Appeal No. UKEAT/0394/14/BA

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 March 2015

**Before**

**THE HONOURABLE MRS JUSTICE SIMLER**

**(SITTING ALONE)**

---

| MR K SHINWARI | APPELLANT |
|---|---|
| VUE ENTERTAINMENT LTD | RESPONDENT |

---

Transcript of Proceedings

JUDGMENT

---

© Copyright 2015

**APPEARANCES**

| | |
|---|---|
| For the Appellant | MR CHRISTOPHER McNICHOLAS<br>(of Counsel)<br>Direct Public Access |
| For the Respondent | MR EDWARD MORGAN<br>(of Counsel)<br>Instructed by:<br>DWF Solicitors<br>5 St Paul's Square<br>Old Hall Street<br>Liverpool<br>Merseyside<br>L3 9AE |

**SUMMARY**

**VICTIMISATION DISCRIMINATION - Whistleblowing**

**VICTIMISATION DISCRIMINATION - Detriment**

**VICTIMISATION DISCRIMINATION - Dismissal**

**UNFAIR DISMISSAL - Constructive dismissal**

Although the Employment Tribunal found that the Claimant made a protected disclosure in good faith, it found:

(i) That many of the alleged detriments were not established as a matter of fact; and/or

(ii) That the Respondent was not vicariously liable for conduct of its employees in response to the protected disclosure: **Fecitt v NHS Manchester** [2012] IRLR 64; and in any event

(iii) That none of the Respondent's treatment of him thereafter was on the grounds of or by reason of the disclosure, and was for properly separable and genuinely different reasons. For example, in relation to the principal detriment relied on (the disclosure of his statement to another employee who was to be disciplined on the basis of it) the Employment Tribunal found that this was done because the Respondent's long-standing and well established disciplinary policy and practice required the witness statement relied on to support the allegation of misconduct to be disclosed to the employee facing misconduct charges; and there was nothing to alert the Respondent to any adverse reaction or threats by the disciplined employee on such disclosure.

These were all findings and conclusions amply supported by the evidence and not arguably in error of law.

**THE HONOURABLE MRS JUSTICE SIMLER**

**Introduction**

1. This is an appeal from a decision of Employment Judge Etherington, sitting alone, promulgated on 30 January 2014 following a two-day hearing in June 2013 at London (Central).

2. In his originating application dated 4 December 2012 (but not in fact submitted to the Tribunal until 19 February 2013) the Appellant (referred to as the Claimant for the purposes of this Judgment), who was advised throughout by solicitors, alleged unfair constructive dismissal based on health and safety concerns he had raised in reliance on sections 44 and 100 of the **Employment Rights Act 1996** or, alternatively, based on a series of breaches of contract by the Respondent which he said amounted to a fundamental breach that entitled him to resign. His complaints about the Respondent's treatment of him included complaints that managers reneged on promises and assurances that he would not be identified as the source of information about another employee's wrongdoing. He complained that there had been a failure to protect him and keep him safe in the workplace, a failure to move him to a safe working environment other than simply to Shepherd's Bush, which was too closely located to the Westfield cinema location, a complaint that the Respondent reduced his hours of work and his terms and conditions and that the Respondent failed to deal with the bullying and harassment he suffered at the hands of colleagues, resulting in him being ostracised and isolated.

3. The Respondent resisted those claims, denying that any assurance of confidentiality was ever given and contending that he had been told that any threats made against him were taken very seriously. Further, it maintained that he had been offered the opportunity to transfer to any

cinema location within the UK but chose to transfer to the Shepherd's Bush cinema as he lived in the area and denied that he had been subjected to any detrimental treatment as a consequence of any disclosure he made. The Respondent also raised a jurisdiction point based on the delay in submitting the ET1.

4. On the first morning of the Full Hearing of his claim the Claimant applied to amend the claim to include a claim of unfair dismissal and detrimental treatment on the grounds of the protected disclosure made by him but based on the facts already pleaded. That application was resisted. The Employment Judge indicated on the first day that he was minded to grant the amendment but required a written formulation of it.

5. I was provided at the hearing of the appeal with the written document produced by the Claimant in consequence of that direction. It was challenged at the Tribunal on receipt by the Respondent as containing no particularisation of the amended claim. Having seen it, I agree with the Respondent's contentions. What was produced was not a formulation of the amendment but rather an argument for permitting the amendment to be made. Nevertheless the Tribunal accepted the proposed amendment expressly on the basis that it was no more than a relabelling of the existing claim, making reference to no additional facts and referred at paragraph 3 of the Judgment to issue 2.3 being added to reflect that claim. It was unfortunate that the issues were not explored, identified and particularised, either by the parties or by the Tribunal at the hearing or in advance of this hearing at a CMD. Nevertheless it is clear from the way in which the amendment application was made and dealt with by the Employment Judge that no additional detriments were relied on beyond those already set out in the originating application and the particulars accompanying it in relation to the health and safety claim. Moreover there has been no suggestion before me that there was a failure by the Tribunal to

address a detriment relied on save perhaps in one particular respect, which I shall address in a moment.

6. The Employment Judge, in a Reserved Judgment, dismissed all the Claimant's claims, holding that the Claimant had not been constructively dismissed or subjected to relevant detriments on the grounds of a protected disclosure or otherwise. The Tribunal did not address the jurisdiction point, though it was plainly a live issue.

7. By a Notice of Appeal dated 12 March 2014 the Claimant raised six grounds of appeal, seeking to challenge the rejection of the claim for automatic unfair dismissal and detriment on grounds of making a protected disclosure, none of which were regarded as raising any arguable point of law on the paper sift under Rule 3(7). However, at a renewed hearing the Claimant was permitted to advance three of those grounds, namely grounds 2, 3 and 5, and was permitted to amend his Notice of Appeal in relation to those grounds.

8. Although those three grounds of appeal are pursued before me, it became clear that there is in fact a single ground of appeal as follows. The Claimant maintains that, although the Employment Judge accepted that he made a protected disclosure, there was a failure to understand that this was the reason for all the detrimental treatment that followed including dismissal because, having promised to keep his identity confidential, the Respondent disclosed a witness statement from him revealing his identity in the disciplinary process involving another employee and thereby failed to treat his identity as a whistleblower with the appropriate level of confidentiality, giving him no alternative but to terminate his employment, claiming constructive dismissal as he did.

9. The Claimant has appeared by counsel, Mr McNicholas, who also appeared below, and the Respondent, who resists this appeal, has appeared by counsel, Mr Morgan, who did not appear below.

**The Facts**

10. The Tribunal's findings of fact, which are not capable of being nor are they challenged on appeal, can be summarised as follows. The Respondent operates cinema facilities nationwide. The Claimant commenced employment as a Customer Assistant on 9 June 2011 based at the Westfield cinema in London. The Respondent had a policy of providing complimentary tickets to staff for films at the Respondent's cinemas but with a prohibition against resale to members of the public or at all. The Claimant, in the course of his employment during 2012, witnessed a colleague, Mr Omar Ali, acting in contravention of that rule. Initially he took no action. However he witnessed the same colleague selling complimentary tickets to members of the public again on 3 July 2012. Mr Ali became aware that he had been seen by the Claimant and offered him a £5 bribe in order to gain the Claimant's silence. The Claimant took the money but only as evidence to hand to managers and not as a bribe. He did in fact subsequently hand the money over to his manager on 17 July.

11. The Claimant first revealed Omar Ali's activities at a meeting with his team leader, Mr Osman Khokhar, on 4 July 2012. During a subsequent investigatory process that followed both the Claimant and Omar Ali were called in to meetings to discuss the incident. The first meeting involved the Claimant, who met with his manager, Manuk Asatryan, on 9 July to provide a statement. The Claimant's case to the Tribunal was that he expressly asked managers during that meeting about what would happen if information that he disclosed about Mr Ali's behaviour was mentioned to Mr Ali. His case, and his evidence, was that he received

assurances that all information given would be private and confidential and would be kept for record purposes only and would not leave that meeting room. He asserted that he was offered promises to that effect, and that he made clear that he did not want his name mentioned to Mr Ali and was afraid of the repercussions. That evidence and those assertions were disputed by the Respondent.

12. There was accordingly a conflict of evidence on this issue that only the Tribunal of fact could resolve. The Tribunal did not accept the Claimant's evidence on this point. The Tribunal found that the Claimant did not indicate at that stage that he had any concerns about Omar Ali seeing a copy of his witness statement.

13. It found that it was evident that he was well aware that managers would investigate and put his allegations to Omar Ali. It found that he signed the record of the interview, confirming that he had been given the opportunity to review and amend his statement, that he understood that he might be the subject of disciplinary action if found to have deliberately given false information, that he understood that he might be called on again to provide further information and that he was obliged in any event to participate in the Respondent's internal investigations. He signed the witness statement to confirm that he was given an assurance that the information he had given would only be used for the purposes of the current investigation and resulting disciplinary hearing. The Tribunal found that all employees of the Respondent were under a positive duty to report wrongdoing by their fellow employees or themselves.

14. Following that meeting with the Claimant on 9 July there was a first disciplinary investigation meeting with Omar Ali, also on 9 July. At the end of that meeting Mr Ali was suspended pending further investigation into his conduct. He was told that he could not return

to the cinema until the investigation had concluded (see paragraph 17), and the Tribunal found that he made no threats at that stage. In fact he did not work again for the Respondent after that date.

15. At the conclusion of the investigation into Mr Omar Ali's activities, Mr Asatryan concluded that there was sufficient evidence to pursue a disciplinary charge against him, and he put together an evidence pack to be provided to Omar Ali. He included within the pack the Claimant's witness statement after checking with Mr Singleton, who was the General Manager, that it was correct to do so. The Tribunal found expressly, at paragraph 19, that he, Mr Asatryan, had no reason to believe that Mr Ali would react in a threatening manner if he discovered the identity of the informant. Ultimately Omar Ali was dismissed with effect from 14 August in connection with the allegations raised by the Claimant.

16. The Tribunal found that the Claimant said he was approached by Omar Ali during the week commencing 23 July 2012 and threatened, but that he did not report this to managers until a second alleged incident on 14 August 2012. In relation to that latter event the Claimant said he was approached by Mr Ali, who was holding a copy of the statement the Claimant had made to managers on 9 July. His name and initials were legible on the document, and his identity as the informant was established through the information contained in that witness statement.

17. The Claimant said that Mr Ali said he knew who it was and would not let go and would make sure that the Claimant paid for this and would beg him for his life. The Claimant went directly to Mr Singleton to tell him about the threat and query why his statement had been given to Mr Ali with his name and initials visible. Mr Singleton advised that if the Claimant was worried he should report the incident to the police because, whilst the Respondent could

provide safety at work and in the workplace, it had no control outside the workplace. Mr Singleton's opinion was that the matter would blow over quickly. The Claimant told Mr Singleton that he would not be able to continue working if nothing was done about the threat. Mr Singleton responded by offering to transfer the Claimant and suggested a transfer to a cinema outside the immediate locality. The Claimant chose to move to Shepherd's Bush rather than anywhere else: see paragraph 22. The Tribunal found that this transfer was agreed by him expressly.

18. After that Mr Singleton viewed the Respondent's CCTV footage. The Tribunal recorded the fact that in Mr Singleton's view the footage revealed Omar Ali waiting in the corridor and Mr Singleton believed that this was before Mr Ali's disciplinary hearing. The Claimant was seen to approach or pass by, and then come back and sit next to Mr Ali. The CCTV revealed no evidence of aggressive behaviour. There was no evidence that Omar Ali physically touched the Claimant, and judging by the body language, Mr Singleton found no evidence of an argument or anything that would cause concern from the interaction of the two people viewed on that footage (see paragraph 23). Nevertheless the Claimant reported the threat that he said he had received from Mr Ali to the police on 14 August, and by 28 August 2012 the police had approached Omar Ali about his threatening behaviour, and the police subsequently informed the Claimant that Omar Ali apologised and had been given advice as to his future behaviour (see paragraph 33).

19. On 15 August the Respondent decided that the Claimant should be transferred to Shepherd's Bush because of the threat, and the Claimant having said he was prepared to transfer to Shepherd's Bush, that this should take place. That transfer took place on 17 August 2012, and shortly after the Claimant heard rumours of people talking behind his back and

calling him a snitch for getting Manouk Asatryan, his manager and the man responsible for the investigation into the allegations, into trouble. Following that, by letter dated 23 August 2012, the Claimant wrote to the Respondent's HQ raising a grievance, referring to the threats and to his continuing distress about the situation and the fact that he remained scared about his life being in danger. He also complained about the fact that his statement he had provided under promise of confidentiality had been given to Mr Ali and had revealed his identity. The letter was not directed to any particular individual and did not therefore receive immediate attention.

20. On 24 August the Claimant went to Shepherd's Bush cinema with friends and family to watch a movie and was approached by colleagues, who asked what had happened regarding Mr Ali. He was told that everyone was talking about him and calling him a snitch. He reported that incident to his team leader, asserting that he had been bullied and harassed by colleagues in front of family and friends and indicating that he wished to raise a formal complaint. He was told that he would be given details about how to do so, and those details were provided the following day.

21. On 30 August 2012 a second grievance was submitted by the Claimant, asserting that the Respondent had conducted itself in a manner which had seriously damaged the relationship of trust and confidence and that he had no option but to resign with effect from 7 September 2012. He said in his grievance letter and resignation letter that his anonymity as an informant had been disclosed to the workforce at Shepherd's Bush, that he had experienced bullying in the form of malicious rumours and that this had led to his ostracism. He said that he was suffering extreme stress and anxiety and could no longer work for the Respondent as a result of the irretrievable breakdown in trust and confidence that followed.

22. There was a grievance hearing on 25 September 2012 conducted by Adrian Pauley. The Claimant attended and was accompanied. There was a thorough discussion, and the Claimant maintained the allegation that he had been told that the investigation was private and confidential and would not be shared with anyone else but that a week or two later the whole of his statement was given to Mr Ali. Following that grievance meeting there was a break during which Mr Pauley made his own enquiries and discovered that it was standard company practice to tell those being interviewed that their statements would remain confidential at the investigation stage.

23. The Tribunal found that Mr Pauley upheld in part the Claimant's grievance. It held, at paragraph 36, that Mr Pauley accepted that the Claimant should not have been told that his statement was private and confidential, and Mr Pauley went on to say that the statement the Claimant had provided was essential to the investigation and was appropriately included in the pack that went to Mr Ali. Mr Pauley felt that managers had not acted out of any malice towards the Claimant and he believed that the managers had done all that they could in the circumstances which had arisen. Mr Pauley raised the possibility of resuming work, but the Claimant rejected it.

24. Since considerable reliance is placed on it, it is appropriate to record the outcome of the grievance, as dealt with by Mr Pauley's letter dated 28 November 2014 at B22 and B23. Mr Pauley found, so far as relevant, as follows:

> **"After listening carefully to everything that you said, I partially accept you have a valid grievance with regard to the disclosure of the statement that you gave for Omar's disciplinary investigation and I therefore uphold this aspect of the grievance.**
>
> **The main aspect of your grievance was that you should not have been told your statement was private and confidential, and I agree and uphold this aspect of your grievance.**
>
> **…**

> **I believe the statement you gave was essential to the investigation and should have been included in the hearing paperwork and that you should not have been told it was private and confidential."**

25. At paragraph 39 the Tribunal found that the Respondent had a clear and well developed disciplinary procedure which provided that an accused individual appearing at a disciplinary hearing would be given three days' notice of the date, time and place of the hearing, and that all allegations against that individual would be set out clearly. The policy, although the Tribunal does not set it out, also says in terms that any supporting documentation/evidence collated during the investigation stage would be provided to the individual at least three days in advance of any such hearing.

**The Tribunal's conclusion**

26. The Tribunal summarised the submissions made to it by both sides. In relation to the Respondent it summarised the Respondent's primary submissions at paragraphs 40 and 41. It summarised the Claimant's case, as Mr McNicholas accepted, at paragraphs 42 and 43. The Judge set out the law at paragraphs 44 to 51 of the Judgment, and no criticism has been made before me of the self-direction given. Although I note that the Tribunal did not set out in terms section 103A, it did make reference to cases relating to that section and, at paragraph 50, the Tribunal said that it would focus on the reason why dismissal occurred. That meant, it said, it would consider whether or not conduct which the Claimant asserted was a fundamental breach of contract and drove him to resign had been engaged in by the Respondent because the Claimant made a protected disclosure. The Tribunal made reference to the cases of **Nagarajan v London Regional Transport** [1999] ICR 877 and **Chief Constable of West Yorkshire v Khan** and also express reference to **Fecitt v NHS Manchester** [2012] IRLR 64.

27. There was a concession made on the Claimant's behalf, correctly, that a worker (the legislation not having been amended) is protected against acts or omissions by his employer but that no separate protection was then available for alleged acts of victimisation or retaliation perpetrated by fellow employees. That has the consequence that there can be, or could at that stage, be no vicarious liability of the employer for wrongs committed by its employees in the absence of any provision making it unlawful for fellow employees to victimise or take retaliatory action against a whistleblower (see, if necessary, **Fecitt v NHS Manchester**). The legislation has since been amended to alter that position, but that cannot assist this Claimant.

28. The Employment Judge made important findings at paragraph 53, that no blanket assurance of confidentiality was given to the Claimant in relation to his identity being kept confidential from Omar Ali. In reaching that conclusion, the Tribunal relied on a series of matters. One such matter is the fact that the signed witness statement given by the Claimant said expressly that it would be used for the purposes of the current investigation and any resulting disciplinary hearing but made no other reference to confidentiality. Secondly, the Tribunal referred to the fact that there was no statement or anything said to suggest that the Claimant would be informed or consulted before his identity was revealed to Mr Ali.

29. Thirdly, the Tribunal referred to the fact that the Respondent's procedures did not require any information or consultation to this effect; rather, to the contrary, the Tribunal referred to the disciplinary process and procedure and to the fact that the statement confirmed that would be used for any resulting disciplinary hearing. The Tribunal held that, in the context of a disciplinary case based on dishonesty, as this one was, withholding a key witness's name would be exceptional, and the provision of evidence to employees being disciplined was actually dealt with and authorised by the Respondent's policies and handbook.

30. The Tribunal also found separately that the Claimant was not in fact in fear of Mr Ali when he was interviewed on 9 July. It found that it was more likely than not that he shared the assessment of Omar Ali given to it by one of his witnesses that he was a harmless individual who was unlikely to resort to violence. That led to the conclusion that the Claimant would have had nothing to fear and therefore no reason to raise concerns about confidentiality or about his identity being revealed when he attended the meeting on 9 July to provide his statement.

31. At paragraph 56 the Employment Judge rejected the Claimant's argument that the revelation of his identity without first being alerted to the possibility was a detriment on the grounds that he made a protected disclosure. The Judge held that the Respondent's actions were not grounded in his having given information.

32. The Tribunal dealt with the health and safety claims at paragraphs 58 to 69 inclusive. Although these are not challenged on appeal and are therefore in one sense not directly relevant, the Tribunal's approach was an incremental one, and since the Claimant relied on the same facts to establish each of his heads of claim, there are findings of fact or conclusions reached in the context of health and safety which are equally relevant to the protected disclosure claims.

33. So far as relevant, these may be summarised as follows:

> (i) Having notified the Respondent of the threat on 14 August 2012, the Tribunal found that the Respondent responded positively and immediately by commencing an investigation into that threat, by offering him an opportunity to transfer to any other site, by offering to release him from his work commitments for the remainder of the week, by advising him to notify the police about his welfare outside the workplace, by undertaking to transfer him to the site he selected, by

suspending the person responsible for the threats and banning him from the site, thereby doing all that could possibly have been done by a reasonable employer to nullify the threat (see paragraph 60).

(ii) The Respondent took every possible action open to secure the Claimant's health and safety on learning of the threat, and its actions, far from undermining trust and confidence, reinforced and supported the duty of trust and confidence (see paragraph 64).

(iii) It was inevitable that the Claimant's identity would be revealed to any person against whom disciplinary action was pursued, and it was not reasonable of the Claimant to believe otherwise if that was in fact his belief.

(iv) The Tribunal accepted that the Respondent's policy for moving from investigation to disciplinary hearing was reasonable and had operated well (see paragraph 65).

(v) The Judge was satisfied that the Claimant did not suffer any detriment or disadvantage on the ground that he brought to his employer's attention the circumstances of the threat (see paragraph 66).

(vi) The Tribunal rejected the contention that the Claimant suffered a detriment resulting from his change of workplace because his day-to-day duties were greater and his hours were different so that his pay was lower. The Tribunal found that his terms and conditions remained the same and, insofar as there were any differences, they would be sporadic and explained by the normal exigencies of business and would have been experienced had he remained at the Westfield cinema location (see paragraph 67).

(vii) Overall the Employment Judge was satisfied that the Claimant did not suffer detriment by the Respondent's actions. He found that the Respondent acted

reasonably throughout and that any disadvantage the Claimant felt he had experienced was not in any way done on the ground that he had brought circumstances concerning health and safety to his employer's attention (see paragraph 69).

34. The Tribunal then turned to address the protected disclosures claims, building on those findings, at paragraphs 70 to 74. At paragraph 70 the Employment Judge concluded that the Claimant made a protected disclosure when he gave information to the Respondent suggesting that three employees were breaching their legal obligations or perhaps committing criminal offences and that he communicated that information on a bona fide basis. The Employment Judge then said:

> **"… The question therefore is simply whether or not he was dismissed or suffered detriment because he had made a protected disclosure. My answer is unhesitatingly no."**

That is the conclusion that is challenged on this appeal.

35. The Employment Judge's reasoning for that conclusion, as set out in the remaining passages at paragraphs 71 to 74, was as follows. First, the Respondent acted in accordance with its polices and contractual terms under which staff worked. Secondly, the revelation of the Claimant's identity was within the legitimate and longstanding processes of the Respondent and simply followed the requirement for the employer to deal with disciplinary matters fairly and equitably. Third, at paragraph 71 the Tribunal said:

> **"… But most importantly the Respondent's action in disclosing the statement to Omar Ali was not on the ground that he had made a protected disclosure, nor did it amount to a fundamental breach of contract, nor indeed any breach of contract. It was revealed by the Respondent for wholly legitimate reasons anticipated by and authorised by its disciplinary policy. …"**

Fourth, although there may have been a misunderstanding by the Claimant about the extent of confidentiality, the Judge found that the position was clear so far as confidentiality was concerned, and its findings on this issue are summarised above. Fifth, on that basis the Tribunal concluded that there was no breach of the express or implied terms of the Claimant's contract and that the Respondent complied fully with that contract including when it revealed the Claimant's identity to Omar Ali, whose employment was at risk and who would expect to be told who the witness to his alleged dishonesty was. Sixth, moreover, the Tribunal found at paragraph 74 that, as soon as the threat which had not until then been anticipated was reported to it, the Respondent acted immediately, first to investigate the threat, including reviewing the CCTV footage, and secondly, to reduce the effects of the threat by offering the Claimant an opportunity to transfer to another site, to take the rest of the week off, to notify the police so that his welfare outside the workplace could be protected. The Respondent arranged promptly for a transfer to a different site with terms and conditions preserved. The perpetrator of the misconduct witnessed by the Claimant was suspended and banned from the site and ultimately dismissed.

36. In conclusion the Tribunal found that the Respondent was not in breach of any term fundamental to the contract of employment, whether express or implied, and that the Respondent handled in an appropriate way the information the Claimant had given it concerning Mr Ali's conduct.

37. At paragraph 76 the Tribunal concluded that there was no constructive dismissal by reason of or because of a protected disclosure. The revelation of the Claimant's identity was not a breach of any term and was in accordance with and authorised by contract and policy. The information provided by the Claimant had been given voluntarily and unconditionally and

in pursuance of his own contractual obligations. The Tribunal found that the Claimant was not given any assurance about confidentiality in this paragraph, and to the extent that he believed that he had been given such an assurance, that belief did not stem from any failure by the Respondent.

**The Grounds of Appeal**

38. Before addressing the grounds of appeal developed in oral submissions, brief reference to a number of unfortunate observations made by the Tribunal is appropriate. The Tribunal referred to the Claimant as "setting himself up as an enforcer of the Respondent's rules" and as having made the protected disclosure "with his eyes open" and in effect, therefore, accepting the consequences of what followed. Comments of this kind could be said to have a chilling effect on the efficacy of this legislation, which is designed to protect individuals from retaliation for making protected disclosures. I do not think that that is what the Tribunal intended, but that is one way in which its comments could be construed. Although amended ground 5 suggested that it was not permissible, either as a matter of principle or on the facts of this case for the Tribunal to suggest that the Claimant was in the wrong for pursuing a protected act, Mr McNicholas realistically did not suggest that these observations were material in the context of this appeal, and in those circumstances, having drawn attention to them as unfortunate I address them and ground 5 no further.

39. Against the background facts summarised above there are two main challenges pursued by the Amended Notice of Appeal. These are as follows.

40. First it is contended that the Tribunal erred in law by finding that the Claimant was not subjected to any detriment by acts or deliberate failures to act by the Respondent on the ground

that the Claimant made a protected disclosure. In this regard eight detriments set out in the Amended Notice of Appeal are relied on. Secondly, it is said that the Tribunal erred in law in finding that the reason for the detrimental treatment and dismissal was properly and genuinely separable from the protected disclosure. It should not have found that and was in error of law in so doing.

41. Since these grounds are very much interlinked I deal with them together. The starting point is section 47B(1) of the **Employment Rights Act 1996**, which provides that:

> **"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."**

"Protected disclosure" is defined by sections 43A to 43L of the Act, but it is common ground that there was a protected disclosure here, as found by the Tribunal, and there is no challenge to that finding.

42. Section 48(2) of the Act provides, that on a complaint amongst things that an employee has been subjected to a detriment in contravention of section 47B, it is for the employer to show the ground on which any act or deliberate failure to act was done. The Court of Appeal in **Fecitt** dealt with the question of causation. In particular, at paragraph 45, the court said:

> **"… [section] 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. …"**

What underlay the views expressed there was what was set out at paragraph 43, 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."**

The Tribunal in this case referred expressly to **Fecitt**, and there is nothing to suggest that they applied any other approach. Indeed Mr McNicholas has not suggested that a wrong test was applied.

43. So in addition to establishing that detrimental treatment occurred as a matter of fact, for liability to be established the protected disclosure must have materially influenced the employer's actions or omissions in the sense suggested by the Court of Appeal in **Fecitt**. It is insufficient merely to show that, but for the protected disclosure, the act would not have occurred. So far as concerns dismissal, section 103A of the Act provides:

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

It is for the employer to show the reason or, if more than one, the principal reason for the dismissal (see section 98(1) of the **Employment Rights Act**). The protected disclosure must accordingly be the reason or principal reason for the dismissal for automatic unfair dismissal under section 103A to be established.

**The Arguments**

44. The Claimant contends that the Tribunal failed to deal properly with a series of detriments to which he was subjected, all of which he submits formed part of a continuum of conduct flowing directly from his protected disclosure and the Respondent's failure to protect his identity in breach of assurances. Mr McNicholas submits that, to the extent that the Tribunal separated out what Omar Ali did and the consequences that flowed from his actions, that was an error of law. He submits that there is no universal requirement of law or natural justice that an employee must be shown a copy of a witness statement relied on in disciplinary proceedings. There is a range of options open to an employer in these circumstances from

withholding the witness statement altogether to redacting the identity of the maker of that statement. Here he submits that a critical factor in what happened to the Claimant was that he was given an assurance of confidentiality that displaced all other policies or protocols and was supported by Mr Pauley's outcome letter referred to above. That promise or representation of confidentiality is what exposed the Claimant to a series of detriments ultimately resulting in his dismissal. The giving of the confidentiality assurance by Manouk Asatryan, on which the Claimant relied, and the fact that he was not then informed or consulted about the imminent disclosure of his identity before it happened was the principal detriment in this case. This was the catalyst for all that occurred afterwards, and the acts that followed were materially influenced by the protected disclosure, which need only have played a more than trivial part in the Respondent's reasons.

45. I do not accept that there is any substance in those contentions. My reasons are as follows.

46. First, in my judgment the Tribunal dealt with the detriments relied on fully and appropriately. As I have already indicated, it needed, first, to consider whether the detriments were made out on the facts. It needed to address the question whether the detrimental treatment was treatment by the employer or by others for whom the employer had no vicarious liability and it needed, then, to turn to the question of causation. In my judgment it addressed each of those steps appropriately, and reached conclusions amply supported by the evidence.

47. Dealing with the eight detriments outlined in the Amended Notice of Appeal and relied on by the Claimant here, first, so far as concerns the asserted failure to deal adequately with the protected information during the investigation and disciplinary proceedings, I accept that what

is a reasonable disciplinary procedure is fact-sensitive and flexible. There is no universal rule that full disclosure is always required. Whether it is required in a particular case will depend on the nature of the disciplinary charge, the other evidence in the case and the strength of any balancing considerations that support or justify non-disclosure. Here the Tribunal made findings of fact about disclosure including in relation to the statements on the witness statement signed by the Claimant himself, and what he confirmed by signing that statement. It made findings about his own perception, as at 9 July, and the unknown and unanticipated nature of any threat represented by Omar Ali. It made findings about the concerns expressed by the Respondent about the quality of the CCTV evidence showing Omar Ali committing the impugned interaction and it made findings about the importance with which the Respondent viewed the witness statement provided by the Claimant. All of these considerations led to the conclusion that disclosure in this case was reasonable, and was in accordance with and authorised by the Respondent's policies.

48. So far as Mr Pauley's statements in the outcome letter are concerned, and in particular the question whether these should have been treated as a concession by the Tribunal that confidentiality had been guaranteed, as Mr McNicholas argued, it seems to me that the following points are relevant. Mr Pauley's outcome letter came much later and significantly after the Claimant resigned. Accordingly what Mr Pauley said in his letter cannot have had any influence on what the Claimant was thinking at the time. Mr Pauley recognised the Claimant's sense of grievance but made no factual findings about what exactly happened on 9 July at the meeting where the Claimant gave his witness statement to Manouk Asatryan. Mr Pauley's task was to adjudicate on the grievance and on whether, in particular, the Claimant was entitled to feel aggrieved about the disclosure of his witness statement. That was not the issue for the Tribunal, and in my judgment Mr Pauley's outcome letter was in no sense a concession. Mr

Pauley's letter simply formed part of the admissible evidence in the case, and received consideration as such. It was not dispositive of the issues, particularly where the evidence before the Tribunal led it to make findings of fact about what transpired and, in particular, to make findings reflected in the conclusions at paragraphs 73, 74 and 76.

49. The Tribunal, in my judgment, dealt carefully and thoroughly with these points. It found that there was no failure to deal adequately with the so-called protected information. It made important findings, as I have already outlined, at paragraph 53, supported by evidence that no assurance was given to the Claimant, that he raised no concern and made no reference to confidentiality because he was not in fear of Omar Ali when interviewed on 9 July and did not then and could not then have anticipated the reaction of Omar Ali when his statement was ultimately disclosed. It seems to me, in those circumstances, that there was no failure to deal with the protected information allegation. Secondly, in relation to the asserted failure to notify or consult the Claimant before the release of his identity as an informant, the Tribunal found that there was no such obligation and that the facts did not support any basis for the Respondent to inform the Claimant or to consult him before releasing his statement. Accordingly the detriment alleged was not made out on the facts. Thirdly, in relation to the asserted failure to abide by the agreement of confidentiality relating to the informant's identity, the Tribunal found here that there was no such agreement and accordingly the detriment alleged was not made out on the facts.

50. Fourthly, in relation to the asserted failure to consult the Claimant about the Respondent's deliberate and/or reckless decision to release the protectively disclosed information, the Tribunal found that there was no such act or failure to act in the sense alleged, and therefore, again, the detriment was not made out on the facts. Fifthly, in relation to the

allegation that breaching confidentiality in the protected disclosure resulted in the Claimant being threatened by Omar Ali, this allegation is factually incorrect. The Tribunal found that there was nothing to put the Respondent on notice that Omar Ali would react in the way he did to the knowledge that the Claimant was the informant and that there was no reason accordingly for the Respondent to consider that his identity was to be kept confidential. The release of his identity as the informant led to a threat, but this was not on the grounds of the protected disclosure, as the Tribunal clearly found. Moreover there was no detrimental treatment by the Respondent here. What Omar Ali did was not a detriment within the meaning of the Act for which the Respondent could be held vicariously liable.

51. Sixth, in relation to the allegation of changing the Claimant's workplace to another location, which arose as a result of the protected act and constitutes a detriment, the way in which this detriment is put in the Notice of Appeal differs significantly from the way in which it was put before the Tribunal. As a matter of fact the detriment relied on by the Claimant in his originating application and before the Tribunal was that there was a failure to move him beyond Shepherd's Bush rather than a complaint about transferring him to another workplace. As a matter of fact, the Tribunal found that the Claimant wished to move and agreed to the transfer. Further, the Tribunal found that the Claimant chose to move to Shepherd's Bush rather than further afield. In any event the Tribunal found that there were no changes in his terms and conditions or in the hours that he worked as a result of that change in location. Moreover the Tribunal found that Omar Ali was suspended, banned from the premises and ultimately dismissed so that there was no sense in which the Claimant was regarded as the troublemaker whilst Omar Ali received better treatment.

52. Seventh, in relation to the allegation of bullying and ostracism of the Claimant by colleagues, prompted by the breach and not separable from the protected act of the Claimant informing the Respondent of wrongdoing, it is not clear to me that this was an alleged detriment. To the extent that it was, however, two points can be made. Firstly, the Respondent cannot have been and was not held liable for wrongs committed by employees who either bullied him or called him a snitch (see the Tribunal's findings at paragraph 56), and in any event this was common ground. Secondly, the Tribunal found expressly at paragraph 56 that, to the extent that this occurred, the Respondent's actions were not grounded in the Claimant having made a protected disclosure. I shall return to the point about separability in a moment. Eighth, in relation to the allegation of acts and/or omissions by the Respondent that made the Claimant's work relationships so untenable that this culminated in his resignation, the points made above in relation to bullying and ostracism equally apply.

53. That deals with the list of detriments referred to in the Notice of Appeal. The second reason for my conclusion is that the Tribunal's decision shows clearly that it was satisfied that the reasons given by the Respondent for acting as it did were genuine and demonstrated that the fact that the Claimant made protected disclosures had no influence and played no part in those decisions. This was a case where the Tribunal was amply satisfied, as reflected by its unhesitating conclusion, that the Respondent behaved reasonably and properly in acting swiftly to protect the Claimant within the workplace and by advising him on steps he could take to address any threat outside the workplace, and in addition in suspending, banning and dismissing Omar Ali, offering to transfer him to a location sufficiently far away to separate him from the rumours and ensuring that there was no change to his terms and conditions or any other detrimental treatment found.

54. Further, it seems to me that in the arguments advanced by Mr McNicholas, both here and below, there is confusion between the reasons for the Claimant acting as he did with the reasons the Respondent acted as they did. The two are not the same. Whilst it is right that the Claimant raised a grievance because of the asserted breach of confidentiality in relation to his protected disclosure and the threats, what was in issue in relation to the unfair constructive dismissal claim under section 103A and section 95 was whether the employer acted in fundamental breach of contract or to his detriment by revealing him as the source of the information and whether it did so by reason (or principal reason) of the protected disclosure he made.

55. So far as the former is concerned, whether there was a fundamental breach or detrimental treatment, the Tribunal's findings are clear in relation to the revealing of his identity as the source of the information, and these have already been summarised above. There was no breach, still less any fundamental breach of contract, nor any detrimental treatment by the Respondent here. In any event the Tribunal found as a fact that the reason why the Claimant's identity was revealed when his witness statement was provided to Omar Ali was not the protected disclosure but the Respondent's understanding, based on its longstanding policy set out in handbooks and practice, of providing those who are the subject of disciplinary action with the evidence on which reliance is placed and the finding, combined with that, that the Respondent was not aware of anything to indicate that the Claimant was concerned about his identity being revealed, had not been told of any threat, and had no reason to believe that Omar Ali would react in a threatening way. The Tribunal was plainly satisfied that this was an employer that genuinely acted for reasons other than the protected disclosure. In those circumstances the burden of proving that the prescribed reason played no part in the Respondent's decision was necessarily discharged. There is nothing to suggest that the Tribunal regarded the reasons given by the Respondent for acting as the various managers did

as false or forming only part of the explanation so that there was no room for, nor any basis here, for drawing an adverse inference otherwise. Nor, in my judgment, is there any basis for going behind the Tribunal's findings of fact as to the reason for dismissal in this case.

56. Finally, to the extent that Mr McNicholas submits that the Tribunal was not entitled as a matter of law or fact to draw a distinction between the fact of making protected disclosures and the consequences that followed after the Claimant's witness statement was disclosed to Omar Ali, because the fact of making a protected disclosure could not be separated from the continuum of conduct that followed, I do not accept his submission. Mr McNicholas referred me to and relied in particular on the decision of this Appeal Tribunal in **Woodhouse v West North West Homes Leeds Ltd** [2013] IRLR 773. In my judgment there is nothing in that authority, nor in section 47B of the Act, that prohibits the drawing of a distinction between the making of protected disclosures and conduct by the Respondent that follows, which although related to those disclosures is separable from them. Of course care must be taken to ensure that an argument to that effect advanced by an employer is properly scrutinised, so that the legislation is not abused. But there is nothing, in my judgment, in principle to suggest that such a distinction cannot be drawn.

57. In **Woodhouse** the EAT referred to **Martin v Devonshire Solicitors** [2011] ICR 352. That case concerned victimisation rather than protected disclosures but a similar principle applied. There the complainant made allegations of sex discrimination against two partners in the firm of solicitors involved. Those statements were untrue. The complainant did not appreciate that they were untrue, in part because of her mental health difficulties. The fact that she had made protected acts by making complaints of sex discrimination formed part of the facts that led to her dismissal. The reason why the employer dismissed her, however, was not

the making of those complaints but rather the fact that the complaints involved false allegations which were serious and were repeated and which she refused to accept were untrue. The reason for the dismissal was that she was mentally ill and that there were management problems to which that gave rise. The Employment Appeal Tribunal accepted that the reason for the dismissal constituted

> **"23. … a series of features and/or consequences of the complaint which were properly and genuinely separable from the making of the complaint itself. Again, no doubt in some circumstances such a line of argument may be abused; but employment tribunals can be trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint."**

58. Both **Martin v Devonshire Solicitors** and **Woodhouse** support the conclusion that it is permissible in appropriate circumstances for a Tribunal to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself, provided the Tribunal is astute to ensure that the factors relied on are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did. Although in the **Woodhouse** case that principle was accepted, the EAT there suggested that it would be only in an exceptional case that the detriment or dismissal would not be found to be done by reason of the protected act. It seems to me that there is no additional requirement that the case be exceptional.

59. In addressing the question as to whether the reasons are properly and genuinely separable in a particular case, rather than any exceptionality test, a Tribunal must bear in mind the importance of ensuring that the factors relied on are genuinely separable, and it is helpful to repeat the observations made at paragraph 22 in **Martin v Devonshire Solicitors**:

> **"We prefer to approach the question first as one of principle, and without reference to the complex case law which has developed in this area. The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some**

**feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the *manner* of the complaint [Tribunal's emphasis]. Take the case of an employee who makes, in good faith, a complaint of discrimination but couches it in terms of violent racial abuse of the manager alleged to be responsible; or who accompanies a genuine complaint with threats of violence; or who insists on making it by ringing the managing director at home at 3 a m. In such cases it is neither artificial nor contrary to the policy of the anti-victimisation provisions for the employer to say "I am taking action against you not because you have complained of discrimination but because of the way in which you did it". Indeed it would be extraordinary if those provisions gave employees absolute immunity in respect of anything said or done in the context of a protected complaint. (What is essentially this distinction has been recognised in principle – though rejected on the facts – in two appeals involving the parallel case of claims by employees disciplined for taking part in trade union activities: see *Lyon v St James Press Ltd* [1976] ICR 413 ("wholly unreasonable, extraneous or malicious acts": see per Phillips J at p 419C-D) and *Bass Taverns Ltd v Burgess* [1995] IRLR 596.) Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle."**

60. In the present case the Tribunal did draw a proper distinction between the fact of making the protected disclosures and the consequences which were related but separable from the fact that the Claimant made those protected disclosures. The Tribunal made findings of fact that were supported by the evidence that entitled it to treat the consequences as separable. The material entitled the Tribunal to conclude that the reason why the Respondent acted as it did in disclosing the Claimant's witness statement to Omar Ali was not the making of the protected disclosure but was the wholly legitimate reason anticipated and authorised by the Respondent's disciplinary policy that an individual who was to be disciplined should be provided with the evidence upon which that disciplinary action would be based. There was ample evidence available that entitled the Employment Judge to reach the conclusions he did. In my judgment there was no error of law by the Tribunal in reaching those conclusions and in its consideration of why the Respondent acted as they did.

**Conclusion**

61. For all those reasons, in my judgment there was no error of law in any of the respects advanced by Mr McNicholas either orally or in writing in the Amended Notice of Appeal, and accordingly this appeal is dismissed.