Appeal No. UKEAT/0477/13/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 January 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR F G NESE — APPELLANT

AIRBUS OPERATIONS LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR FRANCESCO GIANLUCA NESE
(The Appellant in Person)

For the Respondent

MR CHRIS MacNAUGHTON
(Non-practising Solicitor)
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SUMMARY

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

UNFAIR DISMISSAL - Reasonableness of dismissal

UNFAIR DISMISSAL - Automatically unfair reasons

VICTIMISATION DISCRIMINATION - Protected disclosure

Protected disclosures - made absent reasonable belief and good faith: the Employment Tribunal had correctly understood the case before it and reached permissible findings on the evidence. The Claimant was wrong to suggest his evidence had not been contradicted.

Reason for dismissal - automatically unfair reasons - reasonable grounds: the Employment Tribunal's findings of fact were based on evidence before it. The Claimant's real complaint was as to the weight the Employment Tribunal had given parts of the evidence; that was not a proper basis of challenge.

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 Bristol Employment Tribunal (Employment Judge Street, sitting with members from 20-23 November 2012; "the ET"), sent to the parties on 21 December 2012; a Judgment comprising 208 paragraphs, some 28 pages. The Claimant appeared at the ET and before me in person. At the ET, the Respondent was represented by its solicitor, Mr Alemoru; today by Mr MacNaughton, a solicitor (non-practising).

2. The ET unanimously dismissed the Claimant's claims (made under various heads) of unfair dismissal; of detriment on the grounds of a protected disclosure; of race discrimination; and of breach of contract. The Claimant appeals against the rejection of the claims relating to his dismissal. That is of unfair dismissal pursuant to the **Employment Rights Act 1996**, section 98 (standard unfair dismissal), section 100(1)(c) (health and safety), section 103A (protected disclosure) and section 104 (assertion of a statutory right), and of wrongful dismissal.

3. After some false starts the appeal was permitted to proceed to a Full Hearing by HHJ Shanks on the following basis:

> **"His appeal relates only to claims arising from the dismissal, namely unfair dismissal, section 103A [Employment Rights Act], section 104 (read with [section] 47B) and wrongful dismissal. So far as those claims are concerned, it seems to me that the employer's and the ET's conclusion that he was acting in bad faith from the outset is highly questionable (see [paragraphs] 145 to 158 of judgment in particular), as is the conclusion that in repeating those concerns in the context of his grievance he was doing any more than setting out the background."**

The Background Facts

4. The Claimant was employed by the Respondent from 21 January 2008 as a Composite and Metallic Stress Engineer. He has a PhD in Aerospace Engineering obtained in Italy, and from March 2011 worked in the Wingtip team, which was headed by Mr Hewson, who was the Claimant's functional manager. Both the Claimant and Mr Hewson reported to Ms Dee, who, in turn, reported to Mr Watts. Mr Hewson had responsibility for liaison with an external company, FACC, which was subcontracted to do part of the development of aircraft components. The subcontractor was called the Risk Sharing Partner ("RSP") for these purposes. The RSP had a responsibility to supply evidence to substantiate the means of compliance. When awarding the contract to FACC, it had been accepted there would need to be a level of coaching provided.

5. There was a meeting with the RSP attended by the Claimant on 23 August 2011. That caused him to have concerns as to the RSP's ability to carry out the required work. He was further concerned that Mr Hewson should have been aware of this and had apparently been supporting RSP for some time. On 8 September 2011 the Claimant e-mailed Ms Dee and Mr Hewson setting out his concerns regarding the RSP and then discussed those concerns at his interim performance and development review with Ms Dee and Mr Hewson on 12 September.

6. The Claimant initially sought to set up a stress audit meeting with the RSP for 22 September 2011, but Ms Dee considered that inappropriate and she asked Mr Hewson to chair a review meeting. The Claimant considered the RSP's input unsatisfactory and was unhappy at how Mr Hewson had chaired the meeting, saying he felt humiliated. He sought a meeting with Ms Dee on 26 September 2011, at which he made her aware of his technical concerns, his

anxiety about them and about whether the Respondent was aware of the issues. Further, he was concerned about Mr Hewson's interventions at the meeting; specifically, Ms Dee records:

> **"[The Claimant] said that Rick [Hewson] was trying to conceal FACC's failure to make progress on the testing and that this was an aircraft safety issue; [the Claimant] also said that Rick was coercing FACC in to keeping quiet about the lack of progress and was proposing to hide the true status of the test work from the CDR (critical design review) panel." (paragraph 39)**

7. Ms Dee investigated by speaking to the Senior Stress Leads, one of whom had been present at the 22 September meeting. They dismissed the Claimant's concerns. Mr Hewson had made them aware of the issues with the RSP, which were already being looked at from a senior level; Mr Hewson was doing nothing that was outside senior management's knowledge. Ms Dee fed back to the Claimant on 28 September 2011 seeking to reassure him Mr Hewson was acting with the knowledge and consent of senior management; he was not seeking to conceal anything and safety was not being compromised because the test analysis would take place using the Respondent's stress tools in due course. She offered the Claimant a meeting with herself and Mr Hewson to discuss these matters further. The Claimant declined, asking for a move into a different team, to which she agreed. He was thereafter placed "on mobility".

8. The ET found from that point the Claimant took the view that Ms Dee was complicit with Mr Hewson in concealing safety issues and lack of progress by the RSP.

9. On 5 October 2011, the Claimant called a technical review meeting on the test activities, which was attended by senior engineers. That there was no concealment would have been apparent to the Claimant after that meeting even if it had not been apparent before.

10. On 12 October 2011 Mr Hewson e-mailed amendments to a test request (discussed on 5 October 2011), which he copied into the Claimant. The Claimant forwarded that e-mail to

others including Mr Watts, describing it as "unbelievable" and subsequently characterising it in his Dignity at Work complaint as "misleading". For his part Mr Watts considered the issues raised as normal for innovative designs. He took a dim view, however, of the Claimant's openly critical e-mail and asked him to a confidential informal meeting to discuss. The Claimant then repeated his allegations concerning concealment on the part of Mr Hewson and that safety was being put at risk. For his part Mr Watts assured the Claimant that senior management was well aware of what was going on and nothing was being concealed. He left it that if the Claimant wished to pursue his allegations he would need to produce further evidence.

11. Subsequently, on 6 February 2012, Ms Dee was involved in the Claimant's performance review. He was unhappy with the conduct of the review and with Ms Dee's involvement in it. On 6 February 2012 he put in a Dignity at Work complaint explaining that his grievance was against Mr Hewson, Ms Dee and Mr Watts and stating, in his introductory summary:

> **"The individuals above have concealed the unsatisfactory work done by FACC. Because I have refused to participate in the breach of the Ethic code, I have been subjected to retaliation for four months."**

The retaliation was said to be psychological harassment, defamation within the company, not giving the Claimant work, spreading false rumours, manipulating his performance and development review and making false allegations.

12. There was an investigation into the complaint by Vista HR Services. Its report of 13 February 2012 did not uphold the complaints but recorded the Claimant still maintained there was "an attempt to conceal unsatisfactory work done by the FACC". The Claimant appealed and his complaint was investigated afresh by the Respondent's Messrs Dufty and Gollin, who, before finalising the report, met with him to go through the findings of fact. Significantly:

> **"80. When it came to the point, central to the way the appeals officers had seen the Dignity at Work complaint, that the failure of the procedures conducted by the RSP raised safety issues,**

> **they sought to explain to Mr Nese that there was no question of any such safety implications arising. Mr Nese said at that point that he was well aware of that, that he accepted it was very unlikely, but that the issue for him was the harassment he had suffered as a result of raising the issues that he had. That echoes the way he presented his appeal, as in relation to detriment for raising issues, rather than the safety risks themselves.**
>
> **81. As Mr Dufty explains:**
>
> > **"Francesco Nese said he knew that Rick could not avoid the tests, and that he was entitled to authorise the use of alternative testing methods and that was not part of his appeal." "**

13. Messrs Dufty and Gollin did not accept that the Claimant had made allegations relating to safety in good faith: he had made very serious allegations, but then made it clear that it did not matter to him whether or not they were actually true. The decision was taken that the Claimant should be suspended pending a disciplinary investigation and hearing into his conduct. Mr Dufty also raised the concerns that the Claimant might raise these matters externally, to the detriment of the Respondent's reputation. He put the matter in context as follows:

> **"the case is sensitive because the individual's allegation is that certain managers were condoning the avoidance of critical stress testing in their work which in turn could have an impact on aircraft safety."**

14. Mr Scott, the Respondent's Head of Quality, chaired the disciplinary hearing, which took place on 17 May 2012. The Claimant attended but declined to answer questions; instead reading out a pre-prepared statement, saying his concerns had not in fact been issues of safety or of concealment but as to the way he had been treated for raising safety concerns. Mr Scott did not accept that. He concluded the Claimant was guilty of pursuing serious allegations against the Respondent and its employees despite knowing such allegations were not based on fact and were untrue. That was gross misconduct, for which he should be dismissed.

15. The Claimant appealed, and his appeal was heard by Mr Wood, a vice-president of the Respondent. Although not a complete re-hearing, the Claimant had written a detailed letter of appeal and took written statements to the hearing and read them aloud. The ET found:

> **"98. Mr Nese repeated his allegations that Helen Dee, Rick Hewson and Alan Watts were concealing from Airbus the difficulties with the RSP, that it was a potential safety issue and that the concealment continued when the status of the test campaign was not properly assessed at the C-maturity review.**
>
> **99. That was a repetition of the allegations that he had made in September and October, and which were reflected in the Vista report and in the Dignity at Work appeal."**

16. Mr Wood found that the Claimant had known Mr Hewson had the authority to use different stress tools and that the stressing would be subject to review later in the development work. In the circumstances, the Claimant could not have genuinely believed that Mr Hewson was attempting to conceal unsatisfactory work or that there was a likelihood that a defective product could be manufactured. At the same time he was making serious allegations that could have made Mr Hewson face dismissal. That was serious misconduct, for which the Claimant had shown no remorse. He confirmed the decision to dismiss.

The ET's Reasoning

17. The protected disclosures relied on by the Claimant as recorded by the ET are as follows: (1) as made to Helen Dee at a meeting on 26 September 2011; (2) as made to Alan Watts in October 2011; (3) as made in the Claimant's Dignity at Work grievance. That summary reflected the way in which the issues in the case were identified during an earlier telephone case management discussion on 21 August 2012, when it was recorded:

> **"AND the whistleblowing detriment and dismissal claims being based upon disclosures qualifying for protection under S43B(1)(b), (d) and (f) and S43C; the respondent concedes that all parts of these definitions are met save that it argues that the disclosures do not qualify for protection because the claimant did not hold a reasonable belief and the disclosures were not made in good faith.**
>
> **AND those disclosures having taken place in September and October 2011 and from February 2012 onward in the investigation into his Dignity at Work grievance."**

Thus it was not disputed that the matters raised by the Claimant were capable of being protected disclosures *if* made in good faith and with reasonable belief.

18. As for the actual nature of the protected disclosures, the ET found:

> **"133. The claimant does not set out the basis of his disclosures in writing fully anywhere save as shown in emails. He has resisted any paraphrase of his concerns.**
>
> **134. They are not recorded in his discussions with Helen Dee, Rick Hewson or Alan Watts. That is regrettable.**
>
> **135. However, the Dignity at Work complaint [makes] it clear that the key aspects related to failure to carry out the stress test programme and deliberate concealment of that by Rick Hewson, with Helen Dee and Alan Watts complicit.**
>
> **136. It is absolutely clear that he himself put things in the context of serious safety issues, challenging the integrity of the procedures that were essential to safe design."**

19. The ET concluded that there were issues with the RSP and the testing procedures. Equally, those were not unexpected. It was all part of the process of developing innovative designs, and it was the role of the team in which the Claimant worked to identify and test these issues. Given that context, the first disclosure, that of 26 September 2011 to Ms Dee, was thus surprising but the ET might have been prepared to accept it had been made by the Claimant in good faith (paragraph 145). After the meeting of 28 September 2011, however, the ET found "… there was no further basis for his concern about Mr Hewson's role or approach"; there was then no reasonable basis for his concern after that time.

20. If there was no reasonable basis for concerns after 28 September 2011, the ET found there was even less so after the meeting of 5 October 2011. The Claimant, however, went on to make the same allegations to Mr Watts and again in his Dignity at Work complaint on 14 February 2011, albeit that he had no new evidence to support the concerns he was raising. The ET concluded those disclosures were not made on reasonable grounds.

21. The ET then returned to the first disclosure and stood back to look at the complete picture. It concluded as follows:

> **"157. … .given how he pressed his allegations long past any reasonable basis for them, substantial doubt is cast on his having acted at any stage in good faith. We note that a key point about his first disclosure to Helen Dee in his witness statement is his humiliation in the meeting of 22 09 11 - that, rather than an explanation of what he reported to her. We don't**

> **understand his reasoning or motivation but anger and mistrust of Mr Hewson and then of other managers was clearly at play, and, we find, without reasonable basis.**
>
> **158. We cannot find that he acted in good faith here."**

22. In the alternative, the ET found there were in any event no detriments because of any of the protected disclosures. As for the dismissal, it was for gross misconduct and the investigation, procedure and outcome all fell within the range of reasonable responses of the reasonable employer and the dismissal was fair. Specifically:

> **"200. We are satisfied that the dismissal was for misconduct. It was not because Mr Nese had made a protected disclosure; that did not figure even in part in the company's thinking. It was not the report of safety concerns that led to the disciplinary hearing, it was the acknowledgment that the concerns were not genuine, made in the course of the appeal hearing. The nub of it was that he made serious allegations without reasonable grounds and not in good faith.**
>
> **201. That being the case, the reason for the dismissal was not that Mr Nese made a protected disclosure.**
>
> **202. Nor was he dismissed because he brought to his employer's attention, by [reasonable] means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety. In truth, this provision does not apply because we accept that there was a safety committee at Airbus to which Mr Nese could have gone with his concerns, if genuine. But the concerns about safety were not the reason for the dismissal; it was the lack of good faith in making such serious allegations.**
>
> **203. Nor was he dismissed on the grounds of his assertion of a statutory right. He was dismissed for gross misconduct.**
>
> **204. He was not automatically unfairly dismissed."**

The ET also rejected any complaint of race discrimination or breach of contract.

The Appeal

23. The grounds of appeal are essentially threefold:

(1) The ET erred, alternatively reached a perverse conclusion, in finding that there were reiterations of the Claimant's initial disclosure after 28 September 2011. To the extent that the Claimant had later referred back to the initial disclosure, that was merely setting out the background or context. It was not repeating that disclosure.

(2) The ET erred, alternatively reached a perverse conclusion, when finding that the Claimant's disclosure had been made in bad faith. First because he had not reiterated the initial disclosure in the protected disclosures to Mr Watts or in his Dignity at Work complaint, and second because it would be perverse, alternatively without evidential basis, to conclude that the initial disclosure had been made in bad faith.

(3) More generally, the ET erred by failing to find that the Respondent had misconstrued the Dignity at Work complaint and in failing to conclude that the real reason for the Claimant's dismissal was his assertion of a statutory right. Alternatively, the ET had failed to correctly apply **BHS v Burchell** [1978] IRLR 379. There were no reasonable grounds for the Respondent's belief in the Claimant's misconduct. Once that was apparent, the only proper conclusion was that the Respondent had dismissed the Claimant for asserting his right to bring an ET claim, an assertion of a statutory right and thus automatically unfair; alternatively there was no good reason for the dismissal and thus it was unfair.

The Relevant Legal Principles

24. A protected disclosure is a qualifying disclosure (as defined by section 43B **Employment Rights Act 1996**), which is made by a worker in accordance with any of sections 43C to H **ERA**. Section 43B defines a qualifying disclosure as any disclosure of information which "in the reasonable belief of the worker making the disclosure" tends to show one or more of the listed concerns; relevantly, that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subjected (section 43B(1)(b)); that the health and safety of any individual has been, is being or is likely to be endangered ((d)); and/or that information tending to show any such matter is, has been, or is likely to be deliberately concealed ((f)). The

Claimant further relied on having made disclosures to his employer in accordance with section 43C(1)(a), which at that time required the disclosures to have been made in good faith.

25. On the question of reasonable belief, as the EAT opined in **Darnton v University of Surrey** [2003] IRLR 133, there can be a qualifying disclosure even if the worker was wrong in what he believed. What is required is *reasonable* belief, even if it is a mistaken belief.

26. "Good faith" was considered by the Court of Appeal in **Street v Derbyshire Unemployed Workers' Centre** [2004] IRLR 687. It means more than simply having a reasonable belief in the truth of the information disclosed. Motive is relevant; acting with malice or antagonism would not be acting in good faith. The burden of proving bad faith is on the employer.

27. If the reason or principal reason for an employee's dismissal is a protected disclosure as so defined, it will then be automatically unfair (see section 103A).

28. In the alternative, the Claimant relied on section 100 **Employment Rights Act** and/or section 104. In respect of the latter, there is also a requirement that the worker has acted in good faith in making a claim to the right and that it has been infringed in good faith.

29. Alternatively, the Claimant put his case under the standard unfair dismissal provision at section 98 of the **Employment Rights Act**. In that regard, it is for the Respondent to establish the reason for dismissal, and that is a reason capable of being fair under section 98(1) or (2). If the Respondent discharges that burden, then the question arises whether the dismissal is fair for section 98(4) purposes, on which the question of the burden of proof is neutral. Where conduct

is relied on as the reason for the dismissal, guidance is set out in the case of **BHS v Burchell**. The ET will look at whether the Respondent had reasonable grounds for its belief in the Claimant's misconduct and had carried out a reasonable investigation. The test for these purposes is that of the band of reasonable responses of the reasonable employer in all the circumstances of the case. See **Sainsbury's Supermarkets v Hitt** [2003] IRLR 23 CA.

Submissions

The Claimant's Case

30. The Claimant first contends that, after his initial disclosure on 26 September 2011, his case had never been about reiterating disclosures about safety (see paragraphs 5, 6, 9 and 13 ET1). To the extent that his later disclosures referred back to the first, that repetition was nothing more than would be normal discussion with safety regulations and set out the context for his later concerns about how he was treated. The ET misunderstood his case. Although there had been an earlier telephone case management discussion, there had been no detailed record of what the protected disclosures were. His case was apparent from the ground attached to his form ET1. If the ET had correctly understood and read the claim form, then it would not have misunderstood his case; he had not repeated his initial concerns.

31. Moreover, the ET had misunderstood evidence not contradicted by the Respondent. When the Claimant complained in his Dignity at Work complaint of having been subjected to retaliation for four months, that was not repeating the original complaint about stress testing. It was referring back to that original concern but his complaint was actually about how he had been treated thereafter. To some extent that was recognised in the ET's finding (see, for example, paragraph 80, where it referred to his stressing that the real issue for him had been the harassment he had suffered as a result of raising his first concern). It was simply inconsistent

with the ET's own finding to then conclude that his later disclosures had repeated concerns after he had been assured that he need not have them.

32. Furthermore the Respondent could not reasonably have believed that the Claimant was repeating that first allegation at the subsequent stages and at the disciplinary hearing given that the Respondent itself had accepted the Claimant was then denying that he had made the allegation. Even on his initial concern, the ET needed to investigate what the Claimant's understanding was. Properly understood, it was in accordance with the Respondent's policy, as included at page 1 of the supplementary bundle: i.e. that any deviation from procedures would have to be raised at a much higher level. If the ET had understood that, it would not have expressed surprise at his initial disclosure.

33. That all fed into the ET's finding as to the reason for the dismissal, as set out at paragraphs 187 and 188. The finding was impermissible given, first, Mr Scott in his witness statement had admitted that the Claimant had not actually said to him that he was going to make his statement externally and, second, the Claimant's real complaint was about being victimised for having raised his concerns. The ET could not properly find that the Respondent had a reasonable belief that the Claimant was going to raise those matters externally. In this regard, it should be noted that the Respondent itself had dismissed the Claimant's appeal in this respect as being without relevance: if so, it could not have formed part of the reason for dismissal.

34. As to the reasonableness of the Claimant's belief, then the evidence in fact supported him. Others within the Respondent had also raised concerns; that being so, the Respondent could not have had reasonable grounds for concluding that he had an unreasonable belief.

35. Turning to the finding of bad faith, the ET's finding on bad faith was not adequately explained, certainly in respect of the first disclosure. Moreover to say that he had kept repeating a disclosure even after being reassured as to his concerns did not demonstrate proper grounds for finding that the first disclosure had been made in bad faith.

36. Furthermore, the ET found that taking the matter externally was part of the reason for the dismissal. If so, that supported the Claimant's claim that he was dismissed for asserting a statutory right (section 104 **ERA**). The letter of dismissal referred to the Claimant taking matters external as being part of the Respondent's reasoning. There was no evidence that the Respondent thought the Claimant would seek to raise the matter with the press or other external sources; it could only be a reference to possible ET proceedings which might attract a media interest. The concern thus related to the Claimant's assertion of a statutory right.

37. Finally, returning to the question of bad faith, the ET had erred in determining this question by looking at what the Respondent believed and not what was in the Claimant's mind. That in itself was an error of law.

The Respondent's Case

38. This was not, as the Claimant sought to contend, a case of uncontested evidence. The ET's finding was clearly that the Respondent had dismissed the Claimant for making allegations after being reassured by Ms Dee; Mr Scott having taken his decision after looking back on all of the evidence. The Claimant's case was characterised by his slipping in and out of making allegations and then seeking to recharacterise those as only setting the context for his complaints about how he had been treated. The way he was putting his case on appeal was simply another attempt to do this.

39. Working through the findings, paragraph 42 set out the ET's conclusion as to Ms Dee's investigation after the pre-assurance disclosure. There was no concealment and no coercion. It then went on to make findings as to the disclosures made on 14 October 2011. The ET made a clear finding as to the nature of the iteration (see paragraph 54, based on the evidence given by Mr Watts as accepted by the ET). It then found that the Respondent's conclusion after investigation was that the Claimant knew that Mr Hewson was entitled to authorise the use of alternative testing methods (paragraphs 81, 85 and 86). Taking and drawing those matters together, the ET concluded (paragraph 103) that Mr Wood had found that the Claimant must have known Mr Hewson had authority to use the different stress tools; he had been reassured and had still repeated the allegations, knowing they were serious. On that basis, the ET was entitled to conclude the allegations were made in bad faith. It found that his real motivations arose from his anger and mistrust of Mr Hewson and other managers (paragraph 157). Key was his sense of humiliation. That was evidence to support the conclusion of bad faith.

40. Returning to the Claimant's attempt to challenge the findings on the disclosures, this was really a perversity challenge. The ET found, however, that the Claimant had, after Ms Dee's assurances, taken a stance that she was complicit with Mr Hewson in "concealing safety issues" and had then repeated those points on 5 October 2011 (paragraphs 131 and 150). The ET then made a specific finding as to a repetition of those complaints to Mr Watts. There was further, evidence to support the ET's conclusion from the Claimant's own Dignity at Work complaint and there was also evidence from Mr Watts. The ET found that the Claimant's Dignity at Work grievance maintained the allegations of concealment; see paragraph 64, where the ET set out the Claimant introductory summary, which repeated his concerns of unsatisfactory work by FACC and concealment by Mr Hewson, Ms Dee, and Mr Watts.

41. There was further evidence in the form of the Vista investigation, which was recorded by the ET at paragraph 69, and the other aspects of the Dignity at Work complaint, to which the ET had regard in its entirety. The ET, on the basis of that, was entitled to summarise its finding as to the Claimant's case as follows (paragraph 138):

> **"There are these elements to Mr Nese's case:**
>
> - **the failure to carry out the required procedures, the potential for inadequate stress testing;**
> - **Mr Hewson being complicit in that failure and in concealing it**
> - **That on Mr Nese reporting his concerns, Helen Dee and Alan Watts became parties to the failures and complicit in concealing them.**
> - **That led to retaliation against Mr Nese for his reports and refusal to be party to the concealment."**

42. As for the appeal hearing, the ET again considered the evidence and concluded the Claimant had repeated his allegations (paragraph 98). The Claimant could not demonstrate that the ET had any misunderstanding of the case or evidence before it. It had carefully gone through the evidence and reached findings that were permissible.

43. Turning then to the findings in relation to good faith and the reasons for dismissal, on the basis of all the material before it and the findings it had made, the ET was entitled to reach its conclusion as to what had influenced Mr Scott (paragraph 178). Mr Scott, it was true, had annotated his witness statement to indicate that the Claimant had not told him directly that he (the Claimant) was going to repeat the allegations externally to his solicitors. Mr Scott clarified that before the ET: the evidence in question had been from the Claimant to Mr Dufty and Mr Gollin, not directly to Mr Scott. As for the finding in relation to bad faith, the Claimant had misread the ET's decision. The ET had parked the question of bad faith regarding the pre-assurance protected disclosure (paragraph 145). On returning to that, the most it said was that substantial doubt was cast on the Claimant's grounds for belief and good faith in making that

first allegation. That was insufficient for a bad faith finding. It would have been a permissible finding, but it was not one the ET made. In any event, the point went nowhere: dismissal, on the ET's findings, was plainly for the post-assurance disclosures, not the first disclosure.

44. As for the evidence to support the Respondent's view that the Claimant had threatened to take his concerns externally, that was based on the evidence of Messrs Dufty and Gollin. In particular, in his e-mail immediately following the meeting with the Claimant, Mr Dufty had recorded that the Claimant had suggested that he would make his complaints external. That was the evidence relied on by the Respondent (Mr Scott preferring Messrs Dufty and Gollin's version of events to that of the Claimant, as he was entitled to do). It should be noted that the ET found that Mr Dufty and Mr Gollin had produced a careful report, having taken care to check the facts with the Claimant and his trade union representative first.

The Claimant in Reply

45. The Claimant reiterated his point: the evidence showed his concern was that Mr Hewson, Ms Dee and Mr Watts were seeking to dismiss him. The reference to his first concern was simply setting out the context, not repeating it as an ongoing allegation.

46. As to the evidence about taking the complaints externally, there was no evidence that any reference to taking the complaints externally related to safety complaints. The most the Respondent could point to was the ET's interpretation of the evidence.

Discussion and Conclusions

47. I start with what the ET understood to be the case before it. For his part the Claimant was asserting that he had made certain protected disclosures and that these, or his assertions of

health and safety concerns, or of his statutory rights, were the real reason for his dismissal. The difficulty in seeking to draw out the issues from the grounds contained within the ET1 is that those set out not just the disclosures relied on but also the detriments - the acts short of dismissal - of which the Claimant was complaining; the distinction between the two was not always made clear. Although I am concerned only with the dismissal claims, before the ET the Claimant was also pursuing his complaints of unlawful detriment.

48. The ET clarified the claims being made, and the issues arising therefrom, in the telephone case management discussion on 21 August 2012. The subsequent identification of the issues at the Full Merits Hearing (see paragraph 3 of the ET's Judgment) is clearly based on that earlier clarification.

49. The Claimant seeks to contend before me that there was no real issue but that his disclosures subsequent to Ms Dee's assurances in September 2011 (the post-assurance disclosures), were not reiterations of his first disclosure of 26 September 2011 but saw him raising his concerns (disclosing information) as to the Respondent's treatment of him after he had raised his initial concern. I can see that was the Claimant's case before Mr Scott at the disciplinary hearing. He was then seeking to deny that he had continued to repeat allegations of, for example, concealment on Mr Hewson's part after Ms Dee's assurances; a denial Mr Scott rejected. I do not, however, accept that his way of putting his case in this regard was uncontroversial or that the ET was bound to accept that that was how his disclosures must be characterised. First, as the ET found, it was the Respondent's belief that the Claimant had continued to repeat his allegations of unsafe practice, coercion and concealment that had - on the Respondent's case and on the ET's findings - led it to dismiss him. The question for the ET

was whether that reason was tainted because it was really founded upon a protected disclosure of a matter in which the Claimant had a reasonable belief and which was made in good faith.

50. It was in the light of seeing the case in this way that the clarification of the issues at the telephone case management discussion had identified the key questions being those of reasonable belief and good faith. If the case had really been about disclosures of a different nature - complaints about how Mr Hewson had treated the Claimant, for example - then other issues may have arisen: e.g. whether these were "disclosures of information" at all, or whether they were simply "allegations".

51. Second, to the extent that the Claimant was saying that the Respondent had mischaracterised his disclosures, that was very much the point in issue between the parties, and the ET was well aware of that. Given it had been the issue facing Mr Scott, it was hardly uncontroversial. The ET was not unaware of how the Claimant was seeking to characterise the way he had repeated the initial concerns; that is, as part of the history rather than as a repetition of the concern. It did not accept his case in this regard.

52. That brings me on to the next point of the appeal, which is whether the ET was entitled to reach the conclusions it did in this respect and/or whether its conclusions as to the nature of the Claimant's disclosures were perverse.

53. The difficulty for the Claimant is that, in seeking to make good his appeal in this regard, he is really seeking to reargue the case below (before the ET and before Mr Scott). He is relying on his earlier assertions as to what he had really been saying (not so much repeating allegations of complicity and concealment against Mr Hewson, but concern as to how he had

been victimised). The fact that his case in this respect is recorded by Mr Scott and by the ET does not, however, make it so. It was certainly not the case that either the Respondent, through Mr Scott, or that ET found as being established on all the evidence.

54. Thus, having found that Ms Dee had investigated the Claimant's initial concerns and assured him that there was no concealment, complicity or coercion, the ET went on to make a finding as to the nature of the Claimant's disclosure of 14 October to Mr Watts. In that respect it made a clear finding as to the nature of the iteration based on the evidence given before it by Mr Watts. It is worth setting out. Mr Watt's evidence to the ET was as follows:

> **"He repeated his claim that Rick was concealing lack of progress by FACC and that safety was being put at risk. I told Francesco that senior management was well aware of what was going on and that nothing was being concealed. I counselled Francesco that he should not make such serious allegations without evidence."**

55. Whether or not to accept that evidence was a matter for the ET. It is not for this court - which does not hear the evidence of the witnesses tested under cross-examination - to interfere with the finding made in that regard.

56. As for the Dignity at Work complaint, the ET also found the Claimant there maintained allegations of concealment, see paragraph 64 (cited above), where the ET expressly set out part of the complaint. That was a statement made by the Claimant, notwithstanding, as the ET found, his being aware of the risk of disciplinary action if he made malicious allegations.

57. The Claimant seeks to put emphasis on other aspects of his Dignity at Work complaint, and it may well be that he did see the focus of that complaint as being on what he alleged to be the victimisation of him rather than the underlying concerns. It may well also be that he considered it necessary to repeat those concerns in order to set out the context. The point is, as

the ET found: he did repeat them. There was further evidence to support this aspect of the ET's decision, in the report of the Vista investigation and in the investigation by Messrs Dufty and Gollin. The Claimant's complaint is really as to the weight given by the ET to certain aspects of the evidence. Matters of evidential weight are, however, questions for the ET; they are not to be disturbed by way of appeal. It is plain that the ET had regard to the entirety of the Dignity at Work complaint, and reached its conclusion based on that (paragraph 135) and its finding as to the Claimant's case overall (paragraph 138). Those were conclusions open to it on the evidence.

58. The next ground of challenge seeks to take issue with the ET's finding that the disclosures were not the product of the Claimant's reasonable belief or made in good faith. The Claimant contends that the ET needed to see these questions from his perspective, not that of the Respondent, and needed to clearly understand what it was that the Claimant understood at the relevant time. Furthermore, to the extent that the ET had found that the first disclosure was not made in good faith, he contends its reasoning was illogical: it depended on finding that he had repeated that concern, even after assurances from Ms Dee, and thus he could not have made the original disclosure in good faith because of that later repetition.

59. I do not accept the Claimant's argument in this respect. I think you can look at what happens later as evidence of somebody's motivations at an earlier stage. It is something which occurs in discrimination cases, for example, when drawing inferences of an employer's motivation. Given that the Claimant continued to repeat the same points even after there was no reasonable basis for so-doing, given all the assurances that had been given, an employer and an ET might well draw the inference that he never really believed those matters originally and had a different motivation for making the allegations.

60. I am persuaded, however, this is all academic; the Claimant does not actually need to go this far as the ET did not clearly find that the first disclosure was made absent good faith or even without reasonable belief. As the Respondent observes, at most the ET concluded that it had substantial doubts (paragraph 157). Although that paragraph might suggest the ET had found it was made without any reasonable basis, I can see that the relevant sentence seems to refer back to later disclosures, because it refers to more than one manager. On that basis I can see that there would be a good reason for saying that the ET's findings, which would need to clear on these points, were not sufficiently clear or adequately reasoned. Does, however, the point go anywhere? In my judgment, no. The ET is clear: the dismissal was not for the original raising of concern but by reason of the continued reiteration of concerns after the assurances, which were made absent good faith. I return to this point below.

61. As to the question of bad faith on the post-assurance disclosures, I am not sure that the Claimant's submissions really seek to challenge this conclusion. In any event, once it had rejected the Claimant's case that these were simply complaints about how he had been treated - not a repetition of the earlier concerns - the ET was entitled to reach the conclusion it did. To the extent that the Claimant points to others raising concerns or to a possible reading of an internal Respondent document, none of that would help him explain the continued repetition of points that were rendered unreasonable after the assurances that he had been given.

62. I do not think that the ET failed to see any of this from the Claimant's perspective. It was alive to the need to look at the Claimant's motivation. It looked carefully at the various assurances that he had been given, and it reached the conclusion that, given these, his disclosures were not made on reasonable grounds and were motivated by anger and mistrust of

Mr Hewson and other managers and were thus not made in good faith. That was a finding for the ET, having heard all the evidence. It cannot be overturned on appeal

63. The last point of challenge relates to the finding of the reason for dismissal, whether it was for a permissible reason rather than being unfair or because the Claimant had asserted a statutory right or made a protected disclosure. The Claimant seeks to attack the ET's finding as to the Respondent's reasonable belief. First, that the Claimant was continuing to repeat his concerns of complicity and concealment without reasonable basis and after he had been given assurances to the contrary. That really goes back to the point made in the first ground. The Claimant is relying on how he put the case to the Respondent (in particular, to Mr Scott) and asserting that, given his denial of any repetition of his earlier concerns, the Respondent could not reasonably have believed that he was continuing to make those allegations. The question for me is whether the ET was entitled to find that the Respondent had a reasonable belief.

64. At the risk of repeating the points already summarised above, the ET heard from Mr Scott and accepted his evidence (paragraph 189). That evidence included his clear statement that he accepted the report of Messrs Dufty and Gollin. The Claimant relies on the clarification of Mr Scott's witness statement that the Claimant had not actually said to him (Mr Scott) that he (the Claimant) was intending to take matters externally. To the extent that formed part of the reason for dismissal (it was certainly referred to in the letter of dismissal and in the ET's findings), the Claimant contends it should not have properly been a reason relied on by the Respondent because it was not evidence directly given to Mr Scott by the Claimant. The point is, however, a bad one. Mr Scott was not solely relying on evidence given to him by the Claimant. He was relying, as he was entitled to do, on a report of the meetings with the Claimant by Messrs Dufty and Gollin. Mr Dufty's evidence was that he had checked his

understanding of what the Claimant had said to him and Mr Gollin earlier, as confirmed in his e-mail (which immediately followed the meeting with the Claimant). That was the evidence relied on by the Respondent; Mr Scott preferring the account given to him by Messrs Dufty and Gollin's over that of the Claimant. In turn, the ET found Messrs Dufty and Gollin's report to have been carefully drafted and checked with the Claimant and his trade union representative. It could not be said that the ET had reached a perverse conclusion in forming the view that Mr Scott had reasonable grounds for his belief in this regard.

65. The other way the Claimant seeks to put this point is that really this is an admission that the Respondent was motivated by the Claimant's statement of his intention to bring ET proceedings, i.e. an assertion of a statutory right.

66. The first point to note is this just one aspect of the reasoning leading the Respondent to conclude that the Claimant had misconducted himself. Second, as the ET found, when Mr Dufty raised his concern about the Claimant possibly taking matters externally, there was no plan or decision to take action against the Claimant but measures were simply put in place to deal with any adverse media comment. Third, and in any event, Mr Dufty's email recording how the Claimant had put the point was not limited to his taking possible ET proceedings, but was referable to a more general threat of taking matters externally. A Respondent is entitled to have regard to threats of that nature; that is not responding to an assertion of a statutory right.

67. Ultimately, the ET was entitled to conclude that the reason for the dismissal in this case had been the Claimant's making very serious allegations, absent good faith. That was a permissible finding on the evidence before the ET and I accordingly dismiss the appeal.