Appeal No. UKEAT/0350/14/DM

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 July 2015
Judgment handed down on 3 September 2015

**Before**

**HIS HONOUR JUDGE DAVID RICHARDSON**

**MRS G SMITH**

**MR M WORTHINGTON**

---

DR Y-A SOH APPELLANT

IMPERIAL COLLEGE OF SCIENCE, TECHNOLOGY AND MEDICINE RESPONDENT

---

Transcript of Proceedings

JUDGMENT

---

## APPEARANCES

| | |
|---|---|
| For the Appellant | MR SHAEN CATHERWOOD<br>(of Counsel)<br>Bar Pro Bono Scheme |
| For the Respondent | MS JUDY STONE<br>(of Counsel)<br>Instructed by:<br>Farrer & Co LLP<br>66 Lincoln's Inn Fields<br>London<br>WC2A 3LH |

**SUMMARY**

**VICTIMISATION DISCRIMINATION - Protected disclosure**

**UNFAIR DISMISSAL - Reasonableness of dismissal**

On the question whether there were protected disclosures, the Employment Tribunal did not precisely apply the statutory test laid down in section 43A of the **Employment Rights Act 1996**. **Darnton v University of Surrey** [2003] IRLR 133 and **Babula v Waltham Forest College** [2007] ICR 1026 applied.

On the question whether the Claimant acted in good faith, the Employment Tribunal applied the law correctly and reached a conclusion which was not perverse. The fact that an allegation is made in defence to a complaint does not necessarily mean that it is made in bad faith. Not every "ulterior motive" is necessarily in bad faith. **Street v Derbyshire Unemployed Workers' Centre** [2005] ICR 97 discussed.

On the question of unfair dismissal, the Employment Tribunal effectively started from its own finding as to the Claimant's state of mind when its task was to consider the decision maker's reasons and decide whether they were reasonable. In this and other respects it did not apply the test in section 98(4) of the **Employment Rights Act 1996**.

Appeal also allowed on subsidiary points relating to contributory conduct and an item of expense claimed.

**HIS HONOUR JUDGE DAVID RICHARDSON**

## Introduction

1. Dr Yeong-Ah Soh ("the Claimant") was employed by Imperial College of Science, Technology and Medicine ("the Respondent") as a full-time lecturer in its Department of Materials until her dismissal on 11 January 2012. She brought proceedings against the Respondent on wide-ranging grounds. Following an 18-day hearing the ET sitting at London Central (Employment Judge Sarah Goodman presiding) delivered a Reserved Judgment dated 19 March 2014.

2. The Claimant made many complaints of unlawful race discrimination, harassment and victimisation. They were set out in a Scott Schedule containing no fewer than 289 allegations. The ET rejected these complaints in their entirety. We are not concerned with them in this appeal but we should record the painstaking care with which the ET dealt with them in its Reasons.

3. The ET rejected the Claimant's case that she was subjected to detriment and dismissed because of public interest disclosures; she appeals against that finding and the Respondent seeks to support it both for the reasons that the ET gave and on other grounds. The ET found that the Claimant was unfairly dismissed and that there should be a reduction of 20 per cent for contributory fault. The Respondent appeals against both these findings. The ET gave judgment for the Claimant in respect of a claim for expenses in the sum of £2,182.92. The Respondent appeals against that finding.

**The Background Facts**

4. The Claimant is a physicist with special research experience. She was an associate professor at Dartmouth College in the United States from 2003 until 2009. As the ET remarked, her credentials as a serious scientist are not in doubt.

5. The Claimant was first offered employment by the Respondent in September 2006. The offer was subject to a two-year probationary period. For various reasons she did not take up full-time employment until 1 July 2009. Her probationary period was extended until June 2010.

6. The Claimant took her first course of lectures in the spring term of 2010. It was the practice of the Respondent to seek feedback on lectures from students by means of a system of online evaluation ("SOLE"). The feedback was adverse. A formal performance review took place in August 2010. The Claimant was issued with a warning to improve. She undertook a second set of lectures in November and December 2010. Again, SOLE feedback was disappointing. By this feedback the Claimant was rated the worst of the 31 lecturers in the department.

7. The ET was critical of the way in which the Respondent handled the Claimant's probationary period. It was part of the Respondent's system that a lecturer should have an academic adviser during that period. The Claimant had two: Professor Alford in her first year of teaching and Dr McPhail in her second. Neither carried out the full responsibilities expected of an academic adviser. Professor Alford did not attend any of her lectures. Dr McPhail attended only two. The Respondent had informed the Claimant that Dr McPhail would be expected to meet her for at least six one-to-one sessions. Unfortunately, the Respondent did not

also give this information to Dr McPhail, and he did not do so. He gave her feedback after the first lecture but not again.

8. By February 2011 Professor Alford was head of department. He met the Claimant informally on 3 February, warning her that she might fail her probationary period and offering her the option of a year's sabbatical. The Claimant submitted a grievance against him on 13 February 2011.

9. On 17 March 2011 a formal probation review meeting took place. Dr McPhail was a member of the panel. As the ET found (and as he later admitted himself) he exaggerated the extent to which he had met the Claimant to discuss her teaching. In a heated moment during the meeting he described the first of the two lectures he had attended as one of the worst lectures he had ever seen. The panel recommended that the Claimant's appointment not be confirmed. The Claimant instituted a grievance against Dr McPhail.

10. Where a panel recommends that an appointment not be confirmed, the Respondent's procedure provides for a second-stage review. This took place on 27 May 2011. By a letter dated 8 June 2011 the panel decided to extend the Claimant's probation until 30 June 2012, giving her a new academic adviser, recommending a mentor outside the department and laying down what was expected of the Claimant. The panel was critical of Dr McPhail's supervision.

11. As we have seen, to a significant extent the Respondent's concerns about the Claimant were based on student feedback through the SOLE system. The Claimant defended herself against assessment on this basis. She said her SOLE scores were poor because she did not "dumb down" the course as other lecturers did.

12. In her grievance concerning Professor Alford, submitted on 13 February 2011, she said the following:

> **"r. Through the conversations with the students, I also learned why I received a negative evaluation from a large number of students. The students stated the following: The content of my lectures were very challenging and half of the students are not interested in learning the material since they want to become bankers. Even though there are other courses that are also quantitative, such as strain and stress, they are not as hard for the students since half of the material they see in their 2nd year was already covered in their 1st year, and therefore they have less new material to learn. On the other hand, because they learn so little magnetism in their 1st year, almost all the material in magnetism is new to them, and therefore the course is hard. Also, they find other instructors more accommodating - they are used to being "spoon fed" - whereas I don't "spoon feed them". For example, some of the instructors told them what would be in the exam, and indeed the exam had those problems. One of my students appreciated that I did not "spoon feed them" because she learned that it was for her benefit in the long run. In addition, they are used to a passive style of learning, where the instructor delivers the material and the students quietly receive it. They want to learn the material at their own pace. I was the only instructor who really expected the students to answer questions, and that was unusual for them. Even though other instructors may ask them questions, they don't really expect the students to answer them."**

13. At the meeting on 27 May 2011 the Claimant stated the following in a presentation slide:

> **"… My course isn't easy, thus it leads to low SOLE scores. Some lecturers 'dumb down' their lecture content to accommodate their students, but I'm not as accommodating which is why I have received low SOLE scores. If SOLE scores are to be used to judge teaching then this article should be taken into account. Students have told me that Dr McPhail spoon feeds them as to what is in the exam and I have the names of the students that have told me this."**

14. She was asked whether she was saying that Dr McPhail gave students the exam questions before the exams. She replied, "Yes".

15. Following the panel's meeting the Respondent took up with the Claimant what she meant by her statement concerning Dr McPhail. A meeting was held on 16 June for this purpose. The Respondent's record of that meeting was as follows:

> **"… at the meeting on Thursday 16th June … you verbally confirmed that you did not intend to give the Probation Review panel the impression that Dr McPhail gives out the exam questions to his students. You explained that you had received reports from a couple of students that Dr McPhail provides more guidance to his students regarding the exams, but you emphasised that you were not told by the students [that] Dr McPhail gives out the exam questions."**

16. The Claimant was asked to confirm whether this was what she meant. After some delay she replied as follows on 6 July:

> **"… I clarified during the meeting on June 16, 2011 that some of the students had told me that Dr McPhail told them what would be in the exam and that indeed the exam had those problems. I was not told explicitly by the students that they were shown the exam questions but the students said that they were told that would be in the exam. In my view, the fact that his name was brought up by the students means that the amount of information that he provides is more than what other academic staff do. Otherwise, the students would not mention his name as a special case. Also, the performance of students in his exam was exceptionally good. 53% of the students achieved 70% or more in his MSE 205 exam achieving a first, and 72% … of the students achieved 60% or more (2.1 and above)."**

17. She also said in a letter dated 10 July in the context of her grievance against Dr McPhail that he had given "unusually strong indications as to the examination questions".

18. Professor Alford decided that the Claimant was making an allegation of improper practice on the part of Dr McPhail. A disciplinary investigation was undertaken. In the course of the investigation, HR told him that there were "two potential outcomes": either disciplinary action could be taken against him, or if it was found that there was no case to answer and the allegation was made maliciously, disciplinary action could be taken against the Claimant.

19. In due course Dr McPhail was acquitted of malpractice. Professor Alford decided that the Claimant should be investigated for making a vexatious allegation (the word "vexatious" being taken from the Respondent's disciplinary procedure), and she was invited to a disciplinary hearing. It is important to note how she put her defence in a letter dated 21 December 2011 prepared for the disciplinary hearing the following day. We will quote four passages:

> **"First, I have never made an allegation against my colleague Dr McPhail or accused Dr McPhail of improper conduct. I only made a comment exemplifying how different styles of teaching can lead to different student satisfaction (SOLE scores) while defending myself against the decision by the College to issue a non-confirmation of appointment based on my low SOLE scores. I did not realize then, nor have I ever been told by any member of the College, that my words would be used by the College to make a serious allegation against Dr McPhail, since I myself did not see any firm evidence for such an allegation. …**

> **Second, I am surprised that a short and rather vague exchange of sentences during my appeal meeting of 27 May has escalated into a major incident where I now find myself under threat of dismissal. The comment that I made during my probationary appeal meeting of 27 May, chaired by Prof Kilner, was that Dr McPhail "spoon-fed students" with respect to what might be asked in examinations. The reason for the comment was to explain that SOLE scores or performance of the students in examinations do not necessarily reflect the quality of the teaching. I was only recalling what two students had told me, and I understood then as I do today that there is plenty of room to interpret those words as not implying anything improper. …**
>
> **I have explained repeatedly during the investigation the context and my reasons for using the comparison between Dr McPhail's and my teaching practices without implying that the practice used by Dr McPhail was improper. …**
>
> **However, I did not assert that anyone had been behaving improperly, and indeed in the summary by Claire Westgate, I am clearly quoted as stating that I did not intend to give the impression that Dr McPhail gives out the exam questions to his students."**

20. On 11 January 2012 the Claimant was dismissed for gross misconduct. The decision was taken by Professor Magee. He did not accept the defence put forward in the letter dated 21 December. He found that the Claimant did intend to make a serious allegation against Dr McPhail and that what she said in her letter dated 21 December was a new argument at the disciplinary hearing. He found that until that time she had persisted in making the allegation. He said:

> **"… It is my belief that you were fully aware of the serious nature of the allegations and the investigation that had been conducted and were also aware of the impact that such an allegation being proven would have on [Dr McPhail]. …"**

21. On 15 January the Claimant wrote to Professor Alford reiterating that she had never implied that Dr McPhail did anything improper. An internal appeal was subsequently rejected.

**The Claimant's State of Mind**

22. One might have thought that the Claimant's letter dated 21 December, from which we have quoted at length, contains the Claimant's considered position with regard to her criticisms of Dr McPhail and that it was indeed her position that she had not intended to imply that Dr McPhail did anything improper.

23. However, Mr Catherwood, representing the Claimant on the appeal, explained to us that the letter did not represent her true position. He told us, and confirmed on instructions, that contrary to what she said in that letter she had always believed Dr McPhail was guilty of misconduct in connection with examinations. He told us that the letter dated 21 December was defensive in nature, rowing back on what she had said earlier in the light of the disciplinary proceedings she faced. On instructions from the Claimant, he took us to an email dated 30 June 2011 written to a colleague as indicative of the view she really held, to the effect that Dr McPhail told students what would be in the exam. It was her case, as explained to us at the EAT hearing, that she always believed that Dr McPhail informed students of what was to be in the exam in a specific and unacceptable manner.

24. It is no part of our task in the Appeal Tribunal to make findings about the Claimant's state of mind; this, so far as relevant to the issues, was the task of the ET. We would only observe that on her case as explained to us (1) the Claimant has varied, it appears intentionally, in her account of her own beliefs and motivations and (2) Professor Magee will have been right to conclude that she always intended to make a serious allegation against Dr McPhail.

**The ET's Reasons**

25. The ET's overall Reasons, including an appendix dealing in detail with 359 issues relating to race discrimination, harassment and victimisation, ran to some 64 pages of close-typed text. We need summarise only those findings that relate to the issues we have to decide.

*Public Interest Disclosure*

26. By order dated 27 July 2012 the Claimant was permitted to amend her claim to introduce complaints that she suffered detriment and was dismissed by reason of public-interest

disclosures. She relied on her comments about students being "spoon fed" and on her allegations about Dr McPhail. It was her case that these were protected disclosures because they tended to show a breach of legal obligation. By the time of the hearing it was her case that she believed there was a legal obligation upon lecturers not to undermine the integrity of the examination system, and the information given by the students that she relayed to the Respondent tended to show that he had done so by giving specific information about what would be in an examination question.

27. On the question of public interest disclosure the ET quoted from section 43B and section 43C of the **Employment Rights Act 1996** ("ERA"). It noted the difference between questions of reasonable belief and good faith, mentioning the decision of the Court of Appeal in **Street v Derbyshire Unemployed Workers' Centre** [2005] ICR 97.

28. The ET found that there were five disclosures of information by the Claimant: the grievance in February 2011; remarks at the meeting on 27 May; what she said on 16 June; and her communications on 6 and 10 July.

29. In an important passage the ET then set out its conclusions relating to bad faith and reasonable belief:

> **"Good faith**
>
> **119. In the other five, the claimant disclosed information, with varying nuance, about Dr McPhail telling students what would be in the exam. Reference to spoon feeding, by itself, carries no suggestion of breach of a legal obligation, only a debate about how to teach. The respondent argues that the claimant acted in bad faith, in that she was angry with Dr McPhail. Had she wanted to have the integrity of the exam system investigated she would also have named the other lecturer the students spoke of (in fact, Dr Skinner), and she would have raised it much sooner, and not left it until her job was threatened.**
>
> **120. The timing of the Alford grievance letter undermines this: she said that students were told what would be in the exam within days of her second conversation with the students, and before she had cause to be angry with Dr McPhail for duplicity. At that point her purpose was not to attack David McPhail, but to argue why she was being unfairly assessed as an inadequate teacher. Nor did she raise it in her grievance about him on 13 May 2011. The accusation resurfaced in the 27 May meeting, in largely the same form as the Alford**

**grievance, when what she had in mind was how much students could or should be "spoon fed", and it was about the rights and wrongs of what she presented as her challenging approach to teaching, which made the students anxious that they would not get a good exam mark.**

**121. What gets more difficult is assessing the claimant's purpose in the meeting of 16 June, when arguably she was on notice that more was being read into her words. Her failure to agree with Mike Finnis's interpretation that she was only saying that Dr McPhail gave "strong hints", is part of this difficulty. Instead, in her e-mail of 6 July going over exactly what the students said, she then added that this explained why his results were so good. Objectively, this can be, and was, read as saying that the students did well because they knew the questions, in other words, he had overstepped the mark. However, in our analysis, while taking into account that she was very angry with Dr McPhail, (in our view with some cause) she was saying no more than what she believed she had heard. The refusal to retract in our view, was because she was so self-absorbed that she had not noticed that her information could suggest that Dr McPhail was guilty of academic misconduct. When she persisted in restating what she had heard as part of her attack on the department's use of SOLE scores to assess, and condemn as inadequate, her teaching, she had not thought through the implications. When she learned the Department was going to investigate the matter, she thought it was for the department to decide whether what she had stated amounted to wrongdoing. We do not think that she acted as she did in order … to get Dr McPhail into trouble. The remarks were made in good faith.**

**Reasonable belief**

**122. What is less clear is that she held a reasonable belief tending to show that Dr McPhail had failed to comply with a legal obligation. In submissions the respondent relies on the fact that once the claimant had been charged with the disciplinary offence of making a vexatious allegation, she was careful to say that she was not accusing Dr McPhail of cheating, only of giving "unusually strong indications". The Tribunal recognises that this may have been self-serving, once she realised that she was in trouble, and that she may have been rowing back from what she had suggested earlier. More interesting is whether in June and July she was stupid or disingenuous when she claims not to have recognised that what she had said was being read as saying that … Dr McPhail was cheating. However, at no point had she said that he gave the text of the questions, and she was careful to say he had not. At most she said he had told them what would be in the exam, and it was. She was right in this, though in fact it was a formula so obvious and crucial it featured in the syllabus. Further it was only one part of a multiple question, and carried only one mark out of forty-four. She was accurate, and misunderstood.**

**123. The context of her remarks is all important. The claimant was always enigmatic and indirect about why she said this about Dr McPhail. In our view she did not believe Dr McPhail was undermining the integrity of the exam system, and so in breach of legal obligation. She did believe that it was wrong and unfair to call him a good teacher because he got good SOLE scores, and her a bad teacher because she got bad ones. That is not breach of a legal obligation, and does not earn the protection against detriment and dismissal provided by the statute. The claims of detriment and dismissal for making public interest disclosures therefore fail."**

*Unfair Dismissal*

30. The ET found that the reason for dismissal related to conduct: the "vexatious" allegation. It directed itself that the approach to be applied was set out in **British Home Stores Ltd v Burchell** [1978] IRLR 379 and made reference to the "standard of the reasonable employer". It said that it must not substitute its own view of what sanction was appropriate.

31. The ET said that it was concerned that the Respondent saw things in binary terms: "either Dr McPhail was guilty, or the allegation was malicious". It justified this concern by reference to what the Respondent's HR had said about "two possible outcomes". We will pick up the ET's reasoning in paragraph 130 (it must be recalled, in reading this passage, that Professor Nethercot was not the person who held the disciplinary hearing. It was Professor Magee who did so):

> **"130. When investigating Dr McPhail from August, Prof Nethercot had not read the grievances about Alford and McPhail, nor should he have been alerted to them, because he was proceeding on the minutes of 27 May meeting and on the claimant's clarification. When then asked at the end of October to investigate the claimant, he interviewed her again, and was still not aware of the background in which this information first came up. Had he seen that the claimant essentially said the same thing in February 2011, he could not have drawn the conclusions about the delay in acting on information that he did. Had he been aware that she had not made an accusation of telling students what would be in the exam in her grievance about Dr McPhail, which came some weeks after he made the unfortunate "worst lecture in 20 years" remark, and that would have been the place for an accusation about his exam practice, he might have rethought the context and seen that it was far less clear-cut - whether what she actually said was untrue, or that she had alleged or implied more than was true. Or even if he concluded, on an analysis of what students B and C said, that she had added two and two and got five, he would have been less ready to conclude that she had seized on it as a way of discrediting Dr McPhail. It would have been seen that she had made these statements well before she had cause to be angry with Dr McPhail. As for failing to retract them, in the view of the tribunal, careful analysis would have shown that she was not adding to what she had said previously, and by saying "pretty much", that she was not saying he showed the written questions. When asked to clarify, she was stopping short of saying he was cheating. In our finding, her motivation did not receive this careful analysis, then or in the disciplinary hearing, because of the climate of hostility which has been described, and because right from the initiation of the investigation the possibility that the allegation was correct, but added up to less than was implied, or was not quite correct, but made in good faith, was lost.**
>
> **131. We concluded that a reasonable, fair-minded employer would have recognised that what was taken to be an allegation of cheating was not vexatious, and possibly not even an allegation of cheating.**
>
> **132. This is not to say that the individuals who make decisions [sic] in this case were malevolent, or that they overlooked the obvious. The claimant was combative, and when on the defensive, chose to stick to repetition of the facts rather than try to explain them, failing to dispel the view that she was disingenuous in failing to recognise the construction put on her words. We have considered anxiously and with some scepticism her assertion that she never realised it was taken by the Respondent that she was accusing Dr McPhail of cheating, because her invitation to the investigation meeting failed to state what Dr McPhail was being told, and have concluded that she was so self absorbed and subjective that she simply failed to appreciate what others thought was a reasonable construction.**
>
> **133. Further, even if the employer had reached the view that her failure, say, to agree with Mike Finnis's interpretation and so avoid ambiguity, or to check with the students first, before making, let alone repeating the allegation, amounted to misconduct, in our view a reasonable employer would not have concluded that this justified dismissal. It is noteworthy that Prof Magee's panel felt the need to add in the breakdown in relations within the Department to justify dismissal, and that this was the point that concerned the appeal panel. There was some right and wrong on both sides, especially in relation to the probation process, and there was a history of difficulty which meant that on some occasions her actions were interpreted uncharitably. Mediation, apology (by Dr McPhail) and consideration of redeployment, perhaps to Physics, would have been ways to handle this problem in a fair way."**

*Contributory Fault*

32. The ET referred to the wording of section 123(6) of the **1996 Act**. It found that the Claimant had been guilty of thorough going and repeated lack of consideration to her colleagues with little in the way of thanks and no apology. The ET then said (paragraph 142):

> **"142. It is just and equitable that the claimant's unfair dismissal compensation should be reduced by 20% on this account; assessing the contribution of conduct alone it would be more, but this proportion reflects that not only was the dismissal was unfair [sic], but also some features of the probation process from which it arose."**

*Expenses*

33. The ET had to determine a claim relating to unpaid expenses for a trip to Seoul. The Claimant did not submit her claim for expenses until August 2012. The ET dealt with this as follows (paragraph 145.2):

> **"145.2. A claim for £2,182.92 for a trip to Seoul in 4 February 2012 [sic] to give [a] talk to a spintronics workshop. The claim was not paid because the event occurred after dismissal. The expense was incurred five days earlier, before the claimant knew that dismissal was the outcome. The claimant objects that she made the arrangements not knowing that she was about to be dismissed. The Tribunal notes that although dismissed for gross misconduct, she was paid three months salary in lieu of notice. There is no suggestion that this was an ex gratia payment. If the contract included a term, as we infer from the parties' conduct that it did, for reimbursement of expenses necessarily and reasonably incurred on academic business, then this is an amount which would have been paid had she served her notice, and arguably was incurred in anticipated performance of her duties even if when the time came she no longer had duties to perform. There is no argument that she could or should have mitigated her loss once she knew of the dismissal; we order payment."**

## Public Interest Disclosure

*Statutory Provisions*

34. Part 4A of the **ERA 1996** defines the meaning of "protected disclosure". These provisions have been amended significantly by the **Enterprise and Regulatory Reform Act 2013**, but this case concerns the provisions in their pre-amendment form.

35. Section 43B(1), so far as relevant, 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,**

**(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,**

**(d) that the health or safety of any individual has been, is being or is likely to be endangered,**

**(e) that the environment has been, is being or is likely to be damaged, or**

**(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."**

36. Section 43C, so far as relevant, provided as follows:

> **"(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith -**
>
> > **(a) to his employer, or**
> >
> > **(b) where the worker reasonably believes that the relevant failure relates solely or mainly to -**
> >
> > > **(i) the conduct of a person other than his employer, or**
> > >
> > > **(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.**
>
> **(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer."**

37. A worker has the right not to be subjected to any detriment by any act or deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure (see section 47B and section 48(2) of the **1996 Act**). A dismissal will be regarded as unfair if the reason, or if more than once, the principal reason, for the dismissal is that the employee made a protected disclosure (see section 103A of the **1996 Act**).

38. Although the ET dealt with the issues in the opposite order, it is logical first to consider whether the disclosures qualified under section 43B(1) and then to ask whether they were protected by section 43C(1) because they were made "in good faith" to the Respondent.

*Qualifying Disclosures*

39. On behalf of the Claimant Mr Catherwood submitted that the ET's reasoning in paragraphs 122 and 123 was flawed. The ET concentrated impermissibly on the motivation of the Claimant; this was irrelevant for the purposes of section 43B. The ET did not apply the correct legal test. The question was not whether the Claimant reasonably believed that Dr McPhail had breached a legal obligation but whether she reasonably believed that the information that she disclosed tended to show that this was the case. Section 43B(1) does not require the worker to hold the belief that the information and allegation disclosed are substantially true; see **Darnton v University of Surrey** [2003] IRLR 133. In any event he submitted that the ET's conclusion was insufficiently reasoned or perverse. He took us through material seeking to show that the Claimant had a reasonable belief that the information tended to show that the examination system was being undermined.

40. On behalf of the Respondent Ms Stone submitted that the ET applied the law correctly. It had identified the difference between "reasonable belief" for the purposes of section 43B(1) and "good faith" for the purposes of section 43C correctly in its statement of the law. It was entitled to consider what the Claimant actually believed when reaching its conclusion for the purposes of section 43B(1). It reached a tenable finding of fact that the Claimant did not hold the requisite belief. Its conclusion was not perverse by the high standards required; see **Yeboah v Crofton** [2002] IRLR 634. She too took us through the materials available to the ET.

41. On this part of the case our conclusions are as follows.

42. The leading case on the interpretation of section 43B(1) is **Babula v Waltham Forest College** [2007] ICR 1026 (see paragraphs 74 to 82), which largely approved the approach in **Darnton**. The following propositions are now well established:

(1) The ET should follow the words of the statute. No gloss upon them is required. The key question is whether the disclosure of information, in the reasonable belief of the worker making the disclosure, tends to show a state of affairs identified in section 43B: in this case, that a person had failed to comply with a legal obligation to which he was subject.

(2) Breaking this down further, the first question for the ET to consider is whether the worker actually believed that the information he was disclosing tended to show the state of affairs in question. The second question for the ET to consider is whether, objectively, that belief was reasonable (see **Babula** at paragraph 81).

(3) If these two tests are satisfied, it does not matter whether the worker was right in his belief. A mistaken belief can still be a reasonable belief.

(4) Whether the worker himself believes that the state of affairs existed may be an important tool for the ET in deciding whether he had a reasonable belief that the disclosure tended to show a relevant failure. Whether and to what extent this is the case will depend on the circumstances. In **Darnton** HHJ Serota QC explained the position in the following way:

> **"29. … It is extremely difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knew or believed that the factual basis was false, unless there may somehow have been an honest mistake on his part. The relevance and extent of the employment tribunal's enquiry into the factual accuracy of the disclosure will, therefore, necessarily depend on the circumstances of each case. In many cases, it will be an important tool to decide whether the worker held the reasonable belief that is required by s.43B(1). We cannot accept Mr Kallipetis's submission that reasonable belief applies only to the question of whether the alleged facts tend to disclose a relevant failure. We consider that as a matter of both law and common sense all circumstances must be considered together in determining whether the worker holds the reasonable belief. The circumstances will include his belief in the factual basis of the information disclosed as well as what those facts tend to show. The more the worker claims to have direct knowledge of the matters which are the subject of the disclosure, the more relevant will be his belief in the truth of what he says in determining whether he holds that reasonable belief."**

43. In passing we would make one comment concerning **Darnton**. In paragraph 31, which seems to serve as a short summary of the position, the exposition does not quite follow the wording of the legislation. As **Babula** makes clear, it is important to adhere to the statutory test.

44. Against this background we turn to the ET's reasoning.

45. As we have seen, the first question for the ET to decide was whether the Claimant herself believed that the information she was disclosing tended to show that the examination system was being undermined. The second question was whether the Claimant's belief was reasonable.

46. The ET's reasoning in paragraphs 122 to 123 does not clearly address either of these questions. Rather, the ET addressed the question whether the Claimant herself reasonably believed that the examination system was being undermined. This may be an important tool in deciding the statutory questions, but it is not itself conclusive. In some cases a deviation from the correct statutory question might make no difference. In this case, where the Claimant's state of mind was a critical and important issue in the case, we think it was essential to focus upon the correct question.

47. There is, as Mr Catherwood submitted to us, a distinction between saying, "I believe X is true", and, "I believe that this information tends to show X is true". There will be circumstances in which a worker passes on to an employer information provided by a third party that the worker is not in a position to assess. So long as the worker reasonably believes

that the information tends to show a state of affairs identified in section 43B(1), the disclosure will be a qualifying disclosure for the purposes of that provision.

48. We do not, however, accept Mr Catherwood's other criticisms of the ET's reasoning. The ET understood the distinction between motivation and belief; it was expressly addressing the question of belief in paragraphs 122 and 123. Nor can it be said that the ET was perverse to conclude that the Claimant did not believe that Dr McPhail was undermining the integrity of the examination system. There was material on which the ET could reach this conclusion. It was, as we have seen, the Claimant's own stated position set out in her letter dated 21 December 2011, and in her grievance against Dr McPhail she had not made any such allegation.

49. It is certainly true that there was material before the ET on which it could have reached the opposite conclusion: indeed neither side is satisfied with the ET's finding of fact on this issue. The test for a finding of perversity is set high, because there is an appeal to the Employment Appeal Tribunal only on a question of law; see **Yeboah** at paragraphs 93 to 95. We do not think the ET's conclusion is open to criticism in this way, nor do we consider that it is insufficiently reasoned when read with the ET's earlier findings of fact.

**Good Faith**

50. Ms Stone submits in any event that the ET ought to have found that the disclosure, even if it qualified, was not protected because it was not "in good faith". She submits that the ET did not apply the reasoning of the Court of Appeal in **Street**. The disclosures of information were made by the Claimant, on the ET's findings, in order to defend herself against her assessment as a teacher, which she regarded as unfair, and to attack the use of SOLE scores to assess her teaching as inadequate. The motive was self-defence against criticism of her teaching. This

was an ulterior motive; the ET ought therefore to have found that the allegation was not made in good faith.

51. On behalf of the Claimant Mr Catherwood submits that Ms Stone's reliance on **Street** is misplaced. The Court of Appeal did not lay down a rule that where a disclosure is made partly or completely for some ulterior purpose, the disclosure is not made in good faith. It may depend on the ulterior purpose, for not every ulterior purpose connotes a lack of good faith, which entails bad faith with connotations of impropriety. In this case the Claimant made the disclosures in order to explain why it was unfair to rely on SOLE scores; it was made in order to cast the allegations against her in a different light. As the ET found, she did not make the disclosures out of spite against Dr McPhail.

52. It is, we think, important to see what the Court of Appeal decided in **Street**. In that case the worker's disclosures of information were found by the ET to be motivated by personal antagonism and for that reason not to have been made in good faith. The Employment Appeal Tribunal dismissed the worker's appeal, holding that the finding of lack of good faith was open to the ET and that it was not the purpose of the legislation to allow grudges to be promoted and disclosures made in order to advance personal antagonism. The Court of Appeal dismissed the Claimant's appeal.

53. The Court of Appeal was concerned that a person who makes a disclosure of wrongdoing may often be resentful or antagonistic towards the perceived wrongdoer. It was submitted to the Court of Appeal that it would undermine the purpose of the legislation if such a person was held to have acted other than in good faith. It was in that context that the Court of Appeal held that the ET should look at the dominant purpose of a disclosure when considering

whether it was made in good faith; see the Judgment of Auld LJ at paragraph 57 and Wall LJ at paragraph 73. The mere fact that a sense of resentment or antagonism forms part of the motive for a disclosure does not require an ET to find that the allegation was made other than in good faith.

54. However, the Judgments of both Auld LJ and Wall LJ make it clear that it is for the ET, on all the material before it, to assess whether the disclosure was made in good faith.

55. Thus Auld LJ said:

> **"53. In considering good faith as distinct from reasonable belief in the truth of the disclosure, it is clearly open to an employment tribunal, where satisfied as to the latter, to consider nevertheless whether the disclosure was not made in good faith because of some ulterior motive, which may or may not have involved a motivation of personal gain, and/or which, in all the circumstances of the case, may or may not have made the disclosure unreasonable. Whether the nature or degree of any ulterior motive found amounts to bad faith, or whether the motive of personal gain was of such a nature or strength as to "make the disclosure for purposes of personal gain" or "in all the circumstances of the case" not reasonable, is equally a matter for its assessment on a broad basis."**

56. And Wall LJ said:

> **"72. Motivation, however, is a complex concept, and self-evidently a person making a protected disclosure may have mixed motives. He or she is hardly likely to have warm feelings for the person about whom (or the activity about which) disclosure is made. It will, of course, be for the tribunal to identify those different motives, and nothing in this judgment should derogate from the proposition that the question for the tribunal at the end of the day as to whether a person was acting in good faith will not be: did the applicant have mixed motives? It will always be: was the complainant acting in good faith?"**

57. Further, he said:

> **"74. It would, of course, be folly to attempt to list what could constitute ulterior motivation or bad faith. The present case provides one example. Ulterior motivation, I am satisfied, is something that tribunals will be able both to identify and to evaluate on the facts of the individual case."**

58. The fact that a disclosure of information was made by a worker seeking to defend herself against an adverse assessment of her performance does not necessarily mean that the disclosure was made other than in good faith. There is no halfway house between "good faith"

and "bad faith"; the one is the converse of the other. "Bad faith" connotes some degree of impropriety in the making of the disclosure. On the ET's findings the disclosure was not made out of spite towards Dr McPhail but rather to illustrate why some lecturers might be more popular with students than others, hence rendering the SOLE marks an unfair way of assessing a lecturer's performance. The ET correctly applied the words of the statute; it had regard to the guidance in **Street**, and we do not think it erred in law.

59. We have therefore found that the ET erred in law in one respect only: it did not directly address the statutory test set out in section 43B(1) of the **ERA 1996**.

**Unfair Dismissal**

*Statutory Provisions*

60. Section 98(1) provides that it is for the employer to establish the principal reason for dismissal and that it is of a kind specified in section 98(2) or some other substantial reason. Section 98(2) specifies conduct. Section 98(4) provides that, where the employer has fulfilled the requirements of section 98(1):

> **"(4) … the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
>
> > **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> >
> > **(b) shall be determined in accordance with equity and the substantial merits of the case."**

*Submissions*

61. On behalf of the Respondent Ms Stone submitted that the ET impermissibly substituted its view for that of the Respondent. It should have asked whether the Respondent genuinely reached the conclusion that the Claimant made a vexatious allegation of cheating and then asked whether the conclusion, and the decision to dismiss, was within the range of reasonable

responses. This was not its approach. Its reasoning was infected with its own conclusion that the Claimant had not done so. There was no real analysis of the decision of Professor Magee or his letter of dismissal. Rather, the ET focused on the investigation report of Professor Nethercot. Thus it criticised Professor Nethercot's lack of knowledge of the Claimant's February grievance when Professor Magee had such knowledge (or at least it did not address the question as regards Professor Magee). This was not permissible; see **Orr v Milton Keynes Council** [2011] ICR 704. Even then it did not ask whether Professor Nethercot ought to have had such knowledge.

62. On behalf of the Claimant Mr Catherwood submitted that the ET had correctly directed itself in law and repeatedly adopted the test of the "fair-minded and reasonable employer". He submitted that it reached a clear factual conclusion that the focus of the Respondent was too narrow, so that it closed its mind to a less negative interpretation of the Claimant's conduct. The criticism of the ET's approach to Professor Nethercot's investigation was correct, since Professor Nethercot could reasonably have obtained details of the February grievance.

63. Mr Catherwood also sought to uphold the ET's decision on other grounds. He submitted that there were defects in the Respondent's processes that rendered the dismissal unfair. These included: inappropriate involvement of Professor Nethercot who, by reason of his involvement in the investigation of Dr McPhail, had reached a conclusion adverse to the Claimant before he started to investigate her case; HR's failure to inform the Claimant that it would use what she said in the investigation of Dr McPhail against her later; refusing permission to the Claimant to call students as witnesses; and Professor Nethercot's failure to read the examination questions during the investigation.

64. Ms Stone accepted that these criticisms had been raised during the ET proceedings. She said it was plain that the ET did not find that these matters gave rise to any unfairness. She answered Mr Catherwood's points individually, seeking to show that each was within the range of ways in which the Respondent could reasonably have proceeded.

*Discussion and Conclusions*

65. It is the task of the ET to apply section 98(4). It must apply the objective standard of the reasonable employer to all aspects of the dismissal: investigation, process, fact-finding and sanction. It must recognise that in many cases (though not necessarily all) there may be a band or range of ways in which a reasonable employer may act.

66. There is an appeal to the Employment Appeal Tribunal only on a question of law. In the context of appeals concerning section 98(4), the Appeal Tribunal must itself avoid substituting its own opinion for that of the ET; see **Fuller v London Borough of Brent** [2011] IRLR 414 at paragraphs 28 to 31. The Reasons of the ET must be read carefully to see if it has in fact applied the law, but the reading must not be pernickety or hypercritical, and it must look at the ET's Reasons in the round.

67. We consider that Ms Stone's criticisms of the ET's reasoning are well founded.

68. Professor Magee concluded that the Claimant made and intended to make an allegation of cheating and that the allegation was vexatious. The ET's task, in applying section 98(4), was to decide whether that conclusion was reasonable. In so doing it was not to proceed from its own findings. It was required by section 98(4) to identify the reasons given by Professor

Magee and decide whether it was reasonable or unreasonable for him to reach those conclusions.

69. The ET did not adopt this approach. It stated, in paragraph 132, its own conclusion that the Claimant was:

> **"132. … so self absorbed and subjective that she simply failed to appreciate what others thought was a reasonable construction."**

70. It did not consider the position from Professor Magee's point of view at all. It appears to have relied on its own findings, largely made in the context of the issues of public-interest disclosure.

71. Professor Magee rejected the Claimant's case put in her letter dated 21 December that she never intended to make an allegation of cheating. He gave reasons for doing so. The ET should have examined them with care. As we have seen, it is now the Claimant's case that she always intended to make a serious allegation of misconduct concerning Dr McPhail. It is difficult to see why it was unreasonable for Professor Magee to reach the conclusion he did, and the ET did not explain why. Professor Magee also found that the allegation of cheating was vexatious. Again, the question for the ET was whether this was a reasonable conclusion for him to reach. In her letter dated 21 December the Claimant did not attempt to justify an allegation of cheating. Why, then, was it unreasonable for Professor Magee to find that the allegation of cheating was vexatious? The ET did not explain why.

72. We think the ET's failure to apply the correct test also appears from its reasoning about sanction in paragraph 133. This reasoning seems to be based on the hypothesis that the Respondent might have taken the view that it was misconduct for the Claimant not to have

avoided “ambiguity” or checked her position with students; but the Respondent took the view that there was a vexatious allegation of misconduct against another member of staff. The ET should have been asking whether it was reasonable to dismiss on that basis; there was no call for it to construct an alternative hypothesis of its own.

73. In paragraph 130 the ET criticised Professor Nethercot for not being aware of the Claimant’s grievance in February 2011. It is not self-evident that he should have been aware of it; indeed the ET said, that at the stage of investigating Dr McPhail, he would not be alerted to it. If it was applying section 98(4) correctly, the question for the ET was whether, acting reasonably, Professor Nethercot should have become aware of the investigation stage of the earlier grievance. The ET did not ask or answer this question.

74. For these reasons, we accept that the ET’s reasoning on the question of unfair dismissal cannot stand.

75. We turn to Mr Catherwood’s criticisms of the fairness of the process. We accept that submissions were made to the ET on these points; the ET did not deal with them in its Reasons. We do not know whether the ET accepted any of these criticisms; it seems unlikely that it did, but it should have dealt at least succinctly with his criticisms. It is not the role of the Employment Appeal Tribunal to make findings of its own on these points or evaluate them against the section 98(4) test. For the reasons we have given, the question of unfair dismissal will have to be remitted to the ET. Mr Catherwood’s submissions, assuming they are repeated at the remitted hearing, can and should be addressed then.

**Contributory Action**

76. Given our conclusions concerning unfair dismissal we will deal briefly with contributory action. This arises from section 123(6) of the **ERA 1996**, which provides:

> **"(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

77. Ms Stone submitted that the ET, having said that it would otherwise have reduced the award by more than 20 per cent, ought not to have fixed the figure at 20 per cent by reason of "features of the probation process from which [the dismissal] arose". She submitted that it was an error of law to focus on the employer's conduct in this way. It must restrict its enquiry to the conduct of the employee; **Parker Foundry Ltd v Slack** [1992] ICR 302, and **Live Nation v Hussain** UKEAT/0234/08 at paragraph 44. Mr Catherwood in response submitted that there was no error of law on the part of the ET. It was not wrong in principle to factor in the employer's conduct and blameworthiness; indeed, it was difficult to see how section 123(6) could operate without some consideration of the employer's conduct.

78. There are, it seems to us, three stages in the application of section 123(6). The first stage is to consider the actions of the employee. It is well established that the question is whether the employee's actions were blameworthy; at this stage the focus is not on the employer at all. The second stage is to consider causation; the focus is on the extent to which the employee's actions impacted on the employer's decision to dismiss. The third stage is to consider justice and equity so as to evaluate the extent to which the employee's conduct ought to be visited by a reduction in compensation. At this stage the conduct of the employer must, we think, be relevant. For example, if the employer's own conduct provoked the employee into blameworthy action, this might be relevant to the proportion by which the award should be reduced.

79. There is, however, no fourth stage at which the ET takes into account the employer's conduct in some separate way so as to vary the award it would reach by application of the three stages we have outlined. This is the approach that the ET's Reasons appear to adopt, and, although the ET gave some further reasoning in response to a request from the Employment Appeal Tribunal, we do not think that further reasoning addresses or could address this problem. It would therefore in any event have been necessary for the question of contributory fault to have been remitted for further consideration.

**Expenses**

80. Ms Stone criticises the ET's reasoning in paragraph 145.2 of its Reasons, which we have quoted. She submitted that it was irrelevant that the expense related to a period in respect of which a payment in lieu of notice was made. She also submitted that the ET should have rejected the claim as it had been made outside the time limit allowed for in the Respondent's policy. It had then submitted to the ET that the claim had been made late and that the Respondent, applying its policy, was entitled to reject it. There was also unchallenged evidence that expenses had to be claimed in accordance with such a policy. At the very least, she submitted, any implied contractual obligation to reimburse employees for expenses must be subject to an expenses policy in force or a requirement that the claim was made within a reasonable time.

81. Mr Catherwood submitted that the expense was a contractual debt that became payable as soon as it was reasonably incurred. It is implicit in the ET's reasoning that it must have rejected any suggestion that there was a contractual time limit.

82. Mr Catherwood has a further argument. The Respondent's ground of appeal relating to expenses was not in the original Notice of Appeal. Leave to amend the cross-appeal was granted at a hearing that the Claimant did not attend. She was entitled to, and did, apply for discharge of the order granting leave to amend. Mr Catherwood submits that there is no good reason why the point now relied on could not have been raised in the original cross-appeal. While it is true that Ms Stone, counsel at the original hearing, was for good reason unavailable when the cross-appeal was drafted, the Respondent's solicitors could and should have ensured the point was taken. Ms Stone, in addition to explaining to us why she was not available to draft the Notice of Appeal, submits that there is no real prejudice to the Claimant in permitting the point to be taken.

83. We have considered afresh whether the amendment should be permitted, applying the overriding objective and the tests in **Khudados v Leggate** [2005] IRLR 540. On the whole we consider that leave to amend should be granted. The point is a short one, it causes no particular difficulty to the Claimant, and it is understandable that a fresh advocate, coming to the case at short notice, should not have seen it.

84. The ET was entitled to find that the contract included a term for reimbursement of expenses necessarily and reasonably incurred. It inferred this from the party's conduct even in the absence of any express contractual term. It does not seem to us to matter whether the expense related to a trip that was (as it turned out) after the date of dismissal; if the expense was necessarily and reasonably incurred prior to dismissal, it would in principle be payable.

85. However, the ET ought to have asked itself whether there was any term limiting the time within which expenses must be claimed. In our collective experience it is generally

understood throughout the employment world that an employer's obligation to pay expenses depends on the making of a claim in accordance with the employer's procedure, including any provision as to time limit. The ET ought to have asked itself whether there was such a procedure here and whether it was to be inferred that reimbursement of expenses necessarily and reasonably incurred was subject to following that procedure. There was evidence of such a procedure; the ET did not address it.

**Remission**

86. It follows that the appeal must be allowed. This is not a case where the Employment Appeal Tribunal can substitute conclusions of its own. As we have seen, there were conflicting materials on the question of the Claimant's belief at the time of making disclosures; it is not permissible for the Employment Appeal Tribunal to resolve that question or the question that may follow: whether any belief was reasonable. All these matters must be remitted. Both parties, no doubt for different reasons, desire that remission should be to a freshly constituted Tribunal.

87. We are not bound to direct that remission should be to a freshly constituted Tribunal merely because the parties desire it. We are sympathetic to the position of the ET which heard this case: it dealt conscientiously and fully with all the issues and decided a multitude of issues which have not been the subject of this appeal. The issue of the Claimant's state of mind was clouded and complicated for reasons we have described.

88. On the whole, however, we think that it is best that remission should be to a freshly constituted Tribunal. The ET expressed in clear and emphatic terms its conclusion that the Claimant was "so self absorbed" that she did not realise she was making a serious allegation.

We think it will be difficult for the existing ET and the parties to revisit the question of unfair dismissal and protected disclosure when both parties are saying that the Claimant did intend to make a serious allegation.

89. The freshly constituted ET must be free to revisit all aspects of the protected disclosure issue, including the question whether the disclosure was in good faith. The existing ET reached its conclusion on reasonable belief and good faith in the context of its finding that the Claimant was not intending to make a serious allegation concerning the conduct of Dr McPhail. On remission this will not be the case for either party. It would be unjust and unrealistic to remit only part of the issue relating to the existence of a protected disclosure.

90. As presently advised we consider that the freshly constituted ET will not need to revisit anything which happened prior to 3 February 2011: it can take its starting point, including its criticisms of Dr McPhail, from the findings of the ET prior to this date. We said, however, that we would give the parties an opportunity to make written submissions to us on the precise scope of remission if they wish to do so. Any such submissions must be lodged and exchanged within 14 days of the handing down of this Judgment.