Appeal Nos. UKEAT/0449/12/JOJ
UKEAT/0450/12/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 May 2013
Judgment handed down on 27 March 2014

Before

HIS HONOUR JUDGE SEROTA QC

MS V BRANNEY

MRS R CHAPMAN

BLACKBAY VENTURES LTD T/A CHEMISTREE — APPELLANT

MS K GAHIR — RESPONDENT

Amended

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RAD KOHANZAD (of Counsel) Instructed by: ADN Law P O Box 341 Northwood Middlesex HA6 9FH
For the Respondent	MR FERGUS McCOMBIE (of Counsel)

SUMMARY

VICTIMISATION DISCRIMINATION

Whistleblowing

Detriment

1. The Claimant was employed by the Respondent which operates a number of pharmacies on 16 August 2010 as a Responsible Pharmacist. Her responsibilities involved the monitoring and securing compliance with the various statutory requirements and guidance laid upon the Respondent

2. Her employment commenced on 16 August 2010 and lasted 18 days, 7 of which were induction. She was in post for only 11 days including a Bank Holiday weekend.

3. The relationship between the Claimant and her superiors was poor because the Respondent resented the fact that the Claimant had questioned the Respondent's practices and procedure and had behaved in an unco-operative manner. She was dismissed on 3 September 2010. During the course of the 11 days she sent emails on 16 August 2010 and 31 August 2010 raising what she said were some 17 separate health and safety concerns and concerns about failures to comply with legal obligation, which she claimed were thus 'qualifying disclosures.' The Respondent responded to the emails at once and agreed to put in hand any necessary changes to its procedures.

4. It is by no means clear which of these 17 matters can be said to have tended to show either breaches of legal obligations or that the health and safety of an individual had been or was likely to be put at risk.

5. The Claimant claimed that she had suffered detriment as a result of making protected disclosures and had been dismissed for having done so. Her case on detriment, accepted by the Employment Tribunal, was that by reason of the Respondent failing to address the issues or deal with them adequately, she suffered the stress of having to work in the role of the Responsible Pharmacist despite having serious concerns about numerous areas of the Respondent's practice.

6. The Employment Tribunal held that the Claimant had been dismissed because the Respondent resented the fact that the Claimant had questioned the Respondent's practices and procedures and went on to find that the dismissal was automatically unfair "the principal reason" for her dismissal was that the making of a protected disclosure.

7. The Employment Tribunal considered the protected disclosures in a rolled up manner and made inadequate findings as to:

a. the source of the relevant obligations.
b. which of the alleged qualifying disclosures were protected.
c. the dates of the acts or deliberate failures to act said to be protected disclosures.

8. The Employment Appeal Tribunal suggested that when considering claims by employees for victimisation for having made protected disclosures Employment Tribunals might take the following approach:

    a. Each disclosure should be separately identified by reference to date and content.

    b. Each alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered as the case may be should be separately identified.

    c. The basis upon which each disclosure is said to be protected and qualifying should be addressed.

    d. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the Employment Tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a checklist of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the Employment Tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the Employment Tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an Employment Tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures.

    e. The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in S43 B1 of **ERA 1996** under the 'old law' whether each disclosure was made in good faith; and under the 'new' law introduced by S17 **Enterprise and Regulatory Reform Act 2013** (ERRA), whether it was made in the public interest.

    f. Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

    g. The Employment Tribunal under the 'old law' should then determine whether or not the Claimant acted in good faith and under the 'new' law whether the disclosure was made in the public interest.

9. The Respondent's appeal against the decision that the Claimant had suffered detriment was allowed but the Employment Appeal Tribunal dismissed its appeal against the decision that the dismissal was automatically unfair because the Employment Tribunal had found that the 'principal reason' for the dismissal was the making of a protected disclosure.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Respondent from decisions of the Employment Tribunal at Brighton and Havant presided over by Employment Judge Cowling. The decision on merits is dated 22 February 2012 and that on remedy 3 July 2012.

2. The Employment Tribunal found that the Claimant had been unfairly dismissed contrary to section 103A of the **Employment Rights Act** (ERA) for making protected disclosures. It also found that she had suffered detriment within the meaning of section 47B and was awarded compensation in the sum of £17,520.24. On 24 April 2012 the appeal was disposed of under rule 3(7) of the Employment Appeal Tribunal Rules by HHJ Peter Clark. However, at a hearing under rule 3(10) of 13 July 2012 HHJ David Richardson referred the appeal to a full hearing, which we have heard.

The relevant facts

3. We take these largely from the Judgment of the Employment Tribunal. The Notice of Appeal and skeleton argument in support are relatively lengthy; we shall keep our summary of the facts as brief as we are able, bearing in mind that appeals to the Employment Appeal Tribunal are on points of law only and not questions of fact. The Respondent operates a number of pharmacies and is subject to the jurisdiction of and regulation by a General Pharmaceutical Council. It operates a number of pharmacies that supply prescribed medication using a monitored dosage system to patients who are unable to attend a pharmacy. The Respondent conducts its business by internet and mail order. It is, therefore, only able to

provide services to patients remotely. The Respondent operates some five depots, which are all mail order/internet-only pharmacies, including one in Eastbourne.

4. The General Pharmaceutical Council issues guidance to "Responsible Pharmacists" who are in charge of regulated pharmacies. All Responsible Pharmacists are obliged to comply with the relevant statutory requirements, including those under the **Medicines Act 1968** (MA) and the **Medicines (Pharmacies) (Responsible Pharmacists) Regulations 2008** (M(P)(RP)R). Responsible Pharmacists are also obliged to follow the "Guidance for Responsible Pharmacists" issued by the General Pharmaceutical Council.

5. The Claimant was employed on 16 August 2010 in the Respondent's Eastbourne depot as a part-time assistant occupying the role of Responsible Pharmacist. Her employment as such began on 23 August 2010 after she had undertaken a one-week induction at the Respondent's head office in Park Street outside St Albans.

6. She was dismissed on 3 September 2010. Her employment lasted 18 days, of which she was in post for only 7. Those 11 days included a Bank Holiday weekend.

7. Prior to the commencement of the Claimant's employment, a Mr Denton, a professional standards inspector of the Royal Pharmaceutical Society of Great Britain, had undertaken a routine inspection at the Eastbourne depot on 19 July 2010 and had prepared a controlled-drugs inspection report form, which raised a number of points that the Respondent attended to, inter alia by issuing a revised standard operating procedure in relation to controlled drugs.

8. On 23 August the Claimant attended at the Eastbourne depot and was introduced to staff. On 25 August 2010 the Claimant sent an email to Ms Mwenso, the clinical pharmacist manager, with a copy to Ms Mitchell, the human resources manager, and to Mr Budhdeo, a director, raising what she said were health and safety concerns. The matters that she raised included the monitoring of refrigerator temperatures, the absence of template controlled-drug stock checks, the absence of a security entrance to the depot, the absence of a fire alarm, suggesting improvements to the security for holding the keys to the depot and suggesting the provision of high chairs for staff. This email was relied upon as being the first of a number of "qualifying disclosures".

9. On 31 August 2010 in her capacity as superintendant pharmacist Ms Mwenso emailed all pharmacists with responsibilities for controlled drugs with a revised controlled-drugs standard operating procedure, designed to address the points raised by Mr Denton. She also responded in detail to the Claimant's email, adding her responses to a copy of that email. I believe that there was a Bank Holiday weekend between 25 and 31 August.

10. On 31 August 2010 the Claimant responded to Ms Mwenso's email relating to the revised standard operating procedure, copied the email widely to the Respondent's staff and sent a blind copy to Mr Denton. The Claimant made a number of points in relation to respects in which the standard operating procedure may have omitted compliance with statutory requirements. She said that the business process outsourcing system was in breach of the **Data Protection Act** (DPA) because it involved transmitting records outside the European Union. The Claimant was also concerned that between 9.00am and 12.00pm there was no Responsible Pharmacist present, in breach of Regulation 3 of the M(P)(RP)R 2008. She also

expressed a concern that a driver was permitted to take drugs for delivery without the presence of a responsible pharmacist (a crate of patients' medication had been received in error at Eastbourne and had to be redirected). The Claimant's evidence was that her email was copied to Mr Denton because she wanted him to be aware that she was addressing these matters in her capacity as Responsible Pharmacist. The Claimant's email was relied upon by her as the second of her qualifying and protected disclosures.

11. The Respondent's case in relation to this email was that it contained no disclosure of information, it was not sent bona fide and the Claimant had no reasonable belief that the Respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject or that the health or safety of any individual had been, was being or was likely to be endangered.

12. Later that day the Claimant contacted the Respondent's operations manager, Mr Coosna, to tell him that a delivery driver, Mr Neale, was required to transport a crate the following day to Ashford. The next day, 1 September, was a Saturday, and the Claimant would not be on duty, and the depot was closed, so she would be unable to supervise the dispatch of the crate. She, therefore, told Mr Coosna that the medicines should not leave the depot. Mr Coosna responded that he had authority to authorise the dispatch despite the Claimant's absence. The Claimant then informed Ms Ponnusami, the pharmacy dispenser, and Mr Neale that the crate was not to leave the depot in the absence of a Responsible Pharmacist. The Claimant advised that it would be a breach of the Medicines Act to hand medicines to a driver without the presence of a responsible pharmacist. The Respondent took a different view as the transaction was simply the redelivery of a crate that had been misdelivered to Eastbourne.

13. Ms Mwenso sent a further email to the Claimant and went through her email point by point addressing each matter and expressed the view that there was no breach of the DPA.

14. On 1 September 2010 the Claimant met Mr Neale and Ms Ponnusami. She told the Employment Tribunal that one of her concerns was that she believed that Mr Neale, as a delivery driver, was assisting Ms Ponnesami in dispensing medicines. This was not the case.

15. Later that day the Claimant telephoned Ms Mitchell and asked if she could have time off in lieu of overtime. She was told that the company policy was to pay for extra hours worked but it was expensive to pay for a locum to cover for less than a full day. The Claimant asserted that she had been told by Ms Mwenso she could have time off in lieu and was very unhappy at what she was told by Ms Mitchell. She declared that her contractual rights were being breached, and the conversation became "heated". On 2 September 2010 the Claimant emailed Ms Mwenso with a letter of complaint, which she also circulated to other employees but did not send a copy to Ms Mitchell. She complained that Ms Mitchell had not granted her request for time off in lieu, which was her contractual right. As others had been granted time off in lieu, this was evidence of prejudice and discrimination, and she declared her intention to take time off. Further, she was not prepared to increase her hours to start at 11.00am instead of 12.00pm so as to provide more time for a Responsible Pharmacist to be present, although previously she had provisionally agreed to increase her hours. She accused the Respondent of not addressing the legal consequences of opening the pharmacy in the absence of a responsible pharmacist. She also declined to provide her personal mobile number, because she said that it was not part of her contract that she could be contacted out of work hours; the Employment Tribunal noted,

however, that her terms of employment did provide for her being required to work outside normal hours to fulfil job responsibilities.

16. When Mr Budhdeo received the Claimant's letter of 2 September, he noted its wider circulation and considered that as Ms Mitchell was the Claimant's line manager any complaint about her should have been addressed to her. The letter was considered to be extremely aggressive and contained allegations against Ms Mitchell of discrimination, prejudice, bullying and other such matters. Mr Budhdeo considered that the tone of the letter appeared irrational and it came across as a personal attack on Ms Mitchell's character and that in relation to the allegation of discrimination that the majority of the Respondent's employees at Eastbourne were judging by their names from ethnic minorities. Mr Budhdeo also considered that the Claimant's refusal to increase her hours was an act of retaliation against what the Claimant had described as the experience of her encounter with Ms Mitchell. The Claimant asserted that this letter was a protected disclosure but later conceded it was not.

17. On 3 September Mr Budhdeo wrote to terminate the Claimant's employment on the grounds of mutual unsuitability. She had been employed for 11 days at Eastbourne, 7 at the head office. Mr Budhdeo wrote that the Claimant's employment was being terminated on the basis of "mutual unsuitability". In view of his concerns that the Claimant's performance, what he described as the "deterring" nature of her relationship with Ms Mwenso, her recent telephone conversation with Ms Mitchell and the letter he had received, he decided that the Claimant did not fit in with the company and that mutual trust and confidence of the company relationship had been destroyed. He took the decision to dismiss the Claimant with immediate effect. On 6 September the Claimant attended the premises to collect her things and sought to

persuade Mr Neale to sign the "minutes" of the earlier meeting, but he refused. Mr Budhdeo considered that the document propounded by the Claimant was designed to defame the Respondent and threatened legal action. The Claimant was again in contact with Mr Denton.

18. On 20 October 2010 the Claimant's solicitors wrote to the Respondent and asserted that the Claimant had been dismissed by reason of having made protected disclosures.

The decision of the Employment Tribunal

19. It is clear that the Respondent considered the Claimant had conducted the proceedings in a vitriolic manner, using the proceedings to smear the Respondent's reputation.

20. The facts found by the Employment Tribunal and the submissions it recorded are not altogether easy to follow, because, rather than deal with all matters sequentially it rather dealt with particular factual assertions together with the submissions relating to those factual conclusions separately.

21. At paragraph 57 the Employment Tribunal recorded that the Claimant asserted that the Respondent's alleged failure to "address the issues" raised in her alleged disclosures or "deal with them adequately" amounted to a detriment. The Respondent:

> **"[…] admits that, in these circumstances, causation would very rarely be proven as it involved the unlikely factual situation that the matters would have been satisfactorily addressed if the employee had kept quiet about them but were not addressed because of the whistleblowing."**

22. The Tribunal was reminded that the standard of proof under section 47B (detriment) was different from that under section 103A (dismissal) in that in the case of detriment the Claimant

needed only to show that the treatment meted out to her was "on the grounds of the disclosure". To succeed in her claim for unfair dismissal, it was necessary for the Tribunal to find that the alleged disclosure was "the reason" (of if more than one, the principal reason), and these formulations are of course correct.

23. At paragraph 58 the Employment Tribunal referred to the decision of **NHS Manchester v Fecitt** [2011] IRLR 64. The Employment Tribunal said the Court of Appeal decided that the dysfunctional situation in that case, which was the reason for dismissal of Mrs Fecitt, was a separate factor from the disclosures themselves:

> **"They found that liability will arise if the protected disclosure materially influences (in a sense of being more than a trivial influence) the employer's treatment of the whistleblower)."**

24. We have quoted this passage because the Respondent submits that the Employment Tribunal does not recognise that the Court of Appeal in **Fecitt** drew a distinction between what was required for establishing the reason for subjecting the Claimant to a detriment and what was required for establishing the reason for dismissal. Nevertheless, at paragraph 60 the Employment Tribunal record that it had been reminded by the Respondent that the Employment Tribunal could only find that there had been an automatically unfair dismissal by reason of the Claimant having made a protected disclosure if that was the principal reason for the dismissal, a higher threshold than the "on the grounds of" test applying to claims of detriment short of dismissal. The Employment Tribunal also recorded the submission that it was necessary to distinguish between disclosures and the manner of making disclosures, as explained in **Martin v Devonshires Solicitors** [2011] ICR 352. At paragraph 78 the Employment Tribunal state:

> **"The Claimant maintains that the protected disclosures were clearly more than a trivial influence on the Respondent's decision to terminate her employment."**

25. In so far as the Claimant appears to have been submitting that the "more than a trivial influence" test applied to both detriment short of dismissal and dismissal itself, it is clearly wrong. At paragraphs 80 and 81 the Tribunal refers to the relevant sections of the ERA inserted by the **Public Interest Disclosure Act 1998** and types of disclosure that qualified for protection. It noted that section 103A provided that a dismissal was unfair if the reason or principal reason was that the worker made a protected disclosure. It also directed itself as to the definition of qualifying disclosures, particularly those relevant to the case, the endangering, or likely endangering, of health and safety of any individual and failure to comply with a legal obligation. The Tribunal noted that disclosures, save for those made to legal advisers, had to be made in good faith to attract the protection of the statute. At paragraph 84 the Employment Tribunal correctly reminded itself that under section 47B it had to be established that the detriment complained of was done "on the ground that the worker has made a protected disclosure".

26. The Employment Tribunal went on to refer again to section 103A that for a dismissal to be automatically unfair "the principal reason" had to be the making of a protected disclosure.

27. The Employment Tribunal noted that protection was afforded for the disclosure of "information". At paragraph 93 the Employment Tribunal stated:

> **"A worker risks losing protection of the statutory provisions if he or she unreasonably persists in making disclosures about concerns that have been addressed by the employer. This is particularly so where the disclosure relates to a matter such a [sic] health and safety breach of legal obligation and where steps have subsequently been taken by the employer to address fully the employee's concerns."**

28. The Employment Tribunal were satisfied that the Claimant's memorandum of 25 August constituted a qualifying disclosure relating to health and safety within the meaning of section 43B(1)(b). The Employment Tribunal (paragraph 95) reported the Claimant's contention that her email of 31 August 2010 was a qualifying disclosure because in her reasonable belief it tended to show a breach of a legal obligation had occurred, was occurring or was likely to occur. The scope of section 43B(1)(b) is wide and covers not only statutory requirements but also any obligation imposed under the common law, for example negligence, nuisance and defamation, as well as contractual obligations and the requirements of administrative law. The Employment Tribunal were satisfied that the disclosures on 31 August 2010 that the Respondent's SOP failed to comply with the **Controlled Drugs Regulations 2006** (CDR) and the **Misuse of Drugs Act 1974** (MDA), with a possible breach of the DPA 1998, a breach of Regulation 3 of the **M(P)(RP)R 2008** for failing to observe the two hour rule and dispatching of drugs without the presence of a pharmacist amounted to qualifying disclosures within the meaning of section 43B(1)(b) of the ERA.

29. The Employment Tribunal considered that the Claimant made the disclosures in good faith. The Employment Tribunal continued:

> **"Her claim that as a result of raising these concerns she suffered a detriment under section 47B in that she suffered the stress of having to continue in the role of Registered Pharmacist [sic] despite raising serious concerns about numerous areas of the Respondent's practice is well founded and succeeds."**

30. At paragraph 99 the Employment Tribunal noted that in order to succeed in her claim of dismissal by reason of having made protected disclosures the Claimant needed to show that the reason or principal reason she was dismissed was because she had made a protected disclosure.

Again, at paragraph 103 the Employment Tribunal reminded itself that it fell to determine "the principal reason for dismissal".

31. Finally, we need to refer to paragraph 105:

> **Applying the test in *Fecitt* we are unanimously of the view that the protected disclosures made by the Claimant materially influenced (in the sense of being more than a trivial influence) the Respondent's treatment of the Claimant to her detriment. The Respondent resented the fact that the Claimant had questioned the Respondent's practices and procedures and the Claimant has discharged the burden of proof on her to show that this was the principal reason for her dismissal. The claims under Section 47B and Section 103A of the Employment Rights Act 1996 are well founded and succeed."**

The Notice of Appeal and submissions in support

32. It was said that the Employment Tribunal failed to give sufficient reasons; the Employment Tribunal had failed to explain how the disclosure allegation by the Claimant had tended to show her reasonable belief that the health and safety of an individual had been or was likely to be endangered by the Respondent's failure. It is said that the Employment Tribunal failed to consider whether the Claimant had a reasonable belief that the alleged disclosure tended to show a breach of legal obligation, but this was so although the Respondent had raised this particular point on at least four occasions.

The Respondent's case on detriment short of dismissal

33. It was said that the Employment Tribunal needed to deal with the question of whether the Claimant had suffered detriment by reason of the protected disclosure. Mr Kohanzad, who appeared on behalf of the Respondent, drew attention to the short passage in paragraph 98 representing the findings by the Employment Tribunal on the question of causation. The Claimant needed to show that the Respondent either did something or omitted to do something

by reason of the disclosures. The Employment Tribunal had not identified any detriment suffered by reason of a protected disclosure. All it said was:

> **"We are satisfied that the Claimant was acting in good faith. Her claim that as a result of raising these concerns she suffered a detriment under section 47B in that she suffered the stress of having to continue in the role of Registered Pharmacist [sic] despite raising serious concerns about numerous areas of the Respondent's practice is well founded and succeeds."**

34. The Employment Tribunal did not assess the fact that it had found the Claimant's concerns had been addressed in writing (see paragraphs 8 and 17). It also did not address the very short time within which the Respondent responded to the Claimant's concern and that those concerns had been addressed in detail. This was relevant to the question of whether the Claimant had in fact been subjected to a detriment and as to the reason why. It is said that the Employment Tribunal failed to address the significance of the letter of 2 September (which is accepted not to have contained any protected disclosures), which alleged prejudice, bullying and discrimination. It is submitted that this was clearly at least the last straw and triggered the decision to terminate the Claimant's employment. It was said that the Employment Tribunal failed to give sufficient consideration to this point both in relation to the detriment short of dismissal and in relation to the dismissal.

35. It was submitted that the four-stage approach set out by Mr Recorder Underhill, as he was, in **London Borough of Harrow v Knight** [2003] IRLR 140 should have been followed. The Employment Tribunal should approach matters when there is a claim in relation to a detriment suffered as a result of making a protected disclosure as follows: (a) establish the Claimant made a protected disclosure, (b) identify that the Claimant had suffered an identifiable detriment, (c) determine whether the Respondent had done an act or deliberately failed to act (the act or omission) subjecting the Claimant to a detriment, and (d) for the Claimant to succeed

it must be established that the act or omission was on "the ground that" the Claimant had made a protected disclosure.

36. In the present case, the Respondent submits that the reasoning of the Employment Tribunal in relation to (b), (c) and (d) is seriously deficient.

37. The Employment Tribunal had failed to identify the act or omission that had the effect of subjecting the Claimant to a detriment. In the absence of identification of the relevant act or omission it is impossible to identify what detriment (if any) has been suffered and also impossible to analyse whether that act or omission had the effect of subjecting the Claimant to a detriment and also the reason that the Respondent subjected the Claimant to the detriment. Further, the Employment Tribunal had failed to consider whether the act or omission was "materially influenced" by a protected disclosure, in the sense that as explained in **Fecitt** of being more than a trivial influence on the Respondent's treatment of the whistleblower. The Employment Tribunal did not identify any relevant act or omission; it is apparent from paragraph 8 that the Employment Tribunal accepted that Ms Mwenso was attempting to address the act or omission. "Omission" must mean an omission to do something within a reasonable period; "doing nothing" is an omission. The Employment Tribunal do not say what the omission was and why the Respondent was not acting within a reasonable time.

38. Mr Kohanzad put the matter this way at paragraph 30 of his skeleton argument:

> **"Although there is nothing wrong in principle with the argument that an omission by an employer can subject an employee to a detriment or can in and of itself amount to a detriment, in this case for the Claimant to have succeeded the Tribunal were obliged to find that the reason why the Respondent failed to address the Claimant's [concerns] was because the she raised the concerns in the first place. That is, the Respondent failed to resolve the matters that the Claimant brought to their attention in her letters because she brought the matters to their**

attention. Although logically not impossible, the argument and implied reasoning of the Tribunal borders on the absurd."

39. The Claimant made the disclosures as part of her job; the Respondent sought to address them promptly. The Employment Tribunal appear to have considered that by taking no action the Claimant was subjected to detriment of continuing in the role of registered pharmacist despite raising concerns and she thus suffered stress. It was submitted that stress was not a detriment but might be caused by a detriment. The Employment Tribunal seems to have considered that the Claimant was subjected to this detriment by the Respondent taking no action, although the precise act or omission was not identified. At paragraphs 8 and 17 the Employment Tribunal appears to have been of the view that the Claimant's concerns were addressed promptly. The stress could only be as a result of some act or omission that took place from the date of receipt of the email of 25 August to the dismissal on 2 September and in relation to the email of 27 August for the period to the 2 September (which included a Bank Holiday weekend).

40. The Respondent submitted that the approach of the Employment Tribunal bordered on creating an obligation on employers to immediately remedy any deficiency raised by an employee as a protected disclosure.

41. The Employment Tribunal, as we have said, recognised that Ms Mwenso was addressing the Claimant's complaints. The Respondent also attempted to remedy the situation of the absence of the Responsible Pharmacist for over two hours by having the Claimant work extra hours, which, although she initially was prepared to do, subsequently refused, so to persist in remedy being an issue that she had properly pointed out. Mr Kohanzad submitted in the

circumstances it was perverse to suggest that the Claimant had suffered detriment over a few days despite Ms Mwenso having taken these matters on board.

42. The Employment Tribunal has failed to explain how the detriment (if that be the effect of doing nothing) resulted from any protected disclosure. Any finding that the Claimant had suffered detriment resulting from a protected disclosure was in the circumstances of the case and based on the Employment Tribunal's findings for such a short time period as to be perverse.

43. The Employment Tribunal had not considered the effect of section 47B(1) (deliberate failure to act). Section 47B(1) presupposes that the employer has an opportunity to decide whether to act or not.

44. The Employment Tribunal upheld the Respondent's submissions that it needed to be satisfied that the Claimant had a reasonable belief in her allegations but did not make any finding in that regard. The Employment Tribunal had not identified which of the allegations amounted to disclosure of information; the Claimant had admitted in cross-examination that some of the matters to which she drew attention formed part of a checklist of what the Respondent needed to do to comply with various obligations. In order for the disclosure to be protected, it had to be shown that the Claimant had a reasonable belief that the information she disclosed showed that the Respondent had, was or was likely to fail to comply with its obligations.

The Respondent's submissions on unfair dismissal

45. The Respondent submitted that the Employment Tribunal had ignored its submissions as to the conversation on 1 September, the letter of 2 September being the trigger for the dismissal.

46. Mr Kohanzad submitted that the Employment Tribunal had misapplied the decision in **Fecitt**, in that it had applied the "material influence" test not only to the detriment short of dismissal but to the unfair dismissal itself. Mr Kohanzad submitted that the Employment Tribunal had adopted the mistaken submission of the Claimant. In support of that submission, he pointed out that the Employment Tribunal had not attempted to correct or point out the inaccuracy in the Claimant's submission. He presented a convoluted argument designed to show that although the Employment Tribunal explicitly found that "the principal reason" for dismissal under section 103A was the protected disclosures, the Employment Tribunal meant that in fact it had applied the **Fecitt** test of material influence, but the Employment Tribunal did not say in terms that the material-influence test propounding in **Fecitt** only applied to detriment short of dismissal. We would say at this point in time that this is an impossible submission, having regard to the clear use of language by the Employment Tribunal that in order to succeed in a claim of automatically unfair dismissal by reason of having made protected disclosures the Claimant needed to show that the making of those disclosures was the principal reason for her dismissal. It seems to us it is irrelevant that the Employment Tribunal chose not to correct the Claimant's error.

47. The Respondent also sought to derive assistance from paragraph 78 of the decision, where the Claimant's submission was recorded that the protected disclosures were more than a

trivial influence on the decision to dismiss. The Respondent submitted that the Employment Tribunal were thus inferring that that was a correct submission of law. We do not agree.

48. Mr Kohanzad explained that the Employment Tribunal had failed to make necessary findings of fact in relation to protected disclosures and noted in the findings in paragraph 105 that the Employment Tribunal had found, in relation to the dismissal, that:

> **"The Respondent resented the fact that the Claimant had questioned the Respondent's practices and procedures and the Claimant has discharged the burden of proof on her to show that this was the principal reason for her dismissal."**

49. Mr Kohanzad produced the list of the 17 points raised by the Claimant in her email of 25 August 2010, the email of 31 August 2010 and her meeting with Ms Ponnusami on 5 September 2010. This list is as follows:

> **"(a) that there was no monitoring of the fridge temperatures;**
>
> **(b) best practice was that CD stock balances should be recorded in the CD register;**
>
> **(c) that there is no alarm system within the depot;**
>
> **(d) there was not a security entrance to the depot;**
>
> **(e) there was no fire alarm;**
>
> **(f) the keys for the pharmacy should be locked in a cabinet in the lobby area with a security number for the key cabinet and should be signed for when taken, rather than merely left with a member of staff;**
>
> **(g) the requested two high chairs for the depot;**
>
> **(h) the SOP was deficient because it failed to comply with some of the statutory requirements;**
>
> **(i) the BPO System was in breach of the Data Protection Act 1998;**
>
> **(j) the Respondent did not have a Responsible Pharmacist in the depot in the mornings;**
>
> **(k) a driver is not permitted to take drugs for delivery without the presence of a pharmacist;**
>
> **(l) checked and dispensed drugs should not leave the depot without the presence of a responsible pharmacist;**
>
> **(m) mixed batches of medicines should not be stored in the one box on the shelves;**
>
> **(n) where drugs are packaged in blisters, they should not be stored loosely;**

(o) that HP was making decisions on whether prescriptions were urgent or not; which was a decision of a pharmacist and not a dispenser;

(p) HP must not ask delivery drivers to dispense medication;

(q) the failure to allow the Claimant to take TOIL;

(r) she had been required to provide her personal mobile telephone number, and

(s) she was not prepared to be contacted out of hours."

50. Mr Kohanzad complains that there is no finding which of these matters constituted protected disclosures and which constituted the principal reasons for dismissal, as accepted by the Claimant, there were protected disclosures alleged to have been made on 1 September, and although it had initially been asserted that the email of 2 September contained protected disclosures that claim was withdrawn.

51. It was said that the Employment Tribunal failed to have regard to the fact that the email of 2 September was in the event, as accepted by the Claimant, not containing protected disclosures, nor did the conversation of 1 September 2010. It failed, however, to adequately consider whether the email and what was said and done at the meeting had a causal link to the Claimant's dismissal.

52. Mr Kohanzad repeated that the Respondent had raised in its submission on a number of occasions the need to make findings as to whether the Claimant had the necessary belief that the Respondent was or was likely to be in breach of its legal obligations and should have done so by reference to each allegation.

53. The Employment Tribunal did not identify which protected disclosures were the principal reason for dismissal.

54. Mr Kohanzad then made submissions that the Employment Tribunal had given insufficient reasons for its decision, relying on the well-known authority of **Meek v City of Birmingham District Council** [1987] IRLR 250. With reference to **English v Emery-Reimbold and Strick** [2003] IRLR 710 he also drew attention to the obligation placed on the Employment Tribunal by rule 30(6) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations**. In particular, Mr Kohanzad complained about the failure of the Employment Tribunal to make findings, as we have already mentioned, as to whether the Claimant had the necessary reasonable belief in the accuracy of her protected disclosures leading to breaches or likely breaches of the Respondent's obligations.

55. In relation to detriment, Mr Kohanzad complained of the failure of the Employment Tribunal to make findings as to causation and the very short time allowed to the Respondent to respond to the complaints made by the Claimant. He also drew attention to the Respondent's attempts to address the Claimant's concerns. Both of these matters were relevant as to whether or not the Claimant was subjected to a detriment and the reason, if she was, as to why she had been so subjected.

56. The Employment Tribunal had failed to address the email of 2 September, which did not contain protected disclosures but made allegations of prejudice, discrimination and bullying, the last straw in the decision to dismiss.

57. If the above arguments had been considered by the Employment Tribunal, it was said that the Judgment contains no evidence of that. Presumably, the Respondent's arguments were rejected, but the Employment Tribunal has given no reason why.

58. We need to go on to consider the Respondent's Notice of Appeal on remedy. It is said that the Employment Tribunal failed to deal with the argument that the Claimant would not have stayed long in the Respondent's employment, having regard to her previous employment record and nine previous employments where the average length of service was under a year. It is said that the Employment Tribunal failed to deal with issues of contribution or a **Polkey v A E Dayton Services Ltd** [1987] IRLR 503 reduction. Mr Kohanzad accepted that the Employment Tribunal was not obliged to deal with all arguments, but the **Polkey** issue and the issue of contribution was apparently not considered. He said that this again constitutes a failure to give adequate reasons.

59. In relation to the uplift to the award, the Respondent assumed this was for breach of contract, but the Employment Tribunal did not make clear how the ACAS Code applied to the facts of the instant case.

60. Mr Kohanzad submitted that the ACAS Code only applied to disciplinary situations, including that of poor performance. He drew attention to the decision of Keith J in the EAT in **Lund v St Edmund's School Canterbury** UKEAT/0514/12. He submitted that this case was authority for the proposition that compensation could only be paid in circumstances where the Respondent had thought that the employee dismissed had committed an act of misconduct, regardless of the actual reason for the dismissal. In the instant case there was no finding that

the reason for the Claimant's dismissal was for misconduct but the fact that she had questioned the Respondent's practices and procedures.

61. Mr Kohanzad submitted that compensation for injury to feelings is not available in cases of automatically unfair dismissal under section 103A. This point is not controversial.

The Claimant's submissions

62. Mr McCombie's principal submission was that the appeal raised no issues as to errors of law but was an inadmissible attempt to appeal on the facts. His client's case (albeit that he did not appear in the Employment Tribunal) had been put under section 43B(1)(b) on the basis of breaches of legal obligation rather than on health and safety concerns, and this was evidently accepted by the Employment Tribunal at paragraphs 65-67. The Employment Tribunal at paragraphs 95 and 96 had set out the parties' respective submissions as to whether the Claimant's email of 31 August 2010 supported her case of qualifying disclosures. The Employment Tribunal preferred the Claimant's submissions to those of the Respondent. It was entitled to conclude the memorandum of 25 August 2010 was a qualifying disclosure relating to health and safety under the meaning of section 43B(1)(b).

The Claimant's case of detriment short of dismissal

63. It was said that the Employment Tribunal was entitled to conclude that the detriment to the Claimant was by reason of the Respondent failing to address the issues or deal with them adequately, and (see paragraph 74) the stress of having to work in the role of the Responsible Pharmacist despite having serious concerns about numerous areas of the Respondent's practice. The Employment Tribunal also said at paragraph 74 that the failure to act could amount to a

detriment; we note, however, the Employment Tribunal did not record that a failure to act in itself amounts to a detriment.

64. The Judgment needs to be read as a whole, and even with the reference in paragraphs 98 and 105 to the Respondent resenting that the Claimant had questioned its practices and procedures if reference were made to the earlier parts of the Judgment it was clear that the Employment Tribunal had found that the Claimant's case was made out on the evidence.

The Claimant's case on unfair dismissal

65. The Employment Tribunal clearly found in terms that the principal reason for the dismissal was that the Claimant had made protected disclosures. There is no question of the Employment Tribunal having been confused into believing that the **Fecitt** test in relation to detriment short of dismissal also applied to the dismissal itself. The reference in paragraph 105 to criticism of the Respondent's practice and procedures was a reference to the matters set out earlier that the Employment Tribunal considered to be protected disclosures.

66. The Respondent's case was in essence a perversity challenge rather than a Reasons challenge. In relation to any alleged absence of findings of fact, paragraph 96 of the decision sufficiently sets out the alleged breaches of legal obligations. It is also clear from the emails to which we have referred that specific reference was made to the CDR, the MDA, the DPA and the M(P)(RP)R so far as qualifying disclosures were concerned as to breaches or apprehended breaches of legal obligation.

The Claimant's submissions on remedy

67. It was submitted that sufficient Reasons had been given and this was another attempt to re-argue the facts. It had obviously rejected the Respondent's case on whether and when the Claimant may have left the Respondent's employment in any event. It was also obvious that the Employment Tribunal had found that the ACAS Code was applicable to the Claimant's dismissal.

68. It was submitted by the Claimant that there is no explicit reference to a **Polkey** deduction or a deduction for contribution but that consideration of these should be inferred. It was pointed out that the Employment Tribunal has recorded the Respondent's submission that compensation should be reduced on the grounds of contributory fault. The Claimant concedes that there had not been a full and exhaustive consideration of both sides' submissions but not a wholesale ignoring of the Respondent's case. The most that could be said was that the Employment Tribunal did not engage fully in dealing with them and the findings of the Employment Tribunal are good enough when the decision is looked at as a whole.

69. In relation to the award of compensation for injury to feelings, it was accepted by the Claimant that it was not appropriate to make such an award in relation to the dismissal but we should be satisfied that the Employment Tribunal meant to say that it was an award solely in relation to the detriment short of dismissal. We should take a "generous approach" to the decision.

70. Returning to the ACAS uplift, it was submitted that the language of section 207A of the ERA extends the ambit of the ACAS Code and consequently the uplift to any unfair dismissal

and the Employment Tribunal has a wide discretion. In relation to the **Lund** case, it was submitted that the important matter for consideration was not the reason for the dismissal but whether there should have been a disciplinary process where the conduct of the employee was in question. In such cases the Code comes into play. The statute provides that it applies in any case where the qualifying period is disapplied, even if the employment lasts one day only. There are good reasons why it should apply in cases of whistleblowing. In any event, in the instant case issues of conduct did apply.

The law

71. We now remind ourselves of the relevant law, and we start by considering the general approach that should be taken to decisions of an Employment Tribunal.

72. A Tribunal does not go wrong simply because it does not address every argument put to it, even if those putting the arguments think that they are important; see Buxton LJ in **Balfour Beatty Power Networks v Wilcox** [2007] 1 IRLR 63 at 37. We also refer to the Judgment of Lord Hope in **Hewage v Grampian Health Board** [2012] IRLR 870 at 26:

> **"It is well established, and has been said many times, that one ought not to take too technical a view of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subjected to an unduly critical analysis."**

73. In **El-Megrisi v Azad University in Oxford** UKEAT/0448/08, 5 May 2009, it is stated that:

> **"The question of the principal reason for the dismissal is a question of fact for the Tribunal with which, in the absence of perversity, this Tribunal should not interfere."**

74. An employee who makes a "protected disclosure", commonly referred to as a whistleblower, is afforded protection against the employer victimising him or her by causing him to suffer a detriment or dismissing him by reason of having made such a disclosure protected disclosure. The meaning of "protected disclosure" is defined in section 43A of the **ERA 1996**:

> **"In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."**

75. "Qualifying disclosures" are defined by section 43B. At the time of hearing, this provided:

> **"43B Disclosures qualifying for protection**
>
> **(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 […]."**

76. For the sake of completeness, we note that since the hearing a new requirement has been inserted by the **Enterprise and Regulatory Reform Act 2013** (ERRA), section 17, as from 25 June 2013 that the reasonable belief is that the disclosure is being made in the public interest, that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, and section 43B(1)(b) provides:

> **"[…] that the health or safety of any individual has been, is being or is likely to be endangered […]."**

77. At the time of the hearing section 43G provided that a qualifying disclosure was made in accordance with section 43 if "the worker makes a disclosure in good faith". This provision has since been repealed by the **ERRA 2013**, section 18(2), as from 25 June 2013.

78. Section 43L(3) qualifies the meaning of "disclosure":

> **"43L Other interpretative provisions**
>
> **[…] (3) Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention."**

79. The protection is afforded by section 47B, which provides:

> **"47B Protected disclosures**
>
> **(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."**

80. We draw specific attention to the requirement that a failure to act must be "deliberate". Section 48(4)(b) is also important and provides:

> **"A deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected do the failed act if it was to be done."**

81. Again, we draw specific attention to the requirement that the Respondent's failure to act is deemed to occur only after the reasonable time when the Respondent might reasonably have done the act expected to be done has expired.

82. A "whistleblower" who has been subjected to a detriment by reason of having made protected disclosures may apply for compensation to an Employment Tribunal under section 48. A whistleblower who has been dismissed by reason of making a protected disclosure is regarded as having been automatically unfairly dismissed (see section 103A):

"103A Protected disclosure

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

83. In order to make a claim for detriment suffered short of dismissal or dismissal by reason of having made protected disclosures, the whistleblower need not have been employed for the qualifying period; see section 108(2).

84. We remind ourselves how the term 'detriment has been explained by the House of Lords; Lord Hoffman in **Chief Constable of West Yorkshire Police v Khan [**2001] ICR 1065 said:

"53. The point is allied to the question of whether, assuming that there was discrimination under section 2(1), Mr Khan was subjected to "detriment" within the meaning of section 4(2)(c). Being subjected to detriment (or being treated in one of the other ways mentioned in section 4(2)) is an element in the statutory cause of action additional to being treated "less favourably" which forms part of the definition of discrimination. A person may be treated less favourably and yet suffer no detriment. But, bearing in mind that the employment tribunal has jurisdiction to award compensation to injury to feelings, the courts have given the term "detriment" a wide meaning. In *Ministry of Defence v Jeremiah* [1980] QB 87, 104 Brightman LJ said that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment."

85. We also draw attention to the judgement of Lord Hope in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 at 34:

"The word "detriment" draws this limitation on its broad and ordinary meaning from its context and from the other words with which it is associated. Res noscitur a sociis. As May LJ put it in *De Souza v Automobile* Association [1986] ICR 514, 522G, the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

35. But once this requirement is satisfied, the only other limitation that can be read into the word is that indicated by Lord Brightman. As he put it in *Ministry of Defence v Jeremiah* [1980] QB 87, 104B, one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? *An unjustified sense of grievance cannot amount to "detriment."*

86. Helpful guidance on the approach that should be taken by an Employment Tribunal in reaching its conclusions in whistleblowing cases is to be found in the Judgment of Mr Recorder Underhill in **Knight** at paragraph 5:

> **"In our view it is particularly important in victimisation cases, which are still rather unfamiliar and require careful analysis, that a Tribunal should, in reaching and explaining its conclusions, set out the elements necessary to establish liability and consider them separately and in turn […] in order for liability to be established in the present case, the Tribunal had to find:**
>
> **(1) that Mr Knight had made a protected disclosure (or disclosures);**
>
> **(2) that he had suffered some identifiable detriment (or detriments);**
>
> **(3) that the Council had "done" an act or deliberate failure to act (for short, an "act or omission") by which he had been "subjected to" that detriment; and**
>
> **(4) that that act or omission had been done by the Council "on the ground that" Mr Knight had made the protected disclosure identified at (1).**
>
> **At 10 That elision of the doing by the employer of an act and the suffering by the employee of the detriment meant that the Tribunal never focused on what precisely it was that the Council did or failed to do. That was potentially important, not only because you need to identify the act in order to ask on what ground the employer did it."**

87. The Claimant has submitted by reference to **El-Megrisi** (supra) the proposition that it is not necessary to identify the relevant part than any particular protected disclosure plays in the decision to dismiss, presumably also in relation to the suffering of any detriment. That case, however, was concerned with the cumulative effect of a number of protected disclosures that might be regarded as having a cumulative impact. It is not authority for the proposition that where there has been a bundle of complaints it is possible to ignore the need to identify those of which amounted to protected disclosures and which, if that be the case, did not:

> **"But in a case where a claimant has made multiple disclosures section 103A does not require the contributions of each of them to the reason for the dismissal to be considered separately and in isolation. Where the Tribunal finds that they operated cumulatively, the question must be whether that cumulative impact was the principal reason for the dismissal. That was clearly, on the Tribunal's own findings already referred to, the case here."**

88. It is important to bear in mind that it is disclosures of *information* as opposed to the making of allegations that are capable of being protected. There is useful guidance in the

Judgment of Slade J in **Cavendish Monroe Professional Risk Management v Geduld** [2010] IRLR 38. In that case, the claimant was both director and a shareholder in the respondent. After a dispute between the claimant and his fellow directors and shareholders he sent a solicitors' letter to them asserting that he had suffered unfair prejudice. He was dismissed and brought proceedings for unfair dismissal, which succeeded before the Employment Tribunal. Slade J said:

> **"24. Further, the ordinary meaning of giving 'information' is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating 'information' would be, 'The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around'. Contrasted with that would be a statement that 'you are not complying with Health and Safety requirements'. In our view this would be an allegation not information.**
>
> **25. In the employment context, an employee may be dissatisfied, as here, with the way he is being treated. He or his solicitor may complain to the employer that if they are not going to be treated better, they will resign and claim constructive dismissal. Assume that the employer, having received that outline of the employee's position from him or from his solicitor, then dismisses the employee. In our judgment, that dismissal does not follow from any disclosure of information. It follows a statement of the employee's position. In our judgment, that situation would not fall within the scope of the Employment Rights Act s.43.**
>
> **26. The tribunal based its conclusion that Mr Geduld was dismissed because, through his solicitor's letter of 4 February 2008, he made a protected disclosure. In our judgment the letter sets out a statement of the position of Mr Geduld. In order to fall within the statutory definition of protected disclosure there must be disclosure of information. In our judgment, the letter of 4 February 2008 does not convey information as contemplated by the legislation let alone disclose information. It is a statement of position quite naturally and properly communicated in the course of negotiations between the parties.**
>
> **Disclosure**
>
> **27. Even if we are wrong in our conclusion that the employment tribunal erred in holding that the letter of 4 February 2008 disclosed information within the meaning of the ERA, we consider whether the employment tribunal erred in considering whether the letter of 4 February 2008 amounted to or contained a disclosure within the meaning of the section. The natural meaning of the word 'disclose' is to reveal something to someone who does not know it already. However s.43L(3) provides that 'disclosure' for the purpose of s.43 has effect so that 'bringing information to a person's attention' albeit that he is already aware of it is a disclosure of that information. There would no need for the extended definition of 'disclosure' if it were intended by the legislature that 'disclosure' should mean no more than 'communication'."**

89. A distinction must also be drawn between the disclosure of information and the manner of disclosure, because where the dismissal is by reason of the manner of disclosure it is not to be treated as a dismissal on the ground that the worker has made a protected disclosure. We refer to the decision of the EAT, Underhill J, in **Martin**:

> **"The question in any claim of victimisation is what was the "reason" that the Respondent did the act complained of: if it was, wholly or in substantial part, that the Claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the *manner* of the complaint. Take the case of an employee who makes, in good faith, a complaint of discrimination but couches it in terms of violent racial abuse of the manager alleged to be responsible; or who accompanies a genuine complaint with threats of violence; or who insists on making it by ringing the Managing Director at home at three o'clock in the morning. In such cases it is neither artificial nor contrary to the policy of the anti-victimisation provisions for the employer to say 'I am taking action against you not because you have complained of discrimination but because of the way in which you did it'. Indeed it would be extraordinary if those provisions gave employees absolute immunity in respect of anything said or done in the context of a protected complaint."**

90. He continued later:

> **"Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had say, used intemperate language or made inaccurate statements. An employer who purports to object to 'ordinary' unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately advanced made in some cases does not mean that it is wrong in principle."**

91. In **Hossack v Kettering Borough Council** UKEAT/1113/01 at paragraph 41, Wall J made clear that Employment Tribunals must be careful not to allow this principle to emasculate the purpose of the legislation that was to protect whistleblowers:

> **"We see the force of Mr McGrath's anxiety that a differentiation between the content of a disclosure and the manner in which it is made could, if not carefully analysed, emasculate the legislation. Plainly, any tribunal approaching a protected disclosure will need to be alert to that danger. In our judgment, however, this tribunal was so alert, and its conclusions are not only, in our view, correct in law, they also accord with common-sense and in no way offend against either the spirit or the letter of the legislation."**

92. **Blitz v Vectone Group Holdings Ltd** UKEAT/0253/10 is a recent example of a case where the claimant, who was employed in a senior position, which involved reporting on possible failures to comply with legal obligations, made such disclosures but was nonetheless

dismissed, partly because of the manner in which he had raised his complaints. We note also this is a case where the claimant was required by his position to report such failures to his employers.

93. We need to refer to the **Fecitt** case in light of the argument put forward by the Claimant that the Employment Tribunal in this case followed a dictum from **Fecitt** as to what a Claimant needed to prove to establish detriment short of dismissal as a result of a protected act, this applying also to the dismissal itself. We refer to the Judgment of Elias LJ at paragraph 7:

> **"It is to be noted that in the dismissal context it is expressly provided that the protected disclosure must be the reason or the principal reason for the dismissal before that dismissal can be found to be automatically unfair. A question which arises in this case is whether the same test should be applied to a worker who is subject to a detriment short of dismissal in order to determine whether he or she can succeed in a claim under s.47B."**

94. It concludes that it does not. He continued at paragraph 45:

> **"In my judgment, the better view is that s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower."**

95. The Court of Appeal in **Fecitt** was careful to distinguish between the standard of proof required in cases of detriment from that required in cases of dismissal itself. The Employment Tribunal can scarcely have believed that the passage at paragraph 45 applied to both detriment short of dismissal and the dismissal itself, even though the Claimant may have fallen into error in her submissions.

96. We now turn to the issues arising in the remedy Judgment and the application of the ACAS Code. The relevant provisions of the Code are helpfully set out by Keith J in **Lund**:

> **"It is necessary here to say something about the Code of Practice. Para. 1 of the Code explains what the Code is all about:**
>
> > **'This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.**
> >
> > **Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should be followed, albeit that they may need to be adapted.**
> >
> > **Grievances are concerns, problems or complaints that employees raise with their employers.**
> >
> > **The Code does not apply to redundancy dismissals or the non renewal of fixed term contracts on their expiry.'"**

97. Keith J then went on to explain in what circumstances the code applied:

> **"So although there are particular situations to which the Code does not apply – dismissals for redundancy and the non-renewal of fixed-term contracts on their expiry – it is intended to apply to those occasions when an employee faces a complaint which may lead to disciplinary action or where an employee raises a grievance. If the employee faces a complaint which may lead to disciplinary action (whether because of his misconduct or his poor performance), the Code applies to the disciplinary procedure under which the complaint is to be investigated and adjudicated upon. Of course, the outcome of the disciplinary procedure may not result in the employee's dismissal at all. Or it may result in his dismissal which on analysis turns out not to be a dismissal for his misconduct or poor performance but a dismissal for something else. The important thing is that it is not the ultimate outcome of the process which determines whether the Code applies. It is the initiation of the process which matters. The Code applies where disciplinary proceedings are, or ought to be, invoked against an employee. […]"**

98. It may be helpful if we suggest the approach that should be taken by Employment Tribunals considering claims by employees for victimisation for having made protected disclosures.

1. Each disclosure should be identified by reference to date and content

2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.

3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.

4. Each failure or likely failure should be separately identified.

5. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the Employment Tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the Employment Tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the Employment Tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an Employment Tribunal to have regard to the cumulative effect of a no of complaints providing always have been identified as protected disclosures.

6. The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in S43 B1 and under the 'old law' whether each disclosure

was made in good faith; and under the 'new' law whether it was made in the public interest.

7. Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

8. The Employment Tribunal under the 'old law' should then determine whether or not the Claimant acted in good faith and under the 'new' law whether the disclosure was made in the public interest.

Conclusions: detriment short of dismissal

99. The Employment Tribunal appears to have failed completely to determine when the "deliberate" decision to subject the Claimant to a detriment short of dismissal was taken. There had to be a finding that a conscious decision to take no action had been arrived at. No such decision could have been taken until the disclosure had been made. As we have pointed out, a deliberate failure to act is to be treated as done when decided on, and in the absence of evidence establishing the contrary the Respondent could only be taken to have decided on a failure to act "when the period expires within which he might reasonably have been expected to do the failed act it was to be done".

100. In this case, the bulk of complaints and the more serious ones were set out in the email of 31 August; the dismissal was on 3 September. It is difficult to see what detriment the Claimant might have suffered for this short length of time, assuming that the Employment Tribunal had been able to determine that a deliberate decision to take no action had been made, in circumstances where the Employment Tribunal appears to have been satisfied that the complaints were promptly addressed.

101. We are unable to understand how simple inaction could amount to a detriment given the fact that the Claimant's job necessarily required her to draw attention to breaches of obligations placed by law on pharmacists. We do not see how the Claimant was in some way victimised for having done what she was employed to do. Further, the "detriment" can only have been for a very short period at a time when her complaints were being promptly addressed. We are unable to see how the Claimant could ***reasonably*** have held a justified sense of grievance for the limited time she claimed to have suffered stress when her concerns were being promptly and fully addressed.

102. There has been no finding, as we have pointed out, as to when the deliberate decision to take no action was made. The detriment could only run from then. The finding by the Employment Tribunal that the concerns appeared to be addressed promptly does not sit comfortably with the finding that the failure to act caused stress to the Claimant by requiring her to work in an environment where there were failures or likely failures to comply with legal obligations that placed health and safety at risk. We have already drawn attention to the fact

that the period from Saturday, 28 August to Monday, 30 August was a Bank Holiday weekend when the premises were shut.

103. In the present case, and by way of example, a request for high chairs or complaints about the refusal to allow time off in lieu could not suggest a breach or likely breach of legal obligations and would not be protected. However, it is by no means clear that "information" was not disclosed. Mr Kohanzad suggests that in the list to which we have referred items (l) to (s) were not protected disclosures (it is accepted that (l) to (s) were not protected disclosures, as the Claimant did not rely on any disclosures at the meeting or in the email of 2 September). Item (j) would constitute a protected disclosure, subject to issues of reasonable belief and good faith; and items (k) to (l) are subject to proof that there was a disclosure of information. Insofar as the Claimant asserted that she was suffering stress as a result of working environment where the two-hour rule was not complied with, when the Claimant was at the depot there was of course a Responsible Pharmacist present by definition, and it was unlikely, therefore, that she would be suffering any particular stress.

104. It is to be noted that the circumstances of the dismissal were not relied upon as constituting a detriment short of dismissal.

105. In all the circumstances, the decision on detriment short of dismissal was wrong in law and one of those rare cases where one can safely say that the decision that the Claimant suffered detriment short of dismissal by reason of making protected disclosures is plainly wrong and perverse.

Conclusions: dismissal

106. We do have significant misgivings as to whether the finding relating to automatically unfair dismissal should be upheld. The Employment Tribunal found that the Claimant had in effect been dismissed for making disclosures that she was employed to make rather than being dismissed as a result of her conduct at the meeting of 1 September and as to confrontation with Ms Mitchell, the terms of her email of 2 September and her refusal to contemplate working longer hours, despite having agreed to this. The decision of the Employment Tribunal may seem surprising and indeed may be one with which we would not have agreed. However, there was material upon which the Employment Tribunal could find that the principal reason for the dismissal was the making of protected disclosures. The Employment Tribunal was satisfied that there had been protected disclosures, in particular in relation to the breach of the two-hour rule, and it was open to the Employment Tribunal to find that the Claimant's disclosure was the principal reason for her dismissal. As we have noted, the reason for a dismissal is essentially a finding of fact by the Employment Tribunal; we cannot reverse findings of fact unless they are perverse. As there was evidence to support the finding, it is extremely difficult to say that it is perverse, even if we do not agree with it. We must take a generous view of the decision of the Employment Tribunal, and we do not feel able in the circumstances to uphold the Respondent's appeal against the finding.

107. We have borne in mind that it may well be said the Employment Tribunal does not appear to have paid sufficient regard to the fact that the Claimant was employed by the Respondent as the responsible pharmacist and her job necessarily entailed ensuring compliance with statutory requirements and proper practice and reporting on this to the Respondent; it was, thus, inherently unlikely that the Respondent would wish to subject her to detriment or to

dismiss her for doing just what she was employed to do; cf **Blitz**. Furthermore, we have regard to the fact that the Respondent reacted promptly to address the issues raised by the Claimant and also to the fact that although the Claimant had complained about the absence of a supervising pharmacist by her own refusal to vary her working hours she perpetuated the problem, and this, it is said, might have cast doubt on her good faith.

108. Nevertheless, and having taken these matters into account, for the reasons we have given we do not find ourselves able to reverse the decision of the Employment Tribunal in relation to automatic unfair dismissal.

Conclusions: compensation and the ACAS uplift

109. It is no longer necessary to consider compensation for injury to feelings, because it is accepted it is not available in relation to the dismissal, and we have set aside the findings relating to detriment short of dismissal.

110. So far as the ACAS uplift is concerned, it is clear from the Employment Tribunal's own findings that the Claimant was not dismissed for a reason to which the Code applies, as established by **Lund** by reason of misconduct, and, following the decision of Keith J in **Lund**, the ACAS Code did not apply. It is unnecessary for us to determine whether or not the ACAS Code might apply in cases where an employee does not have the necessary qualifications by reason of length of service to make claims of unfair dismissal who are dismissed for reasons of misconduct.

111. The Employment Tribunal does not appear to have considered a reduction for contribution or a **Polkey** reduction. Accordingly, the question of remedy must be remitted to the Employment Tribunal. We have borne in mind the decision in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, notwithstanding the increased costs of the remission to a fresh Employment Tribunal, by reason of the fact that the decision in relation to detriment short of dismissal was so flawed.

112. We are, however, very much concerned about subjecting the parties to further cost that may be regarded as disproportionate, having regard to the amount involved. We are therefore, subject to the parties' agreement, willing to reconsider the issues of contribution and a **Polkey** deduction on the basis of written submissions. We await hearing from the parties within 21 days of the seal date of the Judgment.