

Appeal No. UKEAT/0024/13/BA

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 5 November 2013

**Before**

**THE HONOURABLE MR JUSTICE MITTING**

**(SITTING ALONE)**

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MR L GARCIA

APPELLANT

MARKET PROBE EUROPE LTD

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

MR G MILLER  
(Representative)  
(Appearing under the Free  
Representation Unit)

For the Respondent

MR M EGAN  
(of Counsel)  
Instructed by:  
Reculver Solicitors  
12-16 Clerkenwell Road  
London  
EC1M 5PQ

## **SUMMARY**

### **PRACTICE AND PROCEDURE – Preliminary issues**

Whether or not Employment Tribunal right to hold that ET1 did not disclose a claim of unlawful detriment because of a protected disclosure. No.

## **THE HONOURABLE MR JUSTICE MITTING**

### **Introduction**

1. The Claimant claimed that he was employed under a contract of employment by Market Probe Europe Ltd (“the Respondents”) beginning work on 15 January 2011. He claimed that he had been unfairly dismissed on 16 January 2012. The Respondents dispute that he was employed under a contract of employment but accept that he was a worker. They say that his engagement was terminated on a date in December 2011. On 14 March 2012 the Claimant submitted a claim to the Employment Tribunal. In paragraph 5.2 of his ET1 form he stated that he:

**“[...] would like to make a claim for unfair dismissal, detrimental treatment and unlawful deduction of wages.”**

2. The Respondents did not submit their response in form ET3 within the time limit provided by the rules, accordingly, a default judgment was entered for the Claimant. The Respondent applied to have it set aside. The Tribunal acceded to that suggestion and in a judgment and reasons sent to the parties on 28 September 2012 set aside the default judgment.

3. The Tribunal went on to deal with one of the claims made in the ET1 form. The Employment Judge who determined the application in paragraph 3.4 of his judgment said this:

**“In the claim form the Claimant has set out a complaint entitled ‘detrimental treatment’. The Tribunal has considered this to be a complaint of breach of contract, being a dispute about the Claimant’s terms and conditions but the Claimant has asserted today that it amounts to a complaint of public interest disclosure. The Tribunal has ruled that it does not consider public interest disclosure to be an issue set out in the claim form presented to the Tribunal by the Claimant. The Claimant has been advised to consider whether to bring a fresh claim or an amended claim in respect of this alleged complaint of public interest disclosure, which should in any event be fully particularised to include all relevant facts and matters on which the Claimant relies.”**

4. The Claimant appeals to this Tribunal against that ruling. He says in his form ET1 he did make a claim that he had been, in common parlance, subjected to a detriment because he had made a public interest disclosure.

5. In addition to the paragraph of the form ET1 which I have already cited, it contained the following. First of all, under the heading “Chronology of the events”:

**“5. On the 09 December 2011 the supervisor Vito refused to put into my account the 6 hours that I worked on the 07 December 2011 and which were still missing from the system.**

**6. On the 10 December 2011 I made a complaint to my employer using his “Contact us-complaint” facility because the supervisor Vito cancelled my shift without informing me in advance and refused to put my 6 missing hours into the system.”**

6. On the following page under the heading “My claim for detrimental treatment” the Claimant typed the following:

**“I sustained detrimental treatment for the following reasons:**

**I made a genuine complaint against the supervisor Vito for the following reasons: He refused to put all my hours into my account as a consequence I received a message from my employer blaming me wrongly for not having attended a booked shift and three points were removed from my account. My record was not amended despite my numerous requests. Moreover contrary to the rules the supervisor Vito cancelled my shifts without informing me in advance. I was removed from the list of the interviewer and dismissed in retaliation because I made a complaint for the following reasons: I received no reply to my complaint against the supervisor Vito however I was removed from the list of the interviewers preventing me from accessing my account at the same time as I made my complaint and I was dismissed without any good reasons. Hence I have sustained detrimental treatment only because I was ascertaining my legal rights concerning a breach of several legal obligations by my employer.”**

7. Mr Egan for the Respondent submits, as did the Respondent below, that in the passage which I have just cited, what the Claimant was really saying was that he was dismissed because he had made a complaint about the actions of his supervisor Vito. That is certainly one way in which that paragraph can be read. However, it is just capable of being read as in the following sense. It contains a statement that the Claimant supplied to the Respondent two pieces of information: one, Mr Vito refused to put all his hours into his account; two, he cancelled his shifts without informing him in advance. In addition he complained about those actions and it

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was the combination of providing information and making the complaint which caused the Respondent to act to his detriment in the manner that they did.

8. Thus analysed, it is just possible to discern in the words used by the Claimant a complaint that he made a protected disclosure. The disclosure was, on legal analysis that Mr Vito, acting as the servant or agent of the Respondent, had committed a breach of a legal obligation by the Respondent to record hours worked and not to cancel shifts without informing him in advance. Accordingly, applying the reasoning in **Parkins v Sedexho Limited** [2002] IRLR 109, a decision which, at least for the time being, binds the Employment Tribunal, he was making a justiciable claim. Thus analysed, although the Employment Judge reached an understandable conclusion, it was one which does not, on close analysis, survive that analysis.

9. The form ET1 was not drafted professionally. It was drafted by the Claimant, perhaps with the assistance of others, it not clear, but it, therefore, should be read generously and if, as I believe it to do, it contains enough information to indicate that a claim of detriment for making a protected disclosure to have been made then that claim should go to trial and not be treated as forming no part of the claim.

10. I express no view about the merits of the claim, but it is one that should be heard or, at least, not removed from consideration at this stage. To that extent, this appeal is allowed.