Appeal No. UKEAT/0061/15/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 June 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

SALISBURY NHS FOUNDATION TRUST — APPELLANT

MR M WYETH — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS KATE BALMER (of Counsel) Instructed by: DAC Beachcroft LLP Portwall Place Portwall Lane Bristol BS1 9HS
For the Respondent	MR MARK WYETH (The Respondent in Person)

SUMMARY

UNFAIR DISMISSAL - Automatically unfair reasons

Protected disclosure - automatic unfair dismissal - section 103A ***Employment Rights Act 1996***

Having found that the Claimant had been constructively dismissed and that the Respondent had not put forward any reason that was capable of being fair for the purposes of section 98 **ERA**; the Claimant's dismissal was unfair. The issue was whether the reason or principal reason for that dismissal was a protected disclosure, thus rendering the dismissal automatically unfair for the purposes of section 103A **ERA**. The ET had found that it was.

The Respondent contended that in so doing, the ET had (1) erred in law in applying a "but for" test rather than determining what was the reason or principal reason for the dismissal; alternatively (2) failed to properly identify the reason or principal reason for the dismissal and/or reached a conclusion that was perverse.

Held:

Although the Claimant had put his case on a "but for" basis, the ET had not fallen into the error of applying that approach but had kept in mind the need to determine what was the reason or principal reason for the dismissal. Where an error did arise, however, was in the ET's failure to engage with the potential explanations put forward by the Respondent and/or arguably apparent from its own findings of fact. The ET thereby failed to conduct the necessary critical analysis of the Respondent's reason for its conduct and failed to properly explain its findings and reasoning in that regard. In the circumstances, the appeal on this ground would be allowed and this matter - the section 103A aspect of the claim - remitted to a freshly constituted ET for re-hearing.

HER HONOUR JUDGE EADY QC

1. I refer to the parties as the Claimant and the Respondent, as below. This is the Respondent's appeal against a Judgment of the Southampton Employment Tribunal (Employment Judge S Jenkins sitting alone on 11 February 2014 and 4 June 2014; "the ET"), sent to the parties on 17 June 2014. The Respondent was there represented by Ms Harris, counsel, but today appears by Ms Balmer. The Claimant has represented himself throughout.

2. By its Judgment the ET, relevantly, upheld the Claimant's claim of automatic constructive unfair dismissal by reason of having made a protected disclosure. The Respondent appeals. The proposed grounds of appeal were initially considered on the papers by Simler J, who took the view that they disclosed no reasonable basis for the appeal to proceed. At a hearing under Rule 3(10) of the **EAT Rules 1993** HHJ Shanks was persuaded to let the appeal proceed to a Full Hearing, albeit observing:

> **"Although the appeal is very unmeritorious so far as the substantive merits are concerned and it is hard to see that it will make much practical difference (given that there can be no doubt, as was accepted by counsel for the [Appellant], that the [Claimant] was unfairly dismissed) I was just persuaded that the [Appellant] had an arguable point on causation and section 103A and so allowed the appeal to proceed to a [Full Hearing]."**

The Background Facts

3. The Claimant started working for the Respondent in 2008 as a Nursing Assistant, originally working day shifts but transferring to nights in December 2008, when he worked as part of one of two Operating Department night teams. On each team was also employed an Operating Department Practitioner ("ODP"), an essential member of the team who assists the anaesthetist in any emergency operations.

4. In 2011 the Claimant raised a concern with the Respondent's General Manager Main Theatres, Mrs Hope, as to the behaviour of the ODP on his team ("ODP1") and as to what seemed to be a potential misuse of anaesthetic drugs. ODP1 had been found asleep and difficult to rouse on several occasions, and the Claimant said he had seen ODP1 inhaling a substance from a bottle in the operating theatre. The Claimant regarded ODP1 as a friend and found reporting this conduct difficult; he did so because he considered it to be in the interests of public safety, the one ODP on any night duty being a necessary member of the Operating Department night team during both any operation and recovery.

5. There is no specific finding that this (the Claimant's raising of his concerns in 2011) was a protected disclosure, although (on the ET's finding of fact) it is not clear why it would not have been (indeed, as a general observation, one might say that the facts of this case seem to involve precisely the kind of whistleblowing the law is designed to protect). The Claimant tells me this was a point canvassed at an earlier hearing, but I have not seen that decision and the position remains uncertain.

6. Returning to the narrative, ODP1 was a popular member of staff and no complaints had been made previously. Mrs Hope spoke to him about the allegations, which he denied. She took the matter no further at that stage.

7. Thereafter, in 2012, the Claimant again raised concerns of the same nature about ODP1 with Mrs Hope. This was accepted to be a protected disclosure. Although on this occasion, Mrs Hope escalated the matter, there was a delay in the start of any formal investigation. Meanwhile other staff now also raised concerns about ODP1 and Mrs Hope herself witnessed an occasion when it was difficult to rouse him when he was asleep whilst on duty.

8. The Claimant's disclosures included the fact that ODP1 had been seen crawling on the floor, was at times comatose and difficult to wake and there were discarded swabs in the bin, which amounted to evidence (the Claimant's belief being that ODP1 might have been inhaling anaesthetic drugs). As the fact of the concerns became known, another ODP and friend of ODP1 - "ODP2" - sought to carry out an investigation with a view to exonerating ODP1. The Claimant informed Mrs Hope of this, and she met with ODP2 to tell him to desist. Subsequent to that, however, ODP2 acted aggressively towards the Claimant on a shift. On the Claimant complaining of this, he was asked by Mrs Hope to put this in writing. He was then moved to the day shift; something Mrs Hope explained was to avoid the hostile situation with ODP2 but which the Claimant found to be humiliating and embarrassing. After raising concerns as to his treatment with Mrs Hope the Claimant went off sick from work with depression.

9. Thereafter, efforts were made to arrange for a phased return to work for the Claimant, albeit that was to be on day shifts with no target set for a return to night shift working.

10. Meanwhile, an investigation took place into the concerns raised regarding ODP1, but there was no interview with the Claimant. The conclusion of the investigation was that, although there was evidence of a change in ODP1's behaviour and difficulties waking him when on night shift, there was no direct evidence to support the allegations of anaesthetic drug misuse. The Claimant was notified of this outcome by a letter from Mrs Hope dated 21 March 2014 (handed to the Claimant on 27 March), which is when he realised he had not been called to be part of the investigation. The letter, which was also sent to other members of staff, ended "I will not tolerate unfounded gossip undermining [ODP1's] return to work". The Claimant interpreted this as a veiled warning to him.

11. On his returning to work after the Easter holiday weekend, it was apparent that the outcome of the investigation was generally known and being discussed. The Claimant felt he had been made to look like a liar and he wrote to Mrs Hope resigning his employment.

12. I have taken that summary from the ET's findings. It is, however, important to see how the ET characterised matters when reaching its conclusions on the protected disclosure claim:

> **"86. … In 2011, the Claimant, alone, made allegations to Mrs Hope about the behaviour of ODP1. Mrs Hope decided how she would deal with this, spoke to ODP1 and significantly, decided not to take any further action. In 2012, the Claimant made a protected disclosure, to Mrs Hope, in the form of more allegations about ODP1's behaviour. Mrs Hope, herself, witnessed ODP1 being very difficult to rouse and other members of staff, as well as the Claimant, complained about ODP1's behaviour. [Mrs] Hope met with the investigator, Miss Ford, and handed over the evidence that she had collected apart from the oral evidence provided by the Claimant. She had informed the Claimant that he might be called to give evidence to the investigator but she did not put the Claimant's name forward to that investigator. The Claimant then reported ODP2 for 'skewing the investigation' and Mrs Hope took ODP2 to task over this. The Claimant was then shouted at in front of witnesses by ODP2. The Claimant was initially told by his supervisor that his complaint would be dealt with informally but then the Claimant was asked to put his complaint about ODP2 in writing. The Claimant was then unilaterally removed from the night shift "for his own safety" although he had worked with ODP2 safely for some nights after the event. The Claimant's complaint about ODP2 was not then investigated and events continued to unfold …."**

The ET's Reasoning

13. The ET first considered whether the Claimant had made good his claim of having been constructively dismissed. Considering the evidence and its findings of fact the ET concluded:

> **"72. … by not investigating the Claimant's complaint under the Bullying and Harassment policy; moving him unilaterally without consultation from night shift to days; ignoring the difficulties he had arising from this sudden move; and, by continuing not to investigate and resolve his complaint of bullying and instead leaving the Claimant 'temporarily' working on day shift, that the Respondent conducted itself in a manner likely to destroy or serious damage the relationship of confidence and trust with the Claimant per *Mahmud*. Further, I find that this was a repudiatory breach going to the root of the contract."**

14. It further found that the letter of 21 March 2013 (sent to other members of staff) was the "last straw" as it confirmed that the Claimant had not been part of the investigation, was the only person removed from the night shift and made what could reasonably be taken to be a veiled warning against him (see paragraphs 76 to 78 of the ET's findings).

15. The ET then considered whether the Claimant resigned in response to the breach. It concluded he did (paragraph 73). Asking whether the Claimant had waited too long or otherwise affirmed his contract, the ET concluded he did not. He had been waiting to give evidence to the investigation into ODP1 and the failure to interview him and the warning about continued gossip (Mrs Hope's letter), amounted to a last straw. He then only worked one shift before resigning, and the fact he offered to work out his notice did not alter the position.

16. Having found the Claimant was thus constructively dismissed, the ET turned to the reason for that dismissal. The Respondent did not seek to rely on a potentially fair reason so the dismissal was inevitably unfair for section 98 **Employment Rights Act 1996** ("ERA") purposes. The Respondent did, however, resist the contention that the dismissal had been because of any protected disclosure.

17. To the extent that the Claimant had been subjected to a detriment because of his complaints about ODP2, the Respondent argued that was not because of any protected disclosure. Further, as the ET accepted, other staff had also made what would have amounted to protected disclosures relating to ODP1 in 2012 but did not lose their employment as a result.

18. For his part the Claimant contended that if he had not made the complaints about ODP1's behaviour in 2011 and 2012, none of the events leading to his resignation would have occurred.

19. Having reminded itself of its findings of fact (see paragraph 86, set out above) the ET concluded:

> **"87. When the facts are examined in this way I find that it was the making of the protected disclosure in 2012 that was at the very root of the events as they unfolded for the Claimant. In 2012, when the Claimant made the protected disclosure he was one of several complainants,**

> **but, significantly he was the only complainant who had also reported an incident in 2011. All other complaints had been made in 2012. The Claimant is the only member of staff, who complained about ODP1's behaviour, who was subsequently removed from the night shift. Given how the Claimant was treated and without credible explanation otherwise as to why events turned out as they did, I draw the conclusion, on the balance of probabilities, that Mrs Hope did not want the Claimant working among the staff on the night shift while the investigation was undertaken, nor did she want the Claimant to give his evidence to the investigation. I find, therefore, that the Claimant's protected disclosure was the reason or at least the principal reason for what occurred which led to the Claimant's resignation. The Claimant's evidence to the investigator all most certainly would have included all the detail of what he had witnessed in 2012 together with what he had witnessed in 2011 and it follows that this at least would have indicated that Mrs Hope had deemed it not necessary for an independent investigation at that time. Whether such an investigation was necessary given there was only one complaint is not for me to judge."**

On that basis the ET concluded it was the Claimant's making the protected disclosure in 2012 that was the reason or principal reason for his dismissal.

The Appeal

20. The Respondent appeals the finding that the dismissal was because of a protected disclosure. Accepting that the dismissal was unfair for section 98 **ERA** purposes, it challenges the conclusion that it was automatically unfair.

21. First, the Respondent contends the ET wrongly applied a "but for" test. Its conclusion was effectively founded upon the Claimant's submission that:

> **"… if he had not made the complaints about ODP1's behaviour in 2011 and in 2012 then none of the events leading to his resignation would have happened …" (as recited at paragraph 83)**

And, in this regard, the Respondent relies on the ET's conclusion at paragraph 87 that;

> **"… it was the making of the protected disclosure in 2012 that was at the very root of the events as they unfolded for the Claimant. …"**

The Respondent contends the ET wrongly concluded that, because the protected disclosure was the originating cause of events, that was sufficient to establish liability. That was impermissibly applying a "but for" test as opposed to asking whether the protected disclosure was the sole or principal reason in the mind of the employer at the time of the dismissal.

22. The Respondent's second basis of challenge complains, in the alternative, that the ET failed to properly identify the reason or principal reason for the dismissal or reached a conclusion that was perverse. In particular, the Respondent argues the conclusion is inconsistent with the ET's own finding - at the end of paragraph 87 - that Mrs Hope's real motivation was her concern that, if the Claimant participated in the investigation, he would reveal she had not properly investigated his concerns when first raised in 2011.

The Relevant Legal Principles

23. I start with the statute, which provides, at section 103A **Employment Rights Act 1996**, as follows:

> **"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."**

As Ms Balmer observes, it is important to note the different wording of section 103A and that used in the protection against detriment, afforded by section 47B **ERA**, which provides:

> **"(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."**

24. A shorthand way of describing the difference is to say that the detriment protection mirrors the language of discrimination protection whereas section 103A mirrors that of unfair dismissal. The distinction was made rather more fully by Elias LJ in **Fecitt and Ors v NHS Manchester** [2012] IRLR 64 CA. In considering the correct approach for section 47B purposes Elias LJ opined:

> **"43. … liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act. … *Igen* [that is a reference to the discrimination case on the burden of proof of *Igen Ltd v Wong* [2005] IRLR 258 CA] is not strictly applicable since it has an EU context. However, the reasoning which has informed the EU analysis is that unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions. In my judgment, that principle is equally applicable where the objective is to protect whistleblowers, particularly given the public interest in**

ensuring that they are not discouraged from coming forward to highlight potential wrongdoing."

25. Turning, then, to the protection against dismissal, he continued:

> **44. I accept … 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 that 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] IRLR 530 at paragraph 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 the risk of complicating rather than clarifying the legal concepts.'**
>
> **45. In my judgment, the better view is that s.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. If Parliament had wanted the test for the standard of proof in s.47B to be the same as for unfair dismissal, it could have used precisely the same language, but it did not do so."**

26. Moreover, when asking what was the reason or principal reason for a dismissal, that is a "reason why" question, which is not the same as a "but for" test, see as put by HHJ Peter Clark in the case of **Arriva London South Ltd v Nicolaou** [2012] ICR 510:

> **"28. The reason why question must not be confused with the "but for" test. … In short, whereas the but for test may be appropriate in "criterion" cases … it is the reason why question which prevails in circumstances where the employer's mental processes (conscious or subconscious) are in issue. The latter question arises in the present case."**

27. It can, furthermore, be the case that an employer may dismiss an employee in response to a protected disclosure but still (see **Martin v Devonshires Solicitors** [2011] ICR 352 EAT, at paragraph 22) say that the reason for the dismissal "*was not the complaint [the protected disclosure] as such but some feature of it which can properly be treated as separable*". **Martin v Devonshires** was a case involving a protected act for victimisation purposes, but the reasoning can be read across to a protected disclosure claim. The classic example of this distinction might be a dismissal that apparently takes place in relation to the making of a

protected disclosure but where it is not, in fact, that disclosure that is the reason for the dismissal but the manner in which it was made.

28. A subsequent division of the EAT, in **Woodhouse v West North West Homes (Leeds) Ltd** [2013] IRLR 773 per HHJ Hand QC, warned that ETs should not be too quick to see cases as fitting within the **Martin v Devonshires** template; that would generally be the exception rather than the rule, and it was right that appellate courts remain mindful that the assessment will be for the ET as the first-instance Tribunal (as acknowledged in **Martin)**.

29. Returning to the case-law on protected disclosures, it has been further recognised that there can be a distinction between the protected disclosure and the way in which the Respondent responds to it, see per Carnwath LJ, sitting in the EAT in **Price v Surrey County Council and Governing Body of Wood Street School** [2011] UKEAT/0450/10/SM:

> **"52. This approach in our view reflects a misconception of the statutory scheme. It is about the protection of "whistle-blowers". The purpose is to ensure that employees do not suffer simply because they have had the courage to speak up about problems affecting their workplace. Thus it is the "making" of the protected disclosure which is the focus of attention, and which must be the principal reason for the dismissal, or for the other detrimental action or inaction. In this case, by contrast, Mrs Price's forced resignation came about, not because of the making of her complaint as such, but because of the inadequacy in one important respect of the authorities' response to it."**

30. Where an ET has to identify whether a protected disclosure was the reason or principal reason in constructive dismissal case, it will be important to ensure that the correct focus is maintained. As was held in **Berriman v Delabole State Ltd** [1985] ICR 546 CA:

> **"… It is the employers' reasons for their conduct not the employee's reaction to that conduct which is important. …" (page 551B)**

31. In such a case, the ET will have identified the fundamental breaches of contract that caused the employee to resign in circumstances in which she was entitled to claim to have been constructively dismissed. Where no reason capable of being fair for section 98 purposes has

been established by the employer, that constructive dismissal will be unfair. Where, however, the reason remains in issue because there is a dispute as to whether it was such as to render the dismissal automatically unfair, the ET then has to ask what was the reason why the Respondent behaved in the way that gave rise to the fundamental breaches of contract? The Claimant's perception, although relevant to the issue why she left her employment (her acceptance of the repudiatory breach), does not answer that question.

Submissions

The Respondent's Case

32. Ms Balmer candidly acknowledged this was a case where the Respondent had not covered itself in glory; it had acted unfairly and had breached the Claimant's terms and conditions. She equally accepted that the appeal might be seen to be academic: the section 98 unfair dismissal finding was not contested and the compensation due might prove to be the same in either event. All that said, the case raised an important legal issue on the section 103A complaint: if the ET had applied the correct test, the result would have been different.

33. The Respondent relied on the distinction in approach between section 103A and section 47B **ERA**. The latter required only that the protected disclosure was a material factor. Section 103A required it to be the reason or principal reason (see **Fecitt**, CA).

34. The first question that arose was how the ET was to go about constructing the reason for the constructive dismissal. The answer was (see **Berriman**) all about identifying the employer's reason for its conduct. So the ET had to identify the acts that gave rise to the constructive dismissal, giving each such weight as was correct. The ET here seemed to have

focussed on two acts: (1) the failure to act on the Claimant's complaints and call him as a witness to the investigation; (2) moving the Claimant to the day shift.

35. When then turning to the reason for those acts, a "but for" test was not the right approach. A "but for" test effectively held that, if X had not happened, then Y would not have happened. That was not the same as "the reason why", which was not determined by the contextual fact of a protected disclosure having been made but required a careful examination of what was in the employer's mind. Moreover, if an employer gave an account of why it has so acted, other than the protected disclosure, the ET needed to determine whether that reason was false; only then should it go on to consider the alternative prohibited reason. And, if it so found the employer's reason to be false, it would need to explain why it had done so.

36. In this case, following from the way in which the Claimant had put his argument, the ET had wrongly applied a "but for" test. It had failed to make reference to the relevant case-law and had erred in seeing the context provided by its recitation of facts at paragraph 86 as determinative of the question before it (see paragraph 87).

37. Alternatively, if the ET had applied the "reason why" test, then it had failed to analyse Mrs Hope's reasons; it did not consider the other reasons that may have led her to act as she did and it needed to do so.

38. On the Respondent's moving the Claimant to the day shift, the Claimant's case was that that was a deliberate act to make his life difficult. The ET did not make that finding but arguably accepted the Respondent's arguments (see paragraph 69). If it had not accepted those arguments, it would have needed to explain (given the evidence adduced by the Respondent)

why. This was crucial; it went to the reason for one of the matters the ET found caused the Claimant to leave. The ET had needed to make clear findings as to what were the reasons in the Respondent's mind. It was not sufficient merely to refer to unfair process, lack of consultation. That might go to fairness but could not of itself support a finding that the reason for taking the Claimant off the night shift was the protected disclosure.

39. As for the apparent finding that Mrs Hope wanted to exclude the Claimant from the investigation, although the ET concluded that she wanted the Claimant off the night shift for the period of the investigation so he would play no part in it, the ET's own finding (at the end of paragraph 87) was the best indication of what really motivated Mrs Hope; that was that it was her concern that if he was interviewed, it would indicate she had not deemed it necessary to carry out an investigation in 2011. So the reason, or principal reason, was management face-saving. The protected disclosure provided the context but was not itself the reason.

The Claimant's Case

40. Mr Wyeth first referred me to paragraph 66 of **Fecitt** in the EAT, where a balance of probabilities test was applied, which, he observed, was the same approach as adopted by the ET in this case. He did not accept that the ET here had applied a "but for" test. He relied on the reasoning at paragraph 87, in particular where the ET found that, on a balance of probabilities, Mrs Hope did not want him working on the night shift.

41. He further made it clear that he had at all times relied on the 2011 complaint as a protected disclosure.

42. As for the Respondent's evidence before the ET, he took issue with how that had been represented on this appeal. It was, for instance, apparent that Mrs Hope's evidence to the ET as to her reason for moving the Claimant from the night shift could not be correct, as the dates did not tally with ODP1's suspension; there was good reason for the ET not to accept it. Moreover it made no sense, as the only instability that had arisen on the night shift arose from Mrs Hope requiring the Claimant to put in a written complaint about ODP2's bullying and harassment, which she then relied on to move the Claimant on to day shifts. In truth, there was no stabilising to do and indeed the Claimant had worked with ODP2 for a whole week after the bullying incident with no problem. He was only moved after he had put in the written complaint (as he had been told to do). The ET had effectively accepted this (see the finding at paragraph 68 where the ET observed that the Claimant had worked with ODP2 for ten days after the event he complained of) and asked: "If safety was an issue why was the Claimant not moved immediately?" Mrs Hope's real motivation was to keep the ODPs on side because the Respondent was operating with only one ODP on night shift, sometimes covering two operations, and that breached regulations.

The Respondent's Submissions in Reply

43. Ms Balmer noted the Respondent's position that a number of the points the Claimant had raised on the facts were not accepted.

Discussion and Conclusions

44. On the automatically unfair - protected disclosure - dismissal claim, the starting point was provided by the ET's conclusion on the question of dismissal (see paragraphs 72 and 76 to 78). The Claimant was constructively dismissed because he left as a result of the Respondent having conducted itself in a manner likely to destroy or seriously damage the relationship of

trust and confidence essential to the employment contract. It did that (on the ET's findings) by: (1) moving him, without consultation, from the night to the day shift; (2) ignoring the difficulties that had arisen from this sudden move; (3) continuing not to investigate and resolve his complaint of bullying; (4) leaving him "temporarily" working on the day shift; (5) not including the Claimant in the investigation into ODP1; and (6) sending the letter of 21 March 2013 (to the Claimant and other staff) with what might be seen as a veiled warning to him.

45. It was for the ET to decide, on the evidence, what weight to give to each of those factors. From its analysis at paragraph 87, it seems reasonable to adopt Ms Balmer's identification of the main factors found by the ET to be the move onto the day shift and the exclusion of the Claimant from the investigation. The question for the ET was: what was the reason, or principal reason, in the Respondent's mind for that conduct?

46. In carrying out the necessary assessment, the ET had to maintain focus on the reason for the dismissal, not simply the context; the question could not be answered by simply applying a "but for" analysis. Understandably the Claimant had put his case on that basis: from his point of view, the position was clear: but for his disclosures about ODP1, none of the other events would have occurred. Adopting that approach might indeed seem to accord with common sense; from his point of view the reason for his constructive dismissal was therefore his protected disclosures about ODP1. The difficulty is that this approach focuses on the context; which is not the same thing as actually identifying the reason for the Respondent's actions.

47. I do not, however, consider that the ET fell into this error. Setting out the way in which this Claimant put his case is not the same as adopting that approach. In my judgment, the ET kept in mind that it had to find the reason or principal reason operating on the Respondent's

mind; the fact that the Respondent would not have so conducted itself but for the protected disclosure was not enough. In this regard, although it would have been helpful if the ET had set out the relevant legal principles (as summarised above), I do not consider its failure to do so demonstrates it fell into the error of applying a "but for" test to the question it had to determine.

48. As the ET identified, the Respondent had not put forward a reason that was capable of being fair for statutory purposes. That meant that the dismissal was unfair under section 98 but did not mean it was thereby automatically unfair under section 103A. The Respondent had put forward some evidence by way of explanation for its conduct. On the move of the Claimant from the night shift, Mrs Hope had explained her concern about what she described as a volatile situation and the need for an experienced ODP to work on the night shift. As she was aware that ODP1 was likely to be suspended (thus, she was already going to be faced with the difficulty of finding alternative cover), she would not wish to move ODP2 as well. Although the ET accepted that evidence at face value, it is unclear whether it also allowed that it might provide a potential explanation for the move of the Claimant or whether it rejected that outright as a potential explanation (having found - see paragraph 68 - that the safety issue had not been made out). Given the importance of this factor (on the ET's findings), it was fundamental that it engaged with the Respondent's explanation for why it had acted as it had and made clear findings as to whether that explanation was accepted or rejected and, if rejected, why.

49. As for the exclusion of the Claimant from the investigation process, the ET's conclusion does seem to identify Mrs Hope's desire for a face-saving avoidance of disclosure of the 2011 complaint and how she had failed to deal with it (see the end of paragraph 87). If that was indeed the reason - whilst hardly laudable - I can see how that might be said to be other than the protected disclosure itself (albeit the protected disclosure would certainly have provided the

context). I cannot, however, be certain that is what the ET ultimately found or as to how that would then impact on its assessment of the reason or principal reason for the dismissal.

50. Although I appreciate this may be difficult for Mr Wyeth to understand, I am bound, therefore, to allow the appeal on the second of the points of challenge, namely that the ET failed to conduct the necessary critical analysis of the Respondent's reason for its conduct and failed to properly explain its findings and reasoning in that regard.

51. I turn to the question of disposal. The Respondent urges that the EAT should substitute its own conclusion for that of the ET. On my analysis of the ET's Judgment, however, more than one outcome is possible and it would be wrong for me to adopt that approach. The matter must therefore be remitted to the ET, and the only question which remains is whether it should be the same or a different ET.

52. The Respondent urges I remit the matter to a different ET: (1) that would give it the opportunity to be heard by a full, three-member, panel, which would be preferable (albeit not a statutory requirement) in this type of case; (2) there is always an element of prejudice to a party who has appealed from a decision; (3) time has passed and there is no particular advantage to remit to the same ET; and (4) both parties could approach the matter afresh, taking the findings on constructive dismissal as read: the new ET would then hear the evidence on the section 103A point afresh, and it might be open for the Claimant (depending on how things had been dealt with at earlier stages) to also rely on the 2011 disclosure as a protected disclosure.

53. From his point of view Mr Wyeth frankly acknowledges that his real concern is that the Remedy Hearing on the unfair dismissal case (due to be heard in July) goes ahead. Apart from

that, he does not have any particular view as to the order I should make. Ms Balmer has helpfully indicated that the Respondent also considers the Remedy Hearing should go ahead and recognises it might be helpful for that hearing to take place before anything else happens so the likely level of award is known. That, of course, is a matter for the parties and the ET, but I also see no reason why the Remedy Hearing should not take place.

54. I return, then, to the question of disposal. I have in mind the guidance laid down in **Sinclair Roche Temperley v Heard and Fellows** [2004] IRLR 763. In terms of the time that has passed, the position is neutral: no doubt this case would soon come back to mind, particularly as the Employment Judge will be conducting the Remedy Hearing. On the other hand another ET would quickly pick up the case, being bound by the findings that have already been made, and not disturbed, on constructive unfair dismissal. Whilst there may be a sense of prejudice for a party who has appealed a Judgment of an ET, I am satisfied that this Employment Judge would approach their task on any remission in an entirely professional way; that would cause me no concern. I do, however, see that there are advantages for both parties to be able to deal with the issues afresh on the basis of the findings made on the constructive dismissal claim. I also consider there is something in Ms Balmer's point that it is likely to be preferable for this matter to be heard by a full ET, with lay members. It appears that the question of the appropriateness of this case being heard by a Judge alone or a fully constituted ET might have been missed as it seems (reading from paragraphs 1 to 6 of the Judgment) that the section 103A claim got somewhat lost the proceedings.

55. I therefore direct that the matter should be remitted to a differently constituted ET with the recommendation, to the extent practicable, that it be an ET sitting with lay members.