Appeal No. UKEAT/0041/14/DXA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 November 2014 and 22 January 2015
Judgment handed down on 1 May 2015

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

MR R BARTON — APPELLANT

ROYAL BOROUGH OF GREENWICH — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

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SUMMARY

VICTIMISATION DISCRIMINATION - Whistleblowing

UNFAIR DISMISSAL - Automatically unfair reasons

The Claimant was an employee of the Respondent and had at one time been an elected shop steward and health and safety representative.

He received a concern from a work colleague that his line manager had emailed a large number of documents to her home ("hundreds") which he believed contained confidential or personal data about himself and her personal email was not part of a secure system nor encrypted. The Claimant considered that this was a significant breach of the **Data Protection Act 1998**.

He did not report the matter to his line managers but reported his concerns to the Information Commissioner's Office ("ICO"), and thereafter to his line managers. Having consulted the ICO website, he telephoned the advice line to clarify his understanding of the **Data Protection Act**. The information he provided was wholly inaccurate. The manager had emailed 11 documents to her home email which was password protected. None of the documents were regarded as inappropriate for her to have sent.

Having established that the Claimant had referred the matter to the ICO without first referring it to his line manager, the Claimant was informed that he should have referred the matter to his line managers before raising concerns with the ICO, and was specifically instructed not to contact the ICO or other external bodies in relation to the matter without the prior authority of his line manager. He was told that the Respondent would investigate the concerns promptly, as it did.

The Claimant took it upon himself to telephone the ICO to seek advice as to what he should do about the instruction. The Respondent regarded the Claimant's action in contacting the ICO despite having been instructed not to do so as a serious breach of duty and he was summarily dismissed. He was at the time subject to a final written warning in relation to an unrelated matter and also found to have committed gross misconduct by writing an inappropriate letter in the course of his duties, as a tenancy relations officer, to a member of the public.

The Claimant claimed that he had been unfairly dismissed for whistleblowing and relied on the original communication with the ICO and the subsequent telephone call as protected communications.

The Employment Tribunal found that the original referral was a qualifying disclosure but not a protected disclosure because the Employment Tribunal did not consider that the Claimant held the requisite reasonable belief that the information he disclosed tended to show that the Respondent had failed, or was failing, to comply with its obligations under the **Data Protection Act**. The subsequent telephone call was not a qualifying disclosure because there was no disclosure of information.

The Employment Tribunal considered that the two disclosures had to be considered separately. On appeal the Respondent sought to argue that the two disclosures could be aggregated so that together they constituted a protected disclosure. On appeal the Claimant sought to argue that the instruction not to contact the ICO was unlawful, contrary to public policy and a breach of Article 10 of the European Court of Human Rights (the illegality point).

The Employment Appeal Tribunal following **Bolton School v Evans** [2007] ICR 641 held that the telephone call could not be treated as part of the original referral and could not on its own

constitute a qualifying disclosure in the absence of disclosure of "information". The illegality point had not been argued below and the Employment Appeal Tribunal, following the authority of **Kumchyk v Derby City Council** [1978] ICR 1116, declined to entertain the point; but had it done so, it would have rejected the illegality point on the facts as found by the Employment Tribunal and because the Employment Tribunal was satisfied that there was a reasonable basis for the belief by the dismissing officers that the instruction not to contact the ICO was legitimate and reasonable, there were reasonable grounds for the belief that the Claimant had breached a legitimate and reasonable instruction.

Appeal dismissed.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Claimant from a decision of the Employment Tribunal sitting at London South (Employment Judge Williams QC, sitting with lay members Mrs B Currie and Dr R B Fernando). The Judgment is dated 18 September 2013 and was sent to the parties on 2 October 2013.

2. The Employment Tribunal dismissed the Claimant's claim for wrongful dismissal on withdrawal and dismissed further claims as follows: (1) automatic unfair dismissal pursuant to section 152 **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA") and section 12(3) of the **Employment Rights Act 1996** ("ERA") (this particular claim does not feature in the appeal, and I shall say little more about it); and (2) the Employment Tribunal also rejected whistleblowing claims under section 47B and section 103A of the **ERA 1996**. For the sake of completeness, I note that on 21 January 2013 the Employment Tribunal (Employment Judge Hall-Smith sitting alone) had rejected an application by the Claimant for reinstatement pending the hearing. By an order of 11 November 2014, the Employment Appeal Tribunal made a **Burns-Barke** request to the Employment Tribunal which provided a response dated 24 November. I wish to record my thanks to the Employment Tribunal for its prompt and comprehensive response.

3. Before I refer to the factual background and the Judgment of the Employment Tribunal, it is helpful to set out certain relevant statutory provisions to facilitate understanding the significance of the matters set out in the factual background.

4. Employees are protected from suffering any detriment or from dismissal by reason of making "protected disclosures". In this case there were two potential protected disclosures on the part of the Claimant:

(1) An email sent by the Claimant on 22 December 2011 to the Information Commissioner's Office ("ICO"): the email raised issues about alleged breaches of the **Data Protection Act 1998** ("DPA").

(2) A telephone call by the Claimant to the ICO made on 11 January 2012: the purpose of the telephone call was to seek advice about an instruction given to the Claimant by a manager, Mr John O'Malley, not to contact the ICO and that he should not contact the ICO or any other external body in relation to the matters complained of in the earlier email without prior authorisation from his line manager.

5. In order for a disclosure to be protected there is a two-stage test. Firstly, it must be established that the disclosure is a "qualifying" disclosure; and secondly, if the disclosure is a qualifying disclosure, it then must be found to be "protected". A disclosure in order to be a qualifying disclosure must be a disclosure of "facts" as opposed to the disclosure of an allegation without reference to specific facts; see the decision of Slade J in **Cavendish Munro Professional Management v Geduld** [2010] ICR 325 EAT. The law applicable to this case has been amended, and so the references that I make are to the law as it was at the material time. So far as concerns this case, section 43B(1) of the **ERA 1996** provides as follows:

> **(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following -**
>
> > **(a) that a criminal offence has been committed, is being committed or is likely to be committed,**
> >
> > **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
> >
> > **…"**

6. So far as is relevant to this case, a qualifying disclosure becomes protected if made in good faith and in the reasonable belief, so far as the facts of this case are concerned, that there has been a failure to comply with the **DPA** in accordance with section 43F(1)(b). Disclosure must be to a person prescribed by an order of the Secretary of State and the informant must reasonably believe that the relevant failure that he is reporting is within any description of matters in respect of which that person is so prescribed. So far as concerns this case, there is no issue that the email of 22 December 2011 was potentially a protected disclosure, but the Employment Tribunal concluded it was not because it was not satisfied that the Claimant "reasonably believed that the information disclosed … was substantially true".

7. So far as concerns this case, there is no issue that the ICO was a prescribed person and the subject matter of the email was within the remit of the ICO:

> **"43F. *Disclosure to prescribed person***
>
> **(1) A qualifying disclosure is made in accordance with this section if the worker -**
>
> **(a) makes the disclosure *in good faith* to a person prescribed by an order made by the Secretary of State for the purposes of this section, and**
>
> **(b) reasonably believes -**
>
> **(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and**
>
> **(ii) that the information disclosed, and any allegation contained in it, are substantially true."**

8. Employees are given protection from suffering detriment by reason of making protected disclosures. Section 47B of the **ERA** provides:

> ***"Protected disclosures***
>
> **(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."**

9. Employees are also protected from dismissal by reason of having made a protected disclosure by section 103A of the Act:

> ***"Protected disclosure***
>
> **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."**

10. As there is reference in the Judgment and in the parties' submissions to section 43J, which deals with contractual duties of confidentiality, I set it out:

> ***"Contractual duties of confidentiality***
>
> **(1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.**
>
> **(2) This section applies to any agreement between a worker and his employer (whether a worker's contract or not), including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract."**

11. For the sake of completeness I shall also set out section 58 of the **DPA 1998**:

> ***"Disclosure of information***
>
> **No enactment or rule of law prohibiting or restricting the disclosure of information shall preclude a person from furnishing the Commissioner or the Tribunal with any information necessary for the discharge of their functions under this Act [or the Freedom of Information Act 2000]."**

The Factual Background

12. I now turn to the relevant factual background, which I have taken largely from the decision of the Employment Tribunal. There is no need to address the Claimant's employment history in any detail, nor investigate his complaints of suffering dismissal on the grounds of trade union activities nor of exercising a right to accompany a fellow employee in grievance or disciplinary proceedings, because these have played no part in the appeal.

13. At the material time the Claimant was employed by the Respondent ("Greenwich") as a tenancy relations officer. He was dismissed summarily on 19 December 2012, but the terms of the dismissal were varied on appeal to dismissal on 12 weeks' notice. At the time of his dismissal the Claimant was an elected shop steward as well as a health and safety

representative. The Respondent had a whistleblowing policy for staff, and its general rules and procedures contained fairly standard terms in relation to misconduct and gross misconduct. In particular, employees were required to carry out their duties in a conscientious manner and were to not wilfully neglect their duties. All employees were required to comply with legitimate instructions, procedures and codes of conduct. Misconduct was stated to include:

> **"Misconduct of any kind which may have an adverse effect on the working of Royal Greenwich or subject it to unfavourable criticism."**

14. Misconduct also included failure to carry out reasonable duties or obey reasonable instructions. In the section dealing with gross misconduct the following example was given:

> **"Deliberate actions, omissions or negligence which cause or may cause loss, damage or injury to Royal Greenwich or its staff, operations, reputation or property …"**

15. On 8 June 2009 the Claimant was placed on a written warning for disrespectful behaviour towards a manager. His appeal was dismissed. The disciplinary hearing relating to his disrespectful behaviour had been conducted by Mr O'Malley, the head of Greenwich's community housing services. Mr O'Malley on that occasion imposed a written warning on the Claimant.

16. On 22 December 2011 the Claimant was contacted by Jen Oree, a manager in the homeless-persons unit, whom the Claimant had previously represented in a number of workplace matters. Mr Oree expressed concern that his line manager, Dorothy Thomas, had emailed a large number of documents to her home using the Respondent's facilities, and Mr Oree believed that these documents contained confidential or personal data about himself and that Ms Thomas' personal email was not part of a secure system. He said that he believed there were "hundreds of documents and emails attached". He was concerned that Ms Thomas' private email was not encrypted nor secure. The Claimant then consulted the ICO website and

telephoned the advice line to clarify his understanding of the **DPA**. He followed this with an email headed "Advice please" (Tribunal Decision, paragraph 33):

> **"I am a representative for my workplace colleague who has just provided evidence from discarded printed material that shows a manager who has been involved in disciplining him has sent large amounts of material to her home e-mail address.**
>
> **…**
>
> **We have an excellent Data Protection Officer, Graeme James at this council but he is away … and there is no other person I can contact at the council to discuss this with. … [This may not have been altogether correct because he was able immediately afterwards to send the email I refer to in the next paragraph.]**
>
> **There appears [sic] to be hundreds of e-mails and documents attached which are of a private nature sent to the manager's personal e-mail address, which is not part of a secure 'work at home' or encrypted system.**
>
> **The person I represent believes this may be a police matter, but I thought it best to get some general advice from you as well as reporting it to the senior management here at Greenwich Council. He would like to know if there is any urgent action that may be taken to retrieve this material and the [sic] prevent the ability of this person to access the material.**
>
> **An urgent response would be appreciated given the holiday period is about to begin. …"**

17. Later that day the Claimant emailed Mr O'Malley and Mr Corbett, Mr James' deputy, copying in Mr Oree, suggesting that Mr Oree had provided information:

> **"… which appears to show that Dorothy has sent personal information from her council email to her own personal email address. …**
>
> **It appears that many hundreds of documents have been sent without his permission to her home email address. There it may be accessed or read by anyone she chooses to allow to read or even forward it on further.**
>
> **Jen has asked the matter is dealt with as quickly as possible and on his behalf I have contacted the Office of the Data Commissioner to see if police involvement may be an option.**
>
> **They as you know are particularly concerned by the lax standards at many local authorities."**

18. The Claimant informed Mr O'Malley that the Council should deal with the matter with urgency and a caseworker from the ICO would contact him soon. He also reported that he had spoken to Mr Corbett as the person with the responsibility for data protection issues in Mr James' absence. Attached to the email appears to be an email to Mr O'Malley from Mr Oree. I do not know if this is the "evidence" referred to by the Claimant. This email suggests that the complaint was not only about a serious breach of the seventh principle of the **DPA** but was also a complaint about Dorothy Thomas:

> **"… I want the information recovered; deleting the files will not just do because ID theft is rife these days. …"**

19. He also refers to another complaint against Dorothy Thomas about the loss of a personal file (a physical file) referring to capability issues, that had occurred in August 2011. There is nothing in that email which in any way might constitute evidence showing that Ms Thomas had sent personal information from her Council email to her own personal email address. On 23 November Mr O'Malley sent an email to the Claimant and enquired if the Claimant had discussed his concerns with his line manager and sought authorisation before contacting the ICO. The Claimant responded by saying:

> **"Please do not be silly about this. I do not need to seek authorisation for anyone [sic] before speaking to the ICO for advice."**

20. He referred to the fact that he had contacted Mr Corbett and went on to say:

> **"At the moment there is no official complaint to the Commissioner but that will depend on what happens in the next few hours. At the moment there has been no union involvement in the matter. …"**

21. The Claimant said he had spoken to Mr Corbett who had told him he needed Mr O'Malley's agreement so he could access Ms Thomas' emails and confirm whether or not a potential breach had occurred. Mr O'Malley invited the Claimant to a meeting and made it clear that he should have sought advice from his line manager as a first step. Mr O'Malley made clear he would be investigating all aspects of the issue and would take whatever actions were appropriate:

> **"… Given that I am arranging for the matter to be investigated as soon as practicable, I am instructing you that you do not contact the Office of the Information Commissioner or any other external body in relation to this issue without prior authorisation from your line manager."**

22. As the Employment Tribunal pointed out, it was that last sentence that formed the basis of the subsequent disciplinary action against the Claimant. Despite this instruction, on 11

January 2012 the Claimant telephoned the ICO and sought advice as to what to do, and the ICO confirmed to him that Greenwich had no authority to tell him not to contact them. The Claimant informed Mr O'Malley and Mr Oree and copied in Mr Corbett and Mr James (the corporate information and compliance officer) who was responsible for investigating the alleged breach of the **DPA**.

23. On 9 January 2012 Mr James' investigations had revealed that Ms Thomas had emailed 11 documents in total to her own personal email account. None of these documents were described as confidential. Four related to annual leave, and one was from the post master about an email that was undeliverable. It does not appear that any of the documents were inappropriate to be sent. He expressed disappointment that the Claimant had felt the need to go directly to the ICO rather than await his return, because he and the Claimant had debated many other matters together over the years.

24. On 3 February 2012 Mr O'Malley set out his conclusions in an email to the Claimant, Mr Oree and other interested persons, in which he concluded there had not been a breach of the **DPA** because Ms Thomas had sent the limited documentation to her own email account, which was password protected and not accessed by others. On 11 January 2012 the Claimant emailed Mr O'Malley and Mr Oree and mentioned that he had spoken to the ICO for advice on what to do and that the ICO had confirmed that Greenwich had no authority to tell him not to contact them. Mr O'Malley on 12 January 2012 emailed Ms Mills of Human Resources forwarding the Claimant's email. Mr O'Malley wanted to discuss this because he had informed the Claimant not to contact the Information Commissioner, but he had nonetheless done so. It was suggested that Mr O'Malley had not contacted HR promptly. The Employment Tribunal at paragraph 42 said:

"In so far as an issue is raised over it, we accept that the e-mail is a genuine one and that Mr O'Malley did raise the matter with human Resources from as early as 12 January 2012. …"

Mr Barton wishes me to record that he had never questioned the authenticity of the email and had not alleged that it was a forgery.

25. On 6 February 2012 the Claimant represented Mr Oree at an appeal in relation to a stage 1 warning imposed by Ms Thomas under the capability procedure. Mr Oree was not a trade union member at the time, and so the Claimant accompanied him on the basis of Mr Oree's right to be accompanied. Mr O'Malley presented the management case because Ms Thomas was on sick leave. The appeal succeeded. The Claimant maintained that Mr O'Malley was resentful about this and initiated disciplinary proceedings in revenge.

26. At a meeting on 28 February 2012 the Employment Tribunal was satisfied that the Claimant was told he would be subject to a disciplinary investigation in relation to his failure to comply with the direction not to contact the ICO. The Claimant asserted that he was told there would be a disciplinary investigation as to whether he was disrespectful to Mr O'Malley at the meeting on 6 February 2012; again, this is an allegation rejected by the Employment Tribunal. The complaint against the Claimant was investigated by Ms Rennie (I am not certain of what her position was at Greenwich). She concluded that the Claimant had a case to answer for breaches of the Respondent's disciplinary rules. She considered there were four ways in which Greenwich's disciplinary rules appeared to have been broken: Firstly, the Claimant had not carried out his duties in a conscientious manner and had wilfully neglected his duties so as not to cause any waste of time or productivity: she considered that the Claimant was given a reasonable explanation by Mr Corbett that the matter would be dealt with as soon as practicable but he had nevertheless contacted the ICO. She also considered that the Claimant had not

complied with a legitimate instruction; she considered it had been a reasonable request in the circumstances for the Claimant not to contact the ICO, given that senior management had undertaken to deal with the matter as soon as was practically possible and that no further breaches could occur in the interim. She also noted the Claimant had not used the Council's own internal whistleblowing policy and had admitted in his email of 11 January that he had breached Mr O'Malley's instruction not to contact the ICO. Finally, Ms Rennie considered that the Claimant had undertaken an act that could, among other things, bring Greenwich into disrepute and that the evidence pointed to the Claimant escalating matters to outside bodies with unreasonable haste in a way that could have caused reputational damage to the Respondent.

27. In early April 2012 in the course of his duties as a tenancy relations officer the Claimant responded to a complaint of homophobic behaviour received from a team leader in the registrar's department, Brendan Lanegan, in relation to a boundary dispute with his neighbour, Mr Harrington. The Claimant wrote a letter to Mr Harrington that was received by Mr Harrington's son, who lodged a formal complaint. When Mr O'Malley saw the letter, it caused him genuine and serious concerns. The Claimant in due course accepted that the letter was unbalanced and wrote to Mr Harrington to apologise. However, the sending of this letter led to a further disciplinary investigation.

28. The Claimant gave an explanation for the letter (which, he conceded, should not have been sent out in the terms in which it was written) to excuse himself, but the explanation was rejected by the Respondent's project director - Mr Baigent - and other decision-makers. On 14 May 2012 the Claimant was suspended on full pay, pending an investigation. The matter was investigated by the head of income maximisation - Mr McAuley - and Mr Baigent conducted a

disciplinary hearing on 17 December 2012. Mr Baigent was assisted by Ms Armstrong of HR. Mr McAuley found a charge of bullying, with which I have not been concerned, not proved but found the other complaints proven, including in particular having contacted the ICO contrary to an instruction not to do so. Mr Baigent concluded that as the Claimant was already subject to a final written warning his conduct constituted gross misconduct, and he was summarily dismissed on 19 December 2012. I have already mentioned that this was varied on appeal to dismissal on 12 weeks' notice.

The Decision of The Employment Tribunal

29. The Employment Tribunal set out the facts as I have briefly summarised them and then directed itself as to the law. The Employment Tribunal directed itself in relation to unfair dismissal by reference to section 98(4) of the **ERA 1996**. It reminded itself of the need to consider the range of reasonable responses as set out in **British Home Stores Ltd v Burchell** [1980] ICR 303 and the more recent decision of the Court of Appeal in **Turner v East Midlands Trains** [2012] EWCA Civ 1470. The Employment Tribunal noted at paragraph 88:

> **"Where the misconduct relied upon by the employer involves failure to comply with a manager's instruction, the Tribunal's assessment usually includes consideration of whether the instruction in question was legitimate, whether it was a reasonable instruction and, if so, the reasonableness of the employee's refusal in the circumstances."**

30. It also reminded itself it was inappropriate in an unfair-dismissal claim for the Employment Tribunal to look behind an earlier final written warning providing that warning had been issued in good faith and there were *prima facie* grounds to support it. The Employment Tribunal then went on to consider the claims under section 152(1) **TULRCA** and section 12(3) **ERA 1996**, to which is it not necessary to refer further. The Employment Tribunal then considered the law relating to "whistleblowing detriment and dismissal". I have already referred to the relevant statutory provisions. The Employment Tribunal reminded itself

of the decision in **Bolton School v Evans** [2007] ICR 641 in which it was emphasised that where an employee had made a protected disclosure, a Tribunal should examine with care any argument on the part of the employer that the dismissal was not because of the protected disclosure but because of a separable act related to it. The Employment Tribunal also reminded itself of the decision of Slade J in **Geduld**, to which I have already referred. There has been no challenge to the Employment Tribunal's self-direction.

The Conclusions of the Employment Tribunal

31. The Employment Tribunal rejected any link between the disciplining of the Claimant and his trade union activities or representing a colleague at a disciplinary hearing. The Employment Tribunal then turned to the question as to whether the communications between the Claimant and the ICO constituted protected disclosures. In considering whether the two communications constituted qualifying disclosures, the Employment Tribunal rejected a submission by the Claimant that it should consider the combined nature and effect of the email and subsequent telephone conversation. The Employment Tribunal considered that the two communications had to be approached individually for the purposes of assessing whether the statutory criteria for protection were met. The Employment Tribunal considered that the email of 22 December 2011 did convey a disclosure of "information", although it conveyed allegations and assertions as well. There is no challenge to this finding. The Employment Tribunal then went on to consider whether the information contained in that email, in the reasonable belief of the Claimant, tended to show that the Respondent had failed or was failing to comply with its obligations under the **DPA**. The Employment Tribunal accepted that is what the Claimant believed at the time, but whether the belief was a reasonable one in the circumstances gave the Employment Tribunal more pause for thought. The Employment Tribunal had this to say:

> **"122. The Claimant's belief was based on what Mr Oree had told him. Apparently Mr Oree showed him one example of the emails Ms Thomas had sent to her personal account. However, the belief that there were "hundreds" of documents involved stemmed from what he**

had been told by Mr Oree. The Claimant did not seek to verify this at the time before contacting the ICO. On the account that Mr Corbett gave during Ms Rennie's investigation … which we have no reason to doubt, the Claimant was made aware on the day that there was no immediate urgency and that the matter could await Mr James' return.

123. However, balanced against that the Claimant had a long association with Mr Oree acting as his representative and on the face of it he had no reason to doubt Mr Oree's complaint, who presented to him as very concerned about the matter. Furthermore section 43B(1) requires that the information "tends to show" the failure to comply with the legal obligation in question, not that the worker must reasonably belief [sic] that the information is true and/or proves that a breach has occurred.

124. Accordingly, we consider, that the Claimant's belief was a reasonable one in the circumstances, albeit the point is quite finely balanced."

32. Accordingly the Employment Tribunal concluded that the email of 22 December 2011 was a qualifying disclosure.

33. The Employment Tribunal then proceeded to consider the telephone call of 11 January 2012. The Employment Tribunal then went on to accept that the Claimant "genuinely believed" (something of a tautology) that the Respondent did not have the power to issue the instruction that Mr O'Malley had given him. The Employment Tribunal also accepted that the telephone call on 11 January 2012 conveyed the information that he had been given this instruction (in the context of asking for advice as to its legality).

"128. However, on balance, we do not consider that this was a reasonable belief on the part of the Claimant. In response to questions from the Tribunal, the Claimant told us that he had not taken any steps to evaluate the legality of this instruction - for example by taking advice from his union or from employment law sources - before he called the ICO on 12 January 2012. When he did call them, there was no immediate urgency to the matter. Furthermore, the Claimant did not suggest that anyone had told him or suggested to him that the instruction was a breach of his contract; it was simply that he felt this must be the case and so he wanted to check his suspicion with the ICO. He said that he called them for advice on this point, but did not ask to speak to someone with legal expertise in employment matters when he did so."

34. The Employment Tribunal did not therefore consider that the telephone communication on 11 January 2012 was a qualifying disclosure. The Employment Tribunal, however, in case a different view were to be taken on that point, went on to address the question of whether there was a protected disclosure in respect of both of the Claimant's communications with the ICO. The Employment Tribunal at paragraph 130 concluded that the telephone communication of 11

January would fall at the first hurdle (if it were a qualifying disclosure) since the Information Commissioner was only a prescribed person in respect of the matters specified in the schedule to the prescribed persons' order; this related to **DPA** compliance and not to employment law advice on whether the enquirer's contract of employment had been breached.

35. In relation to the email of 22 December 2011 the Employment Tribunal accepted that it raised an issue relating to **DPA** compliance so that the ICO was a prescribed person for the purpose of that communication. The Employment Tribunal accepted that this had been made in good faith so the criteria contained in section 43F(1) were satisfied. The Employment Tribunal then turned to consider section 43F(1)(b) and considered firstly whether the Claimant reasonably believed the breach he alleged fell within the ICO's prescribed role. The Employment Tribunal accepted that he did given that the focus of the concern was upon **DPA** compliance.

36. The Employment Tribunal then went on to consider whether the Claimant reasonably believed "that the information disclosed and any allegation contained within it are substantially true". The Employment Tribunal continued:

> **"133. … This entails a higher threshold than the test of belief that we referred to when considering whether there was a qualifying disclosure. Here a reasonable belief in the truth of what is said - both in terms of information conveyed and allegations made - is required. Given the circumstances that we have already highlighted … we do not consider that the Claimant's belief was a reasonable one in all the circumstances; put shortly, he "jumped the gun" in circumstances where he knew and/or could fairly easily have found out there was no real urgency and that there was time to seek some verification of the allegation made by Mr Oree first."**

37. The Employment Tribunal concluded at paragraph 134:

> **"Accordingly, we do not consider that either communication with the ICO amounted to a protected disclosure and thus the "whistleblowing" claims fail and, strictly, the fourth issue we identified does not arise."**

38. The Employment Tribunal then addressed two further matters for the sake of completeness. Had it been necessary to decide the causation point, it would have found that the Claimant was disciplined for breaching Mr O'Malley's instruction and not in whole or in part because of his original contact with the ICO in December 2011. The Respondent took no disciplinary steps against him in relation to that earlier action, although its officers were aware of the communication and the date when it was sent. The Employment Tribunal accepted that Mr O'Malley's reason for triggering the formal investigation was specifically and solely because the Claimant had breached the instruction that he had given to him; the apparent insubordination that this entailed and the potential consequences for the Council at the time when they were addressing the matter internally.

39. The Employment Tribunal also accepted the evidence of Mr Baigent (who had made the decision to dismiss the Claimant) and of Mr Matthew Norwell (director of community safety and environment) who had heard the Claimant's appeal, that their decisions were not influenced by the Claimant's original contact with the ICO but were based upon the Claimant's insubordination in failing to follow Mr O'Malley's instruction.

40. The Employment Tribunal then turned to consider section 43J(1) of the **ERA**, which I have set out earlier in this Judgment. The Employment Tribunal did not decide whether this was relevant in determining if the instruction was or was not a legitimate one and whether the provision had any application outside of a specific agreement between employer and employee. The Employment Tribunal concluded the point did not require determination, because there was no protected disclosure. The Employment Tribunal also emphasised that Mr O'Malley's instruction was not an absolute prohibition against contacting the ICO. It was a requirement that he seek the authority of his line manager first, in the context that the Council was intending

to address the matter on Mr James' return. The Employment Tribunal concluded that Mr Baigent and Mr Norwell had reasonable grounds for finding that the Claimant had breached a legitimate and reasonable instruction in circumstances where he had no reasonable reason for doing so (paragraph 141).

41. In relation to the Harrington letter, at paragraph 142 the Employment Tribunal concluded that the decision-makers were entitled to reject the Claimant's explanation as to why he produced the letter in the terms he did as "lacking credibility" and concluded in all the circumstances there were reasonable grounds for concluding the Claimant acted in a way that brought the Council into disrepute and seriously damaged the trust and confidence relationship.

42. The Employment Tribunal rejected the contentions that the final written warning had been imposed in bad faith or was manifestly inappropriate and accepted that the warning was live at the material time. Although it did not have to decide the point, it considered that the ICO allegation did involve similar misconduct as to the 2008 incidents. The crux of both the ICO allegation and the 2008 incidents involved the Claimant showing a lack of respect for the authority of the Respondent's managers and insubordinate behaviour on his part. The Employment Tribunal did not consider that the Harrington letter involved similar misconduct, but the fact that one of the two incidents of misconduct now found proven was similar to the conduct that led to the final written warning provided a sufficient basis for the Respondent's decision-makers to take it into account when deciding upon penalty.

43. The Employment Tribunal then at paragraph 147 concluded that the decision to dismiss the Claimant was within the band of reasonable responses taking into account: (1) there was an extant final written warning and one of the two further incidents involved similar misconduct;

(2) the Claimant had committed two further incidents of misconduct within a few months of one another; (3) the Claimant had shown no remorse in respect of the ICO allegation, had refused to participate in the investigation and was critical of his employer's actions; (4) the Claimant showed an attitude of insubordination from the outset in response to Mr O'Malley's instruction (his initial response of, "Please do not be silly about this"), the letter to Mr Harrington was highly inappropriate from start to finish and characterised by Mr Baigent as "an appalling letter", with which the Employment Tribunal agreed; and (6) the Claimant only gave a limited apology to Mr Harrington and during the investigation and disciplinary and appeal process maintained an incredible explanation as to how he had come to email the text he had sent and had sought to downplay the significance and extent of his culpability in relation to the letter and the extent to which it was inappropriate. Both of the incidents of misconduct had the potential to occasion significant reputational damage to the Respondent.

44. The Employment Tribunal took into account the length of the Claimant's service and the fact that the Harrington letter was the first time that such a problem had arisen with his correspondence. The Employment Tribunal accepted the Claimant worked long hours and was under a lot of pressure in his job. However, the Employment Tribunal also accepted that both Mr Baigent and Mr Norwell took account of those factors when arriving at their decisions. Accordingly, it concluded that the decision to dismiss the Claimant was a fair one in all the circumstances.

45. On 20 January 2014 HHJ Eady QC referred the Notice of Appeal to a Full Hearing.

46. When the matter came first before me on 11 November 2014, I gave permission for the Notice of Appeal to be amended to raise further issues in relation to the lawfulness or otherwise

of the instruction not to contact the ICO. I also referred the matter to the Employment Tribunal under the **Burns-Barke** procedure so that the Employment Tribunal could explain the extent to which arguments had been deployed in the Employment Tribunal as to the effect of the perceived unlawfulness of the instruction not to contact the ICO without the consent of the Claimant's line manager.

47. I refer to the Employment Tribunal's response. The Employment Tribunal confirmed that Mr Pullen, the consultant who had appeared for the Claimant before the Employment Tribunal and appeared before me also, had suggested that the telephone contact was itself a qualifying disclosure as it contained the disclosure of information that, in the Claimant's reasonable belief, tended to show that the Respondent had acted in breach of his contract of employment in issuing the instruction. Secondly, the legitimacy of the instruction was raised in Mr Pullen's closing submissions by reference to section 43J **ERA** (which of course only rendered void provisions in an *agreement* that precluded the employee from making a protected disclosure). It was submitted that the instruction should be equated with an agreement that would be held to be void, in so far as it precluded the Claimant from making a protected disclosure. In relation to the case of ordinary unfair dismissal the Claimant had submitted that the instruction was not legitimate and neither was it reasonable, submissions that had been rejected by the Employment Tribunal.

48. The Employment Tribunal specifically state that contacting the ICO in breach of Mr O'Malley's instruction was capable as a matter of law of amounting to a conduct reason for the dismissal. The only material relied on by the Claimant in support of the submission that the instruction was unlawful, as opposed to unreasonable, was the analogy Mr Pullen sought to draw with the position that would apply if there was an agreement pursuant to section 43J of the

Act. No other authority was cited in the respect of the suggestion the instruction amounted to a breach of contract.

The Grounds of Appeal (as set out in the Amended Notice of Appeal) and Submissions in Support

Protected-Disclosure Issue

49. It is submitted that the Employment Tribunal was wrong or misdirected itself when it found there was no protected disclosure because the Claimant lacked a reasonable belief in the truth of the matters alleged in the email of 22 December 2011. This seems on first reading to be very much a question of fact. This ground of appeal runs to some 5 pages, with 9 paragraphs and 11 sub-paragraphs. The Claimant sets out in some detail various factual matters, and I draw attention to paragraph 6:

> **"All of the facts and matters of evidence set out above were ones to which the tribunal should have had regard when considering whether the appellant reasonably believed that the information disclosed, and any allegation contained in it, was substantially true. Although all these matters formed part of the evidence before the tribunal, it failed to refer to them when concluding that the appellant did not have a reasonable belief in the substantial truth of the allegations contained in the disclosure to the OIC [sic]."**

50. Mr Pullen would have addressed me in detail on all of that had he been permitted to do so and in effect was asking me to find the Employment Tribunal wrong because of the strength, or perceived strength, of the evidence, in particular in relation to past failures on the part of the Respondent to comply with the provisions of the **DPA**. There had been previous lapses in relation to information technology protection and a general lack of care about confidential material.

Whistleblowing Detriment

51. It was submitted that the Employment Tribunal should have found that the disciplining of the Claimant for breach of instructions not to re-contact the ICO amounted to a detriment. The

Employment Tribunal should have found that the detriment (dismissal) related to the original disclosure to the ICO, not the telephone call. It was argued there was some form of associative connection between the email of 22 December 2011 and the telephone call of 11 January 2012.

Automatic Unfair Dismissal: Whistleblowing

52. It was submitted that the Employment Tribunal erred in law in not finding that the Claimant had been automatically unfairly dismissed by reason of whistleblowing by virtue of section 103A **ERA 1996**.

53. The concession made before the Employment Tribunal by the Claimant that if an employee were dismissed for two conduct reasons that weighed equally with the employer and only one of the two amounted to a protected disclosure, then the statutory criterion that the reason or principal reason for the dismissal was that the employee made a protected disclosure would not be met. It was submitted that, to the extent that this was a concession made on the Claimant's behalf that his dismissal-related whistleblowing claim of unfair dismissal must fail, if he could not show that the principal reason for his dismissal related to whistleblowing, then the concession was incorrectly given and the Claimant seeks to withdraw it. I do not recall this point being elaborated upon in Mr Pullen's oral submissions. It was then submitted that the burden was on the Respondent to show the reason for the Claimant's dismissal was conduct, rather than having made a protected disclosure.

Ordinary Unfair Dismissal

54. The final ground is that the Employment Tribunal erred in law in finding that the Claimant was fairly dismissed in accordance with the ordinary unfair dismissal provisions of the **ERA 1996**. This ground has been the subject of significant amendment and seeks to

demonstrate that the instruction to the Claimant not to contact the ICO was unlawful as fettering his right to do so. Reference was made to sections 51 and 58 of the **DPA** and to section 43J of the **ERA 1996** in support of the submission that the Claimant had an unfettered right to contact the ICO that could not be restricted.

55. The Claimant drew attention to the functions of the Commissioner. Reference was made specifically to section 51(1) (duty of the Commissioner to promote the observance of the requirements of the Act by data controllers). Reference is also made to section 51(2) (the duty of the Commissioner to arrange for dissemination of information as to the operation of the Act and good practice and other matters within the scope of the Commissioner's functions). It is provided that the Commissioner "may give advice to any person as to any of those matters". Reference was also made to section 51(9), which defined "good practice". Reference was also made to section 58, which I have set out earlier in this Judgment.

56. It was submitted that the Employment Tribunal was wrong to have regarded the instruction to the Claimant not to contact the ICO as a proper instruction. It was submitted that it was unfair to rely upon the earlier final written warning even though not imposed in bad faith nor manifestly inappropriate because the misconduct was not similar and the misconduct related to the Harrington letter was not similar misconduct. In his Skeleton Argument and oral submissions Mr Pullen relied upon the provisions of section 51 and section 58 of the **DPA** as well as section 43J of the **ERA** as giving him a right to contact the ICO in order to seek advice relating to data protection compliance matters. He submitted that the Respondent could not lawfully fetter that right in the way that it did by instructing him not to contact the ICO without obtaining prior authorisation and then disciplining and dismissing him when he ignored that instruction. The instruction should not have been regarded as a proper instruction. So long as

disclosures are to an appropriate person or body, they are protected, notwithstanding the motive of the Claimant; reference was made to the decision of Scott J in **Re A Company's Application** [1989] ICR 449.

57. It was also submitted by reference to **Morrish v Henly's (Folkestone) Ltd** [1973] ICR 482 that an employer cannot reasonably instruct an employee to perform an illegal act; it was submitted that the decision is authority for the proposition that if an employer's instruction offends the general public interest, the Court will not allow the fact that the employee disobeys such an instruction to constitute a potentially fair reason for dismissal. Reference was made by Mr Pullen to the decision of the European Court of Human Rights ("ECHR") in **Matuz v Hungary** [2014] ECHR 112, in which the ECHR held that a journalist employed by Hungarian state television had his freedom of expression, as guaranteed by Article 10 of the **European Convention on Human Rights and Fundamental Freedoms** ("ECHRFF"), unjustifiably interfered with when dismissed for breaching the confidentiality restrictions in his contract of employment. Mr Pullen submitted that as a public employer the Respondent was under a duty to ensure that the reason for dismissal was not one that unjustifiably interfered with the Claimant's rights and freedoms under the ECHR including the right to freedom of expression under Article 10.

58. It was then submitted that under section 3 of the **Human Rights Act 1998** ("HRA") domestic Courts and Tribunals were required so far as possible to read and give effect to UK legislation in a way that was compatible with Convention Rights. Reference was made to the decision in **Pay v Lancashire Probation Service** [2004] ICR 187.

59. Mr Pullen submitted that, although an Employment Tribunal had no jurisdiction to consider a claim brought directly under the **HRA 1998**, any potential breach of a Convention Right was relevant in considering both the reason for dismissal and the fairness of the dismissal; so, if an employee were penalised for exercising the right to freedom of expression, the fact that the Respondent is a public authority with a duty to ensure that freedom would be relevant in assessing whether there had been a potentially fair reason for dismissal and if so, whether the dismissal was fair or unfair; reference was made to **Hill v Governing Body of Great Tey Primary School** [2013] IRLR 274. Mr Pullen submitted in the circumstances the instruction given to the Claimant was illegitimate and an impermissible restriction on the Claimant's right to contact the ICO about genuine and legitimate issues of concern. The Employment Tribunal should therefore have found that the instruction was unlawful rather than finding that there was a reasonable basis for the Respondent's decision-makers to conclude the instruction was a lawful and reasonable instruction. The Employment Tribunal erred in misdirecting itself, misapplied the law to the relevant facts, or the decision was perverse in being one that no reasonable Tribunal could have arrived at.

Reasonableness of Dismissal for Failing to Follow an Unlawful Instruction

60. Mr Pullen submitted that the Claimant was dismissed by reason of his conduct in telephoning the ICO and also in relation to the Harrington letter. The Employment Tribunal in its Decision did not address the question of which of the two issues was the principal reason for the dismissal.

61. Mr Pullen again relied upon what he characterised as the "unlawful" nature of the instruction given to the Claimant and upon the fact that the Respondent maintains that the

misconduct in relation to the Harrington letter was more significant than that in contacting the ICO.

The Respondent's Response and Submissions

The Protected-Disclosure Issue

62. Ms Omeri submitted that the Employment Tribunal was entitled to conclude on the facts that the Claimant had not reasonably believed that the information disclosed, and any allegation contained within it, was substantially true; see paragraph 132. It was submitted that the test for determining reasonable belief was partly subjective but also partly objective because of the use of the term "reasonably"; see **Babula v Waltham Forest College** [2007] ICR 1026.

Subjection to Detriment

63. Ms Omeri submitted that the Employment Tribunal was entitled to find that the telephone conversation was a separate issue to the email of 22 November and that neither amounted to a protected disclosure. There was no concept of "associative connection"; reference was made to **Bolton School v Evans**. While it was always the case that an Employment Tribunal should scrutinise with care an employer's argument that the dismissal was not because of a protected disclosure but a separate act related with it, that does not mean that the act of disclosure should comprehend the entire course of the Claimant's conduct.

Automatic Unfair Dismissal: Whistleblowing

64. Ms Omeri submitted that the Claimant appears to have accepted his dismissal was for conduct (both in relation to the telephone call and the Harrington letter). The Claimant's telephone call on 11 January was to seek advice not to provide information and was not in relation to the original advice he had given. As neither the telephone call of 11 January nor the

email of 22 December was a protected disclosure, there could not be automatically unfair dismissal.

65. Under sections 98 and 103A of the **ERA** a Respondent only needs to show that dismissal is for misconduct as being the reason or principal reason for dismissal. There is no need to identify a particular act if more than one. Ms Omeri submitted that to construe section 98 as requiring the "principal reason" for dismissal to connote a particular act of misconduct rather than misconduct simpliciter would produce absurd results and would result in employers dismissing for a number of equally serious instances of misconduct having "artificially" to suggest that one such act is more serious than another for fear of falling foul of section 98(1)(a). This would not be conducive to good and efficient industrial relations.

66. Ms Omeri also submitted that if the Employment Tribunal concluded that the Respondent's reason for dismissal was not accepted, the Claimant must have been dismissed for the reason put forward by the Claimant. Although the burden of proving that the principal reason for dismissal was conduct falls upon an employer, where an employee positively asserts a different and inadmissible reason for his dismissal he must produce some evidence to support that case. Having heard the evidence on both sides relating to the reason for dismissal, it will be for the Tribunal to consider the evidence as a whole and make findings of primary fact - see **Kuzel v Roche Products Ltd** [2008] ICR 799 - a submission that I accept.

Unfair Dismissal/Unlawful Instruction

67. If the Claimant was entitled to contact the ICO, it would only be to provide information not to seek advice. The Employment Tribunal found there was a reasonable basis for the Respondent believing Mr O'Malley's instruction to be legitimate. In essence, therefore, the

Claimant's challenge is on the grounds of perversity. No fetter was imposed on the Claimant's right to contact the ICO in relation to the carrying-out of his statutory duties. The provision of employment advice was outside those duties.

68. In relation to the new matters raised in relation to the unlawfulness of the instruction the Claimant had clearly not argued human-rights or public-policy points before the Employment Tribunal. His argument had been limited to a submission based upon an analogy with section 43J of the **ERA**, which made void any provision in an agreement insofar as it purports to prevent the worker from making a protected disclosure. No public-policy argument was advanced. The fact that the point now raised by the Claimant may be regarded as one of some importance is not relevant. This point was not taken below; so, it cannot be raised now. In this regard the Respondent relies upon the well-known line of authorities starting with **Kumchyk v Derby City Council** [1978] ICR 1116 to the effect that in almost all cases it will be unjust to allow a point to be raised on appeal that was not argued in the Employment Tribunal. The question of whether or not public policy or the effect of Article 10 would invalidate the instruction not to contact the ICO would necessarily require further factual enquiry, especially into issues of proportionality in relation to Article 10 and as to the ambit of duties of fidelity, should be taken into account. These factual matters were not explored before the Employment Tribunal.

69. Section 58 of the **DPA** was not relevant, as an instruction is not an enactment or rule of law. Neither is section 43J of the **ERA** of relevance, because what was in issue in this case was an instruction given by an employer rather than any provision in an agreement.

70. The Employment Tribunal at paragraphs 138 to 139 had expressly found the instruction to be reasonable and within the range of reasonable responses. As the Employment Tribunal rejected the only argument that it was an unlawful instruction by reason of section 43J of the **ERA**, it follows the Employment Tribunal must have been satisfied that the instruction was lawful. Any challenge to the Employment Tribunal's conclusions as to the reasonableness of the Respondent's conclusion that Mr O'Malley's instruction was legitimate and reasonable can only be mounted on the grounds of perversity, and the Claimant is unable to raise a perversity challenge.

71. The instruction was not unlawful in any event; the Claimant did not have an unfettered right to contact the ICO. His right to contact the ICO was to make contact in order to assist the ICO in carrying out his statutory duties. The instruction by Mr O'Malley did not preclude the Claimant from furnishing the ICO with any necessary information. The Claimant had already furnished the ICO with all the information he possessed in relation to Mr Oree's allegations in his email of 22 December. It was clear from the context of his complaint to Mr O'Malley that he had no further information to disclose either to the ICO or to the Respondent. It was wholly appropriate for the Employment Tribunal to consider whether the instruction was reasonable, and the Employment Tribunal (paragraphs 138 and 139 of the Reasons) clearly accept that this was the case.

72. Even if contrary to the Respondent's principal point that the instruction was not unlawful, it was open to the Employment Tribunal to find that the Respondent's belief that the instruction was legitimate and reasonable and fell within the range of reasonable responses. Ms Omeri submitted that this is akin to the, not unknown, situation where an Employment Tribunal finds that a Claimant (dismissed because the employer reasonably believed that he had committed an

offence) was wrongfully dismissed because he did not in fact commit the disciplinary offence alleged against him, but that he was not unfairly dismissed because it was reasonable for the employer to have believed that he had committed the offence in question.

73. Ms Omeri relied upon the decision in **Farrant v Woodroffe School** [1998] ICR 184 in support of the proposition that a genuine, even if mistaken, belief on the part of the employer as to the conduct of the employee relied upon will be sufficient to discharge the burden of establishing this potentially fair reason for dismissal (misconduct). The question of whether the instruction was lawful is of course critical in cases of wrongful dismissal but is not a decisive point when considering reasonableness of a dismissal under section 98(4) in a case of unfair dismissal. The conclusions of the Employment Tribunal at paragraphs 138 and 139 could only be overturned on the grounds of perversity, but the amended Notice of Appeal, it was submitted, disclosed no challenge to the findings or conclusions in those paragraphs.

74. No explanation has been given as to why the "new" points were not raised before the Employment Tribunal; if it be the case that they had simply not been thought of, that would not be a good reason for permitting them to be raised on appeal (see **Secretary of State for Health v Rance** [2007] IRLR 665).

Claimant's Response to the *Kumchyk* Point

75. Mr Pullen submitted that what he was seeking to raise was not a new point of law, rather than an alternative way of putting his original case. No new facts were necessary as to whether the instruction was unlawful.

The Law

76. I have already set out the statutory framework in relation to protected disclosures. It is convenient to refer to **Kumchyk**. The general rule is not to allow a point to be raised on appeal that was not argued in the Employment Tribunal. Although there is a discretion to allow such points to be taken, it is a discretion that is exercised very sparingly, and it would require a wholly exceptional case where further factual investigation might be required. In **Kumchyk** Arnold J said:

> **"Our conclusion upon the matter is this, that there is nothing in the language of the statute to exclude the consideration of a new point of law but that it would in almost every conceivable case, as the National Industrial Relations Court said in *GKN (Cwmbran) Ltd v Lloyd* [1972] ICR 214, be unjust to do so . … It certainly is not enough, in our judgment, that the point was not taken owing to a wrong, or what turns out in the light of after events to have been a wrong, tactical decision by the appellant or his advocate. It would certainly not be enough that the omission was due to the lack of skill or experience on the part of the advocate. It would certainly not, we think, be enough that the omission could have been made good had the industrial tribunal chosen to suggest the point for consideration to the appellant or his advocate. It is well established in these tribunals, and we hope in this appeal tribunal, that where the representation is a non-professional representation, or possibly even where it is an inexperienced professional representation (if such a thing can be conceived), in listening to an argument put forward by an advocate or evaluating a point of law put forward by an advocate, the tribunal will be as helpful as possible, perhaps by itself refining and improving the argument, perhaps by suggesting to the advocate that the argument might be put in a different or more favourable fashion, something of that sort. But we think that it is very far from the duty or indeed the practice of the chairman of industrial tribunals that they should be expected to introduce into the case issues which do not figure in the presentation on the one side or the other … this is a case in which the facts have simply not been investigated and it would be, even if that narrower rule were the rule that ought to be applied, quite plainly a case in which the new point would not be allowed to be raised, and for those reasons, we dismiss the appeal." (page 1123)**

77. The authorities were also considered in **Jones v Governing Body of Burdett Coutts School** [1998] IRLR 521, a case in which Robert Walker LJ attached particular importance to the prospect of factual issues having to be determined. He referred to the authorities and at paragraph 20 had this to say:

> **"20. These authorities show that although the Employment Appeal Tribunal has a discretion to allow a new point of law to be raised (or a conceded point to be reopened) the discretion should be exercised only in exceptional circumstances, especially if the result would be to open up fresh issues of fact which (because the point was not in issue) were not sufficiently investigated before the industrial tribunal. In *Kumchyk*, the Employment Appeal Tribunal (presided over by Arnold J) expressed the clear view that lack of skill or experience on the part of the appellant or his advocate would not be a sufficient reason. In *Newcastle*, the Employment Appeal Tribunal (presided over by Talbot J) said that it was wrong in principle to allow new points to be raised, or conceded points to be reopened, if further factual matters would have to be investigated. In *Hellyer*, this court (in a judgment of the court delivered by Slade LJ which fully reviews the authorities) was inclined to the view that the test in the Employment Appeal Tribunal should not be more stringent than it is when a comparable**

point arises on an ordinary appeal to the Court of Appeal. In particular, it was inclined to the view of Widgery LJ in *Wilson v Liverpool Corporation* [1971] 1 WLR 302, 307, that is to follow:

> **"The well-known rule of practice that if a point is not taken in the court of trial, it cannot be taken in the appeal court unless that court is in possession of all the material necessary to enable it to dispose of the matter fairly, without injustice to the other party, and without recourse to a further hearing below."**

21. In this case the Employment Appeal Tribunal recognised that the consequence of allowing Mr Jones's appeal would be a new hearing with fresh evidence (so far as that can be an appropriate term for evidence given in 1998 of events of five years ago): [1997] ICR at pp.398-9. It was therefore a case in which the Employment Appeal Tribunal would have had to have exceptionally compelling reasons for taking such an unusual course. It is necessary to consider the course of the proceedings to see whether there were such compelling reasons.

78. The authorities were all considered by HHJ McMullen QC in **Rance**. I would note that HHJ McMullen QC made clear that the Employment Appeal Tribunal will not permit a new point to be taken where:

> **"… the issue arises as a result of lack of skill by a represented party, for that is not a sufficient reason."**

Reasonable Belief by Employer Even if Mistaken

79. In **Farrant** it was held that a mistaken but genuine belief by an employer in the employee's misconduct may be sufficient to discharge the burden of establishing a fair reason for dismissal. HHJ Peter Clark said:

> **"The first question is whether the reason for dismissal relates to the conduct of the employee. A genuine, even if mistaken, belief on the part of the employer as to the conduct of the employee relied upon will be sufficient to discharge the burden of establishing this potentially fair reason for dismissal: see *Trusthouse Forte Leisure Ltd v Aquilar* [1976] IRLR 251; *Maintenance Co Ltd v Dormer* [1982] IRLR 491. …**
>
> **In our judgment, where the conduct relied upon by the employer is the employee's refusal to obey an instruction, the question as to whether that instruction is lawful, a critical question in a claim of wrongful dismissal, is a relevant but not decisive question when considering the reasonableness of the dismissal under section 98(4) in a case of unfair dismissal." (page 194)**

80. A protected disclosure must be a disclosure of information; a linked point is that one cannot convert a disclosure that does not qualify, for example because it is not a disclosure of information, by associating it with another disclosure that does qualify.

81. **Bolton School v Evans** is authority for the following propositions:

(1) Disclosure is an ordinary English word and should be given its normal meaning.

(2) The Tribunal should look with care at arguments suggesting that a dismissal was because of acts related to the disclosure rather than because of the disclosure itself.

82. The case concerned a teacher at Bolton School who had hacked into the Respondent's computer system to show that it was insecure. He was disciplined because of his conduct in entering the computer system without authority but not for reporting that the computer system was insecure. The Claimant sought to argue that hacking into the system was part and parcel of his protected disclosure (I note this is also a case where the Employment Tribunal concluded that the Respondent's view of the facts was based on a mistaken belief that was nonetheless reasonable). In the Court of Appeal Buxton LJ said at page 649:

> **"12. … The nub of the argument as presented in this court, and more particularly as presented in the oral submissions that we have received this morning, is that the whole course of conduct of the claimant should be regarded as an act of disclosure, so the hacking was part of the disclosure, and if the claimant was warned because of the hacking, as the school said that he had been, that was in itself an admission that he had been dismissed for making a protected disclosure. Mr Barnett called this an "entire transaction" approach to disclosure. …**
>
> **13. … These factors were said to point to the need to give a wide meaning of the concept of qualifying disclosure, in the interests of the employee.**
>
> **14. I am afraid that I was not persuaded by any of that. The legislation uses a common word, "disclosure", and sets out in some detail the circumstances in which that disclosure will or will not be protected. There is no reason to think that Parliament intended to add to that machinery by introducing some special meaning of the word disclosure. … The question of whether the conduct for which the employee was disciplined was indeed "disclosure" accordingly remains a question for the normal meaning of that word. …**
>
> **15. Accordingly, was the whole of the conduct of the employee an act of disclosure? The factual contentions supporting the argument were that the appeal tribunal had overlooked (as indeed the employment tribunal itself must have) that: (i) the claimant had not only told Mr Edmundson that he was going to enter the system, but had also announced to the headmaster his successful demonstration that the system was insecure. Without that announcement the employer could not have known that it was the claimant who had entered the system, because he had been using not his own access codes but codes belonging to other people that he had abstracted from the system. If he was disciplined for that act of access, as the school said he was, it must follow that he was disciplined for informing the school that he had access to them in the first place. (ii) "Disclosure" can be by acts as well as by words. The claimant's conduct in entering the system should have been regarded as an act of disclosure in itself …"**

83. Buxton LJ was also at pains to point out that:

> **"The tribunal should look with care at arguments that say that the dismissal was because of acts related to the disclosure rather than because of the disclosure itself."**

Restrictions on the Claimant's Disclosure to Authorities

84. The Claimant relied on the decision of Scott J in **Re A Company's Application**. The case concerned an argument as to whether the Claimant should be enjoined from making disclosures to a financial-services regulator. Scott J said at 455:

> **"I think it would be contrary to the public interest for employees of financial services companies who thought that they ought to place before F.I.M.B.R.A. information of possible breaches of the regulatory system, or information about possible fiscal irregularities before the Inland Revenue, to be inhibited from so doing by the consequence that they might become involved in legal proceedings in which the court would conduct an investigation with them as defendants into the substance of the information they were minded to communicate."**

85. The Claimant wishes to rely upon Article 10 of the ECHR set out in the Schedule to the **HRA 1998**:

> **"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.**
>
> **"2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."**

86. I will also refer to the decision of HHJ McMullen QC in **Pay**. HHJ McMullen QC said that section 98(4) of the **ERA** would require an Employment Tribunal when considering the reasonableness of a decision to dismiss an employee by a public-authority employer the Employment Tribunal should interpret the phrase "reasonably or unreasonably" in section 98(4) of the **ERA** as including the words "having regard to the applicant's Convention rights" and that a public-authority employer would not be acting reasonably under section 98(4) if it violated its employee's Convention Rights. The school was not a private litigant but a public

authority, and accordingly it owed the duty directly to secure the freedoms protected by the Convention.

87. I have also considered the duties of the Commissioner set out in section 51 of the **DPA**, to which I have already referred. The duties generally relate to promoting good practice and promoting the observance of the requirements of the Act. They do not include the giving of legal advice.

Conclusions

88. It is important to bear in mind that it is not necessary for the Employment Tribunal to make findings on all matters of dispute before them or to recount all of the evidence. A Tribunal does not go wrong just because it does not address every argument put to it, even if those putting the arguments think they are important. While the Employment Tribunal must consider all that is relevant, it need only deal with the points that were seen to be in controversy relating to those issues that are significant for their decision. The essential question in most cases is likely to be whether the Employment Tribunal's self-direction as to the law and its application to the facts as found was correct.

89. I do not propose in this Judgment to deal with every submission made to me but will concentrate on those that I consider are relevant to the issues I have to decide and are sufficient to explain the reasons for my decision.

90. I shall firstly deal with the **Kumchyk** point and the legality of the instruction given to the Claimant by Mr O'Malley on 23 December. I have set out the principle in **Kumchyk** in my consideration of the law. While I can see some force in the argument that the Claimant is

simply seeking to argue a point as to the unlawfulness of the instruction on different and wider grounds than relied on before the Employment Tribunal, where the only ground relied upon was by analogy with the treatment of confidentiality clauses in contracts and the effect of section 43J(1) of the **ERA 1996**. However, the introduction of arguments in relation to Article 10 of the ECHR may well require factual analysis - and, in my view, is likely to do so - going beyond the evidence adduced before the Employment Tribunal. This evidence of course has never been placed before the Employment Tribunal. Such evidence would seem to be highly material in considering (if Article 10 applied) whether the restriction imposed could be regarded as "necessary" within the meaning of Article 10(2). The discretion to permit the point to be raised, as I have already said, is exercised very sparingly, and it would have to be a wholly exceptional case where further factual investigation is required. No explanation has been given as to why the point was not raised below, and, notwithstanding it may be said the point is a significant one, that is not a reason for permitting it to be raised on appeal. In the exercise of my discretion I decline to deal with the point. However, in case I am wrong, I would have found that the instruction was not unlawful; I shall explain why later in this Judgment.

The Protected-Disclosure Issue

91. The argument that the Employment Tribunal was wrong or misdirected itself when it found there was no protected disclosure in relation to the email of 22 December because the Claimant lacked reasonable belief in the truth of the allegations seems to me to be very much an argument as to factual matters. The Notice of Appeal runs to some 5 pages, 9 paragraphs and 11 sub-paragraphs; paragraphs 6 and 7 of the amended Notice of Appeal, to which I have already referred, make clear that this is simply a complaint about factual findings made by the Employment Tribunal. Mr Pullen would have addressed me in detail on all of the facts and was in effect asking me to find that the Employment Tribunal had fallen into error and made

impermissible findings because it had paid insufficient attention to previous lapses in relation to IT security and a general lack of care in relation to confidential material. This is essentially a perversity argument. The Employment Tribunal saw and heard the witnesses over three days and was well able therefore to determine the credibility of the witnesses. It was entitled on the evidence to conclude that the Claimant failed to hold the necessary reasonable belief in the truth of the allegations set out in the email of 22 December 2011. In my opinion, the Employment Tribunal was amply entitled to come to the conclusion it did in paragraph 133 that the Claimant's belief was not a reasonable one in all the circumstances and that he had "jumped the gun" in circumstances where he knew or could fairly easily have found out that there was no real urgency and there was time to seek some verification of the allegation by Mr Oree (which as the Employment Tribunal knew, was wholly misconceived).

Whistleblowing Detriment

92. The Claimant cannot create a protected disclosure by aggregation of the email letter of 22 December 2011 and the telephone conversation on 11 January 2012, neither of which were established as protected disclosures. Each disclosure must be considered separately in accordance with the decision in **Bolton School v Evans**, to which I have already referred. This ground of appeal therefore must fail.

Automatic Unfair Dismissal "Whistleblowing" Claim

93. I agree that the Employment Tribunal was required to determine this matter on the facts; see **Kuzel**. As neither the telephone call nor the Harrington letter was a protected disclosure, it is impossible for the Claimant to make out a case of automatic unfair dismissal. Neither is it possible to challenge the Employment Tribunal's finding that the dismissal related to the

telephone conversation of 11 January and the Harrington letter, rather than the original email of 22 December to the ICO.

94. The Claimant is unable to demonstrate that the Employment Tribunal fell into error in finding that the telephone call of 11 January was not a protected disclosure; it cannot be suggested that the Harrington letter constituted such a disclosure. This ground of appeal must fail also.

95. The Employment Tribunal found (in terms, and there was material to justify the finding) that there was a reasonable belief by Mr James and Mr O'Malley that the instruction given to the Claimant not to contact the ICO was both legitimate and reasonable, and that Mr Baigent and Mr Norwell had reasonable grounds to believe that the Claimant had breached a legitimate and reasonable instruction in circumstances where he had no reasonable reasons for doing so. The Employment Tribunal therefore clearly found that the Respondent had demonstrated that the principal reason for dismissal was misconduct in relation to the breach of the instruction from Mr O'Malley and the Harrington letter.

Revisiting the Question of Unfair Dismissal and Alleged Unlawful Instruction Together with Article 8 EHCR

96. I have already declined to deal with the grounds alleging that the instruction by Mr O'Malley to the Claimant not to contact the ICO was unlawful. However, if I am wrong about that, my view would have been that the instruction was not unlawful. In the circumstances of this case I am not satisfied the instruction was unlawful; it was considered to be a reasonable instruction by the Employment Tribunal in circumstances where there was no blanket bar on the Claimant having contact with the ICO but he was not to take the initiative in contacting them

during the course of the Respondent's inquiry into the matter, which was already underway. The restriction was also not an unqualified restriction. It was a restriction on contact with the ICO without the consent of the Claimant's line manager, and there was no evidence to suggest that a request by the Claimant would have been refused, whether unreasonably or at all. I can see no basis for finding that public policy would impose a blanket restriction on any limitation of contact between an employee and the ICO in all circumstances. I consider that each case will be required to be considered by reference to its own facts as to whether the limitation was reasonable. The instruction to the Claimant in the present case would not, in my opinion, have prevented him from speaking to the ICO if it were pursuant to his being contacted by them by telephone. The Claimant had already disclosed all relevant information to the ICO and was not seeking to supply further information but was asking for advice; that could not be a protected act. The Employment Tribunal (see paragraphs 138 and 139) expressly found that Mr O'Malley's instruction was reasonable. The Employment Tribunal, having rejected the only ground put forward as to the perceived unlawfulness of Mr O'Malley's instruction, clearly therefore was satisfied that the instruction was lawful, because it rejected the only argument put forward as to its unlawfulness.

97. The Claimant had made serious and wholly inaccurate allegations, as it was soon discovered, which were potentially highly damaging. He had sent the email without having taken the trouble to check the accuracy of the allegations or to draw the matters raised by Mr Oree to the attention of his superiors, and it is to be noted that he emailed his managers shortly after sending the email of 22 December to the ICO. There was no reason why he could not have contacted them before going to the ICO.

98. Even if I am wrong in upholding the Employment Tribunal's decision that the instruction given to the Claimant was a proper instruction, the Respondent, following **Burchell**, needs to show reasonable grounds for its belief in the Claimant's misconduct to satisfy the burden of proof in demonstrating a substantially fair reason for dismissal. It does not need to prove that there actually was misconduct. As HHJ Peter Clark said in **Farrant**:

> **"A genuine, even if mistaken, belief on the part of the employer as to the conduct of the employee relied upon will be sufficient to discharge the burden of establishing this potentially fair reason for dismissal."**

99. That is what the Employment Tribunal found in the present case. Further, the question of whether the instruction that is disobeyed was lawful is a relevant, as opposed to a decisive, question when considering the reasonableness of the dismissal under section 98(4) in a case of unfair dismissal; see the passage I have cited earlier from **Farrant**.

100. In relation to the question as to whether the sanction of dismissal for breach of the instruction and circumstances concerning the Harrington letter was a reasonable sanction, the Employment Tribunal considered that dismissal was within the range of reasonable responses, and I can see no basis upon which that conclusion of the Employment Tribunal can be challenged.

101. Further, in relation to the alleged unlawfulness of the instruction, the Claimant has not adduced any authority other than the Judgment of Scott J in **Re A Company Application**, which concerned an attempt to prevent employees from disclosing information relating to possible breaches of the regulatory system or financial irregularities to the relevant regulatory bodies. That is not what the Claimant was restricted from doing by Mr O'Malley's instruction, which was far more limited in scope and was reasonable in the view of the Employment Tribunal in the particular circumstances of the case.

102. I also consider that the Employment Tribunal was entitled to find that the final written warning that the Respondent had taken into account when determining there should be a sanction of dismissal was not given in bad faith and neither was it manifestly inappropriate. Further, the Claimant's conduct in contacting the ICO contrary to an instruction not to do so was similar, as found by the Employment Tribunal, to his previous misconduct in that both demonstrated a lack of respect on the part of the Claimant for his managers and insubordinate behaviour.

103. In all the circumstances, all the grounds set out in the amended Notice of Appeal fail, and the appeal must be dismissed.

104. I regret the delay in handing down this judgment but I have been indisposed.