Appeal Nos. UKEAT/0226/12/LA
UKEAT/0227/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 & 26 November 2014
Judgment handed down on 30 June 2015

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

MR G LEWIS

PROFESSOR K C MOHANTY JP

MISS M S SCHAATHUN — APPELLANT

EXECUTIVE & BUSINESS AVIATION SUPPORT LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS MARIA SCHAATHUN (The Appellant in Person) and MR NIGEL BROCKLEY (of Counsel) Direct Public Access
For the Respondent	MS CLAIRE McCANN (of Counsel) Instructed by: Blake Morgan LLP Seacourt Tower West Way Oxford Oxfordshire OX2 0FB

SUMMARY

UNFAIR DISMISSAL - Automatically unfair reasons

The Claimant claimed that she had been automatically unfairly dismissed for making protected disclosures within the meaning of **Employment Rights Act 1996** section 43. Save in respect of disclosures to HMRC, the Employment Tribunal erred in failing to make findings as to whether she had made qualifying disclosures to a legal advisor in accordance with section 43D or to a prescribed person in accordance with section 43F as had been required by an Order of another Employment Judge. The Employment Tribunal struck out the allegations which formed the basis for these disclosures. The Employment Tribunal erred in holding that the disclosures to HMRC were not protected disclosures because the Claimant had not told the Respondent about them. Further, the Employment Tribunal failed to consider whether the Respondent was aware of the disclosures to HMRC by other means and therefore whether the reason for dismissal was the protected disclosures. In light of these errors together with concern about the conduct of the proceedings which included striking out allegations of protected disclosures without consideration of sections 43D and 43F, the dismissal of the claim of automatic unfair dismissal under section 103A was set aside and remitted to a differently constituted Employment Tribunal. If the claim under **Employment Rights Act** section 103A is dismissed, the finding of ordinary unfair dismissal and related compensation is to stand.

THE HONOURABLE MRS JUSTICE SLADE:

1. Ms Schaathun, the Claimant, was dismissed by the Respondent, Executive and Business Aviation Support Ltd. ("EBAS2), on 23 July 2009. She brought a claim for unfair dismissal contending that she had been dismissed for making protected disclosures within the meaning of section 43 of the **Employment Rights Act 1996** ("ERA") and her dismissal was automatically unfair by application of **ERA** section 103A. The Respondent contended that the Claimant was dismissed for redundancy. By amendment they submitted in the alternative that she was dismissed for some other substantial reason ("SOSR"), the breakdown of her personal and working relationship with the managing director, Mark Abbott.

2. By a Judgment sent to the parties on 5 August 2011 after a three day hearing on 19 to 21 July 2011, the Employment Tribunal ("ET"), Employment Judge Lewis, and members, Mr Sapwell and Mr Baldwin held that the Claimant was not 'automatically' unfairly dismissed by application of **ERA** section 103A. The ET held that the reason for her dismissal was the breakdown of the Claimant's relationship with Mr Abbott and the irretrievable destruction of trust which arose from events of December 2008.

3. The ET found the dismissal to be unfair but concluded that, applying **Polkey v AE Dayton Services Ltd** [1988] ICR 142, if the Respondent had adopted a fair procedure appropriate to what the ET had found to be the reason for the dismissal, they would have dismissed the Claimant at the latest by the date she was in fact dismissed, 23 June 2009. Accordingly no compensatory award was made save for £380 for loss of statutory rights.

4. On 19 August 2011 the Claimant applied for a review of the Judgment of 5 August 2011. By an Order with Reasons sent to the parties on 7 September 2011 Employment Judge Lewis refused the application for a review.

5. The Claimant appeals from the dismissal of her claim that she was automatically unfairly dismissed by operation of **ERA** section 103A. She also appeals from the refusal of her application for a review of the Judgment of 5 April 2011.

6. We will set out a brief history of the proceedings before the Employment Appeal Tribunal ("EAT"). The Claimant lodged a Notice of Appeal on 15 September 2011. On the sift on 19 October 2011 Mr Justice Langstaff, President, considered the appeals to be wholly unarguable. By Order of 27 April 2012 HH Judge Serota QC allowed the Claimant's application under Rule 3(10) of the **Employment Appeal Tribunal Rules (as amended)** and ordered that the appeals from the ET Decision of 5 August 2011 and from the rejection of the review application on 7 September 2011 be set down for a Preliminary Hearing at which the application to amend the Notice of Appeal was to be heard. HH Judge Serota QC ordered that the Employment Judge ("EJ") and members of the ET were to be asked for their comments on the Claimant's allegations of procedural unfairness for the purposes of the Preliminary Hearing. An appeal against a costs order of £2,500 made against the Claimant on 6 September 2011 was adjourned. That appeal has been the subject of a separate hearing.

7. The Claimant suffers from a serious medical condition. The appeal was not listed earlier for medical reasons. HH Judge McMullen QC invited counsel for both parties to a Directions Hearing on 11 September 2013. The Judge directed that, in accordance with the overriding objective, the order for a Preliminary Hearing would be converted to one for a Full

Hearing. The Judge also gave leave to amend the Notice of Appeal to add the grounds set out in the application to amend dated 17 April 2012.

8. In a note of 24 November 2014 the Claimant helpfully identified the live grounds of appeal.

Outline Background Facts

9. At the hearing before us the Claimant was represented by Mr Brockley and the Respondent by Ms McCann.

10. The Respondent company was incorporated by Mr Abbott in April 2005. The business of the Respondent is the carrying out and management of maintenance of private and corporate jet aircraft. At the time of the formation of the Respondent the Claimant and Mr Abbott were in a close personal relationship. The Claimant was and is a 10% shareholder in the company and became Company Secretary. The Claimant initially also carried out payroll and bookkeeping duties. From August 2007 these were contracted out. There was only one other employee of the Respondent.

11. In September 2008 Mr Abbott sought to end his personal relationship with the Claimant. He concluded that their relationship had come to an end. They were living together and remained in the same house until 19 December 2008.

12. On or about 15 December 2008 a Mr Bloomfield saw the Claimant at the Respondent's office at Oxford Airport. He noticed that she was using the photocopier. He was surprised to

see her there as he knew that the Claimant's relationship with Mr Abbott was in difficulty. Mr Bloomfield mentioned this to Mr Abbott.

13. Mr Abbott went into the Claimant's bedroom in her absence and opened a locked suitcase which she kept there. The ET accepted Mr Abbott's evidence that papers in the suitcase included bank statements and other documents relating to him personally. The ET held at paragraph 6.19 that:

> **"Finding the papers was, for Mr Abbott, the Rubicon."**

14. Although not referred to in the Judgment, it appears from her statement that the Claimant had been concerned that Mr Abbott may have been putting personal expenditure through the company account and that as Company Secretary she felt under some responsibility to investigate this.

15. At paragraph 6.19 the ET held:

> **"The discovery of the papers in the Claimant's suitcase showed Mr Abbott that the Claimant had looked for confidential papers; had photocopied them when she found them; and had then hidden them from him. The discovery showed to the Claimant that Mr Abbott had entered the part of the house which she thought of as her space, had searched it, and found the items which she had hidden. We accept that any remaining trust between them was destroyed as a result."**

On the same day, Mr Abbott told the Claimant to pack her bags. The Claimant left the house on 18 December 2008.

16. On 19 December 2008 the Claimant was removed as Company Secretary.

17. The ET found that by 19 December 2008 at the latest there were no tasks for the Claimant to carry out for the Respondent.

18. Further, the Claimant alleged that she made protected disclosures in the period between December 2008 and March 2009. These were alleged to be to solicitors. Further, it was said that there were disclosures to the Environment Agency about alleged storing of hazardous substances at the Respondents' premises and that chocks had been removed from under aircraft wheels; to solicitors and HMRC about use of the Claimant's tax allowance for the Respondent's dividends and to Mr Abbott about this which she was concerned was a tax evasion scheme. Further the Claimant alleged she had made a disclosure to solicitors alleging that Mr Abbott was putting personal expenses through the Respondent's accounts, and to solicitors and the Civil Aviation authority ("CAA") alleging that Mr Abbott was maintaining and flying aircraft whilst under the influence of alcohol.

19. On 11 February 2009 (wrongly dated in the Judgment as 2010) Manches, solicitors, wrote to Mr Abbott:

> **"Our client wishes to come to an agreement with you under which all the issues arising from the breakdown of your relationship will be settled, along with all issues that arise from her position of 10% shareholder and employee of EBAS."**
>
> …
>
> **"Our client is willing to transfer her shares to you or EBAS and agree that her employment should be terminated, provided that suitable terms can be agreed, and her personal possessions be returned."**

20. On 13 May 2009, in response to a draft separation agreement, Manches wrote:

> **"As the "Separation Agreement" purports to dismiss all of our respective clients' claims against each other howsoever arising, our client is not willing to enter such an agreement at the present time."**

The ET did not set out the terms of the draft "Separation Agreement".

21. The ET recorded at paragraph 6.31 evidence given by Mr Abbott that the correspondence from Manches in May 2009 led him to the view that:

> **"the negotiating process with the Claimant had come to an end, and that it would not be possible to achieve an agreed outcome of the issues between him and her… He also realised that the employment relationship with the Claimant could not be ended by consent, and would therefore have to be terminated by the Respondent."**

22. On 27 May 2009 the Claimant was invited to a redundancy consultation meeting with Mr Smith an independent HR consultant. On 28 May 2009 the Claimant wrote that she would not wish to find herself in a position where Mr Abbott would join the meeting at some stage.

23. The meeting took place on 4 June 2009. Mr Smith consulted Mr Abbott after the meeting abut proposals the Claimant had put forward. A second meeting took place on 19 June 2009 between the Claimant accompanied by a friend and Mr Smith.

24. On 23 June 2009 Mr Smith wrote to the Claimant on behalf of the Respondent terminating her employment on that day by reason of redundancy.

25. On 27 June 2009 the Claimant appealed against her dismissal. The appeal meeting took place on 13 July 2009. The ET observed that the notes of the appeal meeting recorded that Mr Abbott said that he was unaware of any whistle blowing activity by Ms Schaathun and he reiterated that the dismissal had been fair.

26. By letter dated 20 July 2009 the appeal was dismissed.

27. The Claimant presented a claim for unfair dismissal on 18 September 2009. She wrote in her ET1 that there was no genuine redundancy and that she believed that public interest

disclosures she had made were "likely factors to have contributed to Mr Abbott's decision to exclude me from the company."

Case Management Orders

28. Case management orders were made by Employment Judge Warren on 4 March 2010 which identified issues including alleged protected disclosures by the Claimant to solicitors, to the Environment Agency, to HMRC, to the CAA and to Mr Abbott.

29. On 14 May 2010 Employment Judge Hill refused a request by the Claimant for disclosure. Employment Judge Hill directed that a further request for disclosure made by the Claimant on 6 November 2010 be raised at the beginning of the substantive hearing.

30. A case management order made by Employment Judge Cowling on 14 January 2011 identifies the issues arising in the case. These were set out in schedule A to the Order. The claims made were set out in Paragraph 1. They included:

> **"1.2 Automatic unfair dismissal by reason of having made qualifying protected disclosures, contrary to Section 103A ERA."**

An issue identified at paragraph 6 was:

> **"If the Claimant was unfairly dismissed would she have been dismissed fairly in any event (Polkey) such that any compensation should be reduced accordingly?"**

31. Employment Judge Cowling identified the issues to be decided in considering the Claimant's claim of automatic unfair dismissal. Since these applied to the hearing the subject of this appeal we set them out in full:

"Automatic Unfair Dismissal

8. The Claimant states that the reason or principal reason for her dismissal was that she made qualified protected disclosures and that her dismissal was therefore automatically unfair by virtue of section 103 ERA.

9. The Claimant relies upon the following alleged disclosures: -

9.1 December 2008 – the Claimant contacted HMRC regarding concerns she had over the conduct/advice of the Respondent's accountant, Clark Howes regarding the Claimant's tax return for 2007/2008.

9.2 December 2008 – the Claimant contacted a solicitors firm alleging that Mark Abbott was storing hazardous substances at the Respondent's premises and that chocks had been removed from under aircraft wheels.

9.3 January 2009 – the Claimant contacted a solicitors firm about the alleged tax evasion scheme referred to above.

9.4 December 2008 / January 2009 – the Claimant contacted a solicitors firm and the HMRC alleging that Mark Abbott was putting personal expenses through the Respondent's accounts.

9.5 January 2009 – the Claimant contacted a solicitors firm alleging that Mark Abbott was maintaining and flying aircraft whilst under the influence of alcohol.

9.6 February 2009 – the Claimant contacted the Civil Aviation Authority alleging that Mark Abbott was maintaining and flying aircraft whilst under the influence of alcohol.

9.7 9 March 2009 – the Claimant made a protected disclosure to Mark Abbott about the alleged tax evasion scheme referred to above.

9.8 March 2009 – the Claimant contacted the environment agency alleging that Mark Abbott was storing hazardous substances at the Respondent's premises and that chocks had been removed from under aircraft wheels.

10. Were any of the above protected disclosures made?

11. If so, do any of those disclosures qualify for protection under section 43B ERA?"

The Judgment of the Employment Tribunal

32. The Claimant represented herself. The Respondent was represented by Ms Claire McCann who appeared before us.

33. The ET observed at paragraph 4 that "a considerable degree of case management was necessary at this hearing." At paragraph 4.2:

> **"4.2 It was necessary at the start of the Hearing to state to the parties that the Order of Judge Cowling of January 2011 set out exhaustively the issues which were before the Tribunal, and that no further issues would be permitted."**

The ET held:

> **"4.8 It seemed to us in the interests of justice that the Respondent's case should be heard first. It was for the Respondent to show the reason for dismissal, and it seemed to us right that the represented party should present its case first."**

It appears from paragraph 4.11 that the Judge sought clarification as to whether the Respondent accepted that the Claimant had a reasonable belief in her alleged disclosures and had made them in good faith. Ms McCann confirmed that she did not propose to cross-examine on any element of the section 43B definition, although she reserved the right to do so in relation to the good faith requirement of section 43C. No reference was made to the good faith requirement in 43F. Paragraph 4.11 continued:

> **"This approach assisted the Tribunal to concentrate its task by focusing on what was relevant, which , as the judge pointed out to the Claimant in light of Ms McCann's concession, was the question of what Mr Abbott views of the alleged disclosures at the time."**

34. It appears from paragraph 4.12 that the Employment Judge took over the questioning of Mr Abbott when the Claimant was cross-examining him, the Judgment records:

> **"4.12 In the course of the Claimant's cross-examination of Mr Abbott on 20 July, an issue arose which led to an extensive intervention by the judge in cross-examination with the following consequences.**
>
> **4.13 It appeared to the Judge, from the questions which were put, that the Claimant did not challenge Mr Abbott's assertions that he had not known about a number of the protected disclosures relied on in this case. The Judge asked the Claimant whether or not she accepted that she had not made Mr Abbott aware of the disclosures set out by Judge Cowling, of all of which he denied knowledge. The Claimant conceded this point in relation to five of the disclosures and in relation to half of a sixth one. After the lunch adjournment , and having given the Claimant the opportunity to consider the point, all of those allegations were struck out on the basis that they no longer had any prospect of success, it having become common ground that Mr Abbott had not been made aware of the alleged qualifying disclosures at the time of the Claimant's dismissal.**
>
> **4.14 Within that framework, the Tribunal heard the following witnesses on behalf of the Respondent: Mr Brian Bloomfield, employed by a company called Hanger 8 Ltd.; Mr Hugh Smith, external HR advisor; and Mr Mark Abbott, proprietor and director."**

35. At paragraph 6.28 the ET explained:

> **"As stated above, a large part of the claim relating to protected disclosures was struck out in the course of Mr Abbott's evidence, upon the Claimant acknowledging that she had not informed Mr Abbott by any means of the protected disclosures relied upon. It followed that they could have formed no part of his decision to dismiss her."**

The ET therefore directed themselves to consider the remaining protected disclosures: a report to HMRC in late 2008 about the Claimant's tax return for 2007/8, a report to HMRC with an allegation that Mr Abbott was putting personal expenses through the company accounts and telling Mr Abbott about either of these.

36. The ET found in respect of the alleged disclosure in respect of the tax return that Mr French of Clark Howes wrote to Mr Abbott on 4 December 2008:

> **"6.30.2 … I've 'cut' your dividends… However I could use Maria's tax allowances to try to keep you further out of the 40% band (and save you 25% tax on the excess) if we can utilise her tax allowances for that year… do you think she'd have a problem having income and not knowing it…?**
>
> **6.30.5 On 4 January and again on 12 January 2009 the Claimant wrote to HMRC [143,145] to express her concerns about the proposal that she complete a tax return."**

HMRC informed the Claimant that she did not need to complete a tax return and she informed Clark Howes that she would not sign one. The Claimant agreed that she did not give a copy of her correspondence with HMRC or Clerk Howes to Mr Abbott.

37. The Claimant asserted that she had told Mr Abbott about the qualifying disclosures to HMRC in a telephone conversation with him on 9 or 10 March 2009. She had recorded these conversations and transcribed them. The ET could find no reference in the transcriptions to either of the HMRC issues: the using of the Claimant's personal allowance for dividend payments and the allegation that Mr Abbott put his personal expenses through the Respondent's account.

38. The ET held:

> **"The first question for us is whether or not the Claimant has made qualifying disclosures which have become protected disclosures in accordance with the provisions of Sections 43B and 43C of the Employment Rights Act 1996.**

> **6..30.11 … that in her letters of 4 and 12 January the Claimant made qualifying disclosures in relation to an allegation that she was being asked to complete a misleading tax return, with a view to obtaining an improper tax advantage for somebody. We need make no findings as to whether her fears and suspicions were well founded."**

39. The ET found that no qualifying disclosure was made by the Claimant to HMRC in relation to Mr Abbott's business expenses.

40. The ET held:

> **"6.30.14 Mr Abbott denied that the Claimant had ever told him that she had made a disclosure to HMRC, such as to constitute a protected disclosure. We accept Mr Abbott's evidence, and we find that the Claimant did not inform Mr Abbott that she had communicated with HMRC in relation to either her tax return, or his business expenses.**
>
> **6.30.15 It follows that while we have found that the Claimant did make qualifying disclosures on 4 and 12 January 2009, when she wrote to HMRC about Messrs Clark Howes advice that she prepare a personal tax return, and the reasons for it, we have also found that Mr Abbott was not shown or told of the disclosure at any time material to the issues in this case. Therefore the disclosures did not become protected disclosures.**
>
> **6.30.16 It follows on that ground alone that the Claimant's claim under Section 103A Employment Rights Act 1996 cannot succeed.**
>
> **6.30.17 In our findings below, about the dismissal, we deal with the issue which was not before us, ie as to the reason for the dismissal."**

41. When considering the reason for the Claimant's dismissal, the ET held at paragraph 7.5 that the argument that she had been dismissed for making protected disclosures failed:

> **"as we have accepted the Respondent's evidence that Mr Abbott had no knowledge of a protected disclosure at any material time in the dismissal process. It was therefore not necessary for us to consider this issue further."**

The ET concluded:

> **"7.9 … the sole operative reason for the Claimant's dismissal was not redundancy, but the breakdown in her relationship with Mr Abbott, and the irretrievable destruction of trust which arose from the events of December 2009. We also add for the sake of completeness, that in light of this finding we would not, if the issue had been before us, have found that any protected disclosure was the sole or main reason for dismissal (as required by the language of section 103A)"**

42. The ET found the dismissal unfair for the reason set out in paragraph 7.12:

> **"We find that the requirements of section 98(4) have not been fulfilled. The reason is very simple. The Respondent and Mr Smith conducted a procedure which was based on a premise which we have rejected, namely that the reason for dismissal was redundancy. The Respondent therefore, in our judgment, answered a question which was not before it. It required the Claimant to address issues which were not the real issues. There could not be a fair dismissal in those circumstances, and on that basis alone, and no other, we find that the Claimant's dismissal was unfair."**

43. The ET found at paragraph 7.14:

> **"7.14 … that if the Respondent had adopted a fair procedure, which addressed what we have found to be the reason for dismissal, it would undoubtedly have reached the same conclusion by the same date at the latest. We find that there was a chance of 100% that the Claimant's employment would not have been prolonged beyond 23 June. Application of the *Polkey* principle accordingly extinguishes her entitlement to a compensatory award save for one item… [loss of statutory rights]."**

Evidence before the Employment Appeal Tribunal

44. In accordance with the Order of HH Judge McMullen QC, in light of the allegation made in paragraph 7.1.2 of the Notice of Appeal that the Claimant was in effect prevented or deterred by the ET from cross-examining Mr Abbott on relevant parts of the transcript of telephone conversations to challenge his denial of awareness of the alleged protected disclosures, witnesses gave oral evidence about the conduct of that hearing.

45. Mrs Brain gave evidence that she attended the ET hearing on 19 and 20 July 2011 and was a witness for the Claimant. She considered that the Tribunal hearing was conducted in an unfair manner. The EJ stopped the Claimant referring to transcripts of telephone conversations with Mr Abbott. She stated that the EJ threw a bundle of papers firmly onto the desk and warned the Claimant that he would end the hearing if she once more referred to those documents. Mary Ryan who had attended the Tribunal on 19 July 2011 as an observer gave similar evidence. She said that EJ Lewis warned the Claimant that her claim would be struck out if she made one more reference to her personal relationship with Mr Abbott. At one point

EJ Lewis responded to the Claimant's submission by loudly slamming a bundle of papers on the desk. Mrs Kaldhol came from Norway to give evidence. She said that the Claimant was stopped when referring to transcripts of telephone conversations with Mr Abbott. The EJ said he would end the hearing if the Claimant once more referred to what he had told her not to mention. Mr Winning-Matthew gave evidence that he knew the Claimant as they had attended the same university course and had been fellow students at the Legal Practice Course. Mr Wining-Mathew gave evidence that on about ten occasions the Claimant asked to refer to the transcripts of telephone conversations and her requests were refused. At some point EJ Lewis picked up the bundle and threw it on the table.

46. The Claimant gave evidence. She said that the papers in her suitcase discovered by Mr Abbott on 15 December contained two personal invoices of Mr Abbott's which were being run through the company by him. The Claimant said that she recalled she was told by EJ Lewis that she was not able to rely on the transcripts of telephone conversations. He said that if the Claimant said transcripts one more time he would strike out the case. The Claimant said that having been threatened with strike out she was intimidated. The Claimant said that EJ Lewis took over cross-examination of Mr Abbott. The Claimant was given two warnings about costs. At some point EJ Lewis picked up the bundle and threw it on the table.

47. Miss Sadler, an associate solicitor at Blake Lapthorn gave evidence for the Respondent. She said that she had no recollection of any discussion of transcripts or slamming of papers onto the table by EJ Lewis. She did not recall that the EJ acted in an unusual manner as he acknowledged in his letter 18 June 2012.

48. Mrs Anderson, trainee solicitor with Blake Lapthorn, attended the Tribunal on the first day. Mr Abbott was not cross-examined on that day. Mrs Anderson had no recollection of any loud bangs. Mrs Anderson recalled EJ Lewis saying that the Tribunal had powers to strike out for unreasonable conduct. Mrs Anderson took a note of the proceedings.

49. Mr Abbott gave evidence. He recalled EJ Lewis exhibiting frustration. The EJ took off his glasses and put them down on the table. He pushed the bundle away with his left hand. Mr Abbott in cross-examination said that he was happy that what was on the transcripts was in the tapes of the telephone conversations but they were not complete as indicated by brackets and dots.

50. EJ Lewis and the lay members were asked for their comments on the allegations by the Claimant about the conduct of the proceedings. By letter to the EAT dated 18 June 2012 EJ Lewis wrote:

> **"My recollection is that there was a moment during the hearing when regrettably I betrayed my frustration. The Claimant had returned to a point from which I had directed her to move on. I accept that I pushed away the open bundle which was lying in front of me, and said words to the effect that the Tribunal had powers to strike out for unreasonable conduct, which could include failure to obey the direction of the Tribunal. I did not throw or slam the bundle, as alleged. As I was sitting with members, I believe that I took care not to express myself in personalised terms (i.e. not to say that I had powers to strike out if my directions were not followed), but to refer to the powers of the Tribunal, working as a whole.**
>
> **I accept that this was a momentary lapse from the standards of the Tribunal. It in no way hindered the Claimant's ability to express herself or participate, and it did not lead to an unfair outcome."**

51. Mr Sapwell, lay member, wrote that EJ Lewis gave the Claimant a great deal of guidance on ET protocol and allowed her latitude which would not be given to a professional representative. Nonetheless it was necessary for the Judge to "constrain" the Claimant to the employment issues.

52. The other lay member, Mr Baldwin, commented that he did not recall the events as described in the statements of the Claimant's witnesses but observed:

> **"What is true is that Judge Lewis was robust in explaining to the Claimant how the case would proceed. I saw nothing wrong with his approach because the alternative would have been a disjointed and prolonged hearing."**

The Submissions of the Parties

Notice of Appeal: grounds 7.1.2, 7.5 and 8 referring to Review Application 1(a)(b)(c) and Amended Notice of Appeal paragraphs 2.1, 2.2 and 4.2

53. Mr Brockley, counsel for the Claimant submitted that from the outset of the hearing EJ Lewis was being more than robust in his case management. His manner was overbearing. From the outset he showed hostility towards the Claimant. EJ Lewis prevented or deterred the Claimant from cross-examining Mr Abbott on relevant parts of transcripts of recordings she had made of telephone conversations with him to challenge his denial of awareness of one or more of the protected disclosures and that the Claimant was their source. Further the prohibition or deterrence from pursuing cross-examination on the transcripts and on other issues affected the Claimant's ability to present and develop her case. The ET erred as set out in paragraphs 1(a) to (d) of the review application. EJ Lewis stopped the Claimant from giving evidence or cross-examining Mr Abbott about their personal relationship when this was relevant to his knowledge or awareness of the protected disclosures.

54. Mr Brockley referred to Ms McCann's handwritten note of the intervention made by EJ Lewis during the Claimant's cross-examination of Mr Abbott on the second day of the hearing.

> **"EJ: Do u agree that p .120 is something MA didn't see or know about.**
>
> **C: Y.**
>
> **EJ: so he can't have dismissed u for it.**
>
> **C: Correct**

EJ: S.103A ERA is diff to some of other law on UD. PD is unfair if:

"the reason or, if more than one, the principal reason was the PD"

U have to prove it was the reason or the main reason. MA says he didn't know about PDs. U agree NOT aware of others

120	**Darbys**
143	**HMRC**
Letter	**Manches**
Letter	**CAA**
Call	**EA**

Do U accept that MA didn't know about these?

C: MA knew about PD's made to him re alcohol issue, E.A. issue.

…

EJ: … U've agreed U knew about para 9.6 but none of others B4 your dismissal?

C: 9.4 he received Other from SOL FU inclined Other form SOLs nothing in p.55 in Other by Manches to C on your behalf on 11.2.09.

C: I made PD to Sol + Sol contacted MA.

EJ: 9.1-9.3, 9.5, 9.6, 9.8 => MA didn't know about.

C: Para 9.1 => MA knew about

EJ: U r conducting it w/out any regard to discipline of ET + w/lamentable disregard for law. Your task has been to show these PD's were operative consideration in MA' mind. U have agreed he didn't know about MA PDs. I won't allow u to go beyond the 8 PDs not good enough to say MA knew something.

…

[p251] EJ Not prepared to allow Cl to depart in middle of case from issues ID'd.

…

C: he knew of b'grd

EJ: That's not the way we r proceeding. This is a structured process

2.05pm

EJ: Propose to strike out the whole of the PD claim except for para 9.7 reason = u accepted that MA didn't know."

55. Mr Brockley conceded that the language of the transcripts of the telephone conversations the Claimant sought to rely on was opaque. However the extract from a conversation of 7 March 2009 at 18.31 suggests that Mr Abbott knew the Claimant had complained to solicitors that Mr Abbott's income had been allocated to her tax account. The transcript at page 19 of the Supplementary Bundle reads:

> **"… one of the things I went through with Roger after your solicitor's letter saying that tax money allocated from me to your tax account, well, unfortunately you're going to look really stupid…"**

An email of 9 May 2009 from Mr French, the accountant, to Mr Abbott, reads:

> **"EBAS FC loan in their (sic) quite clearly – though would be tempted to put the money back into EBAS FC whilst this MS stuff going on…"**

Mr Brockley submitted that Mr Abbott was well aware that the Claimant was alleging financial impropriety as he said in the telephone conversation on 7 March 2009 "There's no swindles." The Claimant should have been permitted by EJ Lewis to cross-examine fully on the transcripts. Counsel acknowledged that the Claimant was permitted to make some reference to the transcripts but she did not feel able to advance all her points by reasons of the hostile attitude of EJ Lewis.

56. Counsel contended that the Claimant was deterred or prevented from referring to correspondence between her and the Respondent's accountant and between the accountant and Mr Abbott in support of her complaint that he knew about the disclosure to HMRC regarding tax affairs. The request for her to file a tax return when she had not done so in previous years was linked to the proposal, which she considered possibly unlawful, to direct Mr Abbott's dividends to her to use her tax allowance to reduce his tax bill. Raising the need to file a tax with HMRC of which Mr Abbott was aware was linked to the protected disclosure to HMRC and supported the Claimant's contention that Mr Abbott was aware of it.

57. It was contended on behalf of the Claimant that she was unfairly treated by the EJ, placed at a disadvantage and was not on an equal footing with the Respondent.

58. With regard to all the alleged protected disclosures it was accepted by the Claimant that Mr Abbott gave evidence that he was not aware of the alleged disclosures and that she did not directly advise him of the relevant disclosures. However, it was said that the Claimant was denied the opportunity of challenging Mr Abbott's assertion that he was unaware of the alleged disclosures by other means or that he suspected that the Claimant had made protected disclosures to HMRC, the CAA and the Environment Agency and that she felt pressured into not pursuing these matters in cross-examination by the threatened strike out. EJ Lewis accepted in his comments of 18 June 2012 that he had said:

> **"words to the effect that the tribunal had powers to strike out for unreasonable conduct, which could include failure to obey the direction of the tribunal."**

Notice of Appeal: Amended grounds 3.2, 3.3 and 4.4

59. No additional arguments were advanced in oral submissions in support of these grounds of appeal. Brief submissions are made in the skeleton argument on behalf of the Claimant that the cumulative effect of the conduct of the proceedings by EJ Lewis prevented the Claimant from challenging the evidence and conclusion reached as to the relevance and impact of events of 15 December 2008 and that this caused Mr Abbott to cross "the Rubicon" referred to in paragraph 6.19 of the Judgment. Reference in the skeleton argument was made to the rejection by the ET of two witness statements submitted by the Claimant relating to the photocopying allegations and to alleged inconsistencies in Mr Abbott's evidence regarding that incident.

Notice of Appeal: grounds 7.2 and 7.3

60. It was submitted on behalf of the Claimant that the ET erred in striking out the allegations of protected disclosures listed at 9.2, part 9.4 (in so far as it related to the Claimant contacting HMRC on expenses issues), 9.5, 9.6, 9.7 and 9.8 listed in Appendix A to EJ Cowling's case management order of 10 January 2011.

61. Amongst the errors asserted in paragraph 7.2 of the Notice of Appeal was that the Claimant was led by the ET to believe that a disclosure to a solicitor was not a protected disclosure within the meaning of **ERA** section 43B. Further, it was asserted that the ET failed to consider whether Mr Abbott became aware of one or more of the protected disclosures other than by being told about them by the Claimant. In ground of appeal 7.2 it is also asserted that the ET prevented or deterred the Claimant from cross-examining Mr Abbott to establish such awareness.

62. In ground of appeal 7.3 it was asserted that the ET erred in recording at paragraph 4.13 that it had become common ground that Mr Abbott had not been aware of the alleged qualifying disclosures at the time of the Claimant's dismissal.

63. Mr Brockley submitted that, as explained by the Court of Appeal in **Hogan v Commissioner of Customs and Excise** [2004] IRLR 63, the power to stop a case at half time should be exercised with considerable caution. The same principle is to be applied to the power to strike out. Further, it was submitted that particular caution should be exercised when the striking out is of the case of a litigant in person. Further, Maurice Kay LJ held in **North Glamorgan NHS Trust v Ezias** [2007] IRLR 603:

> **"29. It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success while the central facts are in dispute."**

64. In this case the Claimant asserted that Mr Abbott knew of her protected disclosures either from her actions or by other means. The way in which the hearing was conducted intimidated her to the extent that she was not able properly to pursue these contentions.

65. It was submitted that the Claimant was not given the opportunity to question Mr Abbott as to whether he suspected her of being involved in visits by the Environment Agency by reporting him. Further it was said that because of the refusal of the EJ to allow her to cross-examine on their private life the Claimant felt inhibited from asking relevant questions of Mr Abbott about his alcohol consumption and flying which became the subject of her contact with the CAA. Mr Brockley submitted that the evidence given by Mr Abbott that neither the CAA nor the Environment Agency had informed him about disclosures by the Claimant did not answer the point that she was not given the opportunity to cross-examine him on his suspicion that she was the source of the disclosures. Whilst the Claimant accepted that she did not tell Mr Abbott that she was the source of the disclosures she asserted that he knew about the protected disclosures made by her to him about the alcohol issue and the Environment Agency issue. The ET should have decided whether the reason for dismissal fell within **ERA** section 103A having heard all the evidence.

66. Mr Brockley referred to the judgment of the EAT in **Balls v Downham Market High School & College** [2011] IRLR 217 in which Lady Smith held:

> **"Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects."**

It could not be said that the Claimant's claims had no reasonable prospect of success at the point when some were struck out. Only the Respondent's evidence had been heard. The Claimant had yet to give evidence as to why she believed Mr Abbott dismissed her for making

protected disclosures. Further the reason for the dismissal is for the ET to decide on all the facts from which they may draw inferences.

67. Ms McCann submitted that a strike out of the alleged protected disclosures was appropriate because the Claimant had said that she had no reason to suppose that Mr Abbott knew about them. Whilst the Claimant said that she had raised similar concerns about Mr Abbott flying and carrying out aircraft maintenance while under the influence of drink those assertions did not form part of her alleged protected disclosures. The Claimant said that she didn't tell Mr Abbott about five and a half of the protected disclosures. As for two and a half, the Claimant said that whilst she did not tell Mr Abbott about them, he came to know of them. However, counsel agreed that knowledge can be inferred from the circumstances. Whilst the Claimant had not yet given evidence the Tribunal had read her witness statement.

68. Ms McCann submitted that the ET did not err in striking out the allegations of certain protected disclosures on the day of the hearing. **Logan** and **Ezias** are to be distinguished. There is a difference between striking out at a pre-hearing review or where there are disputed facts. In this case there was nothing pointing to circumstances from which knowledge of the protected disclosures could be inferred.

Notice of Appeal: ground 7.6

69. Mr Brockley contended that the ET erred in concluding at paragraph 7.14 that there was a 100% chance that the Claimant would have been dismissed on the basis of the breakdown of her relationship with Mr Abbott. It was said that the ET failed to consider whether if, as they found, redundancy were not the real reason for dismissal, the Respondent would nonetheless

have initiated a dismissal process. The ET failed, in particular to properly consider when a dismissal, if such were to take place, would have occurred.

70. It was submitted that the breakdown in the relationship between the Claimant and Mr Abbott did not inevitably mean that the Claimant would have been dismissed or that a dismissal would have taken place at the time it did. Counsel referred to **Hill v Governing Body of Great Tey Primary School** [2014] IRLR 274 in which Langstaff P held at paragraph 24

> **"the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."**

71. Mr Brockley submitted that where an employer has relied on reason "A" for dismissal it cannot be assumed to be entitled to rely on reason "B" for **Polkey** purposes even if the ET finds that reason "B" was the real reason for the dismissal. If the Respondent did not expressly dismiss for reason "B" can it be assumed that he would have dismissed for that reason. In support of this argument Mr Brockley relied on **Trico-Folberth Ltd. V Devonshire** [1989] IRLR 396 in which Nourse LJ held at paragraph 15.7 an alternative ground for dismissal:

> **"However, I think it clear that the effect of Mr Hick's evidence in the passage which May L.J. has quoted was that the appeal panel thought that it would have been unfair to dismiss the employee on that ground. On that footing I do not see how, without the evidence to the absence of which Mr. Sendall has pointed, we can assume that the employer would have dismissed the employee on that ground, even if it had known that it could do so with impunity.**

Mr Brockley said that he did not suggest that in all circumstances an employer cannot rely on a different reason for dismissal when advancing a **Polkey** argument.

72. Mr Brockley contended that there was no evidence to support the conclusion of the ET that Mr Abbott would have dismissed the Claimant because their relationship had broken down.

In **Software 2000 Ltd. V Andrews** [2007] IRLR 568 Elias P (as he then was) held at paragraph 54 of the principles emerging from the authorities:

> **"(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future)."**

73. Even if the ET, having heard evidence, were entitled to conclude that the Claimant would have been dismissed because of the breakdown in her relationship with Mr Abbott, they would still have had to consider whether a dismissal for that reason would have been fair and when it would have taken place had a fair procedure been used. Mr Brockley contended that faced with the possibility of dismissal because of a breakdown of the relationship the parties may have resolved their differences. When EJ Lewis asked Mr Abbott about reinstatement he replied "Maria would have to change her attitude."

74. Accordingly it was submitted that the ET erred in deciding the **Polkey** issue.

75. Ms McCann submitted that the ET did not err in concluding that if a procedure appropriate to dismissal for a breakdown in relations between the Claimant and Mr Abbott had been used the Claimant would have been dismissed at the latest by 23 June 2009.

76. During the course of the hearing before us, Ms McCann handed up a copy of the statement of the Claimant which was before the ET. Counsel drew attention to four paragraphs which included the following:

> **"98. [At the appeal hearing] … I felt uncomfortable meeting MA face to face, given his previous violent behaviour towards me. I did not shake his hand**
>
> **…**

> **105. [On 26 July 2009] I suggested that the sabbatical without pay would then be a viable option but MA said it would be difficult as HS had said I had not even acknowledged MA at the Appeal Hearing. I reminded him of his violent behaviour towards me and abusive conduct on the telephone."**

Ms McCann also referred to paragraph ten of Mr Abbott's statement in which he said:

> **"I had hoped to be able to resolve matters amicably with Ms Schaathun following the breakdown of our relationship and instructed lawyers in or around December 2008 to try to effect an agreement in full and final settlement of all personal issues, employment matters and shareholding issues. Negotiations began in December 2008 and continued until April 2009 when it became clear that it was not going to be possible to reach an amicable settlement. I continued to pay Ms Schaathun throughout this period."**

77. Ms McCann submitted that there was evidence before the ET that the relationship between the Claimant and Mr Abbott could not continue on any level. There were only three employees in the Respondent company: Mr Abbott, the Claimant and an apprentice. Two pilots and an air hostess were employed in the associate company. The organisation was so small that it would not have been possible for the Claimant and Mr Abbott to work together. There was no basis for contending that the dismissal for a breakdown in relations between the Claimant and Mr Abbott would not have taken place by 23 June 2009 at the latest.

The Appeal from the refusal to review the Judgment of 5 August 2011

78. Both counsel agreed that the Review Decision stands or falls with the appeal against the substantive Decision and Judgment of 5 August 2011.

79. It was submitted on behalf of the Claimant that given the nature of the application for review, it should not have been determined by EJ Lewis as, in effect, he was "being a judge and jury in his own cause." Mr Brockley referred to **Elys v Marks and Spencer Plc** [2014] ICR 1091 in which Langstaff P held at paragraph 12:

> **"…if there is a proper case, and I emphasise those words, that there may have been bias or an appearance of bias or *a material* procedural irregularity, the Tribunal might be thought to be judge and jury in its own case if it were the sole arbiter of fact."**

80. At paragraph 13 Langstaff P held that for the purposes of a Review Hearing after setting out the relevant facts the ET should decide whether the defects identified to it satisfied the Tribunal that there had not been a fair hearing. Counsel submitted that the refusal of the EJ to review the decision of the ET showed an unwillingness or failure to recognise the procedural unfairness of the hearing.

81. Ms McCann pointed out that the Claimant did not make allegations of bias in her application for a review of the decision. This came in 2013 when witness statements in support of the appeal were served. Ms McCann submitted that the complaints made of EJ Lewis did not satisfy the well known test of appearance of bias explained in **Porter v Magill** [2002] 2AC 357 paragraph 103

> **"The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."**

Ms McCann said that the question was not what the Claimant's witnesses thought of the conduct of the proceedings but what the view of an impartial observer would have been. Ms McCann submitted that an impartial observer may have formed the impression that EJ Lewis was being quite firm in his conduct of the proceedings but was not biased. The EJ did not err in refusing to review the original decision of the ET.

Discussion and Conclusion

Notice of Appeal: grounds 7.1.2, 7.5, 8 referring to Review Application ground (a)(b)(c) and Amended Notice of Appeal paragraphs 2.1, 2.2 and 4.2.

82. By these grounds of appeal the Claimant asserts that the EJ improperly prevented her from cross-examining Mr Abbott on transcripts of telephone conversations she had with him. The Claimant asserted that by preventing or inhibiting her from doing so she could not adduce

evidence to show that Mr Abbott knew or must have known that she had made protected disclosures.

83. Oral evidence given before us by Ms Schaathun and her witnesses supported her concern that EJ Lewis prevented or deterred her from pursuing questions of Mr Abbott based on the telephone conversations. Notes of the proceedings before the ET were made by solicitors and counsel for the Respondent, the accuracy of which was not challenged. The notes show that EJ Lewis intervened extensively when the Claimant was questioning Mr Abbott as he himself acknowledged in paragraph 4.12. The interventions included the following:

> **"C. Look at the second and third line of the conversation…**
>
> **EJ We can spend a lot of time on this but he was not under oath and might not have known these conversations were being recorded and might not tell the truth to an ex-girlfriend.**
>
> **J. What is your case, that MA knew that you had reported him to HMRC**
>
> **MS: MA knew about that as he suggested I had been in contact with the auth.**
>
> **9.1 MA was aware of that**
>
> **J. You are getting into difficulty, I asked if you have shown or told him about it.**
>
> **MS I had not told him or shown him them. He did raise them with me. He did contact me.**
>
> **J so someone unknown to you made a protected disclosure; by**
>
> **Are you aware of the ability of the ET to make costs for these proceedings. Do I need to warn you.**
>
> **J. is there evidence in support of 9.4 relating to HMRC alleging R put personal expenditure through co. a/cs Miss S?**
>
> **[MS reading bundle]**
>
> **MS: no ref to that in letter but ref to that in conversation**
>
> **J: so the answer to that is no.**
>
> **What you rely upon is what you say MA said in convos to you in tape recorded convos."**

A further passage of questions of Mr Abbott [omitting answers] reads:

> **"MS Spring 2009, in our convos you suggested that I had been in contact with HMRC**
>
> **MS: did we discuss gift with funds**
>
> **J: my understanding as you read ledger entry for any expenditure, need to get into CO., goes into Director's loan a/c**

J: not unlike how self employed people manage their affairs, it is a way of dealing with CO a/c and personal a/cs mistakenly applied."

When cross-examined on behalf of the Respondent before us the Claimant said:

"During cross-examination of your client directed by the judge I stopped cross-examination at which point Employment Judge Lewis took over cross-examination when he had completed."

84. Whilst the notes of the proceedings before the ET show that the Claimant was able to ask Mr Abbott questions on the content of her telephone conversations with him they also show that the Claimant was relying on those transcripts as evidence that Mr Abbott was aware that she had complained to HMRC about his putting personal expenses through the company. However the notes of proceedings show that EJ Lewis curtailed this line of questioning and gave the Claimant a costs warning when she said Mr Abbott raised her reporting him to the HMRC. In light of the notes of the interventions set out and others it is unsurprising that the Claimant and her witnesses considered that the EJ was preventing her from relying on the transcripts.

85. The concern of the Claimant and her witnesses was reinforced by the admitted display of irritation by the EJ towards her. Whilst the EJ does not agree that he slammed down a file on his desk in annoyance with the Claimant as she and her witnesses assert, he wrote in his letter of 18 June 2012 commenting on the allegation:

"My recollection is that there was a moment during the hearing when regrettably I betrayed my frustration. The Claimant had returned to a point from which I had directed her to move on. I accept that I pushed away the open bundle which was lying in front of me, and said words to the effect that the Tribunal had powers to strike out for unreasonable conduct, which could include failure to obey the direction of the Tribunal. I did not throw or slam the bundle, as alleged. As I was sitting with members, I believe that I took care not to express myself in personalised terms (i.e. not to say that <u>I</u> had powers to strike out if <u>my</u> directions were not followed), but to refer to the powers of the Tribunal, working as a whole."

86. Thus, according to the notes of proceedings taken by the Respondent's legal advisors and the letter from the EJ, it appears that on two separate occasions he gave the Claimant a costs warning for alleging that Mr Abbott knew about a protected disclosure when she had not told him or shown him a letter about it and referred to his powers to strike out her claim when the Claimant returned to a point from which he had directed her to move on. In our judgment these examples of intervention in the Claimant's cross-examination of Mr Abbott and the warnings of a costs and a strike out order together with an overt display of irritation may well have given an informed or objective bystander the impression of hostility towards the Claimant. However, we do not consider that those acts on their own cross the high threshold of appearance of bias although this came close.

87. The group of grounds of appeal brought together under Notice of Appeal ground 7.12, 7.5, 8 referring to Review grounds (a)(b) and (c) and Amended Notice of Appeal paragraphs 2.1, 2.2 and 4.2 all refer to the prevention or deterrence of the Claimant relying on transcripts of her telephone conversations with Mr Abbott. The transcripts she wished to rely upon were placed before us. We have considered them carefully. In our judgment they do not contain evidence supporting the contention that Mr Abbott was aware that the Claimant had made protected disclosures about his conduct to relevant authorities. Accordingly, although there is some force in the argument that the Claimant was deterred from pursuing cross-examination of Mr Abbott on the transcripts to the extent she would have wished, nothing we have been shown on appeal shows that she was thereby disadvantaged.

Notice of Appeal: grounds 7.2 and 7.3

88. These grounds of appeal challenge the decision of the ET to strike out the allegations that the Claimant had made the protected disclosures listed by EJ Cowling as 9.2, 9.3, half of

9.4 and 9.5 to 9.8. They also challenge the observation by the ET that it became common ground that Mr Abbott had not been aware of the qualifying disclosures at the time of dismissal. What was accepted was that the Claimant had not told Mr Abbott about the disclosures she asserted that he knew or must have known about them. The ET erred in dismissing the Claimant's claim that she was dismissed for making protected disclosures on the basis that she had not told Mr Abbott about them.

89. At paragraph 4.11 the EJ set out the matters which he considered to be in issue between the parties. It is recorded that, rightly, Ms McCann directed the ET to the elements of **ERA** section 43B and 43C. Counsel was not going to cross-examine on any element of section 43B but reserved the right to cross-examine on the good faith requirement of section 43C. The observation by the ET in paragraph 4.11:

> **"This approach assisted the Tribunal to concentrate its task by focussing on what was relevant which, as the Judge pointed out to the Claimant, in light of Ms McCann's concession, was the question of what Mr Abbott knew of the alleged disclosures at the time."**

is ambiguous. Was Mr Abbott's knowledge of the disclosures regarded as relevant to whether the disclosures were protected disclosures within the meaning of **ERA** section 43 or was such knowledge regarded as relevant to whether the reason for dismissal was making protected disclosures? The ET found in respect of disclosure to HMRC:

> **"6.30.15… we have also found that Mr Abbott was not shown or told of the disclosure at any time material to the issues in this case. Therefore the disclosures did not become protected disclosures.**
>
> **6.30.16 It follows on that ground alone that the Claimant's claim under Section 103A Employment Rights Act 1996 did not become protected disclosures."**

It appears from these passages and from the observation at paragraph 6.20.17 that in their findings "below" about the dismissal they:

> **"deal with this issue which was not before us, ie. as to the reason for dismissal."**

The ET found that disclosures to HMRC could not be protected disclosures because the Claimant did not tell Mr Abbott about them. A conclusion that disclosure to HMRC could not be a protected disclosure because it was not made to Mr Abbott would be not only a failure to apply **ERA** section 43F as HMRC are a prescribed person, but also a failure to consider section 43F as directed by paragraph 14 of the Order made by EJ Cowling. The ET found in paragraph 6.30.15 that qualifying disclosures to HMRC did not become protected disclosures because the Claimant did not tell Mr Abbott about them.

90. Similar criticisms may be made of the approach of the ET to striking out the disclosures listed as 9.2, 9.3, half of 9.4 and 9.5 to 9.8. The ET stated in paragraph 4.2:

> **"It was necessary at the start of the hearing to stress to the parties that the Order of Judge Cowling of January 2011 set out exhaustively the issues which were before the Tribunal, and that no further issues would be permitted."**

In a thorough and careful list of issues, EJ Cowling set out the persons or bodies to whom the Claimant alleged she made protected disclosures. These included HMRC, solicitors, the CAA and the Environment Agency as well as Mr Abbott. The CAA and the Environment Agency as well as HMRC are listed as prescribed persons in the PID Order for the purposes of **ERA** section 43.

91. EJ Cowling listed as issues to be determined:

> **"10. Were any of the above protected disclosures made?**
>
> **11. If so, do any of those disclosures qualify for protection under section 43B ERA?"**
>
> **12. If so, were any of these disclosures made in accordance with Section 43C ERA ie disclosure to an employer or <u>other responsible person?</u>**[emphasis added]
>
> **13. And/or were any of those disclosures made in accordance with Section 43D ERA ie disclosure to a legal advisor?**
>
> **14. And/or were any of those disclosures made in accordance with Section 43F ERA ie disclosure to a prescribed person?**
>
> **15. In particular were any of those disclosures made in good faith?**

> **16. Was the Respondent aware that the Claimant had made any of the above protected disclosures?**
>
> **17. Was the reason, or if more that one reason the principal reason, for the Claimant's dismissal on 23 June 2009 that the Claimant had made any qualifying protected disclosure?"**

Save for the disclosures to HMRC which the ET found had been made by the Claimant and those to Mr Abbott which the Claimant agreed that she had not made, the ET failed to make findings as to whether she had made qualifying disclosures to a legal advisor in accordance with **ERA** section 43D or to a prescribed person in accordance with section 43F.

92. The Respondent did not apply to strike out the Claimant's allegations that she had made protected disclosures. Striking out is a draconian step. **The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1** ("ET Rules") lay down in Rule 37 a procedure to be adopted on striking out. An ET may of its own initiative strike out all or part of a claim on the basis that it has no reasonable prospect of success. Rule 37(2) provides:

> **"A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."**

93. It is apparent from paragraph 4.12 of the Judgment of the ET that striking out followed an "extensive intervention by the Judge in cross-examination" of Mr Abbott. This is also clear from the extracts of proceedings set out by counsel for the Respondent in her written submission for the Preliminary Hearing in the EAT. These show that EJ Lewis questioned the Claimant at length as she was cross-examining Mr Abbott. The questioning gives the impression that the EJ was cross-examining the Claimant. The following extract appears at paragraph 16 of the Respondent's submission:

"EJ: You are getting into difficulty. I asked if you had shown or told him about it.

C: I had not told him or shown him them. He did raise them with me. He did contact me.

EJ: So someone unknown to you made a protected disclosure to Mr Abbott but you didn't know who or when. Are you aware of the ET's ability to make costs for these proceedings – do I need to warn you?

C: Mark Abbott knew that I had raised a concern about my tax return – there is evidence based on a clandestine tape recording not just about the tax return issues but also other issues.

EJ: Do you accept that Issues 9.2, 9.3, 9.4, 9.6 and 9.8. Mr Abbott did not see, did not know about, was not copied into. Is there any reason why these claims should not be struck out?

C: I'm grateful that you have told about the structure and the technicality and I do accept on a technicality or I have worded myself incorrectly then they cannot stand. Based on a misunderstanding.

EJ: So Issues 9.1, 9.4 and 9.7. 9.4 in relation to the communication to Manches. You didn't tell him about Manches. You have relied on pages 46-47 of the Supplementary Bundle which is a letter from Manches to Mr Abbott. Where in that letter is it stated that Mark Abbott was putting personal expenses through the Respondent's accounts?

C: Issue 9.4 is two-fold: HMRC and solicitors.

EJ: Do you agree that the Manches part of the claim can't go forward?

C: Yes sir.

EJ: That leaves us with 9.1, 9.4(HMRC) and 9.7. We are striking out the others which are dismissed as there is no evidence that Mr Abbott knew of these disclosures. The only protected disclosures going forward are 9.1, 9.4 (Insofar as it relates to the HMRC) and 9.7. And on 9.1 and 9.4, the Claimant's case is that she did not copy of tell Mark Abbott about her communications with HMRC – correct?

C: Yes sir."

One of the lay members of the ET observed that EJ Lewis was "robust" in explaining to the claimant how the case would proceed.

94. We consider that there is force in the submission made on behalf of the Claimant that considerable care should be exercised before striking out a claim or part of a claim. This is particularly so in this case where the Claimant was unrepresented and had not been given advance warning that the step of striking out of part of her claim was to be taken. The Claimant was in no or in a weak position to question the proposition of law put to her by the EJ that

because she had not told Mr Abbott about and he did not know of certain protected disclosures they should be struck out. This question was posed in the context of the EJ asking her whether she was aware of the ability of the ET to make a costs order.

95. The Claimant challenges the assertion by the ET in paragraph 4.13 that it

> **"having become common ground that Mr Abbott had not been made aware of the alleged qualifying disclosures at the time of the Claimant's dismissal."**

The Claimant accepted that she had not told Mr Abbott of the protected disclosures or shown him any document in which she had made such disclosure. Her case was that he was aware or must have been aware of the disclosures by other means. The notes of the proceedings, for example those set out at page 14 of the Respondent's submissions for the Preliminary Hearing in the EAT, show that the Claimant was contending that Mr Abbott was aware of protected disclosures. It was common ground that the Claimant had not told Mr Abbott of these. It was not common ground as suggested by the ET in paragraph 4.13, that he had not been made aware of these by other means.

96. If the draconian step of striking out part of the Claimant's claim had been open to the ET and procedurally fair, the legal basis for the ET doing so is open to question. If the qualifying disclosures were struck out because the Claimant had not told Mr Abbott about them and therefore, according to the decision of the ET, they did not become protected disclosures, the ET erred in law for the reasons set out above. If the protected disclosures were struck out because the Claimant had not shown that Mr Abbott knew about them and therefore they could not have been the reason for the Claimant's dismissal again, in our judgment the ET erred in striking them out before the Claimant had completed her cross-examination of Mr Abbott or given her evidence.

97. The ET held at paragraph 7.5 that it was not necessary to consider the issue of whether the reason or principal reason for her dismissal was her protected disclosures because they accepted Mr Abbott's evidence that he did not know of the disclosures to HMRC. As the other protected disclosures had been struck out, the ET did not make findings of fact having heard all the evidence as to whether Mr Abbott was aware of any of them before he dismissed the Claimant.

98. EJ Lewis put the following proposition of law to the Claimant:

> **"EJ: Section 103A of ERA 1996 is different to some of the other law on unfair dismissal. A protected disclosure dismissal is unfair if the reason or, if more than one, the principal reason was the protected disclosures. And you seem to agree that he was not aware of the various letters in which you allegedly made the disclosures: page 120 to Darbys; 143 to the HMRC; the letter to Manches; the letter to the CAA; the letter to the Environment Agency. Do you accept that Mark Abbott didn't know about these disclosures?**
>
> **C: Mark Abbott knew about the protected disclosures made to him about the alcohol issue and the Environment Agency issue."**

In **Kuzel v Roche Products Ltd** [2008] IRLR 799 Mummery LJ held at paragraph 61:

> **"I emphatically reject Roche's contention that the legal burden was on Dr Kuzel to prove that protected disclosure was the reason for her dismissal. The general language of section 98 (1) is applicable to all of the kinds of unfair dismissal in the 1996 Act ("for the purposes of this Part"), including the subsequently inserted provisions. Section 98(1) is inconsistent with Mr Bowers's submission, as is the specific provision placing the burden of proof on the employer in case of detriment to the employee by reason of a protected disclosure. It is probable that no similar provision was made in the case of dismissal because it was considered, correctly in my view, that the situation in the case of dismissal was already covered by the general terms of section 98(1) and was blindingly obvious as a matter of general principle. An employer who dismisses an employee has a reason for doing so. He knows what it is. He must prove what it was."**

Mummery LJ held at paragraph 57 that whilst where an employee positively asserts that there was an inadmissible reason for his dismissal he must produce some evidence supporting a positive course, such as making a protected disclosure, the employee does not have the burden or proving that the dismissal was for that reason.

99. In our judgment, whilst the ET originally correctly directed themselves in paragraph 3, they erred in law in placing the burden proof on the Claimant to show that the reason for her dismissal was that she had made protected disclosures. Accordingly the ET erred in rejecting in the claim of automatic unfair dismissal under **ERA** section 103A on the grounds upon which they relied in paragraph 7.5.

100. In paragraph 7.9 the ET held that :

> **"the sole operative reason for the Claimant's dismissal was not redundancy, but the breakdown in her relationship with Mr Abbott, and the irretrievable destruction of trust which arose from the events of December 2009."**

The ET went on to add:

> **"… for the sake of completeness, that in the light of this finding, we would not, if the issue had been before us, have found that any protected disclosure was the sole or main reason for dismissal (as required by the language of Section 103A)."**

101. If the ET had not erred by striking out the majority of the alleged protected disclosures, we may have upheld their decision to reject the claim of automatic unfair dismissal under **ERA** section 103A for the reasons set out in paragraph 7.9 of the Judgment. However, in light of our conclusion that the ET erred in law in a number of important respects in other decisions reached by them and having regard to our concern about the conduct of the proceedings and the overriding objective of dealing with cases justly, we set aside the decision of the ET rejecting the claim that the dismissal was unfair by reason of **ERA** section 103A. Since this decision has an effect on the conclusion reached by the ET as to the reason for dismissal, the finding that the reason for dismissal was the breakdown in the relationship between the Claimant and Mr Abbott is also set aside.

Notice of Appeal: ground 7.6

102. Mr Brockley submitted that the ET erred in holding that the Claimant would inevitably have been dismissed at the time she was, in light of the reason for dismissal found by the ET, the breakdown of the relationship between the Claimant and Mr Abbott. In our judgment, on the findings made by the ET they were entitled to conclude that the termination of the Claimant's employment was inevitable. The ET had concluded on the basis of the evidence before them that there was an irrevocable breakdown in the relationship between the Claimant and Mr Abbott. The Respondent was a small organisation with only three employees and their associate flight crew company was small and had reduced requirements for staff. At paragraphs 6.24 and 6.35 the ET set out extracts from letters from the Claimant's solicitors of 11 February and 13 May 2009 referring to the possibility of an agreement on termination. The extract from the letter of 13 May 2009 concludes:

> **"As the Separation Agreement purports to dismiss all of our respective clients' claims against each other howsoever arising, our client is not willing to enter such an agreement at the present time."**

103. The ET held at paragraph 6.26:

> **"there had been no resolution of any of the areas of dispute between the Claimant and Mr Abbott or the Respondent at the time of termination of the Claimant's employment."**

On such evidence there was no basis upon which it could be said that the ET erred in failing to hold that the employment could or would have been terminated by a negotiated agreement.

104. We reject the contention that properly directing themselves the ET should have held that the Claimant's employment would have come to an end later than 23 June 2009 if a procedure appropriate to dismissal for a breakdown in her relationship with Mr Abbott had been adopted. There was no evidential basis for such a finding.

105. Mr Brockley questioned whether **Polkey** could be applied in circumstances in which the reason for dismissal was found to be other than that advanced by the Respondent. The ET found the dismissal of the Claimant to be unfair because the procedure adopted was not one which addressed what they found to be the reason for dismissal. Even if **Polkey** were not applicable in such circumstances, the ET would consider what loss had been caused by the dismissal. On the findings of fact made by the ET the unfair dismissal caused no loss beyond 23 June 2009 as the Claimant would have been dismissed fairly by then in any event. Accordingly the appeal from the making of no compensatory award other than for loss of statutory rights is dismissed.

The Review Decision

106. The parties were agreed that the outcome of the appeal from the Review Judgment depends on that against the Judgment of 5 August 2011. Accordingly the appeal from the Review Decision succeeds to the same extend as that from the Judgment of 5 August 2011.

Disposal

107.

107.1. The appeal from the dismissal of the claim of automatic unfair dismissal under **Employment Rights Act 1996** section 103A is allowed.

107.2. The claim is remitted to a differently constituted Employment Tribunal to determine the Claimant's claim of unfair dismissal under **Employment Rights Act 1996** section 103A.

107.3. The Employment Tribunal is directed that if they do not find that the reason of the principal reason for dismissal of the Claimant falls within

Employment Rights Act 1996 section 103A, the Decision of 5 August 2011 as to the reason for the Claimant's dismissal and that it was unfair is to stand.

107.4. The appeal from the decision not to make a compensatory award other than for loss of statutory rights is dismissed.

107.5. If, on a remitted hearing the Employment Tribunal finds the dismissal automatically unfair within **Employment Rights Act 1996** section 103A, they will consider the consequential awards afresh.

107.6. The appeal from the Review Judgment is allowed to the same extent as that from the Judgment 5 August 2011.