that the Claimant genuinely believed that there was an obligation on the Respondent not to mislead people about who was conducting the communication and to let them know who was. Further the ET held that the Claimant believed that there was a legal obligation to do so.

42. Mr Cordrey relied upon the judgment of the EAT in **Bolton School v Evans** [2006] IRLR 500 in which Mr Justice Elias (as he then was) and members held at paragraph 41 information given by the Claimant that he had broken into the school's computer system that:

> **"41. Mr Chaudhuri, for the school, accepted, as we understand it, that the latter was information tending to show that a breach of a legal obligation was likely to occur. We think that is plainly so and it does not lose that characterisation merely because it is the informer himself who broke into the system. It is true that the claimant did not in terms identify any specific legal obligation, and no doubt he would not have been able to recite chapter and verse at the time. But it would have been obvious to all that the concern was that private information, and sensitive information about pupils, could get into the wrong hands, and it was appreciated that this could give rise to a potential legal liability."**

Counsel submitted that the Judgment of the ET should be read as a whole. If there was any difference in approach of the EAT in **Bolton** and **Blackbay**, **Bolton** should be preferred. As in **Bolton** it was obvious that the information given by the Claimant, that clients were being misled, could give rise to potential legal liability.

43. In my judgment there is no conflict between **Blackbay** and **Bolton** as is suggested by Mr Cordrey. The Claimant in **Bolton** hacked into the school's IT system and disabled some accounts. The Claimant told the headmaster what he had done. He contended on his internal appeal that he had hacked the system to draw attention to failure to safeguard data in breach of the **Data Protection Act 1998**. Counsel for the school accepted that this was information tending to show that a breach of a legal obligation was likely to occur. The issue which is the subject of ground 2 of the Notice of Appeal in this case was therefore not in play in **Bolton**. Further, as Mr Justice Elias observed at paragraph 41 of this acceptance by counsel "we think that is plainly so". **Bolton** was an "obvious" case of assertion of a breach of a legal obligation referred to by HH Judge Serota QC in **Blackbay** as not requiring the identification of the source of the legal obligation.

44. Employment Tribunals considering claims based on protected disclosures apply the words of the **ERA**. The ET in this case was required to decide whether in making the disclosure set out in paragraph 134 of the Judgment the Claimant reasonably believed that it tended to show that Mr Ashton had failed to comply with a legal obligation to which he was subject.

45. The ET found at paragraph 135 that the Claimant genuinely believed that what Mr Ashton was doing was wrong. Further the ET held at paragraph 138 that the Claimant "believed that there must be a legal obligation on the business" to inform people who in the Respondent organization they were dealing with. The closest the ET came to deciding that the reasonableness of the Claimant's belief is at paragraph 140 in which the ET held:

> **"140. It may be that because of the lack of experience in the industry, the Claimant was completely mistaken in her belief. …"**

A The ET found that the Claimant had not been provided with the contact details of the Respondent's external compliance advisors nor had Mr Ashton given a copy of the relevant manuals and Guidance. The ET held:

B > **"140. … The Claimant … was therefore acting from her general belief and understanding of how a client should be treated. It is our judgment that she had a reasonable belief that what she was saying was true and applicable in this industry."**

C 46. In my judgment it is not obvious that not informing a client of the identity of the person whom they are dealing if the employee is trading from another person's computer is, as in **Bolton**, plainly a breach of a legal obligation. That being so, in order to fall within **ERA** section 43 B(1)(b), as explained in **Blackbay** the ET should have identified the source of the legal obligation to which the Claimant believed Mr Ashton or the Respondent were subject and

D how they had failed to comply with it. The identification of the obligation does not have to be detailed or precise but it must be more that a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance

E without being in breach of a legal obligation. However, in my judgment the ET failed to decide whether and if so what legal obligation the Claimant believed to have been breached.

F 47. The decision of the ET as to the nature of the legal obligation the Claimant believed to have been breached is a necessary precursor to the decision as to the reasonableness of the Claimant's belief that a legal obligation has not been complied with. Whilst the Judgment of

G the ET has to be read as a whole without applying a fine tooth comb to it to detect faults, in my judgment on a fair reading, this ET failed to identify a legal as opposed to a moral or lesser obligation which the Claimant believed had been broken by Mr Ashton.

H 48. As a necessary statutory ingredient of a "qualifying disclosure" is that a Claimant has a reasonable belief that a person has failed to comply with a legal obligation, as contrasted with

A another type of obligation, the decision of the ET that the Claimant made a qualifying disclosure is set aside. Both counsel rightly agreed that if the decision were set aside on this ground the question of whether the Claimant had a reasonable belief that Mr Ashton had failed to comply with a legal obligation would have to be remitted to an Employment Tribunal.

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Ground 3

C 49. Mr Nicholls contended that the ET failed to make findings of fact to support their conclusion that the reason the Respondent removed clients from the Claimant and thereby subjected her to a detriment was that she had made a protected disclosure. Counsel contended that the ET impermissibly elided two questions, the fact that the Claimant had made disclosures

D and the way in which she made her objection to Mr Ashton's conduct in dealing from her computer terminal without identifying himself to the clients. In order to bring herself with **ERA** section 47B(1) the Claimant must show that the decision to remove clients, admitted to be

E a detriment, was materially influenced by the disclosure of information. If the decision was materially influenced not by the disclosure of information itself but by the way in which the Claimant showed her objections to Mr Ashton's conduct the facts would not support a conclusion that there had been a breach of section 47B(1).

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50. Mr Nicholls relied upon **Panayiotou v Chief Constable of Hampshire Police** [2014] IRLR 500 in which Mr Justice Lewis in the EAT held at paragraph 49 that:

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> **"49. … Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. …"**

The ET found in paragraph 134 that the Claimant made the protected disclosure on one

H occasion, the 14 May 2014. However in considering whether the protected disclosure materially influenced the Respondent's decision to remove three clients from the Claimant the

ET referred to Mr Ashton not being happy about the Claimant openly challenging him on six occasions about his conduct and sharing passwords by repeatedly changing her password. It was submitted that this finding of fact does not support the conclusion that the decision to remove clients from the Claimant was materially influenced by the disclosure on 14 May 2014.

51. Rather, as explained in **Panayiotou**, it was submitted that it was the manner of making her objections known which the ET found to have materially influenced the decision to impose a detriment on the Claimant. The ET erred in eliding the fact of disclosure on 14 May 2014 with the way in which the Claimant challenged Mr Ashton's conduct by objecting to the shared password policy and by changing her password to bar others from using her computer. The ET therefore erred in concluding that the Claimant had been subjected to a detriment, the removal of three clients, on the ground that she had made a protected disclosure.

52. Mr Cordrey submitted that ground 3 properly viewed, is a perversity appeal. All the findings of the ET point in one direction. Counsel referred to paragraph 15 of his skeleton argument in which he wrote:

> **"The Respondent expounds a distinction without a difference: the distinction between the Respondent having treated the Claimant to her detriment because she challenged Mr Ashton per se as opposed to treating her to her detriment because she challenged him about the particular conduct of logging on to her system and conducting trades whilst impersonating her. …"**

An employer cannot escape liability under the **ERA** by artificially separating the disclosure of information and the challenge that relates to it. Counsel submitted that the ET correctly had in mind **Fecitt v NHS Manchester** [2012] ICR 372 CA when they directed themselves at paragraph 128:

> **"128. … it is not necessary that the protected disclosure is the sole or principal reason for the treatment. Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. …"**

A It was submitted that the ET correctly applied this approach in reaching their conclusion that taking three bank clients away from the Claimant was done on the ground that she had made a protected disclosure.

B

53. The grounds upon which it is said that the ET erred in concluding the Claimant's claim under **ERA** section 47B(1) was established is that their findings of fact do not support a conclusion that the decision to remove three bank clients from the Claimant was materially

C influenced by her protected disclosure. The ET held that the protected disclosure was made on 14 May 2014. If the ET had concluded that the decision to remove the clients from the Claimant was materially influenced not just by the disclosure on 14 May 2014 but by its

D repetition on other occasions in my judgment they could not have been said to have erred in law. It would be open to a Tribunal to conclude that detrimental action influenced by repetition of a disclosure falls within **ERA** section 47B(1). However the ET did not find that other

E challenges made to the practice of sharing passwords were disclosures or repetitions of the disclosure. The ET held:

> **"158. … it is our judgment that the fact that the Claimant questioned him about his practice of going on to the computer and chatting to those whom she considered to be clients without first introducing himself; and conducting trades with those clients and challenged him about the password practice by continually changing her password in order to thwart his practice caused him to take clients away from her and give them to the trainees who were less likely to**

F **challenge him or question his practices.**
>
> **159. It is our judgment that she challenged him and colleagues about their practice of going on her computer and logging on to her Bloomberg chat on 6 occasions. The disclosure on 14 May was only one of those occasions. The Claimant openly challenged the practice of sharing passwords by repeatedly changing her password so that Mr Ashton had to ask IT to assist him in getting on to her Bloomberg. In our judgment Mr Ashton was not happy about the Claimant's actions and they were the main or more than a trivial cause of his decision to take**

G **away those 3 Banks from her."**

54. As found by the ET in paragraph 158 it was that the Claimant repeatedly challenged Mr Ashton and colleagues about the password practice by questioning the practice of going onto

H her computer and engaging in IB chats with traders without identifying themselves and continually changing her computer passwords in order to thwart this practice which caused him

to take clients away from her. On a fair reading of the Judgment it cannot be said that the ET reached their decision on the basis that it was the Claimant's disclosure on 14 May 2014 rather than her repeated objection to sharing passwords and her acts in changing her passwords to frustrate the use of her Bloomberg chat by others which materially influenced Mr Ashton's decision to remove clients from her. As posited by Mr Justice Lewis in **Panayiotou**, this is a case in which it is necessary to decide whether it is the making of the disclosure or the manner in which, in this case, the Claimant acted consistently with the disclosure which materially influenced the Respondent. The ET has erred in law by failing to decide whether it was the protected disclosure rather than the objections to the use of her IB chat by others and the acts of the Claimant in seeking to frustrate such use which materially influenced the decision to remove clients from her. The decision that the Claimant was subjected to a detriment on the ground that she made a protected disclosure is set aside.

Ground 4

55. Mr Nicholls submitted that the ET erred by wrongly applying the test for determining whether a worker had been subjected to a detriment on the ground that they had made a protected disclosure to the question of whether the reason for dismissal was that the Claimant had made a protected disclosure. In **Fecitt** paragraph 43 Lord Justice Elias agreed that the test for whether a Claimant has been subjected to a detriment on the ground that they have made a protected disclosure:

> **"… if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act. …"**

is different from the test for whether a dismissal falls within **ERA** section 103A Elias LJ held at paragraph 44 that:

> **"… in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair. …"**

A

56. Mr Nicholls submitted that in at least three paragraphs of the Judgment the ET rely on their view that the Respondent had the disclosure "in mind" when deciding to dismiss the Claimant. Whereas the ET gave a self direction in paragraph 128 on the correct approach to the claim under **ERA** section 47B(1) there is no self direction on the approach to the decision as to whether the protected disclosure is the sole or principal reason for the dismissal.

B

57. Mr Nicholls pointed out that the ET made a finding in paragraph 176 that:

C

> **"176. The Claimant was dismissed over her refusal to share her password, her challenge to the Respondent's practice of sharing passwords by repeatedly changing her password once they knew the existing one and for switching off her computer when she had been told not to."**

D

This is not a finding that the reason or the principal reason for the Claimant's dismissal was her protected disclosure. Counsel submitted that it is clear that the ET failed to consider and decide the issue which was before them: whether the reason or the principal reason for the Claimant's dismissal was that she made a protected disclosure.

E

58. Mr Cordrey acknowledged that the ET had used what he described as "infelicity of language" in for example paragraphs 172 and 178 when they said that the disclosure was "on the Respondent's mind" when they decided to dismiss her. However counsel submitted that the ET set out in paragraph 130 the correct test for dismissal on grounds of making a protected disclosure. In that paragraph the ET referred to the judgment of the Court of Appeal in **Kuzel v Roche Products Ltd** [2008] ICR 799. Mr Cordrey submitted that the fact that the ET set out in paragraph 128 a different test in determining whether the Claimant had suffered a detriment on the ground that she had made a protected disclosure showed that they had recognised the difference in approach which was required.

F

G

H

59. In my judgment it is clear that the ET erred in that they applied the wrong test in deciding that the Claimant's dismissal was unfair under **ERA** section 103A.

60. The Claimant's claim for "ordinary" unfair dismissal under **ERA** section 98 had been struck out as she did not have the necessary qualifying period of employment to bring such a claim. A claim for unfair dismissal for making a protected disclosure requires no qualifying period of employment and is brought under **ERA** section 103A. Section 103A provides:

> **"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."**

61. Section 103A, automatic unfair dismissal by reason of making a protected disclosure, and section 47B(1), a right not to be subjected to a detriment on the ground of making a protected disclosure, are in different Parts of the **ERA**, Part IX and IV respectively and use different language. The consequences of these differences for the tests in establishing claims for unfair dismissal under **ERA** section 103A and being subjected to detriment under **ERA** section 47B(1) were authoritatively determined by the Court of Appeal in **Fecitt**, a claim under **ERA** section 47B(1). These differences were explained by Elias LJ in paragraph 44 in which he held:

> **"44. I accept, as Mr Linden argues, that this creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair. However, it seems to me that it is simply the result of placing dismissal for this particular reason into the general run of unfair dismissal law. As Mummery LJ cautioned in *Kuzel v Roche Products Ltd* [2008] ICR 799, para 48, in the context of a protected disclosure claim:**
>
> > **"Unfair dismissal and discrimination on specific prohibited grounds are, however, different causes of action. The statutory structure of the unfair dismissal legislation is so different from that of the discrimination legislation that an attempt at cross fertilisation or legal transplants runs a risk of complicating rather than clarifying the legal concepts." "**

Different tests are to be applied to claims under **ERA** sections 103A and 47B(1). Thus for a claim under **ERA** section 103A to succeed the ET must be satisfied that the reason or the

principal reason for the dismissal is the protected disclosure whereas for a claim under **ERA** section 47B(1) to be made out the ET must be satisfied that the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's detrimental treatment of the Claimant.

62. Whilst the ET set out passages in **Kuzel**, in which Mummery LJ refers to the approach of an ET to a claim for "automatic" unfair dismissal for making a protected disclosure, the issue on appeal was the burden of proof in such cases. The difference in the tests for claims under **ERA** section 103A and section 47B(1) was not referred to by the Court of Appeal. The ET in paragraph 128 did refer to **Fecitt** for the test to be applied in determining the claim under **ERA** section 47B(1). However they did not refer to the passages in that case which highlight the differences between the tests for determining claims under **ERA** sections 47B and 103A.

63. In the section of their Judgment in which they set out their conclusions on the claim for unfair dismissal under **ERA** section 103A the ET direct themselves at paragraph 169 to consider:

> **"169. … whether the making of a protected disclosure was a matter which was in the employer's mind at the time of dismissal."**

This is a clearly erroneous approach to considering whether the reason or the principal reason for the dismissal was the protected disclosure. The ET repeated this error in subsequent paragraphs:

> **"172. It is our judgment that we have examples of other misconduct that has occurred within the business which we can look at … in order to conclude whether or not the disclosure was on the Respondent's mind when they decided to terminate her contract for her conduct.**
>
> **…**
>
> **178. In our judgment the Claimant has proved that a large part of why she was dismissed was her disclosure and that the Respondent had it in mind when Mr Ashton made the decision to dismiss her. … Even if that were not the case, it is our judgment that Mr Ashton had in his mind at the time he made the decision to dismiss her; her challenge to him about the way in**

which he used her Bloomberg chat and her belief that this was improper or a breach of legal obligations."

64. In my judgment the reference in paragraph 169 by the ET to whether the making of a protected disclosure was "a matter which was in the employer's mind at the time of dismissal" and the repetition of words reflecting that self direction shows that the ET erred in their approach to **ERA** section 103A. Although in paragraph 180 the ET referred to the Claimant's dismissal being "mainly due to the fact that she made a protected disclosure on 14 May" this finding was coupled with the findings that it was her refusal to co-operate with the Respondent's practice of sharing passwords which was unacceptable to Mr Ashton. This finding elides the disclosure with not sharing her password and changing it locking Mr Ashton out of her computer. It is consistent with the finding that Mr Ashton had the disclosure "in mind" when he reached the decision to dismiss her. It does not support a conclusion that the ET decided the claim under **ERA** section 103A by considering whether the disclosure itself was the reason or the principal reason for the Claimant's dismissal.

65. Ground 4 of the appeal succeeds. The finding that the dismissal of the Claimant was unfair under **ERA** section 103A because she made a protected disclosure is set aside.

Ground 5

66. Mr Nicholls contended that the ET erred in law by failing to make any findings as to the reason Ms Thomas endorsed the decision to dismiss taken at the hearing on 24 July 2014. Counsel pointed out that at paragraph 170 the ET held:

"170. … Although she was the in-house HR advisor and she had taken notes at the dismissal meeting it is likely that she also took part in the discussion. …"

A Counsel therefore contended that the ET erred in failing to make findings about and take into account her reasons for deciding to dismiss the Claimant.

B 67. Mr Cordrey contended that the findings of fact of the ET make it clear that the primary decision maker throughout the disciplinary dismissal process was Mr Ashton. It was submitted that the ET correctly considered Mr Ashton's reason for dismissing the Claimant when analysing the reason for dismissal under **ERA** section 103A. The ET found that Ms Thomas C took part in the discussion at the disciplinary hearing. They did not find that she took part in the decision.

D 68. Ms Thomas was the in-house HR advisor. In my judgment paragraph 170 on which Mr Nicholls relies does not support his contention that Ms Thomas was a decision maker in dismissing the Claimant. Ms Thomas was an HR advisor who was present at the disciplinary E meeting taking notes. As was submitted by Mr Cordrey the ET made a finding in paragraphs 77 and 170 that the letter dated 24 July 2014 following the disciplinary meeting suggested that she took part in the discussion. It did not suggest that she was a decision maker.

F 69. It is unsurprising that an HR advisor would take part in a discussion at a disciplinary hearing. In the absence of evidence, a reasonable inference may be that Ms Thomas advised on procedural and HR matters. The ET did not find nor can it be inferred that they decided that G she with Mr Ashton took the decision to dismiss the Claimant. At paragraph 170 the ET held that it was inappropriate for Ms Thomas to hear the appeal not because she with Mr Ashton decided to dismiss the Claimant but because she took part in the discussion.

H 70. Ground 5 of the appeal does not succeed.

Disposal

71. 1. Ground 1 of the appeal does not succeed. The finding that the Claimant made a disclosure on 14 May 2014 remains in place.

2. Ground 2 of the appeal succeeds. The decision that the Claimant made a qualifying disclosure is set aside on the ground that the question of whether the Claimant had a reasonable belief that Mr Ashton had failed to comply with a legal obligation is remitted to an Employment Tribunal for determination.

3. Ground 3 of the appeal succeeds. The decision that the Claimant was subjected to a detriment on the ground that she made a protected disclosure is set aside. The claim under the **Employment Rights Act 1996** section 47B(1) is remitted to an Employment Tribunal for determination.

4. Ground 4 of the appeal succeeds. The decision that the dismissal of the Claimant was unfair under **Employment Rights Act 1996** section 103A is set aside. The claim is remitted to an Employment Tribunal for determination.

5. Ground 5 of the appeal does not succeed.

72. The claims under **Employment Rights Act 1996** sections 47B(1) and 103A are remitted for rehearing before a differently constituted Employment Tribunal. The findings of fact in paragraphs 12 to 114 of the Judgment remain in place. The Employment Tribunal may give directions as to the conduct of the hearing including any evidence to be given.