Appeal No. UKEAT/0046/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 July 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR M JOHNSON — APPELLANT

MITIE ASSET MANAGEMENT LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PETER LINSTEAD (Of Counsel) Appearing under the Free Representation Unit
For the Respondent	MR JAMES BOYD (of Counsel) Instructed by: Pinsent Masons LLP 3 Hardman Street Manchester M3 3AU

SUMMARY

VICTIMISATION DISCRIMINATION - Protected disclosure

DISABILITY DISCRIMINATION

PROTECTED DISCLOSURE – section 43B Employment Rights Act 1996

Inadequate findings of fact by the ET as to what had actually been said by the Claimant and, if not a protected disclosure, why. Ultimately, however, the ET's clear findings of fact as to the reason for the Claimant's dismissal (redundancy arising from a genuine restructuring) meant that the only permissible conclusion was that there was no causative link between any protected disclosure and the decision to dismiss.

DISABILITY DISCRIMINATION

Disability – section 6(1) and Schedule 1 Equality Act 2010

ET failed to consider the deduced effect of the Claimant's impairment and had apparently failed to have proper regard to the medical evidence. The conclusion that the Claimant was not a disabled person for the purposes of the 2010 Act was unsafe. Nevertheless, the question remained as to whether any of his claims of discrimination in this respect were made out.

Discrimination arising in consequence of disability – section 15 EqA 2010

The ET failed to address this claim, albeit that it had apparently recognised that it remained a "live" complaint at the Hearing. That said, the substantive answer to the claim of discrimination arising in consequence of disability was apparent from reading the Tribunal's Judgment in its entirety: it was not the Claimant's disability that led to his failure to engage but his view that the head of finance role was his job, that the redundancy was a sham and his decision not to engage after the failure to agree terms of payment under a compromise agreement. The detriments relied on, therefore, did not arise as a consequence of the Claimant's disability.

Reasonable adjustments – section EqA 2010

The ET failed to adopt the structured approach endorsed in (e.g.) **Smiths Detection - Watford Ltd v Berriman** UKEAT/0712/04 and **Secretary of State for Work and Pensions (Jobcentre Plus) and Ors v Wilson** UKEAT/0289/09. Of the two reasonable adjustments identified by the Claimant, however, one was simply not relevant (relating to the location of grievance meetings; not pursued on appeal) and the ET expressly addressed the second (the need to delay the redundancy process pending the Claimant's recovery), finding that

> **"We do not accept that the process should have been delayed indefinitely until the Claimant had recovered."**

The Claimant may not have expressed the required adjustment as an indefinite delay but that was the reality of his position and the Tribunal was entitled to reach the conclusion it did.

Unfair dismissal – s 98 ERA

Given the conclusions reached on the Protected Disclosures and Disability Discrimination claims, the grounds of appeal in respect of the unfair dismissal case largely fell away. The additional (stand-alone) point as to what was said to be a perverse finding as to the Claimant's qualification did not fairly reflect the ET's findings.

Appeal dismissed.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent, as they were below. This is the Claimant's appeal against a Judgment of the Reading ET (Employment Judge Mitchell sitting with members on 7 and 8 November 2012), sent to the parties on 17 December 2012. The Claimant was then represented by Mr Charles of Counsel, now by Mr Linstead of Counsel, acting pro bono through the FRU. The Respondent was represented before the ET by its solicitor, Mr Deakin, but before me by Mr Boyd of Counsel.

2. The ET was charged with determining the Claimant's complaints of unfair dismissal and of detriment or automatic unfair dismissal as a result of having made protected disclosures, alternatively of having suffered discrimination because of his disability in relation to his dismissal and the process of that dismissal, including a failure to make reasonable adjustments. In addition, the way in which the Claimant put his claim of disability discrimination also incorporated a claim of discrimination arising from disability under section 15 of the **Equality Act 2010** (EqA). That is a point to which I shall return later in this Judgment.

3. The Tribunal rejected the Claimant's complaints of disability discrimination, unfair dismissal and detriment and automatic unfair dismissal by reason of protected disclosures.

The Background Facts

4. The Claimant worked for the Mitie Group, which included the Respondent, from 19 April 2006 until 17 January 2012, when his dismissal took effect. The Mitie Group is a large organisation employing many thousands of workers nationally and internationally.

Within the Respondent, where the Claimant was latterly employed, there is a staff of some 125. The Respondent's focus is on the provision of asset management services for decentralised sustainable energy and mechanical and electrical installations for computer data centres. The Respondent is predominantly based at Farnham.

5. The Claimant had worked elsewhere within the group until April 2010, relevantly in its engineering services division, but became the divisional financial controller of the Respondent. He claimed he had made verbal protected disclosures, in relation to the engineering services division in April 2009, in relation to the financial accounts for year-end March 2010 at various times in the spring and summer of that year, with further verbal protected disclosures in respect of contractual arrangements made with another company in August and October 2010, and, finally, in April 2011, regarding the financial accounts for year-end March 2011. The Respondent denied that any protected disclosures had been made. Whether the Claimant had made protected disclosures for the purposes of section 43B of the **Employment Rights Act 1996** (ERA) was thus one of the issues the Tribunal had to determine.

6. By July 2011, the Claimant was showing signs of ill-health and was signed off work from 5 or 6 September 2011, ultimately being diagnosed as suffering from reactive depression in October 2011. He never returned to work. During this period of absence, the Respondent referred the Claimant to occupational health in October and December 2011. He was prescribed medication, which he remained on at the time of the Tribunal hearing.

7. Meanwhile, the Respondent's business had been changing focus from a transactional form of business to one where the Respondent was developing its own sustainable-energy plants, with the customer purchasing energy from those plants over a period of years. That led

to a review of the finance team by the Respondent's director of finance, Mr Payne; the view being taken that the Respondent needed to reposition itself to focus on asset investment. Mr Payne considered that this would require a different form of expertise and proposed a restructure, which included a proposal for a new head of finance position, incorporating the Claimant's responsibilities but taking on broader and greater responsibilities. Mr Payne did not think the Claimant had a sufficient level of expertise to perform the new role and he expected an external candidate to be appointed, albeit that the Claimant was not precluded from applying. Mr Payne also suggested an alternative, however, which was that the Claimant could leave under a compromise agreement with the Respondent.

8. There were negotiations as to a compromise package, with meetings taking place in August 2011, but the parties could not agree. The Claimant was holding out for £50,000; the Respondent was standing at an offer of £32,000. By an email sent at the end of August 2011 the Claimant intimated a grievance to Mr Payne, complaining that he was being removed from his employment because he had raised concerns regarding the Respondent's accounting practices. He submitted a formal grievance on 6 September 2011, albeit that he did not supply specific details, maintaining that his medical condition precluded him from doing so.

9. On 6 September 2011, the Claimant had been due to attend work for a meeting regarding the announcement of the restructuring proposals. That day he was suffering from a heavy cold and called in to say he would not be in attendance. The following day he saw his GP and was signed off work and did not return. Whilst the Claimant was off sick, he was sent a copy of the briefing document from the 6 September meeting and was invited to attend a consultation meeting on 12 September. He did not do so. Ultimately that meeting took place, in his absence, on 10 October 2011, albeit that the decision then taken was to obtain a report from

occupational health before proceeding further. It was in October 2011 that the Claimant was diagnosed as suffering from reactive depression. He was still unwell at the time of the Tribunal hearing. Originally, the prognosis had seemed more optimistic and the Claimant had been hopeful he would return to work in November 2011. At the beginning of that month, however, he had been signed off for a further month, and that remained the position when he was invited to attend a final consultation meeting on 12 December 2011, which he was unable to attend.

10. By letter of 13 December 2011, the Claimant was given notice of the termination of his employment on grounds of redundancy, effective 17 January 2012. He did not appeal and at no time sought to use what the Tribunal described as the Respondent's comprehensive whistleblowing policy. The Tribunal also noted that, apart from the email sent to Mr Payne in August, the Claimant did not supply details of the grievance he had submitted in September.

The Tribunal's Conclusions and Reasons

11. The Tribunal heard from the Claimant and from Mr Payne and a Ms Denham, the HR consultant involved in the redundancy process. On the question of whether the Claimant had made any protected disclosures, the Tribunal accepted that from time to time he had had reservations regarding various matters relating to the Respondent's financial affairs but concluded that these were really different views regarding accounting practices and not protected disclosures. In weighing up the evidence as to whether protected disclosures had been made by the Claimant, the Tribunal preferred Mr Payne's evidence, as:

> **"40. The difficulty with this aspect of the case is that there is no written evidence of the disclosures which the Claimant maintains that he has made. We have therefore had to weigh up the evidence given by Mr Johnson, the Claimant, and Mr Payne for the Respondent. In weighing that evidence, the following matters appeared to the Tribunal to favour the recollection of Mr Payne.**
>
> **40.1. It is implausible that protected disclosures made more than a year before the dismissal had any influence on the decision made in December 2011. It is implausible that a qualified accountant who in his witness statement considered some of his disclosures to amount to 'fraudulent misrepresentation and potentially in breach of director's fiduciary duties' would fail to draw the attention of either the internal auditors who visited the Claimant's office**

> **several times a year, or the external auditors from a major City firm of accountants who were at the Claimant's office for substantial periods of time during the year, of his concerns.**
>
> **40.2. It is also noticeable that he did not make any contact with his own professional body to seek any advice in relation to his alleged concerns. As a professional accountant, responsible for the reporting, if there was fraudulent misrepresentation, he would be liable at the very least for professional misconduct.**
>
> **40.3. There was a whistleblowing procedure. The Claimant made no use of that procedure.**
>
> **41. The Claimant failed to particularise any alleged protected disclosures at any time during his employment although he made oblique reference to it in the grievance submitted in September 2011. The Claimant made no reference to having made protected disclosures until he was aware that his job was at risk."**

12. Further, the Tribunal was satisfied that redundancy was the reason for the Claimant's dismissal (paragraph 45). This had related to the restructuring of the finance department with the result that (paragraph 44):

> **"The Respondent needed a head of finance with a higher level of qualification than the Claimant. Its requirements for the role required either ACA or CIMA qualifications. The Claimant had not succeeded in passing the CIMA exams."**

13. The ET considered that a reasonable employer could take the view that the overall structure plan should be determined before embarking upon individual consultation. If wrong on that, however, it concluded that - given the Claimant's stance in the consultation process that did take place and the opportunities given to him to consider alternative employment within that process, which lasted some three months - the dismissal for redundancy was procedurally fair.

14. As for the disability discrimination claim, the ET first considered whether the Claimant was disabled for the purposes of the **EqA**. It treated the date of 13 December 2011 (the date of the letter giving notice of termination of employment) as being the relevant date for determining this question. It noted that, on the medical information available, there were no symptoms of depression until the end of July (paragraph 51). The diagnosis of reactive depression was made on 6 October 2011, but the occupational health reports advised that it was

reactive to workplace stress, with improvement being noted in November and December 2011, and was likely to dissipate once the trigger for the reaction was removed.

15. The ET concluded that, at the relevant time, the Claimant did not meet the statutory definition of suffering from an impairment with an adverse effect on his abilities to carry out normal day-to-day activities that was likely to last at least 12 months. If it was wrong about that, the Tribunal rejected totally any suggestion that the Claimant's ill-health played any part in the decision to dismiss. The process was underway before any relevant ill-health was displayed. There were a number of reasonable adjustments made to the consultation process, meetings were delayed, and the Claimant was informed of developments by telephone et cetera; no case of disability discrimination was made out.

The Appeal

16. The proposed appeal was initially rejected on the paper sift but was permitted to proceed by HHJ Hand QC after a Rule 3(10) hearing, at which the Claimant was represented by Mr Linstead, acting under ELAAS. Whilst not abandoning any of the grounds of appeal drafted by the Claimant, Mr Linstead then, and now, put the Claimant's appeal on the following bases:

(1) The ET misdirected itself as to whether the Claimant had made any protected disclosures by failing to make any, or any adequate, findings of fact and/or by conflating the parties' respective opinions as to whether section 43B was satisfied with a factual finding as to what had actually been said and whether that was a protected disclosure.

(2) The alternative finding as to the absence of any causative link between any protected disclosure and the decision to dismiss contained a misdirection and/or was perverse.

(3) The ET misdirected itself as to whether the Claimant was disabled by failing to take account of/ failing to adequately deal with evidence that his condition was likely to last more than 12 months and/or as to the effect of his medication and/or reached a perverse conclusion on this issue.

(4) In the absence of an adequate analysis of the nature of the Claimant's disability and its impact, the alternative finding on reasonable adjustments could not stand.

(5) Although more an observation on the consequences of the preceding grounds than a separate ground of appeal in itself, that the findings on unfair dismissal would need to be reopened if the Claimant's appeals in respect of protected disclosure or disability discrimination succeeded.

(6) In any event, the conclusion that the Respondent had acted reasonably in dismissing for redundancy was based on a misdirection/ was perverse in respect of its finding in relation to the Claimant's qualification.

The Relevant Legal Principles

17. Section 98(2) of the **ERA** 1996 allows that redundancy (defined by section 139(1)(b) **ERA**) can be a fair reason for dismissal; the approach to determining the fairness or otherwise of the dismissal for that reason being laid down by section 98(4) of the 1996 Act.

18. As for the whistle-blowing claim, the relevant statutory provisions are contained within Part IVA of the **ERA** 1996. In particular, section 43B provides, so far as material:

> **"(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—**

> **[…]**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject […].**

19. Pursuant to section 43B, the disclosure must be "of information". In **Cavendish Munro Professional Risk Management Ltd v Geduld** [2010] ICR 325, the EAT (Slade J presiding), drew a distinction between a disclosure of information and an allegation.

20. The burden of proof in terms of showing that a protected disclosure has been made is on the employee (**Boulding v Land Securities Trillium (Media Services) Ltd** UKEAT/0023/06). On the question of causation, in respect of the detriment claim, the test is laid down by Elias LJ in **NHS Manchester v Fecitt and Ors** [2012] IRLR 64 at paragraph 45:

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

21. For the purpose of the automatic unfair-dismissal claim, however, the test is that laid down by section 103A of the **ERA**. That is, whether the employee's making the protected disclosure was the reason – or, if more than one, the principal reason – for the dismissal.

22. Turning to the disability discrimination claim, section 6(1) of the **EqA** 2010 defines disability (relevantly) as, if a person (P) has a physical impairment that:

> **"(1) (b) […] has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."**

23. Schedule 1 of the Act assists in defining what are long-term effects of an impairment, as is correctly set out in the Tribunal's self-direction, at paragraph 36 of its Reasons:

> **"Schedule 1 of the [EqA] 2010 assists in defining the long term effects of an impairment if it has lasted for at least 12 months or is likely to last for at least 12 months, or it is likely to last for the rest of the like of the person affected. It is also provided that in considering the substantial adverse activities, we are to discount the medication or measures being taken to correct the condition."**

24. "Likely" is to be taken as meaning "could well happen", rather than it is more probable than not that it will happen (see paragraph C3 of the 2010 Guidance to the **EqA** 2010). The relevant time at which to consider whether a person was disabled would be the date of the alleged discrimination (see **McDougall v Richmond Adult Community College** [2008] ICR 431).

25. The question whether a Claimant is disabled is one for the ET to decide on the evidence. The ET will wish to have regard to any medical evidence but is not bound by it.

26. As for medical treatment, the Tribunal is faced with a difficult task. It has to consider how the complainant's abilities had been affected at the material time while being treated and then to deduce what the effects would have been but for the treatment. The question is whether the actual and deduced effects on the Claimant's abilities to carry out normal day-to-day activities are more than trivial (**Goodwin v The Patent Office** [1999] ICR 302).

27. Where a complainant is disabled for the purposes of the 2010 Act, different forms of discrimination are potentially relevant. The complaint may be one of direct discrimination (section 13) or of discrimination arising from disability (section 15):

> **"(1) A person (A) discriminates against a disabled person (B) if—**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."**

28. Further, pursuant to section 20 of the Act, there is a duty to make reasonable adjustments, and a failure to comply with that duty can amount to a separate form of discrimination (section 21). Schedule 8 of the Act provides that an employer will not be subject to the duty to make

reasonable adjustments if it could not know and could not reasonably be expected to know that the employee had a disability or was likely to be placed at the disadvantage in question.

29. The approach Employment Tribunals are to adopt in considering the question of reasonable adjustments has been considered in a number of cases, such as **Environment Agency v Rowan** [2008] ICR 218, **Smiths Detection - Watford Ltd v Berriman** UKEAT/0712/04 and **Secretary of State for Work and Pensions (Jobcentre Plus) and Ors v Wilson** UKEAT/0289/09. The cases suggest that a structured approach should be adopted as follows: (1) is there a provision, criterion or practice applied by or on behalf of an employer (or a physical feature of premises occupied by the employer or a need for an auxiliary aid)? (2) the Tribunal should then identify, where appropriate, any non-disabled comparators; (3) the Tribunal should then identify the nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee.

Submissions: the Claimant's Case

30. On behalf of the Claimant, the point was made that there was in fact no express statement of a finding in terms that the Claimant had *not* made any protected disclosures, although that conclusion was implicit. The real point was that there was a failure to make findings of fact as to the actual protected disclosures. The Claimant's case had been put on the basis that these had been made verbally, but the Tribunal did not actually make findings as to what the Claimant had said, which it needed to do in order to reach a conclusion as to whether protected disclosures had been made or not. The references to the matters relied on by the parties at paragraphs 6 and 7 were not sufficient, nor were the Tribunal's partial conclusions at paragraphs 40.1 and 42. Further, the final sentence of paragraph 42 failed to apply the correct legal test and imposed too high a burden on the Claimant.

31. Building on this point, Mr Linstead observed that the Claimant had put in a table setting out his protected disclosures and had made reference to that in his witness statement. That had shown that he was claiming to have made ten separate protected disclosures to a number of different people, including persons other than Mr Payne, who had not been called to give evidence. The ET needed first to make findings of fact as to what had been said; then, and only then, could it ask the legal question as whether that complied with section 43B of the 1996 Act.

32. Going through the Reasons provided by the Tribunal, paragraphs 6 and 7 merely set out the parties' respective positions. The Tribunal's conclusions at paragraph 40 appeared to show that the Tribunal had accepted the Respondent's position on the legal analysis. That would suggest that it had not accepted the Respondent's primary position that no protected disclosures had been made. Paragraphs 40 and 42 jumbled together legal and factual conclusions. It was impossible to discern from these what disclosures the ET had found were made, still less its reasons for rejecting those disclosures as failing to meet the requirements of section 43B.

33. To the extent that the Tribunal made an alternative finding of a lack of any causative link between the Claimant's protected disclosures and the relevant decisions in the dismissal process, at paragraph 40.1 it got the history wrong. The last protected disclosure had been in April 2011, only four months before the relevant decisions regarding restructuring, not over a year as the Reasons suggested. In any event, there were simply insufficient findings on the question of causation. The ET treated the protected disclosure issue separately and so, under the unfair dismissal heading, had made no relevant findings as to whether dismissal was tainted by any preceding protected disclosure. It would not be correct to read across from the findings under the unfair dismissal heading as answering the question of whether the Claimant had been dismissed for having made a protected disclosure, as that would require a different approach.

34. Turning to the claim of disability discrimination, Mr Linstead argued that the finding that the Claimant was not disabled at the relevant time amounted to an error of law or, alternatively, was perverse. The Tribunal had failed to apply the correct legal analysis. It had failed to ask (as it was required to do under schedule 1) what the deduced effect would be if the effect of the Claimant's medication was removed. It also failed to have regard to the entirety of the evidence before it, in particular the evidence from occupational health. That evidence made clear that the Claimant was likely to be on medication for a further 18 months, and so any observations as to an improvement in the Claimant's condition made in the occupational health reports would need to be seen in the light of the reference to that continuing medication. Moreover, the occupational health evidence contained in it information that the Claimant had suffered symptoms for some time prior to October 2011 and also alluded to the fact that the Claimant's condition would continue for six months after the end of the stress that had produced the depressive reaction. Properly having regard to that evidence - which was apparently accepted by the ET - would take the period in question to be around 12 months. Whilst the Claimant accepted that the Tribunal would be entitled to reject the occupational health evidence and to form its own view on this issue, where there is medical evidence then the Tribunal would need to engage with it and give reasons for not accepting it (see the guidance of the EAT in the case of **Edwards v Mid-Suffolk District Council** [2001] IRLR 190, paragraph 45).

35. As to the alternative finding on the disability discrimination complaint, the ET had failed to consider the Claimant's section 15 claim and the possibility that his inability to engage with the redundancy process arose from his disability. There was no overt consideration as to the possibility that his refusal to engage arose from his severe depression. The ET had failed to deal with the section 15 claim at all, and that required, if anything, a remission of the case, not

simply the use of the **Burns/Barke** procedure, which was properly directed at cases where there are gaps in the reasoning, not a complete failure to deal with the claim.

36. As for the alternative finding in respect of reasonable adjustments, the Tribunal had entirely failed to adopt the kind of structured approach required of it (see **Berriman**, as followed by the EAT in **Wilson**). Even if the Tribunal was not required to rigidly adhere to those steps, it had failed to engage with the Claimant's positive case, i.e. that the Respondent should have delayed dealing with the issues relating to the restructuring process and the Claimant until he was well enough to engage with these points. The Tribunal had stated that it did not accept that the process should have been delayed indefinitely until the Claimant had recovered (paragraph 52) but that was not how the Claimant had put the point; he was seeking only the adjustment of a delay until he was well enough to engage in consultation. More generally, if the Tribunal had erred in respect of the finding on disability, then the discrimination question as a whole needed to be reopened and remitted for fresh consideration.

37. Turning finally to the unfair dismissal claim, Mr Linstead first submitted that if the Claimant succeeded in respect of the protected disclosure or disability discrimination grounds of appeal, then the findings in respect of unfair dismissal would need to be revisited. The question of reasonable adjustments would go to the process, and, as for the question of protected disclosures, that would require a different approach, scrutinising what was in the mind of the employer in respect of the findings of protected disclosures than simply a straightforward case of section 98 unfair dismissal.

38. Finally, the finding at paragraph 44 - that the Claimant had not succeeded in passing the CIMA exams – was perverse. There was no evidence before the Tribunal that the Respondent had known what the position was in that regard at the relevant time.

The Respondent's Case

39. On the question of protected disclosures Mr Boyd for the Respondent accepted that the Tribunal had not expressly set out what the Claimant had said. He sought to argue, however, that that had to be seen in context. The grounds attached to the ET1 drafted by solicitors on the Claimant's behalf had made an assertion as to protected disclosures in merely generalised terms, and the Claimant himself had given only a generalised allegation prior to raising his internal grievance. Accepting, however, that the Claimant's witness statement and the table to which it referred plainly had provided rather more detailed Particulars, he submitted that there was clearly a dispute on the evidence on those points, and the Tribunal should be permitted to have made the more generalised findings that it did. Paragraphs 6, 7, 40 and 42 were sufficient in this regard. Per Elias LJ in the **Fecitt** case, there was no need for a blow-by-blow rehearsal of the evidence. Accepting that the Tribunal did not seem to engage with/set out its findings in respect of the detailed Particulars in the Claimant's witness statement, if there was insufficient particularity, then this could be remedied by a reference under the **Burns/Barke** procedure.

40. Turning to the question of causation and the argument that the Tribunal incorrectly analysed the question and incorrectly stated the chronology; that went nowhere, given the clear findings made by the ET on the unfair dismissal case. The Tribunal must have analysed the Respondent's case and found that the rationale for the decision made was a bona fide one. Paragraph 40 might be susceptible to criticism, but it included findings that went to the issue of

causation. Clearly, the Tribunal had been left with the strong impression that disclosures were manifestly unlikely to have been the reason, or principal reason, for the dismissal.

41. As for disability discrimination and the question of deduced effect, the basis for the Tribunal's conclusion was that the Claimant was not disabled because the impairment was not likely to last for at least 12 months and the medication issue was not relevant to that. Accepting, however, that the Tribunal had seemed to accept the occupational health evidence but had failed to actually address that part of it referring to the Claimant continuing to take his medication for some 18 months, Mr Boyd acknowledged that that was a point that a Tribunal would normally be expected to demonstrate it had considered and reached a conclusion on. This, however, ultimately went nowhere, given the Tribunal's alternative finding that there was no causative link between the Claimant's disability and the relevant decisions made. If one read from paragraph 11 to the end of the findings of fact, it was apparent that the disability had no relevance to the decisions taken or the process adopted.

42. Accepting that the Tribunal had not expressly set out conclusions on the section 15 claim, again, reading the decision in its entirety, that provided an answer to the case that the Claimant put under that section. Alternatively, that was also a point that could be remedied under the **Burns/Barke** procedure.

43. On the reasonable adjustments case, the Respondent also accepted that there the Tribunal should have set out its reasoning, showing that it had adopted a structured approach, but did not do so. It had not set out expressly what the reasonable adjustments were. It was clear from the ET1, however, that the Claimant was relying on two reasonable adjustments as part of his positive case. The first was an adjustment requiring a delay until the Claimant was well enough

to consult with. The second was that the Respondent should have arranged a meeting at the Claimant's home in order to take the grievance process further. The Tribunal had, however, dealt with the substance of the first of those points and had rejected the delay as a reasonable adjustment. The second did not arise, because the Tribunal had made the finding that the grievance had been put on hold because the Claimant could not give specific details of his grievance, and so the question of location of meetings was not relevant.

44. On the unfair dismissal claim, the Respondent did not accept that the Tribunal's findings were tainted by any errors of approach in respect of protected disclosure or disability discrimination. Moreover, any failure to make findings of fact or reach conclusions under section 15 of the **EqA** could not go anywhere, with paragraph 48 providing a complete answer on those points in respect of the unfair-dismissal claim. As for the reference to the Claimant's qualifications, the point could go nowhere. As HHJ Hand QC had noted, at the Rule 3(10) hearing, the new role was to be a broader and more complicated role and the view was formed that the Claimant would not be qualified for it; it was beyond his capabilities. That being so, the specific reference to a particular qualification at paragraph 44 of the Reasons could not undermine the overall conclusion reached.

Discussion and Conclusions

45. I start with the Tribunal's finding on the question of whether the Claimant made any protected disclosures. As Mr Boyd for the Respondent conceded, there is no express finding as to what the Claimant actually said in this regard. Paragraphs 6 and 7 of the Reasons identified the parties' respective positions. The Claimant was relying on a number of verbal disclosures made between April 2009 and April 2011; the Respondent was maintaining that no such disclosures had been made. The suggestion at paragraph 40 initially seems to be that the

Tribunal preferred the Respondent's case, but paragraph 42 records that the Claimant had expressed some reservations or concerns but that the Tribunal did not accept that those fell within section 43B. The Tribunal's finding thus seems to have been that the Claimant may have expressed a difference of view but not that he disclosed information. If so, that would be a conclusion falling somewhat short of the Respondent's primary case.

46. To the extent that it was finding that the Claimant had made disclosures but that these were not protected disclosures for section 43B purposes, one is left with the difficulty of trying to understand the Tribunal's reasoning. The Respondent's submission that the Tribunal cannot be criticised for failing to make detailed findings as to the nature of what the Claimant had said, because he failed to give sufficient Particulars, cannot be right (as, in fairness, Mr Boyd accepted). For completeness on this point, I should say that I agree with Mr Linstead that, when the Tribunal (paragraph 41) refers to the Claimant's failure to particularise any alleged protected disclosures at any time during his employment, that must be a reference to his failure to do so during that employment and not during the ET proceedings, as he plainly provided detailed Particulars in his statement and the attached schedule.

47. Many of the incidents in the Particulars relied on by the Claimant seemed capable of amounting to disclosures of information rather than simply allegations or statements of opinion. That said, it would be open to the Tribunal to reject that evidence; to find that particular disclosures alleged by him were never in fact made, or to find that the actual disclosure made did not in truth amount to the giving of information. I cannot see, however, that this Tribunal engaged in that exercise or made relevant findings. Certainly, there are inadequate reasons to explain what it found and why.

48. The question then arises as to whether this matters. That takes me to the second of the Claimant's challenges in respect of the alternative conclusion as to the absence of any link between the protected disclosure and the decision to dismiss. That alternative conclusion is not expressed clearly in terms. Under the heading "whistleblowing", the Employment Tribunal at paragraph 40.1 states:

> **"It is implausible that protected disclosures made more than a year before the dismissal had any influence on the decision made in December 2011."**

49. If that is a finding in the alternative – that, even if the Claimant did make protected disclosures, that fact was not the reason or principal reason behind the decision to dismiss – then it would only have partly engaged with the Claimant's case, in that it only refers to the older protected disclosures relied on by the Claimant, the most recent in time having been made in April 2011. Moreover, it would fail to address the question of the restructuring process and the decision-making in that regard, which, after all, led to the decision to dismiss and which, on any case, started some time before December 2011.

50. The more difficult point for the Claimant is that the ET plainly went on to make very clear findings as to the reason for the dismissal under the next subheading in its Reasons, that of unfair dismissal. The Claimant says these reasons cannot be relied on as establishing an alternative conclusion on the protected-disclosures claim as the Tribunal signified its rejection of that claim at paragraph 43 before moving on to separately address the unfair dismissal claim. This is, therefore, simply be the statement of its conclusions on unfair dismissal for section 98 purposes and not section 103A. I am not sure that is right, and it seems to me that it is appropriate to have regard to the substance of the findings made. The heading "unfair dismissal" can of course refer to both an automatic unfair dismissal claim and what might be called a "normal" unfair-dismissal claim under section 98. It would be overly technical point to

rely on the sentence at paragraph 43 as closing off the Tribunal's consideration of the question of causation in respect of the dismissal for all purposes.

51. The Claimant also says, however, that the Tribunal would have needed to adopt a different approach to the question of unfair dismissal if it had found that the Claimant had made a protected disclosure. That might be right in some cases, but here the question for the ET - whether under section 98 or under section 103A of the 1996 Act - was whether the Respondent had satisfied the burden upon it of showing the reason (or, if more than one, the principal reason) for the dismissal and, if so, whether that was a reason capable of being fair; something it could not be if the reason was the Claimant's having made a protected disclosure.

52. Here, the ET clearly concluded that the Respondent had satisfied that burden and had established that the reason for dismissal was redundancy (as defined by section 139 **ERA**). The Tribunal also concluded that the redundancy arose from a genuine restructuring that gave rise to a diminishing need for employees to carry out the Claimant's role and for a need for a more highly qualified employee. The Tribunal may be criticised for failing to specifically state that it was rejecting the Claimant's positive case - that his making protected disclosures had been the real reason for the dismissal - but it was obviously aware of that case and its conclusion is simply inconsistent with such a possible finding, as must be apparent to the Claimant.

53. As regards the grounds of appeal in respect of the protected disclosure claim, therefore, whilst I see merit in the challenge on the finding of protected disclosure, in my judgment the appeal must fail because the Tribunal clearly made findings that could only lead to the conclusion (in the alternative) that the Claimant's claim had to be dismissed.

54. I then turn to the disability discrimination claim. Again, there are two parts to the appeal in this respect: first, the Tribunal's approach and conclusion on the question of disability; second, the Tribunal's conclusion, in the alternative, as to whether there had been any discrimination.

55. It is common ground that, although the Tribunal expressly referred to schedule 1 on the question of disability in its self-direction, there was no reference to the effect of the Claimant's medication in the findings of fact and conclusions. I initially questioned where this went. I saw force in the Respondent's position that the Tribunal's finding was not dependent upon the impairment being masked by medication but stood or fell solely on the basis of the finding that it was not likely to be of long-term effect. The difficulty with that analysis arises when one looks at the basis for the Employment Tribunal's conclusion in this regard, and credit has to be given to Mr Linstead for demonstrating how the problem arises through the analysis of the evidence.

56. The Tribunal expressly refers to the occupational health evidence at paragraph 9, and it is apparent that this then feeds into its relevant conclusion (paragraph 51) that:

> **"At the time of dismissal the likelihood was that the condition would dissipate once the trigger for the reaction was removed."**

57. The occupational health evidence also stated, however, that the Claimant was likely to be on his medication for a further 18 months, a point the Tribunal failed to address. The difficulty with this is that one is left simply not knowing whether the Tribunal made any finding – and, if so, on what basis - as to whether the dissipation of the Claimant's condition was predicated upon his still taking medication or not. The occupational health evidence apparently accepted by the Tribunal seems to have allowed for the possibility that the Claimant's condition may

improve once the trigger for depression was removed but with the Claimant still being reliant on medication. If so, then the question would be whether the Claimant would be disabled without that medication. Of course, a Tribunal might conclude that medication would also have ceased once the trigger for depression was removed, or that discounting the effect of medication would still lead to the conclusion that the Claimant was not disabled. The difficulty is that the Tribunal's Reasons simply do not address that question and one is left not understanding what conclusion if any it reached in that respect.

58. Further, the Claimant makes the fair point that the Tribunal selectively referred to the medical evidence, apparently ignoring expressions of opinion that the Claimant may be disabled for the purpose of the 2010 Act. The ET also wrongly stated that the medical information did not show that the Claimant experienced any symptoms of depression until the end of July, when in fact there was some reference to the Claimant having started to experience symptoms of stress some two to three years before and suffering quite badly from such symptoms as from May 2011. Again, of course, it would be a matter for an ET as to what weight to give such evidence, and the conclusions it might then reach would be a matter for it. However, apparently accepting the occupational health evidence but failing to engage with these points, leads me to the Judgment that the Tribunal's conclusion as to whether the Claimant was disabled (for the purposes of the **EqA** 2010) is not safe and cannot stand.

59. I turn again to the question of whether that makes any difference. There is an express conclusion, in the alternative, that the Claimant had not been discriminated against. One needs, however, to note that the way in which the Tribunal expresses that alternative conclusion (paragraph 52) apparently deals with the claim of direct disability discrimination and the claim of discrimination by failure to make reasonable adjustments but not a claim under section 15

EqA, of discrimination arising from disability. That might not be entirely fair, but certainly the wording does not make clear that it is dealing with such a claim.

60. It might be thought that the Tribunal had understood that this claim was not being pursued, because the conclusions do not appear to address it. That, however, cannot be the case, as express reference is made to the provisions of section 15 in the Tribunal's self-direction on the law, relevantly, at paragraphs 31 and 32. The Respondent says that this apparent oversight can be remedied by using the **Burns/Barke** procedure, but I agree with the Claimant: that would be for cases where there are gaps in the reasoning, not where a Tribunal has entirely failed to address the claim.

61. A further procedural issue may arise in this respect, as, on my reading of the Notice of Appeal and the Judgment from the Rule 3(10) hearing, it is not apparent to me that the argument in respect of a failure to deal with the section 15 claim was actually raised. That is not a point, however, taken by the Respondent. Had it been, I might simply have allowed an amendment to the Notice of Appeal in any event. I do not simply reject the appeal on that basis.

62. I turn therefore to the substance of this part of the appeal. The question raised by the section 15 claim would be whether the Claimant's approach to the process, and his failure to engage with the issues relating to the restructuring and the decision to dismiss, arose from his disability. Looking at the substance, the difficulty for the Claimant again arises, in my judgment, from the Tribunal's findings under the heading of unfair dismissal, specifically at paragraph 48. Allowing that a Judgment has to be read in its entirety, I take that to be the substantive answer to the section 15 claim (if indeed it was put below as it has been put before

me). That is that it was not the Claimant's disability that led to his failure to engage but his view that the head of finance role was his job, that the redundancy was a sham and his decision not to engage after the failure to agree terms of payment under a compromise agreement.

63. As for the disability discrimination claim in respect of a failure to make reasonable adjustments, as Mr Boyd for the Respondent again concedes the Tribunal failed to expressly set out the kind of structured approach required in the case law. Does that matter? Here, two reasonable adjustments were identified by the Claimant. One related to the location of grievance meetings. That is not a point taken before me on the appeal. In any event, as the Claimant had been unable to particularise his grievance, it had simply been held in abeyance; the question of where meetings might be held did not arise. The only point in issue on the appeal is the suggestion that the process should have been further delayed to allow for consultation once the Claimant was fit enough to participate. The difficulty for the Claimant is that the Tribunal does address this point. It is implicit that the Tribunal recognised that the provision, criteria or practice (PCP) was the holding of meetings or the continuing of the process at a time when the Claimant was signed off with reactive depression. Allowing for that context, the ET expressly found that the Respondent did make a number of reasonable adjustments by delaying meetings and so on. It further expressly found that the Respondent was not required to have delayed the consultation process until the Claimant recovered, or, as the Tribunal put it (paragraph 52):

> **"We do not accept that the process should have been delayed indefinitely until the Claimant had recovered."**

64. The only issue that is taken on the appeal relates to the use of the word "indefinitely". The Claimant complains that that is not exactly how he expressed the required adjustment; he had not said "indefinitely". That, however, was the reality of his position. He was asking for

an adjustment to the process for it to be delayed until he was well enough to be consulted with. As that gave no end date, the Tribunal was entitled to reach the conclusion that that would require an indefinite delay, which would not have been a reasonable adjustment that the Respondent was obliged to make in this case.

65. I lastly turn to the appeal in respect of the unfair dismissal complaint. Given the conclusions I have reached on the challenges to the Tribunal's Judgment in respect of the protected disclosure and disability discrimination claims, I do not accept that the decision on unfair dismissal has to be re-opened for fresh consideration. In my judgment, the findings of fact and the conclusions reached stand. As for the specific perversity challenge (to the conclusion that the Respondent acted reasonably in dismissing for redundancy being based on a misdirection owing to a finding as to the Claimant's qualifications that had not in fact been known to the Respondent at the relevant time), I do not accept that the reasoning is limited to that point; it goes much wider. The point being that the new job was seen by Mr Payne (and the Respondent more generally) as being beyond the Claimant's capabilities. That is, in reality, what the ET found.

66. For those reasons - notwithstanding my criticisms of some parts of the Tribunal's Judgment, and giving credit to Mr Linstead's arguments for the Claimant - I dismiss the appeal.